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After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals

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AFTER THE FLOOD: THE LEGACY OF THE “SURGE” OF FEDERAL IMMIGRATION APPEALS

Stacy Caplow*

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For many years, the big news in United States Courts of Appeal was the skyrocketing immigration caseload. For Courts that traditionally had busy immigration dockets, the effect was tsunami. One of those Circuits, the Second, instituted a nonargument calendar that, over the past five years, has enabled the Court to regain some control over its swollen docket. While this administrative strategy has rescued the Court from drowning, the flow of cases continues, somewhat abated, but with enduring force. The so-called surge had unanticipated consequences extending far beyond court management changes. As a result of their increased exposure to immigration cases at the hearing stage—reading transcripts and Immigration Judge decisions—federal judges increasingly found fault with immigration adjudication, criticizing the quality of both the judging and the lawyering. The glaring attention generated public reaction, forcing some reforms from the inside and continuing pressure from the outside. This paper examines the legacy of this exposure and its positive impact on the quest for better access to justice for immigrants facing removal.

I. INTRODUCTION

Beginning in 2002, the United States Circuit Courts of Appeal found themselves in the midst of a “surge,” a sudden and spectacular jump in the number of immigration appeals that quickly “swamped” and “overwhelmed” the federal appeals courts.1 In 2001, the last year of quiet before the storm, the federal appeals courts received 3,300 administrative appeals nationwide, of which 1,760 (53.3%) involved the legacy Immigration and Naturalization Service.2 By 2004, the number

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of immigration cases in the federal appeals courts soared to 10,812 (88.2%). The rate, as well as the volume of appeals nationwide from adverse decisions of the Board of Immigration Appeals rose extraordinarily. Although the drastic spike has leveled off, record numbers of non-citizens facing final orders of removal continue to file petitions for review: 12,349 in 2005, 11,911 in 2006, 9,123 in 2007, 10,280 in 2008, abating slightly to 7,518 in 2009.

Today, we can see clearly that the surge is not temporary, and continues to burden the courts. More than seven years after the floodgates opened, this steady flow of cases inexorably has altered the landscape of federal judicial review of immigration cases. It is increasingly evident that the true legacy of the surge lies in the considerable unintended consequences that are just beginning to make an impression at both the administrative and federal appellate courts. The surge is responsible for innovative case management techniques, which, for better or worse, have relieved much of the pressure on the courts. More fundamentally, the surge has helped raise awareness of the need for systemic change, particularly by invigorating civic commitment to the importance of assuring effective legal representation. At the time of the initial geyser of cases, no one could have predicted the variety of voices that now participate in the conversation about immigration adjudication, anticipated the intensity and perseverance of the responses, or foreseen some of the proposed or actual reforms. The surge unquestionably already has had a catalytic effect on several important institutional changes and reform initiatives; even more are likely to happen. Given this new


1. Id.
2. Appeals from decisions involving the BIA account for almost the entire increase in filings. A Decade of Change in the Federal Courts Caseload: Fiscal Years 1997-2006, 39 THE THIRD BRANCH (Nov. 2007), available at http://www.uscourts.gov/News/TheThirdBranch/07-11-01/A_Decade_of_change_in_the_Federal_Courts_Caseload_Fiscal_Years_1997-2006.aspx (last visited Mar. 7, 2011). In 2006, the number of decisions appealed to the federal courts out of the total number of BIA decisions had increased from an historical 5 percent (before 2002) to a approximately 30 percent. Prior to 2002, federal courts were receiving about 125 BIA case appeals per month. By 2006, they were receiving more than 1,000 per month. If the rate of appeal had remained constant at its pre-2002 level, about only 200 cases would have been filed monthly. U.S. Dep’t of Justice, Executive Office of Immigration Review, Fact Sheet: BIA Restructure and Streamlining Procedures (Mar. 9, 2006), available at http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf.

3. A petition for review is the means by which an agency order is appealed directly to a Circuit Court. FED. R. APP. P. 15. Since 2005, it is the exclusive method by which a respondent in immigration proceedings can request judicial review of a final order of removal. 8 U.S.C. § 1252(a)(5) (2010).


climate, it is time to move beyond examining the causes of the surge to study its impact particularly on the public discourse about immigration court practice.  

This article briefly describes the surge and the responses to it, then assesses the current situation, and finally reports on the initiatives to improve the immigration adjudication process for which the surge can be held responsible. It will focus on the Court of Appeals for the Second Circuit, the court with the country’s second highest immigration docket, where the response to the surge was prompt, transformative, and effective. Although the winds of change are in the air, the complexities of the immigration adjudication system pose daunting obstacles to real reform. I am cautiously optimistic, however, because the response of federal judges to their burgeoning and burdensome immigration caseloads has brought the sorry state of immigration adjudication out of the shadows into the sunlight to expose its imperfections, inefficiencies and inadequacies.

II. UNDERSTANDING THE FLOOD

A. WHAT CAUSED THE SURGE OF IMMIGRATION APPEALS?

After several years of experimentation, then Attorney General John Ashcroft published a final rule “streamlining” the Board of Immigration Appeals procedures effective on September 25, 2002.10 For most of its existence, the Board

8. Two authors, both of whom were actively involved in the Circuit’s new case management system, have examined some of the consequences of the surge. See John R.B. Palmer, The Second Circuit’s “New Asylum Seekers”: Responses to an Expanded Immigration Docket, 55 CATH. U. L. REV. 965, 965–66 (2006) [hereinafter New Asylum Seekers] (describing them as “likely to reverberate throughout the entire system of immigration law”) (Mr. Palmer is one of the principal architects of the non-argument calendar which he supervised for part of its first year), id. at 975 n.66; Elizabeth Cronin, When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit, 59 ADMIN. L. REV. 547, 549 (2007) (Ms. Cronin is the Director of the Office of Legal Affairs, U.S. Court of Appeals for the Second Circuit); see also Erik Rivero, Note, Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar, 34 Hofstra L. Rev. 1497 (2006) (criticizing the non-argument calendar on due process grounds).

9 The immigration caseload of all of the other Circuits combined, excluding the Ninth, is less than the number commenced in the Second. JUDICIAL BUSINESS, 2009, supra note 6, Table B-3; see also Fed’l Cts. Comm. Rep., supra note 1, at 5; Tom Perrotta, Immigration Appeals Surge in Second Circuit, N.Y.L.J. 1 (col. 4), Nov. 4, 2004; Mark Hamblett, Circuit Struggles to Cope with Upsurge in Asylum Appeals, N.Y.L.J. 1 (col. 3), Nov. 25, 2005. The Ninth Circuit historically has the largest immigration docket. It’s administrative appeals caseload grew from 1,063 in 2001, Leonides Ralph Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2004 Annual Report of the Director, Table B-3, to a high of 6,583 in 2005, then declined to a still considerable 4,625 cases in 2008. JUDICIAL BUSINESS, 2009, supra note 6, Table B-3. In 2008, appeals from BIA decisions in the Ninth Circuit, amounted to 45% of all BIA appeals. JUDICIAL BUSINESS, 2009, supra note 6, Table B-3. Michael Corradini, The Role of the Circuit Courts in Refugee Adjudication: A Comparison of the Fourth and Ninth Circuits, 23 GEO. IMMIG. L.J. 201 (2008). Despite its enormous immigration caseload, the Ninth Circuit will not vacate oral argument if any judge on a panel wants the case to be heard. 9th CIR. R. 34–1 to 34–3 advisory committee’s note.

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had performed its critical appellate functions sitting in three-Member panels. The streamlining regulations created a new norm of single-Member panels except in a few non-mandatory categories of cases, and changed the standard of review of Immigration Court fact finding from de novo to “clearly erroneous.” Post-streamlining the single-Member could, and actually was prompted by the regulations to, write affirmances without opinion [AWO] in the majority of cases. The goal of the new regime was to reduce a crushing backlog yet paradoxically Ashcroft reduced the size of the Board from 23 to 11 members, thus encouraging the use of expedient one-Member review and single-sentence decisions merely to keep up the pace.

The timing of the surge on the heels of the BIA streamlining regulations implies an inescapable, and to this day, unrefuted, cause-and-effect. This outcome was hardly unexpected. As early as 2003, a backlog in the circuit courts was building up due to the loss of meaningful agency review. Ashcroft even conceded, “Although the streamlining reforms had indeed increased the caseload of the U.S. courts of appeals, such an increase was inevitable if the [BIA] backlog was ever to be resolved.”

The new regulations had an impact on both the quality and the balance of the BIA’s product. Post-streamlining, a sizable portion of decisions were single-member summary orders affirming the Immigration Court’s order of removal. The GAO found that AWOs rose from 44% to 77% over a four-year period. These cursory AWOs essentially were barren of any reasoning or analysis, often making judicial review dependent on the record in Immigration Court. Even single-judge decisions were sparsely reasoned. The effect of the regulations on outcomes was even more dramatic. Prior to 2002, one out of four BIA appeals were granted whereas after that date only one in ten was granted. The impact of the move from the norm of a panel to a single judge was similar: Three-member panels favored

Whitney] (2003); available at http://www.dorsey.com/files/Publication/e649960f-30c0-408f-8965-0df60469523/Presentation/PublicationAttachment/690ec02a-94b9-4115-a1a0-5d14cf0d7a6d/DorseyStudyABA_8mgPDF.pdf.
noncitizens in 52% of the cases, in contrast to the 7% percent approval rate when decided by a single judge.  

BIA streamlining eroded the confidence of the federal courts in the fairness, accuracy, and quality of the administrative process at both the Immigration Court and BIA levels. By abrogating the prior practice of thorough appellate review, the BIA failed to narrow issues, carefully analyze the factual record, or make apparent the legal standards applied. Without clear analysis, the federal courts have to look at the record of proceedings at the Immigration Court without any filter. In many cases the Circuit Courts have to engage in a two-tiered review process that results in a series of rules regarding the nature of the review required. Federal judges have to dig into the facts developed in the Immigration Court record since so many appeals in asylum cases involve mixed questions of law and fact, and the review by the BIA was neither clear nor dispositive.

Additional factors played a role in the surge, although none as directly clearly causal as the 2002 regulations. First, litigation in the aftermath of many new and complex changes contained in the 1996 Illegal Immigration and Immigrant Responsibility Act of 1996 [IIRAIRA] inevitately contributed to some increase in judicial review as new proceedings were challenged and the BIA and

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18 See ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 182 (Cambridge Univ. Press 2010) (attributing to one Ninth Circuit judge the comment that streamlining had “eviscerated the BIA’s ability to carry out its administrative functions.”).
19 If the BIA issues an independent decision that does not adopt an IJ’s reasoning, the Court of Appeals will review the BIA opinion alone. Belorutaja v. Gonzales, 484 F.3d 619, 622–23 (2d Cir. 2007). More often, however, the BIA’s affirmance does relate back to the Immigration Court rationale, but many variations of BIA affirmances are ambiguous and thus necessitate review of both the BIA opinion and the Immigration Court record. Here are some of the Second Circuit’s standards of review:

- When the BIA summarily affirms the IJ’s decision without issuing an opinion, the court reviews the IJ’s determination as the final analysis. See, e.g., Bennett v. Mukasey, 300 F. App’x 22, 23 (2d Cir. 2008); Wengsheng Yan v. Mukasey, 509 F.3d 63, 66 (2d Cir. 2007); Twum v. INS, 411 F.3d 54, 58 (2d Cir. 2005).
- When the BIA adopts and supplements the IJ’s decision, the circuit court reviews the IJ’s decision as supplemented by the BIA. See, e.g., Delgado v. Mukasey, 508 F.3d 702, 705 (2d Cir. 2007).
- When the BIA affirms an Immigration Court decision in some respects, but not others, the appellate court also reviews the IJ’s decision, although the review is confined to those reasons for denying relief that were adopted by the BIA. See, e.g., Xue Hong Yan v. US Dep’t of Justice, 426 F.3d 520, 522 (2d Cir. 2005).
- When the BIA does not expressly “adopt” an IJ’s decision, but the Board’s opinion closely tracks the IJ’s reasoning, the appeals court considers both the IJ’s and the BIA’s opinions for the sake of completeness. See, e.g., Wangchuck v. DHS, 448 F. 3d 524, 528 (2d Cir. 2006).

20 Even though the federal courts are very deferential in reviewing an IJ’s credibility determination, they will remand if it is based on flawed reasoning, faulty factfinding or impermissible speculation. See Su Chun v. Holder, 579 F.3d 155, 158 (2d Cir. 2009).

the courts interpreted new statutory provisions. The most extensive empirical study of the early years of the surge, conducted by John Palmer, Steven Yale-Loehr and Elizabeth Cronin, explored other explanations as well, most notably a basic change in immigration law practice. The transfer of the action from the BIA to the Courts of Appeal had caused lawyers to recalibrate their practice to concentrate on federal appeals where previously they had only handled immigration matters at the administrative level. Palmer and his co-authors posit that immigration law has gained legitimacy in the academy, that the number of immigration lawyers has expanded, and that immigration practice, more litigious in the face of draconian statutes, has increasingly moved from the backwater administrative agency to the well-respected federal courts for meaningful review. Writing at roughly the same time, Lenni Benson suggests that attorneys have come to recognize the strategic value of filing petitions for review as a means of educating the circuit courts, negotiating for a stipulated settlement with a government lawyer with some discretion, or obtaining a remand. More recently, Benson asserted that the “largest contributing factor to the increase in judicial review is a growth in the number of private attorneys willing to prepare a petition for review.”

The population of lawyers filing petitions for review has changed since the 2005 Palmer report. Many more firms and individual attorneys are handling cases. Of the 1,113 notices of appearance filed on immigration cases before the Second Circuit in 2009, most lawyers handled no more than one or two cases. No nonprofit organization, legal services office, law school clinic or other pro bono counsel handled more than four appeals. There continued to be a group of lawyers who filed petitions for numerous clients. Forty-four lawyers represented more than

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22. DORSEY & WHITNEY, supra note 10, at 19. Examples of these issues are the repeal of previously available forms of relief leaving immigrants no option other than raise legal challenges to statutory terms or the preclusion of judicial review of discretionary decisions leading to litigation on the question of the characterization of a ruling. Lenni Benson, Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts, 51 N.Y.L. SCH. L. REV. 37, 46, 49–52 (2006–2007).


24. Id.

25. Id. at 85–90; see also Palmer, supra note 1, at 29–30.


27. Lenni Benson, You Can’t Get There from Here: Managing Judicial Review of Immigration Cases, 2007 U. CHI. LEGAL. F. 405, 424 (2007); Second Circuit Chief Judge John Walker confirmed this conclusion when he reported that: “Despite expectations that most of these cases [immigration appeals] would be predominately pro se, in 80% of the cases the petitioner is represented by legal counsel.” CHIEF JUDGES’ REPORTS OF THE SECOND CIRCUIT, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, Annual Report 2005, available at http://www.ca2.uscourts.gov/Reports/05/2005%20Annual%20Report%20-%20FINAL.htm#UNITED%20STATES%20COURT%20OF%20APPEALS%20FOR%20THE%20SECOND%20CIRCUIT.
five clients, while three actually handled more than 60 appeals.\textsuperscript{28}

A quick look at the immigration cases decided by the Second Circuit in the single month of June 2009 offers an even simpler picture of the dispersal of representation among more lawyers.\textsuperscript{29} During that month, approximately 130 different lawyers represented the petitioners in the 150 immigration cases decided by the court as counsel of record. Very few lawyers appeared on more than a single case. Without question, the New York immigration bar has developed a culture in which lawyers regularly seek federal court review.

The surge also altered the government’s approach to immigration appeals. Crushed by the volume of cases in the Second Circuit, local A.U.S.As who traditionally had handled immigration matters, no longer could manage the caseload. In a major shift of responsibility, by June 2009, the Department of Justice Office of Immigration Litigation [OIL] represented the government on all but five cases decided in the Second Circuit, reflecting this important transfer of resources from the overburdened U.S. Attorney’s Office to the centralized Department of Justice immigration specialists.\textsuperscript{30} While this change may advance efficiency by centralizing and standardizing litigation in the division of the DoJ with immigration expertise, a high-volume centralized practice actually may inhibit the kind of discretionary decisions that occur with more individualized local case handling that often can help reduce the caseload by stipulation or other settlement.\textsuperscript{31}

\begin{center}
\begin{tabular}{|c|c|}
\hline
Number of Cases & Number of Attorneys \\
\hline
60+ & 3 \\
40-60 & 0 \\
30-40 & 2 \\
20-30 & 2 \\
10-20 & 15 \\
5-10 & 27 \\
\hline
\end{tabular}
\end{center}

Derived from statistics provided by the Clerk of the Second Circuit Court of Appeals, Oct. 29, 2010 (on file with author).

\textsuperscript{28} This month marked the beginning of this writing project. I examined closely the 150 immigration cases decided between June 1 and June 30, 2009, looking at factors such as the result, whether a published or summary order was used, the judges on each panel, the lawyers, and the issue(s) in each case. I will refer to this month as a small-scale exemplar again in Part II.B.2 infra.

\textsuperscript{29} Cronin, \textit{supra} note 8, at 552–53.

\textsuperscript{30} The increase in appeals also may be attributable to a lack of prosecutorial discretion that might, if properly exercised, eliminate the need to file a petition for review. Benson, \textit{supra} note 27, at 425–26. While the government may have been a victim of the surge in terms of its capacity to handle the volume of cases, it has not been an innocent or passive victim. Although the government is not responsible for filing petitions for review, their litigation posture can contribute to the flow by taking Intransigent adversarial positions. John T. Noonan, Jr., \textit{Symposium on Immigration Appeals and Judicial Review: Immigration Law 2006}, 55 CATH. U. L. REV. 905, 913 (2006), see, e.g., Pareja v. AG of the United States, 615 F.3d 180, 186 n.3 (3d Cir. 2010) (chastising the government attorney for deficiencies in the brief). It is impossible to gauge the effect that prosecutorial discretion could or does have on the
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By the end of the decade, the panic over the surge had subsided, and for good reason. Although filings were still high, the backlog was under greater control as a consequence of aggressive court management measures. To achieve this, the Second Circuit radically transformed its practices. Although the new system prompted a few reservations concerning its potential for unfairness given the high volume of cases, there were no significant voices of protest or objection.

B. LEVELING OFF TO A “NEW NORMAL”

1. The Life Preservers: Court Management Solutions

The surge affected all circuits to some degree, but the two most dramatically swamped are the Second and the Ninth. Both courts employed case management mechanisms to cope with their crushing immigration dockets. The Ninth Circuit did not create a new administrative structure to alleviate the crush of immigration cases. Instead, it built on a well-established case management system that permits the court’s staff to screen cases of all types.

The Second Circuit Court of Appeals responded to its overwhelming immigration caseload with a significant structural change to its core principles and operations. After several less successful efforts to regain control, including meetings with senior representatives of EOIR, the Court put into practice a local rule creating a Non-Argument Calendar [NAC] for all cases seeking review of a claim for asylum and related relief. A quick process of deliberation and

courts of appeal since there seems to be no method for tracking cases in which no judicial action occurs. Thus, if the government consents to a remand, that case is not counted in the court’s decision statistics.

32 “The Court is now not only adjudicating enough immigration appeals to prevent the accumulation of a backlog, it has already shrunk the existing immigration backlog…a 37% decrease in just eight months [October 1, 2005-May 31, 2005].” Palmer, New Asylum Seekers, supra note 8, at 976.


34 The immigration caseload of the Second Circuit amounts to 21.6% of all appeals from the BIA, JUDICIAL BUSINESS, 2009, supra note 6, Table B-3. Tom Perrotta, Immigration Appeals Surge in Second Circuit, N.Y.L.J. 1 (col. 4), Nov. 4, 2004; Mark Hamblett, Circuit Struggles to Cope with Upsurge in Asylum Appeals, N.Y.L.J. 1 (col. 3), Nov. 23, 2005.

35 Without question, the Court of Appeals most drastically affected is the Ninth, the circuit with the largest immigration caseload historically. Its administrative caseload grew from 1,063 in 2001, Leonides Ralph Mecham, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2004, Annual Report of the Director, Table B-3, to a high of 6,583 in 2005, then declined to a still considerable 3,351 cases in 2009. JUDICIAL BUSINESS, 2009, supra, note 6, Table B-3. In 2009, appeals from BIA decisions in the Ninth Circuit, amounted to 47% of all BIA appeals.

36 For a more detailed description of the Ninth Circuit’s case inventory system see Anna O. Law, The Immigration Battle in American Courts 158–166 (Cambridge Univ. Press 2010). See also Michael Corradini, The Role of the Circuit Courts in Refugee Adjudication: A Comparison of the Fourth and Ninth Circuits, 23 GEO. IMMIGR. L.J. 201, 213–16 (2008). The circuit engages in substantial triage-like screening, which has expanded since the surge. Local court rules presumptively disfavor publication, 9th Cir. R. 36-2, so that in 2009, 87.9% of the court’s decisions were unpublished. JUDICIAL BUSINESS, 2009, supra note 6, Table S-3. Since publication apparently “increases the likelihood that certain judges vote in favor of asylum,” more cases affirm the denial of relief. David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U.CINN. L. REV. 817, 820 (2005). One author interviewed Ninth Circuit judges and concluded that the court’s ‘coping strategy’ may have helped managed the exploding caseload, but in so doing may have jeopardized or compromised the ability to give full review to all cases by giving thorough and careful scrutiny to the screened cases. Anna O. Law, Rationing Justice?: Caseload Pressures, The U.S. Courts of Appeals, and Immigration Cases 47 (2010), available at http://works.bepress.com/anna_law/1 (hereinafter Law, Rationing Justice).
implementation took place over a few months between May 2005 and October 3, 2005 when the new Rule went into effect.\textsuperscript{37} Under the new rule, those appealing denials of asylum and related relief are not entitled to oral argument in the ordinary course.\textsuperscript{38} This was a radical change to a venerable tradition: “The Second Circuit has prided itself as the last remaining circuit to afford oral argument to all litigants, with the exception of prisoners whose cases have been deemed of insufficient merit to warrant appointment of counsel.”\textsuperscript{39}

Under the new regime, approximately forty-eight new filings are assigned to the NAC weekly. Each of the four three-judge panels convened per week is given twelve cases with the goal of prompt resolution within a few weeks.\textsuperscript{40} Oral argument in asylum cases will occur only at the discretion of the judges either \textit{sua sponte} or by order upon request of counsel. Non-asylum immigration cases are not affected by the rule, although these cases too might result in a summary order. The Circuit’s judges believe that the alleviation of the burdensome caseload is worth the sacrifice of oral argument, particularly in a category of cases in which petitioners routinely claim error due to improper evidentiary analysis by the hearing judge, requiring heavily fact-based review and little in the way of novel or unsettled legal issues.\textsuperscript{41}

To support the NAC, the Circuit created the Immigration Unit of the Staff Attorneys’ Office [SAO] in the Office of Legal Affairs, with authority to hire a supervisor and twelve staff attorneys.\textsuperscript{42} The staff attorneys are not judicial law clerks and their office is not in the courthouse. They prepare bench memoranda on petitions for review on asylum claims that are then referred to the Court’s


\textsuperscript{38} The Rule states:

\textit{2D CIR. LOCAL R. \S 34.2. Non-Argument Calendar}

(a) Subject Proceedings. The court maintains a Non-Argument Calendar (NAC) for the following classes of cases

(1) Immigration. An appeal or petition for review, and any related motion, in which a party seeks review of the denial of:

(A) a claim for asylum under the Immigration and Nationality Act (INA);

(B) a claim for withholding of removal under the INA;

(C) a claim for withholding or deferral of removal under the Convention Against Torture; or

(D) a motion to reopen or reconsider an order involving one of the claims listed above.

(2) Other. Any other class of cases that the court identifies as appropriate for the NAC.

(b) Placement. The clerk identifies a proceeding for placement on the NAC and, as soon as practicable, informs the parties.

(c) Oral Argument. A proceeding on the NAC is decided without oral argument unless the court orders otherwise.

\textsuperscript{39} Newman, supra note 37, at 433.

\textsuperscript{40} \textit{Id.}, at 434; Palmer, \textit{New Asylum Seekers}, supra note 8, at 975.

\textsuperscript{41} See generally Newman, supra note 37, at 433.

\textsuperscript{42} Cronin, supra note 8, at 555.
nonargument calendar. After reviewing a SAO memorandum, the panel assigned to the case generally issues an unpublished summary order.\textsuperscript{43}

Without oral argument and with the screening assistance of the SAC, the output of the Court is prodigious, relying heavily on unpublished summary orders that do not have precedential authority.\textsuperscript{44} As Table 1 illustrates, the absolute number of summary orders almost doubled between 2002 and 2008. While the Court issues summary orders in other matters also, immigration cases dominate the unpublished decisions. Over time, the number of signed opinions also has risen but has never exceeded 525, whereas the number of summary orders has more than doubled, reaching almost 3,000 in 2006, the first full year that the SAO tackled the backlog. The percentage of summary orders also has increased significantly.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Year & Total Decisions & Signed Opinions Number (%) of total & Summary Orders Number (%) of total \\
\hline
2002 & 1411 & 342 (24.2) & 1062 (75.3) \\
\hline
2003 & 1481 & 381 (25.7) & 1028 (69.4) \\
\hline
2004 & 1533 & 446 (29.1) & 1001 (65.3) \\
\hline
2005 & 1921 & 525 (27.3) & 1321 (68.8) \\
\hline
2006 & 3479 & 505 (14.5) & 2871 (82.5) \\
\hline
2007 & 2441 & 366 (15.0) & 1987 (81.4) \\
\hline
2008 & 2631 & 415 (15.8) & 2108 (80.1) \\
\hline
\end{tabular}
\caption{2d Circuit - Methods of Rendering Decisions\textsuperscript{45}}
\end{table}

The NAC has celebrated its sixth anniversary and deserves credit for rescuing the Circuit from drowning. By most qualitative measures, the picture is less grim: fewer cases are pending; more decisions are rendered. While the Circuit does issue a significant number of immigration published decisions on non-asylum matters, the vast majority of asylum cases as well as all some other immigration cases are decided by summary order from the NAC.

2. \textit{Inside the Lifeboat: A Closer Look at the Second Circuit}

Between 2001 and 2008, the number of appeals filed from BIA decisions skyrocketed from 184 to 2,865\textsuperscript{46} steadily increasing after a mind-boggling one-year

\footnotesize
\textsuperscript{43} Palmer, \textit{supra} note 8, at 975–76.

\textsuperscript{44} \textit{FED. R. APP. P.} P. 32.1.

\textsuperscript{45} \textit{See} Second Circuit Statistical Reports, (2003–08), Table 4, available at: http://www.ca2.uscourts.gov/annualreports.htm. \textit{See also} \textit{JUDICIAL BUSINESS}, 2009, \textit{supra} note 6, Table S-3 reporting that 89.2\% of the Second Circuit decisions are unpublished.
jump of 390% (1,548 cases) between 2002 and 2003.\textsuperscript{47} In 2009, that number dropped significantly to 1,624, a decrease for which some explanations will be suggested below. Even with this drop, in 2009, 22% of all federal immigration appeals were filed in the Second Circuit.\textsuperscript{48} This circuit has jurisdiction over matters conducted in the New York Immigration Courts where filings historically exceed those in the Immigration Courts of all circuits other than the Ninth.\textsuperscript{49} Table 2 shows at a glance the growth of the Second Circuit’s immigration docket.

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<tr>
<td>BIA</td>
<td>184</td>
<td>562</td>
<td>2118</td>
<td>2711</td>
<td>2550</td>
<td>2640</td>
<td>2177</td>
<td>2865</td>
<td>1624</td>
</tr>
</tbody>
</table>

Filings are not the only symptom of the crisis; the size of the backlog of pending cases is another. The NAC and the SAO are responsible for harnessing the burgeoning caseload with skyrocketing productivity.\textsuperscript{51} In 2009, 2,448 administrative appeals were terminated.\textsuperscript{52} A Lexis search for immigration cases appealed from the BIA decided during that time period turned up 1,380 opinions in the Federal Reporter and the Federal Appendix combined. Of those, 54 were published decisions; the balance consisted of summary orders with short unpublished opinions.

The new rule and the NAC are entrenched by now, and unquestionably have alleviated the burden placed on the court by its immigration caseload. This section will examine the recent situation in 2009 from both a year-

\textsuperscript{46} JUDICIAL BUSINESS, 2009, supra note 6, Table B-3; James C. Duff, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2006 Annual Report of the Director, Administrative Office of the United States Courts, Table B-3; U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit During the 12-Month Periods Ending September 30, 2002-2006 [hereinafter JUDICIAL BUSINESS, 2006].

\textsuperscript{47} Id. Judge Jon O. Newman provides an insider’s account of the breathtaking increase in the number of immigration cases pending in the Second Circuit almost all of which involved asylum claims. Newman, supra note 37, at 431.

\textsuperscript{48} JUDICIAL BUSINESS, 2009, supra note 6, Table B–3. After 2004 cases were designated as BIA appeals. Prior to that, the category was Administrative Appeals so the figures are distorted by the inclusion of a small number of non-BIA cases.

\textsuperscript{49} The New York Immigration Court presides over 25% of all immigration proceedings. The Second Circuit also has jurisdiction over cases heard in the Batavia, Buffalo and Hartford Immigration Courts as well as courts located in three detention or correctional facilities. See EOIR Immigration Court Listing, http://www.usdoj.gov/eoir/sibpages/ICadr.htm. “Twenty-six Federal Plaza [the principal court in New York City] is an extremely busy court.” Noel Brennan, A View from the Immigration Bench, 78 FORDHAM L. REV. 623, 624 (2009). Immigration Judge Brennan estimates that each of the 25 judges carries 1,000 cases on his or her docket, the majority of which are asylum matters. Id.

\textsuperscript{50} JUDICIAL BUSINESS, 2009, supra note 6, Table B–3; JUDICIAL BUSINESS, 2004, supra note 2, Table B-3.

\textsuperscript{51} JUDICIAL BUSINESS, 2009, supra note 6, at Table B-6. Again, BIA cases account for the lion’s share of the administrative appeals.

\textsuperscript{52} JUDICIAL BUSINESS, 2009, supra note 6, at Table B-6. Again, BIA cases account for the lion’s share of the administrative appeals.
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long and month-long vantage point, permitting a more detailed glimpse at this progress.

Despite the enormous number of opinions, it is possible to discern some patterns and categories of cases based on the issues raised from a sample of the published decisions:

- Was the proper legal standard used?
- Was the correct legal standard properly applied to the facts?
- Was there an inadequate record or was the consideration of issues incomplete?
- Was a negative credibility finding supported by evidence?
- Is there a need for the BIA to consider and/or clarify an agency position before the Court will make a ruling?
- Is a previous agency interpretation entitled to deference?
- Is there a statutory bar to review or was there insufficient exhaustion?

Immigration cases run a wide gamut and the small number of cases resulting in published decisions reflected this diversity. Some published cases arose in the context of removal proceedings based on criminal convictions, sometimes requiring statutory interpretation, while others related to forms of relief such as waivers, cancellation of removal or citizenship claims. A handful involved jurisdictional questions.

Although most asylum cases are adjudicated on the NAC, about 50% of the published Second Circuit opinions in 2009 also involved asylum claims suggesting that not all asylum cases end up on the NAC, or that the issues in some NAC cases warrant closer scrutiny and more authority. Several published asylum opinions raised legal questions related to the refugee definition or the bars to relief.

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53. See, e.g., Rotimi v. Holder, 577 F.3d 133, 134 (2d. Cir. 2009) (addressed question of eligibility for waiver of conviction under INA 212 (h)); Almeida v. Holder, 588 F.3d 778, 790 (2d. Cir. 2009) (addressed eligibility for cancellation of removal); Lanferman v. B.I.A., 576 F.3d 84, 88–93 (2d. Cir. 2009) (analyzed the BIA’s interpretation of criminal statute regarding firearm offenses); Pierre v. Holder, 588 F.3d 767, 770 (2d. Cir. 2009) (found that Petitioner was denied due process when BIA found her removable as an aggravated felon); De Johnson v. Holder, 564 F.3d 95 (2d. Cir. 2009), Garcia-Padron v. Holder, 558 F.3d 196, 201–04 (2d. Cir. 2009) (addressed petitioner’s eligibility for waiver of inadmissibility under INA 212(c)).


55. See, e.g., Lin v. Holder, 584 F.3d 75 (2d. Cir. 2009); Weng v. Holder, 562 F.3d 510, 515 (2d. Cir. 2009) (finding the persecutor bar did not apply to the facts); Liao v. Holder, 588 F.3d 152, 158 (2d. Cir. 2009) (remanding for determination about firm resettlement); Wang v. Holder, 583 F.3d 86, 90–91 (2d. Cir. 2009) (selling body parts constitutes ‘serious non-political crime’).
Several concerned the adequacy of the IJ’s credibility determination. A few cases found that the BIA had engaged in impermissible fact-finding. It is less obvious, however, why these particular asylum cases merited review on the regular argument calendar [RAC], as the more in depth description of the June decisions will confirm.

A close-up single-month snapshot rather than the panoramic year-long view of the surge provides an even clearer impression of the court’s workload. In June 2009, the Second Circuit issued 305 decisions in total, a sizeable increase in output over prior monthly dockets. Out of these, 150 were petitions for review of removal orders (49.3%). Of the 305 cases, only thirty-five full decisions were published. The NAC released 270 summary orders (71.4% of all decisions) of which 147 (54.4%) arose from removal orders based on a denial of asylum and/or related relief, or motions to reopen or reconsider these orders based on new factual or legal developments. Only five (3.4%) petitions for review in immigration matters were granted and remanded.

Table 3
June 2009: Distribution of Published and Summary Order Cases

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Published Imm</td>
<td>40%</td>
</tr>
<tr>
<td>Published Non Imm</td>
<td>11%</td>
</tr>
<tr>
<td>Summary Order Imm</td>
<td>48%</td>
</tr>
<tr>
<td>Summary Order Non Imm</td>
<td>1%</td>
</tr>
</tbody>
</table>


58. According to the IMMIGRATION LAW ADVISOR, the EOIR in-house organ, in the month of June 2009, the eleven circuits decided 395 BIA appeals, 250 of which were opinions issued by the Second (148) and the Ninth (102) Circuits. Forty-four of the 395 cases were reversed: twenty-nine in the 9th, six cases in the 2d, four in the 3d, two each in the 5th and 11th and one in the 8th. No cases were reversed in the 1st, 4th, 6th, 7th, or 10th Circuits. John Guendelsberger, Circuit Court Decisions for June 2009 (U.S. Dep’t of Just.: EOIR), IMMIGRATION LAW ADVISOR, vol. 3, no. 7, p. 6 (July 2009).

59. There are some small discrepancies among the various sources of data. This number, 150, which slightly deviates from the BIA count, was derived from the court’s own website where both opinions and summary orders are posted daily, available at http://www.ca2.uscourts.gov/opinions.htm.

60. Id. It is possible, that a summary order might be issued in a case other than asylum. See, e.g., Canales v. U.S.C.I.S., 346 Fed. App’x 668, 669 (2d. Cir. 2009 (summary order issued for appeal from denial of an application for cancellation of removal).
Of the 35 published opinions issued by the Court in June 2009, only three (8.5%) were immigration matters.\(^{61}\) One was dismissed on procedural grounds.\(^{62}\) The second was remanded because the BIA engaged in impermissible fact-finding in a cancellation of removal application.\(^{63}\) In the third, *Baba v. Holder*, the Circuit concluded that both the IJ and BIA committed error when each concluded as a matter of law that the mistreatment about which Baba testified did not rise to the level of persecution.\(^{64}\) This decision expressed serious concern with the proceedings below and contained a detailed analysis of how the prior adjudicators misapplied the legal standard.

The number of published immigration cases only amounted to a small fraction of the Court’s output in June 2009, yet the Court found error committed by either the IJ or the BIA in two-thirds of them. And third petition was dismissed, leaving open the possibility that, when the petitioner properly exhausts his administrative remedies, the Court would reconsider aspects of his claim. The near-total success of immigration petitioners whose cases are published may be strong evidence that the system is working properly since the Court has identified cases warranting more than summary consideration.

It should come as no surprise that the picture was different on the NAC. Of the Court’s 150 immigration-related cases decided in June 2009, 147 (99.1%) were decided by summary order. All but five of the summary orders either were denied or the petition for review was dismissed, representing an affirmance remand rate of 96.6\(\%\).\(^{65}\)

The cases from the NAC in which the petition was granted are not that distinguishable from the published opinions. Four out of five petitioners were Chinese.\(^{66}\) In each case, the court remanded to the agency because it had not properly applied its own standards. One case, *Xia v. Holder*, involved the insertion of an IUD against the will of a Chinese woman.\(^{67}\) The BIA previously had held that insertion of an IUD was not persecution *per se* without aggravating circumstances

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\(^{61}\) The opinion in a fourth case, *Mahmood v. Holder*, 562 F.3d 118 (2d. Cir. 2009), was amended on June 25 so it appears on the Circuit’s decision list for that month. Mahmood was remanded in light of the Supreme Court’s decision in *Dada v. Mukasey*, 554 U.S. 1 (2008).


\(^{63}\) *Guzman v. Holder*, 568 F.3d 61, 62–63 (2d Cir. 2009).

\(^{64}\) 569 F.3d 79, 86–87 (2d Cir. 2009).

\(^{65}\) There are some small discrepancies among the various sources of data. The number, 150, which slightly deviates from the BIA count, was derived from the court’s own website where both opinions and summary orders are posted daily, available at [http://www.ca2.uscourts.gov/opinions.html](http://www.ca2.uscourts.gov/opinions.html).

\(^{66}\) The petitioners in 53 cases were Chinese nationals. Other countries scattered throughout the calendar included Bangladesh (3), Malaysia (1), Montenegro (2), Indonesia (2), Albania (3), Ecuador (1), Uzbekistan (2), Dem. Rep. of Congo (1), Haiti (1), Sri Lanka (1), Cameroon (1), Guinea (3), Liberia (1), India (1), Mali (1), Dominican Republic (1), Guatemala (1), Pakistan (1), Côte d’Ivoire (1), Sierra Leone (2), Egypt (1), Belarus (1), Nepal (1), Russia (1).

\(^{67}\) Xia v. Holder, 330 Fed. App’x 277, 278–79 (2d. Cir. 2009).
such as resistance. Even though the Circuit itself had not decided this issue, the court remanded it because the BIA’s ground for affirming was “insufficient to permit meaningful review.” In another coerced population control case, the agency had not applied its own standards in determining whether the petitioner belonged to the particular social group of “over-birth” children in China. The panel remanded to the BIA for a determination whether this group qualified under the refugee standard and for a clearer explanation of its determination as well as its reasoning for finding that the harms she faced were not on account of her social group membership. In the third Chinese asylum case, this one based on religious persecution, the Court found the record of changed country conditions insufficient to rebut the regulatory presumption of a well-founded fear of persecution since the judge had concluded that he did suffer from past persecution.

In the fourth remanded summary order, the Court agreed with the BIA’s conclusion that the Ivorian petitioner had not suffered past persecution, but found that, because the Board’s analysis regarding his well-founded fear of future persecution was legally flawed because it ignored significant facts and country conditions evidence.

With increasing frequency, the Court has had to assess whether the agency’s credibility determination is justified. This has led to considerable jurisprudence on standards for reviewing credibility. These standards have guided the non-precedential summary orders that, more often than not, are rooted in a challenge to the credibility assessment. Most of the time, the NAC panel finds that there was substantial evidence to support an adverse credibility finding. In June 2009, it did so in 46 cases. In its fifth remanded summary order, the Court deviated from this pattern. In Zheng v. Dep’t of Homeland Security, the Court conducted a detailed analysis of the basis for the immigration judge’s negative credibility finding the IJ erred by relying on records that had not been admitted into evidence to establish inconsistencies with the respondent’s testimony, by overstating the respondent’s failure to provide corroborating evidence, and by “an insupportable misreading of a letter from respondent’s father.”

Some other interesting facts emerge from studying this monthly inventory. In most cases, the court found that the Immigration Judge and the BIA committed no error either in applying the asylum standards (30 cases) or in judging the

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69 Xia v. Holder, 330 Fed. App’x at 279 (2d Cir. 2009) (citing Beskovic v. Gonzales, 467 F.3d 223, 227 (2d Cir. 2006)).
70 Lin v. Holder, 335 Fed. App’x at 114, 115–16 (2d. Cir. 2009).
71 Id. at 116.
74 See, e.g., Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003) (an IJ must set forth “specific, cogent reasons” that bear a “legitimate nexus” to the credibility determination which itself may not be based on “speculation and conjecture.”). See also Palmer, New Asylum Seekers, supra note 8, at 984–88.
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sufficiency of evidence or credibility (46 cases). Many cases reflected some inadequacies in representation. For example, in at least 14 cases, the petitioner did not properly raise or preserve a claim, or properly exhaust administrative remedies. On the other hand, only two cases raised ineffective assistance of counsel as part of the claim; neither case was successful. Finally, a large number of cases (58) cases arose following a denial of a motion to reopen or reconsider and all found either no abuse of discretion or that the motion was untimely, or both.

We can easily observe how the circuit has altered its practices in order to survive the surge. Its revised case management organization affects at least 50% of the petitions for review, and almost all of those filed in immigration matters. This regime also heavily routinizes these cases by utilizing court staff as screeners, dispensing with oral argument and issuing summary orders. Despite these adjustments for the sake of efficiency, the court is responsible for considerable amounts of significant jurisprudence on a wide range of immigration issues.76

III. SIGHTING LAND

A. THE TIDE OF APPEALS IS SUBSIDING

The court management adjustments motivated by the daunting caseload allowed for greater efficiency, but the surge of appeals seems destined to be a permanent condition. Although filings do fluctuate a bit, they remain extraordinarily high until this past year. In FY 2009, the number of immigration appeals filed nationwide decreased noticeably from 10,280 in 2008 to 7,518 nationwide. In the Second Circuit, filings dropped from 2,865 in 2008 to 1,624. In the Ninth, the decline was from 4,625 to 3,351.77

Why is the number of appeals declining? Are the reasons for the decline a mirror image of the reasons for the surge? Are there new developments in the immigration picture that are trickling into the adjudication process or is the process itself changing? If the tidal wave is subsiding, what has it left in its wake?

The next section will attempt to answer these questions, but the freshness of this development renders definitive conclusions elusive. Four recent developments may account for the sharp decline of federal appeals: 1) an overall decline in Immigration Court cases, resulting in a concomitant decline in appeals filed at the Board; 2) a significant decrease in asylum denials and a concurrent increase in the level of representation at Immigration Court proceedings on asylum cases; 3) an

76 In 2009, for example, the court considered issues relating to the classification of a crime as an aggravated felony, see, e.g., Pierre v. Holder, 588 F.3d 767 (2d Cir. 2009) and Almeida v. Holder, 558 F. 3d 778 (2d Cir. 2009); recognized the court’s power to interpret the “exceptional and extremely unusual hardship” standard for cancellation of removal in some circumstances, see, e.g., Mendez v. Holder, 566 F. 3d 316 (2d Cir. 2009); and addressed the applicability of certain bars to asylum, see, e.g., Yanqin Weng v. Holder, 562 F. 3d 510 (2d Cir. 2009) and Yan Yan Lin v. Holder, 584 F. 3d 75 (2d Cir. 2009) (the persecutor bar); Guo Qi Wang v. Holder, 583 F. 3d 86 (2d Cir. 2009) (the serious non-political crime bar); Jin Yi Laio v. Holder, 558 F. 3d 152 (2d Cir. 2009) (the firm resettlement bar).

77. JUDICIAL BUSINESS, 2009, supra note 6, at Table B-3.
ever-growing backlog of case completions in Immigration Court that slows down the entire process; and 4) an increase in detained cases. Taken together they provide a powerful causal picture.

1.  A System-wide Decline

The immigration adjudication process begins in the Immigration Courts where approximately one-quarter of a million cases are handled yearly by the approximately 230 judges sitting in 58 Immigration Courts nationwide. The vast majority of these cases are removal proceedings, of which about 82% result in IJ decisions, either oral or written. In the five-year period between 2005 and 2009, Executive Office of Immigration Review (EOIR) statistics show the overall number of IJ decisions and a drop in the number/percent of those decisions appealed to the BIA. The fairly low rate of appeals to the Board does not signify satisfaction with the result of the Immigration Proceedings. The huge gap between the Court’s and the Board’s caseload is more likely because most individuals in proceedings do not request relief, and thus have no basis for appealing. Moreover, to the extent that respondents are unrepresented, the odds of finding counsel to appeal to the BIA are high.

Table 5
IJ Decisions (Proceedings) Appealed to BIA and to Circuit Courts

<table>
<thead>
<tr>
<th>Year</th>
<th>IJ Decisions</th>
<th>Appeals Rec’d by BIA</th>
<th>Appeals Rec’d by Cir.Cts.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>264,785</td>
<td>12,349</td>
<td>7,518</td>
</tr>
<tr>
<td>2009</td>
<td>232,212</td>
<td>19,047</td>
<td>5,149</td>
</tr>
</tbody>
</table>

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78. FY2009 STATISTICAL YEAR BOOK (U.S. Dep’t of Justice: EOIR), Table 3, C3 (2010).
79. Id. at Fig. 4, D1.
80. FY 2009 STATISTICAL YEAR BOOK, Table Y1.
81. In 2009, only 24% of respondents made applications for relief, FY2009 STATISTICAL YEAR BOOK, supra note 78, at 78, N-1 fig. 22. Only 39% of respondents were represented., Id. G-1, Fig. 9. Evelyn Cruz, Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’ Summary Affirmance Procedures, 16 STAN. L. & POL’Y REV. 481, 497 (2005).
82. These figures derive from two sources: JUDICIAL BUSINESS, 2009 supra note 6, U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced During the 12-Month Periods Ending September 30, 2005 Through 2009, Table B-3 and FY2009 STATISTICAL YEAR BOOK, supra note 78, at Y1, fig. 32.
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While the appeal rate from Immigration Court to the BIA ranged between 9-12% in this period, the rate of appeal from BIA decisions to the Circuit Courts was consistently between 39% to almost 50%, representing the number of appeals received by the BIA relative to the number of petitions for review subsequently filed. The statistics do not permit an exact calculation since some immigration cases are appealed directly from district courts, judicial review is barred to many types of cases that are appealed and affirmed by the BIA, and some cases are remanded by the BIA to Immigration Court. While the absolute numbers have declined somewhat, the Circuit Courts continue to grapple with a huge immigration caseload as many non-citizens pursue additional, and likely more meaningful review in federal court. Even the likelihood that the review will be unfruitful is not a sufficient deterrent to the consistent flow of petitions for review.83

Fiscal year 2009 witnessed a drop in appeals to the BIA for the first time since 2002. Following a growth of 13% in 2008, filings fell 27%.84 But when measured against the number of appeals filed from BIA decisions, the rate of appeal of BIA cases to the circuit courts slipped only slightly from 40.4% in 2005 to 39.4% in 2009.85 While the absolute number of filings appears to have decreased in the past year, the nationwide filings from BIA decisions have a long way to recede before returning to their pre-streamlining numbers of 1,936 in 1998, 1,173 in 1999, 1,723 in 2000, and 1,760 in 2001 the final year before the surge.86

One measure of the effectiveness of the BIA’s appellate role is the number of cases remanded by the Circuit Courts. Streamlining, with its emphasis on productivity, depends on speed and routinized review of a high volume of cases. It is likely that individual Board members will be unable to devote adequate attention

<table>
<thead>
<tr>
<th></th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>4,932</td>
<td>4,510</td>
<td>4,829</td>
</tr>
</tbody>
</table>

83 The BIA’s own internal figures reported in the Immigration Law Advisor, an in-house newsletter, reports that for the past three years, the numbers have been fairly steady. Unaccountably they do not correspond exactly to the data provided by the Administrative Office of the U.S. Courts (see Table 5).


85 This figure was obtain by dividing the number of appeals from the Board filed in the Circuit Courts (Table 1) by the number of appeals received by the BIA (Table 2).

and concentration to particular cases. Board review will be less thoughtful, thorough and nuanced, resulting in more error-correction by the federal courts.

This prophesy found support in some of the more damning pronouncements of circuit court judges, including Judge Richard Posner’s now famous declaration that in 2005, 40% of BIA appeals were reversed in whole or in part by the Seventh Circuit.87 A disturbing number of those reversals derived from problems with adverse credibility determinations in asylum cases.88 John Palmer, writing about the Second Circuit, also describes an “explosion of precedential decisions addressing issues of credibility,” that in turn guide the volumes of summary orders.89

John Ashcroft disputed that single-judge decisions and AWOs were less accurate than three-member written decisions by citing a BIA study that found no significant difference in the reversal rate pre- and post- streamlining.90 According to the more complete picture provided in the EOIR’s Immigration Law Advisor, the overall reversal rate for all circuits in 2009 was 540 cases, amounting to 11.2% of the total. Table 6 shows a decline in the reversal rate over the past four years although the numbers in the individual circuits fluctuate. This drop could be attributable to improved performance by the BIA and the IJs in response to the criticisms of from the federal bench, the effect of some reforms instituted after 2006. Other possible explanations might be a greater use of stipulated remands without court involvement or less dependence on AWOs so that the circuit courts are able to rely on more evolved reasoning in the BIA decision.

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88. The Ninth Circuit reports that it reversed 20% of the adverse credibility determinations between January 2005 and March 2008. Tekle v. Mukasey, 533 F.3d 1044, 1047 (9th Cir. 2008). Edward Grant, a Board member reported that in the first two months of 2006, two-thirds of all reversals in asylum cases, amounting to 70 cases, were due to unsupportable adverse credibility determinations made by IJs and affirmed by the BIA. Grant, supra note 10, at 959. His account, however, cites this as a successful, rather than troubling statistic. Id. at 958. Another author provides data that over an eleven-year period from 1995-2005, there were only 138 credibility reversals. Eric M. Fink, Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases, 83 NOTRE DAME L. REV. 2019, 2032 (2008). This disparity can be explained by the dates in the Fink survey which largely pre-date streamlining and the explosion of Circuit Court criticism.
89. Palmer, New Asylum Seekers, supra note 8, at 997. During a 4 ½ year period ending in mid-2006, he reports 22 in which the Second Circuit was critical of the agency’s credibility findings, 17 of which were reversed. Id. at 987.
Table 6  
Circuit Court Reversal Rate by Circuit 2006-2009\(^{91}\)

<table>
<thead>
<tr>
<th>Circuit/Year</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>7.1%</td>
<td>3.8%</td>
<td>4.2%</td>
<td>5.6%</td>
</tr>
<tr>
<td>Second</td>
<td>22.6%</td>
<td>18.0%</td>
<td>11.8%</td>
<td>5.5%</td>
</tr>
<tr>
<td>Third</td>
<td>15.8%</td>
<td>10.0%</td>
<td>9.0%</td>
<td>16.4%</td>
</tr>
<tr>
<td>Fourth</td>
<td>5.2%</td>
<td>7.2%</td>
<td>2.8%</td>
<td>3.3%</td>
</tr>
<tr>
<td>Fifth</td>
<td>5.9%</td>
<td>8.7%</td>
<td>3.1%</td>
<td>4.0%</td>
</tr>
<tr>
<td>Sixth</td>
<td>13.0%</td>
<td>13.6%</td>
<td>12.0%</td>
<td>8.6%</td>
</tr>
<tr>
<td>Seventh</td>
<td>24.8%</td>
<td>29.2%</td>
<td>17.1%</td>
<td>14.3%</td>
</tr>
<tr>
<td>Eighth</td>
<td>11.3%</td>
<td>15.9%</td>
<td>8.2%</td>
<td>7.7%</td>
</tr>
<tr>
<td>Ninth</td>
<td>18.1%</td>
<td>16.4%</td>
<td>16.2%</td>
<td>17.2%</td>
</tr>
<tr>
<td>Tenth</td>
<td>18.0%</td>
<td>7.0%</td>
<td>5.5%</td>
<td>1.8%</td>
</tr>
<tr>
<td>Eleventh</td>
<td>8.6%</td>
<td>10.9%</td>
<td>8.9%</td>
<td>7.1%</td>
</tr>
<tr>
<td>All Circuits</td>
<td>17.5%</td>
<td>15.3%</td>
<td>12.6%</td>
<td>11.2%</td>
</tr>
</tbody>
</table>

A closer look at just 2009 shows an interesting relationship between the volume of appeal and the rate of reversal in each Circuit. In the Second Circuit, with its substantial caseload, and its administrative solution, the reversal rate is lower than some other circuits with smaller immigration dockets. In the Third, Seventh and Ninth Circuits, all quite vocal benches in their criticisms of Immigration Court decision making, the reversal rate is consistently higher than the average. It would appear, therefore, that the Second Circuit is less inclined to reverse the BIA than other circuits. When the number rather than the rate of reversals is considered, however, the picture is subtler since the Second Circuit remanded more cases than all of the other circuits combined, except for the Ninth.

Table 7  
EOIR: Total Numbers of Cases – Affirmed or Reversed by Circuit Courts 2009\(^{92}\)

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Total Cases</th>
<th>Affirmed</th>
<th>Reversed</th>
<th>% Reversed</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>71</td>
<td>67</td>
<td>4</td>
<td>5.6</td>
</tr>
<tr>
<td>Second</td>
<td>1394</td>
<td>1317</td>
<td>77</td>
<td>5.5</td>
</tr>
<tr>
<td>Third</td>
<td>329</td>
<td>275</td>
<td>54</td>
<td>16.4</td>
</tr>
<tr>
<td>Fourth</td>
<td>180</td>
<td>174</td>
<td>6</td>
<td>3.3</td>
</tr>
<tr>
<td>Fifth</td>
<td>252</td>
<td>242</td>
<td>10</td>
<td>4.0</td>
</tr>
<tr>
<td>Sixth</td>
<td>162</td>
<td>148</td>
<td>14</td>
<td>8.6</td>
</tr>
<tr>
<td>Seventh</td>
<td>77</td>
<td>66</td>
<td>11</td>
<td>14.3</td>
</tr>
<tr>
<td>Eighth</td>
<td>78</td>
<td>72</td>
<td>6</td>
<td>7.7</td>
</tr>
<tr>
<td>Ninth</td>
<td>1956</td>
<td>1619</td>
<td>337</td>
<td>17.2</td>
</tr>
<tr>
<td>Tenth</td>
<td>55</td>
<td>54</td>
<td>1</td>
<td>1.8</td>
</tr>
<tr>
<td>Eleventh</td>
<td>281</td>
<td>261</td>
<td>20</td>
<td>7.1</td>
</tr>
<tr>
<td>All Circuits</td>
<td>4829</td>
<td>4289</td>
<td>540</td>
<td>11.2</td>
</tr>
</tbody>
</table>

\(^{91}\) Gundelsberger, Circuit Court Decisions for December 2009, supra note 58, at 5.

\(^{92}\) Id. at 4.
The Second and Ninth Circuits, whose caseloads each exceed the total number of cases in the nine other circuits combined, together issued 69% of all decisions, and were responsible for 14% and 62% of all reversals respectively.93

The figures reported in the EOIR Statistical Year Book on numbers of cases received by the BIA on remand from the circuit courts are different, revealing a much higher remand rate.

<table>
<thead>
<tr>
<th>FY 2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>1290</td>
<td>1,792</td>
<td>2155</td>
<td>1457</td>
<td>997</td>
</tr>
</tbody>
</table>

It is difficult to explain the difference in these figures unless there is a distinction between ‘remand’ and ‘reversal.’ Presumably the former represent all cases sent back to the BIA that were not only court ordered but also followed an administrative action such as settlement or procedural default. In contrast, a ‘reversal’ may relate only to substantive legal decisions. Even accounting for a certain number of abandoned appeals, this suggests that there could be considerable informal activity between the circuits and the BIA when Department of Justice lawyers become involved in assessing potential errors and thus consenting to remand.

1. Four Possible Reasons for the System-wide Decline

(a) Decrease in Cases and Appeals at the Agency Level

As discussed above, the flood of immigration cases filed in the Circuit Court principally derives from asylum and forms of related relief. While other categories of cases also are appealed – disputes about criminal grounds of deportation, denials of applications for other grounds of relief such as cancellation of removal, or claims of citizenship, asylum cases generally are held responsible for the spike. The creation of the Second Circuit NAC is directly attributable to this, and now all asylum cases are referred to the NAC in the first instance.

Between 2005 and 2009, the numbers of cases in the immigration adjudication system decreased overall. Immigration Court completions in cases with applications for relief decreased from 80,526 to 69,442.95 During this period, the number of asylum cases received in Immigration Court, both affirmative and

93 Id.

94. FY2009 STATISTICAL YEAR BOOK, supra note 78, at T2, Tbl. 16. It is also possible that some cases are appealed to the circuit courts more than once.

95. FY2009 STATISTICAL YEAR BOOK, supra note 78, at N1, fig. 22.
defensive, declined substantially from 53,904 to 39,279 (27%) while the rate of completions dropped by 26%.96

Fewer cases overall and fewer completions mean fewer appeals. Not surprisingly, therefore, the number of completed BIA appeals in the same years diminished from 27,364 to 17,866.97 A straightforward conclusion to draw from these figures is that the pipeline from application through agency adjudication to circuit court review is less clogged.

(b) Decrease in Asylum Denials, Increase in Representation

Not only are there fewer cases overall, but also the rate of asylum cases favorably decided on the merits in Immigration Court “significantly increased” between 2005 (38%) and 2009 (47%).98 The absolute number of cases granted actually dropped by about 500, no doubt due to the overall decrease in cases. But the absolute number of denials also dropped by 7,671 to only 11,358.99 In addition, approximately 2,000 applicants were granted withholding of removal under the INA,100 and almost 400 were granted relief under the Convention Against Torture,101 further reducing the combined denial rate. While not everyone whose asylum application is denied appeals to the BIA and beyond, this sharp increase in grant rate translates into far fewer appeals at all levels.

Putting these pieces together, Table 11 shows declines at every level. Most notably, the almost 10,000 fewer cases completed at the BIA means that many fewer cases are likely to be appealed to the Circuit Courts.

96. Id. at 11, Fig. 13 and 12, fig. 14.
97. Id. at T2, Tbl. 17.
98. Id. at K1-2, figs. 16, 17 & 18. In September 2010, the Transactional Records Access Clearinghouse [TRAC] reported that 21,589 asylum cases were denied in Immigration Court in 2009, a 52.5% denial rate. They project that the denial rate will be even lower in 2010 at 50.1%. See TRAC Immigration Asylum Decisions in Immigration Courts, available at http://trac.syr.edu/immigration/reports/240/include/asylumtime.html.
99. FY2009 STATISTICAL YEAR BOOK, supra note 78, at K1, fig. 16.
101. Id. at M1, Tab. 9; 8 C.F.R. § 208.16 (2011).
(c) Immigration Court Backlog

Another explanation for the slowdown in appeals is the growing backlog of pending cases in Immigration Courts nationwide, resulting in delays of more than a year before there is an order to appeal. Overall, the number of pending, incomplete cases has increased about 20% since the end of FY 2008, and is 82% higher than ten years ago. During the first nine months of 2010, New York State was second only to California in the number of pending cases: 42,256. And Connecticut, whose immigration cases also are appealed to the Second Circuit had 1,432 pending cases. More critically, in New York, the average time for a case to be resolved is 469 days.

Table 11
Comparison of Immigration Court and BIA Completions 2005 and 2009

<table>
<thead>
<tr>
<th>Year</th>
<th>Immigration Court</th>
<th>BIA Case Completions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>80,526</td>
<td>114,954</td>
</tr>
<tr>
<td>2009</td>
<td>69,442</td>
<td>260,211</td>
</tr>
</tbody>
</table>

102. Id. at N1, fig. 22; see statistics supra Part III.A.1–2. Another factor to consider in the context of the Second Circuit is the grant rate in the Immigration Courts that feed to that court. The New York court’s grant rate is 73%, the highest in the country. Of the other Immigration Courts in the Circuit, Hartford’s grant rate is 31%, Buffalo’s is 29%. The grant rates at Batavia and Varick Street, the two detention center courts, are 15% and 20% respectively but those courts hear far fewer asylum claims. Id. at N2, Table 11.

and in Connecticut, 266 days. Although the statistics do not breakdown according to type of case, presumably cases in which relief is requested, a relatively small fraction of the total number of Immigration Court matters (see supra Table 11), take longer to resolve since they require more preparation and a hearing on the merits.

“The system is in turmoil,” bemoans the Seventh Circuit bench, when criticizing the conditions under which IJs work. Immigration Court resources are inadequate. The size of the dockets, the absent of adequate law clerk support, the often poor quality of lawyering and interpretation, the disturbing histories of many individuals appearing before them, and the stress of making decisions cases with serious human consequences are cited as explanations for sub-par performance. Often a hearing can consume many hours so only a few cases can be finished each day. Lawyers and respondents have incentives to delay, but even someone eager to resolve his or her case cannot obtain a hearing date in less than a year from the initial appearance at a Master Calendar. Even with the decrease in caseload, therefore, the court simply is not efficient. The simplest reason for the backlog may be that there simply are not enough effective active IJs to efficiently and fairly handle this taxing caseload. In face of this deficiency, the EOIR has made hiring judges a priority. But hiring has not kept pace with attrition or with the number of allocated positions so that little progress had occurred. Despite a commitment to hiring and some hiring success, the total number of judges increased by only nine over the past five years and there are many unfilled positions.

In combination with the reduction of cases filed and the decrease of asylum denials, inefficiency at the Immigration Court with its resultant slowdown in completing cases obviously has a domino effect on the BIA and then on the Circuit Courts. Although the BIA appears productive thanks in large part to the Immigration Court’s bottleneck and to the impact of streamlining, this impression is illusory. Sooner or later the Immigration Court cases will be completed, resulting in the inevitable BIA and Circuit Court appeals.

104 Id.; see generally Julia Preston, Study Finds Immigration Courtrooms Backlogged, N.Y.TIMES, June 18, 2010, at A20.
105 Apouvipseakoda v. Gonzales, 475 F.3d 881, 886 n.2 (7th Cir. 2007).
107 A recent study reported considerable burn-out on the immigration bench as a result of the stress of the decisions being made daily as well as the lack of support or rewards on the job. Stuart L. Lustig, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul, Dana Leah Marks & Denise Slavin, Burnout and Stress Among Immigration Judges, 13-1 BENDER’S IMMIGR. BULL. 2 (2008). The latter two authors of this study are the president and vice-president respectively of the National Association of Immigration Judges, the certified representative and recognized collective bargaining unit of the IJ’s since 1979. See www.ifpte.org. The NAJI was unsuccessful in its attempt to become recognized by the National Labor Relations Board as a collective bargaining unit. 56 F.L.R.A. 616, 620 (2000), available at http://www.flra.gov/decisions/v56/56-097.html (last visited Feb 1, 2011). The recommendations of the burnout survey correspond in large part to the kinds of reforms urged by the judge’s union.
(d) More Detained Cases

Respondents who are not detained are more likely to appeal an order of removal to the court of last resort, particularly after a summary affirmance by the BIA. Non-detained respondents generally have access to counsel, continue to earn money for legal fees while awaiting the outcome of the cases over several years, and might use the extra time to make arrangements for departure if all else fails. While an appeal is pending, they were able to live as usual and hope for the best. For detainees, spending the years of the appellate process in custody, often at detention centers far from their homes, the delay that accompanies multiple appeals is a deterrent. Further, the very nature of the grounds for removal gives most detainees fewer reasons to hope for a favorable outcome. Most detainees face removal for criminal grounds, have fewer claims for relief, and have less access to counsel. Their appeals might be filed *pro se* and thus fail to raise potential arguments.\footnote{The Palmer study found that the increase in appeals largely occurred in cases where the respondent was not detained *Surge in Petitions*, supra note 1, at 7.}

### Table 11

<table>
<thead>
<tr>
<th></th>
<th>Immigration Court and BIA Completions for Detained Cases \footnote{FY2009 STATISTICAL YEAR BOOK, supra note 78, at O1, fig. 23 &amp; X1, fig. 31.}</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Imm. Ct. Proceedings Completed for Detained Cases</td>
</tr>
<tr>
<td></td>
<td>IL Case Appeals Decisions for Detained Cases</td>
</tr>
<tr>
<td>2005</td>
<td>91,392</td>
</tr>
<tr>
<td>2009</td>
<td>144,763</td>
</tr>
<tr>
<td></td>
<td>3,571</td>
</tr>
<tr>
<td></td>
<td>3,361</td>
</tr>
</tbody>
</table>

During the four years from 2005 to 2009, there has been a substantial increase in the numbers of detained cases in Immigration Court proceedings. In 2005, 91,392 cases were completed on the detained docket in Immigration Court. By 2009, the Immigration Court completed 144,763 detained cases, a sizable increase. BIA completions, however, remained static with a slight decrease from 3,571 cases in 2005 to 3,361 cases in 2009. The EOIR report does not break out how many detained cases involved applications for relief and the percent in which

\footnote{The BIA sponsors a *pro bono* project in an effort to secure more representation. See Legal Orientation and Pro Bono Program, http://www.justice.gov/eoir/probono/probono.htm (last visited Feb. 1, 2011). The representation rate on appeals from IJ decisions has increased from 62% to 77% between 2005 and 2009. FY2009 STATISTICAL YEAR BOOK, supra note 78, at W1, fig. 30.}
relief was granted at either the Immigration Court of the BIA, but the small fraction of cases that are appealed from the growing detained docket implies that the many detainees do not request relief; those who do and whose applications are denied appeal at a very low rate.

Just as several factors contributed to the cresting of the wave of appeals, multiple factors contribute to its recession. But unlike the surge, there are no statutory or regulatory changes that created a causal link. The volume of cases, the grant rate for asylum claims, the court backlog, and the number of detained cases are all ephemeral occurrences that could change as quickly as they seem to have happened.

B. PRESSURES ON THE AGENCY TO RESPOND

The flood of circuit court immigration cases has had an inescapable impact on the administrative agency. Academics, NGOs, legislators, government commissions, and bar associations have long proposed various reforms to immigration adjudication. Within the world of immigration practice, the inadequacies of Immigration Court proceedings have been legendary. Advocates and professional groups have inveighed against the Ashcroft streamlining reforms. But all of the criticism had been confined largely to this relatively insular world. The bad news was so contained that there was little hope for meaningful reform. This has changed in the wake of the surge.

The nationwide explosion of immigration appeals required circuit court judges to peer through the looking glass into the previously largely overlooked world of immigration courts and the immigration bar. The circuit courts became increasingly vocal about the quality of immigration adjudication on both the trial and appellate level. Due to the stature of the federal bench, appellate judges’ criticisms drew the attention of the media, then the public, and finally provoked a response from the Attorney General. The spirit of reform, including greater transparency and accountability is in the air. Some progress has occurred, much still needs to be improved.

1. Pressures on Immigration Judges to Improve Their Performance

(a) From the Circuit Courts

During the early years of the surge, circuit court judges became increasingly vocal about the poor quality of immigration adjudication on both the trial and appellate level. Federal judges were reading transcripts of proceedings conducted by impatient or unreasonable immigration judges that were inadequately or illogically reasoned.112 Because the Board’s analysis often lacked substance, or was incomplete and/or inconsistent with the IJ’s reasoning, circuit courts have

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borne an unexpected burden of reviewing the original record in Immigration Court, in addition to any BIA decision.

As the docket grew, so did judicial awareness and intolerance of the flaws of immigration adjudication. The forceful and attention-grabbing criticisms of immigration court decisions and immigration judges by now are well known. In some circuits, most notably the Seventh, criticism has been sharp and unrelenting. The Second, Third, and Ninth Circuits also actively reproached IJs.

The caustic, even impatient descriptions of immigration proceedings voiced by many prestigious Circuit Court judges stemmed as much from frustration and irritation with the increased burdens placed on their own courts as from reactions to poor decision-making at the administrative level. In many cases, the review concluded that the IJ’s reasoning was illogical, unsupported by the record or simply lacking sufficient analysis. In others, the federal court perceived hostility, stereotyping, intolerance and abusive behavior. The proceedings in Immigration Court occasionally were so unfair that the circuit court found a due process violation. In some cases, the judges were so troubled by the conduct of the IJ that the case was remanded for reconsideration before a different judge, an unusual interference with typical administrative authority by the agency. Even if some federal judges expressed an understanding for the pressures of the overworked,

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114 Judge Richard A. Posner decried the “systematic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum.” Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004).
117 See, e.g., Recinos De Leon v. Gonzales, 400 F. 3d 1185, 1187 (9th Cir. 2005); Barroso v. Gonzales, 429 F.3d 1195 (9th Cir. 2005); Rivera v. Ashcroft, 387 F.3d 835, 842 (criticized for acting as prosecutor) (9th Cir. 2004); Reyes-Melendez v. INS, 342 F.3d 1001, 1007 (9th Cir. 2003) (criticized for lack of partiality); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005) (criticized for “prejudgment, personal speculation, bias, and conjecture.”).
118 See, e.g., Hassani v. Mukasey, 301 F. App’x. 602, 603 (9th Cir. 2008) (IJ excluded testimony of several witnesses);
119 See, e.g., Huang v. Gonzales, 453 F.3d. 142, 151 (2d Cir. 2006); Mece v. Gonzales, 415 F.3d 562, 578 (6th Cir. 2005); Nuru v. Gonzales, 404 F.3d 1207, 1230 (9th Cir. 2005).
under-resourced immigration bench,\textsuperscript{120} most comments as a whole were embarrassing or even damning.

This spotlight from the prestigious heights of the federal circuit courts has led to much needed attention from the legal profession well beyond the community of immigration lawyers to the quality of the immigration bench. This loud denunciation finally captured the attention of someone with power to respond, the Attorney General under whose authority the EOIR exists.

\textit{(b) From the Attorney General}

Criticism of the Immigration Court is not new but in the past it tended to concentrate on structures, operations and lack of independence rather than individual performance in applying the law, assessing the facts.\textsuperscript{121} As the window into immigration court proceedings widened due to the new and upsetting attention from prestigious and vocal circuit court judges, then-Attorney General Alberto Gonzales was compelled to respond to the revelations of myriad inadequacies in the quality of adjudication, the resources made available to the immigration courts, and the plight of litigants appearing there.

In January 2006, Gonzales made news when he announced an investigation into the Immigration Court.\textsuperscript{122} About eight months later he publicized his 22 measures to improve the quality and efficiency of immigration courts and the BIA.\textsuperscript{123}

\textsuperscript{120} See, e.g., Metko v. Gonzales, 159 F. App’x 666, 670 (6th Cir. 2005) (Martin J., concurring)

Although I am sympathetic with the difficulties faced by immigration courts and its caseload… Let us not forget the impact of these hearing on the lives of the individual involved. The least we can ask of the immigration court is to provide a thorough and complete analysis for its determination beyond identifying minor inconsistencies, cultural differences, or language barriers.

\textsuperscript{121} In 1990, Professor Deborah Anker concluded, “[T]he current adjudicatory system remains one of \textit{ad hoc} rules and standards…. In other words, there is a significant disparity between the law ‘as stated on the books’, and the law as implemented and practiced.” Deborah E. Anker, \textit{Determining Asylum Claims in the United States-Summary Report of an Empirical Study of the Adjudication of Asylum Claims before the Immigration Court}, 2 INT’L J. REFUGEE L. 252, 255 (1990).

\textsuperscript{122} I have watched with concern the reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice…. I believe there are some [immigration judges] whose conduct can aptly be described as interjurer or even abusive and whose work must improve.


\textsuperscript{123} Dept. of Justice Press Release #06-520, \textit{Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals}, available at
This initiative sowed seeds for reform from within, strengthened arguments for an infusion of more resources into the courts, and drew attention to the need for mechanisms to monitor IJ performance. According to EOIR leadership, many improvement measures have been accomplished— an updated Immigration Judge Benchbook, an Immigration Court Practice Manual, a Code of Conduct for Immigration Judges and Board Members, a published procedure for lodging complaints against IJs, and the establishment of a regional system of supervisory IJs.

The EOIR’s efforts have received mixed reviews. Some real progress has taken place but also, significant deficiencies remain in achieving some objectives, particularly in hiring new IJs and assuring the quality of performance of newly appointed and existing IJs. Although for some time the combined appointment and attrition rates for IJs thwarted real progress in expanding the number of judges, in 2010 Attorney General Eric Holder appointed 33 new IJs, bringing the total to an all-time high. Perhaps even more significantly, the details of the hiring process were made public. This represents meaningful progress, and even without an


Unquestionably this attention provokes negative responses from the immigration judges themselves, who reportedly suffer from stress and burnout even without demoralizing public criticism of their performance. One IJ reports: “The Attorney General’s initiatives and demands on our court system has created the “poster child” for a hostile work environment and fueled a media frenzy of criticism from many who have no meaningful understanding of what we do as judges.” Stuart L. Lustig, et al., Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey, 23 GEO. IMMIGR. L. J. 57, 72 (2008).


The hiring process for most of these new immigration judges began in December 2009. After initial screening, EOIR’s human resources section referred 1,782 applications to the Office of the Chief Immigration Judge. Four panels of assistant chief immigration judges screened the applications for the following criteria: ability to demonstrate the appropriate temperament to serve as a judge; knowledge of immigration laws and procedures; substantial litigation experience, preferably in a high-volume context; experience handling complex legal issues; experience conducting administrative hearings; and knowledge of judicial practices and procedures. The most highly recommended candidates were selected for interviews. Top candidates were then referred for a second review and interview by a panel of senior Department of Justice officials. The Attorney General made the final selections.

March 26, 2011

express admission to that effect, is a likely response to the 2008 disclosure of the Bush administration’s blatant and improper use of political criteria for EOIR appointments.132

While the bills of particular against Immigration Court adjudication lodged by circuit court judges were most vociferous during the early days of the surge, they have not disappeared despite the efforts of the EOIR to improve performance through better training, improved complaint mechanisms and more effective monitoring. Some immigration judges’ behavior continues to be antagonistic, inquisitorial and biased, provoking ongoing negative attention of the federal courts and others.133

2. Pressures on the BIA

Critics of the streamlining initiative focused their disapproval on the regulations permitting single-judge AWOs and the reduction in the number of Board members from 23 to 11.134 In addition, the modified standard of review limited the BIA’s authority to review the findings of fact in an IJ’s decision de novo.135 This combination of loss of power, resources and attentiveness to individual cases led to fears that the Board would engage in assembly-line justice, and issue poorly reasoned and hasty decisions. As Judge Posner assessed the situation, “[T]he adjudication of cases has fallen below the minimum standards of legal justice.” 136

These potential consequences were apparent from the outset, yet the Attorney General was unmoved. The streamlining initiative was formalized and its salutary effect on the BIA backlog ensued, at the expense of the circuit courts. One observer pointed out, “On the macro level the BIA reforms are reshaping circuit courts.”137


134 See generally DORSEY & WHITNEY, supra note 10.


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

The BIA persists in defending its productivity and the quality of its decisions, but the critics have had a measurable impact. The stinging reproaches of federal judges prompted the EOIR to propose revisions to the streamlining regulations that would increase the use of 3-member panels, and give Board members discretion whether to issue an AWO or write an opinion.\textsuperscript{138} The size of the BIA also increased to 15 from 11.\textsuperscript{139}

Whether there have been real improvements is less clear, however. Ninth Circuit judges expressed mixed opinions as to whether there actually were fewer AWO or streamlined cases.\textsuperscript{140} Those judges did foresee that adding resources to the BIA so that cases could be “properly decided” would alleviate the burdens on the Circuit Courts.\textsuperscript{141} Since the new regulations went into effect only in 2008, it may be too soon to measure their impact, but any reduction in AWOs and any expansion of capacity undoubtedly will be improvements.

Because the federal courts will only tolerate so much interference with their business, and the judges have expressed their distress so vocally, the BIA was forced to retrench. Neither the courts nor the EOIR are in a position to publicly acknowledge the cause-and-effect, the fallout from the surge – close scrutiny of immigration adjudication practices followed by frequent censure of the reasoning and processes of both hearings and BIA review – caused the agency to respond, retrench and reform.

III. THE FLOOD WATERS RECEDE: THE LEGACY OF THE SURGE

The surge of immigration appeals is responsible for changes that extend far beyond court administration and doctrine. The unprecedented volume of cases, particularly of asylum claims, exposed circuit court judges to the true state of the previously largely ignored immigration courts and the immigration bar. As the window into immigration court proceedings opened more widely and generated more public criticism thanks to the new attention from circuit court judges, the EOIR has been forced to respond to the revelations of myriad inadequacies in the quality of adjudication, the resources made available to the immigration courts, and the plight of litigants appearing there. This sowed seeds for reform from within, strengthened arguments for an infusion of more resources into the courts, and drew attention from the public and the legal profession to the need for more access to better representation.

More surprisingly, the impact of the surge has reverberated outside of the self-contained world of the agency into the profession more generally. While


\textsuperscript{140} Id., Rationing Justice, supra note 36, at 37.

\textsuperscript{141} Id. at 38.
immigration adjudication reform has never been far from the sights of some organizations, such as the ABA, the post-surge proponents for change has expanded markedly

A. STIMULATING RENEWED CIVIC ENGAGEMENT IN SUPPORT OF FAIRER PROCEEDINGS AND MORE DUE PROCESS FOR IMMIGRANTS

The Immigration and Nationality Act recognizes a right to representation at a removal proceeding, but not a right to appointed counsel. In 1975, the Sixth Circuit held that due process might compel appointment of counsel in immigration proceedings when counsel would be necessary to assure “fundamental fairness.” But this ideal simply has not gained any traction in the reality of Immigration Court. As a result, while many individuals retain counsel, and some are represented pro bono, a large number appear pro se. The lack of counsel causes advocacy groups, professional associations, and even legislators understandable worry about access to justice and due process for immigrants facing deportation.

According to recent statistics, rates of representation in Immigration Court have not improved significantly over the 2005-2009-time period. From a low of 35% in 2005 to a high of 43% in 2007, the 2009 rate of representation in completed cases fell to 39%. The longstanding received wisdom is that individuals in removal proceedings, particularly when relief is requested, fare much better if represented by counsel. One study describes representation as the “single most important factor affecting an asylum case.” The percentage of represented cases at the BIA is higher than at Immigration Court, ranging from 62% to 77%. This is likely attributable to the increased difficulty in finding counsel to take an appeal simply forego an appeal to the BIA.

In addition to the likelihood of a more favorable outcome for the respondent, the presence of counsel generally means greater efficiency for the system as issues are presented more clearly. Moreover, every case in which relief is granted due to the assistance of counsel is one fewer case to climb the ladder of appellate review.

1. Access to Legal Representation

143. Aguilera-Enriquez v. INS, 516 F.2d 565, 568 n.3 (6th Cir. 1975).
144. FY2009 STATISTICAL YEAR BOOK, supra note 78, at G1. fig. 9.
145. Donald Kerwin, Revisiting the Need for Appointed Counsel, INSIGHT 5-6 (Migration Policy Institute, Wash. D.C.), Apr. 2005. One study found it is 4-6 times more likely that asylum is granted if the applicant is represented. Andrew I. Schoenholtz & Jonathon Jacobs, The State of Asylum Representation: Ideas for Change, 16 GEO. IMMIGR. L. J. 739, 743 (2002).
147. FY2009 STATISTICAL YEAR BOOK, supra note 78, at W1, Fig. 30. A BIA Pro Bono Project secures representation for a modest number of detained appellants. Steven Lang, Creating Incentives and Facilitating Access: Improving the Level and Quality of Pro Bono Representation Before the EOIR, 21 GEO. J. LEGAL Ethics 41, 46 (2008).
Concern about the unmet legal needs of immigrants received a renewed boost in the wake of the surge. On February 28, 2007, Judge Robert A. Katzmann of the Second Circuit delivered a prestigious lecture at the Association of the Bar of the City of New York.148 Using an image of a burst dam after years of build up, Judge Katzmann based his remarks on his observations of the flood of immigration cases in the preceding five years in the Second Circuit and nationwide.

The plight of immigrants who have no representation or who have inadequate counsel became a cause for the judge and for a “study group” of stakeholders in New York City that now numbers more than fifty.149 The study group’s task forces authored substantial reports that were presented at a spring 2009 symposium150 and then appeared in the Fordham Law Review. Their focus was not only on expanding options for pro bono representation, but also on identifying the existing barriers to effective representation and the problems of ineffective representation from incompetent lawyers and from largely unregulated nonlawyers.151

The work of the study group continues and its membership now includes people from the Circuit Court bench, private practice at both large and smaller firms, non-profit organizations, legal service providers, academia, City government and prosecutor’s offices, immigration judges, and disciplinary committees. Its core mission remains the same: assuring competent counsel to individuals in the immigration process at the earliest possible time.

The call for an appointed counsel system is not new but since the surge introduced Judge Katzmann and other judges to the defects in the current system of representation. The judges cannot lobby for such a system, but other influential groups can. The exhaustive 2010 American Bar Association report, Reforming the Immigration System calls for a system of appointed counsel for indigent noncitizens as well as categories of vulnerable individuals in removal proceedings152 A

149. For a description of the history and the work of the Study Group see Robert A. Katzmann, Deepening the Legal Profession’s Pro Bono Commitment to the Immigrant Poor, 78 FORDHAM L. REV. 453, 455 (2009). I am a member of the study group.
150. The symposium “filled an amphitheater at Fordham Law School...drawing high-powered lawyers, judges, academics and city officials who talked bluntly about a dysfunctional system and brainstormed into the night.” Nina Bernstein, In a City of Lawyers, Many Immigrants Fighting Deportation Go It Alone, N.Y. TIMES, Mar. 13, 2009, at 21.
152. §§ 5.10-5.15. The ABA is not alone. This recommendation also appears in Ramji-Nogales, et al., Refugee Roulette, supra note 146, at 384. There is a National Working Group on Appointed Counsel in Immigration Proceedings composed of high-level practitioners. See http://www.civilrighttocounsel.org. See also, Donald Kerwin,
coalition of non-profit organizations tried a different tack in 2009. They petitioned the Department of Justice to promulgate regulations for the appointment of counsel for indigent respondents in order for the proceedings to be fundamentally fair. No response was issued, nor are there any signs that the agency will ever consider such a dramatic step.

A system of appointment of counsel at government expense for any respondent unable to afford a lawyer is a quixotic goal. But, with enough pressure from external forces, some less radical goals might be attainable. For example, one as yet concluded federal court initiative, a class action on behalf of detained, incompetent noncitizens in immigration proceedings, ordered appointed counsel for some individuals in that class. Perhaps some IJs may be more open to the argument that, at least in some cases, failure to appoint counsel would result in a proceeding that violates norms of fundamental fairness. But EOIR leadership has to be willing to pay for, appointed counsel in order to achieve even this modest improvement.

2. Assuring Effective Assistance of Counsel

The effort to assure greater access to legal representation for immigrants in removal proceedings is only one part of the struggle to improve the adjudication system. Even when an individual has an attorney or accredited representative, the performance of the lawyer can be so incompetent that appellate courts have had to grapple with methods for redressing these deficiencies in the context of claims of ineffective assistance and in attorney disciplinary proceedings.

(a) Ineffectiveness of Counsel Claims in the Circuit Courts

While Circuit Courts have taken aim much more frequently at the quality of adjudication at Immigration Court and the BIA, incompetent lawyers also have tried the patience of these judges. A majority of circuits have recognized the possibility that due process requires effective assistance of counsel, a claim the

Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded, 04-06 IMMIGR. BRIEFINGS 1, 9 (2011).


154 The ACLU has filed a class action seeking a system for determining the need to appoint counsel on behalf of immigration detainees who are found incompetent to represent themselves. Complaint at 39, Franco-Gonzales, et al. v. Holder, 10 Civ. 0-2211 (C.D. Cal., filed Aug. 2, 2010), see http://www.aclu-sc.org/releases/view/103035. The judge ruled that the government must appoint counsel to two individuals with serious mental disabilities in the class who had pending proceedings in Immigration Court. The ruling was based on the federal Rehabilitation Act of 1973, 29 U.S.C. § 794 (2011). See also Gokee v. Ashcroft, C02-2568 (W.D. Wash 2003) (R&R granting motion to appoint counsel for hearing for mentally incompetent asylum seeker).

155 In a recent survey, judges report that immigration is the civil practice area in which the judges perceived the quality of representation was lowest and where they most often found disparities in representation, particularly between the government lawyer and counsel for the respondent. Richard A. Posner & Albert H. Yoon, What Judges Think of the Quality of Legal Representation, 63 STAN. L. REV. 317, 330, 331, 333 (2011).
usually arises in the context of a motion to reopen a removal order. Although it is unusual for a claim of ineffectiveness to be so egregious as to violate demanding “fundamental fairness” standard, many cases allege fairly serious misconduct. On occasion the frustration of the judges becomes very clear. Judge Katzmann authored an opinion that not only resulted in a remand, but also expressed exasperation with the deficient performance of the lawyer:

The importance of quality representation is especially acute to immigrants, a vulnerable population who come to this country searching for a better life, and who often arrive unfamiliar with our language and culture, in economic deprivation and in fear. In immigration matters, so much is at stake -- the right to remain in this country, to reunite a family, or to work…. [G]iven the disturbing pattern of ineffectiveness evidenced in the record in this case (and, with alarming frequency, in other immigration cases before us), we reiterate that due process concerns may arise when retained counsel provides representation in an immigration proceeding that falls so far short of professional duties as to “impinge[] upon the fundamental fairness of the hearing.

Ineffective representation in immigration proceedings can even spill over into criminal cases. When a removal order that is the predicate for a charge of illegal reentry is so tainted by incompetent counsel, a defendant may be able to challenge that charge without having to first exhaust administrative remedies.

(b) Policing the Bar

A significant portion of the private immigration bar enjoys a poor reputation for competency that on occasion rises to the level of criminality. Attorney disciplinary proceedings are one route for monitoring the immigration bar. The Second Circuit maintains a Committee on Attorney Admissions and Grievances. In a recent case, an immigration attorney, whose clientele was almost exclusively Chinese, was sanctioned and disbarred from practice in the Second Circuit because “the totality of [her] conduct leaves us without assurance that she can conform her future conduct in this Court to all professional and ethical norms.”

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156. See, e.g., Stroe v. INS, 256 F.3d 498, 500-01 (7th Cir. 2001); Saleh v. Dep’t of Justice, 962 F.2d 234, 241 (2d Cir. 1992). For 20 years, the BIA appeared to recognize the constitutional underpinnings of such claims. The Board developed a framework for analyzing such claims that require movants to clear certain procedural hurdles before the merits of the claim will be considered. Matter of Lozada, 19 I. & N. Dec. 637, 639 (B.I.A. 1988); In re Assaad, 23 I. & N. Dec. 553, 556 (B.I.A. 2003). For an example of an ineffective counsel claim that satisfied the Lozada requirements, see In re Grijalva, 21 I. & N. Dec. 472, 473-74 (B.I.A. 1996). In 2009, outgoing Attorney General Michael Mukasey issued Matter of Compean, 24 I. & N. Dec. 710, 714 (B.I.A. 2009), rejecting the constitutional basis of the 20-year precedent. The uncertainty that this decision created was ameliorated by the announcement of newly appointed Attorney General Eric Holder to reconsider the earlier decision and to refer the matter to the EOIR for public rulemaking 25 I. & N. Dec. 1, 3 (A.G. 2009).


158. United States v. Cerna, 603 F.3d 32, 35 (2d Cir. 2010).

159. 2d Ctr. R. § 46.2 (b), Attorney Discipline.

160. In re Jaffe, 585 F. 3d 118, 120 (2d Cir. 2009). Subsequent to the disbarment from the Circuit, Ms. Jaffe was disbarred from practicing law in New York. See also, In re Peter Koenig, 592 F.3d 376, 386 (2d Cir. 2010); In re
Circuit also maintains a “watch list” of lawyers who, after several infractions are noted by the judges, are subject to sanctions.\textsuperscript{161}

The EOIR also polices both attorneys and the other representatives qualified to appear in Immigration Court and before the BIA.\textsuperscript{162} The EOIR published a final rule amending its prior regulations governing standards of professional conduct.\textsuperscript{163} The enhanced regulations strengthen the sanction authority of the EOIR to prevent and punish for fraud, abuse, misrepresentations, frivolousness and other gross misconduct. The EOIR maintains a publicly available list of practitioners who have been suspended or expelled.\textsuperscript{164}

Finally, law enforcement efforts to identify and prosecute lawyers and others providing fraudulent legal services appear to have increased. Occasionally, the miscarriage of justice is so egregious that members of the immigration bar or individuals defrauding immigrants have been found guilty of both criminal and ethical violations.\textsuperscript{165} But such charges are unusual and only can be brought when the conduct comes to light, a difficult step for members of the immigrant community if they fear their own status would be jeopardized by coming forward.\textsuperscript{166}

\section*{B. Stимулирующие Ревиведенные Вызовы Для Системного Реформирования}

The dysfunction of immigration courts and the BIA has been the subject of sporadic concern for many years.\textsuperscript{167} Periodically, the calls for change amplify as a

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\textsuperscript{162} By regulation, non-attorneys may also represent individuals in proceedings. 8 C.F.R. §§ 292, 1292 (2011) permits recognized organizations officially designated by the EOIR, accredited representatives affiliated with recognized organizations, and qualified representatives such as law students or “reputable individuals of good moral character” to both appear in court and to prepare documents. 8 C.F.R. §§ 1.1, 1001.1 (2011).


\textsuperscript{166} There are some potential visa benefits under the INA that might induce even an undocumented non-citizen to cooperate with a criminal investigation. 8 U.S.C. § 1101 (a)(15)(T) (2011) (“snitch visa”).

\textsuperscript{167} Over the decades, many structural reforms have been proposed by practitioners, scholars, special commissions, legislators, and even by the IJs themselves. There are three principal proposals – an Article I immigration court, an Article III court with an executive administrative law judge component, and an independent executive agency. See, e.g., Stephen Legomsky, \textit{Fortieth Annual Administrative Law Issue: Immigration Law and
new report or Congressional hearing pays attention to the situation. The surge and its accompanying negative attention also may have renewed pressures to try to fix the broken system.

1. Restructuring Immigration Adjudication

In the post-surge era, several unsuccessful efforts to redress immigration litigation appeared in bills between 2004–2007. For the most part, court related sections were buried in the midst of many more controversial and consequential provisions. The proposed Civil Liberties Restoration Acts of 2004 and 2005, sought to establish an independent regulatory agency known as the Immigration Review Commission although the Commission essentially preserved the existing structure while expanding the number of BIA members in a return to more comprehensive administrative appellate review.\textsuperscript{168} An obscure provision of one of the comprehensive immigration reform bills proposed in 2006 included a study of the possibility of consolidating all federal appeals into a single circuit, the U.S. Court of Appeals for the Federal Circuit.\textsuperscript{169} This proposal failed to gain support either in the Senate, with immigration experts or with the public.\textsuperscript{170} The defeated Comprehensive Immigration Reform Act of 2007 also contained a deeply buried provision that increased the number of immigration judges, beefed up their personnel, and funded more government attorneys prosecuting immigration matters.\textsuperscript{171} This legislation also increased the number of BIA members and revived the practice of 3-judge panels.\textsuperscript{172} Finally, in recognition of the need to protect independence, the bill prohibited the removal or discipline of IJs or BIA members for the exercise of their “independent judgment and discretion.”\textsuperscript{173}
Persistent but as yet unrewarded efforts to achieve change resurface with regularity in the post-surge fallout era. The NAIJ continues its push for an independent agency or Article I court.\textsuperscript{174} Other new reports and recommendations from both academics\textsuperscript{175} and professional organizations\textsuperscript{176} joined the chorus. Not all proposals have the same name, derive power from the same source, or offer the same implementation details, but all strive for greater efficiency, independence, transparency, professionalism and fairness. Even suggestions that do not require that much radical restructuring focus on principals of quality of adjudicative performance and accountability.\textsuperscript{177}

In this era of stalled immigration reform with all of the attendant controversies, it is unlikely that a transformation of the immigration adjudication system is in the cards. Resistance to comprehensive immigration reform is even stronger than the force of and the reaction to the surge so it is doubtful that the surge ultimately will have a role in reshaping the whole system. Administrative agency adjudication distresses lawyers and judges, and of course, immigrants but is largely invisible to the public. Therefore, any improvements to the system may only occur in response to ongoing vigilance by the federal courts, and continuing concern from civic and professional groups about the denial to immigrants of access to meaningful justice attained only with competent legal representation in courtrooms presided over by capable and fair IJs.

2. Encouraging the Use of Prosecutorial Discretion

Another somewhat tangential, but potentially powerful response to the attention resulting from the surge is the increasing recognition that the system would benefit from a greater use of prosecutorial discretion to defer cases at the trial level and remand cases at the appellate level.

Discretion is the hallmark of immigration decision making at all stages – from the inspectors at the border to the IJs. In immigration court, judges exercise


\textsuperscript{175} Stephen Legomsky, Restructuring Immigration Adjudication, 59 DUKE L.J. 1635, 1691–92 (2010) proposes an Article III specialist court with judges serving on a rotating basis with original trial jurisdiction in the hands of ALJs. The court would be independent of any political authority. \textit{Id.} at 1666.

\textsuperscript{176} After an extensive review of all varieties of reform models (with the exception of Prof. Legomsky’s, proposal, \textit{id.}, published after its report), the ABA endorsed an Article I court as the preferable option, with a fall back preference for an independent commission. \textit{Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases} (ABA Comm. on Immigration and Arnold & Porter) 2010, at 6–35.

\textsuperscript{177} For example, one commentator urges that improved Department of Justice management accomplished by instituting widely accepted judicial performance standards might be the most attainable court reform option.\textsuperscript{177} Another proposal, from a former IJ, suggests a separate merit-selected United States Asylum Court where consistency in legal and credibility determinations about eligibility for humanitarian relief would be more likely to occur. Bruce J. Einhorn, \textit{Consistency, Credibility, and Culture, in Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform} 187-201 (NYU Press 2009).
their discretion daily over such forms of relief as asylum, adjustment of status, or cancellation of removal, or bond determinations. In contrast, prosecutorial discretion—the willingness of the agency to terminate or administratively close proceedings, to consent to relief, to stipulate to particular issues—is absent in Immigration Court despite several aspirational directives from the highest levels of the Departments of Justice and Homeland Security.

This reluctance is at least partially responsible for the growing number of federal appeals. A very frustrated Judge John T. Noonan, Jr. of the Ninth Circuit urged that “Lawyers—real lawyers, lawyers exercising discretion, candid with their departmental client—are the key.” He cites a transcript of a particularly egregious hearing at which the government attorney was groundlessly recalcitrant in his defense of the removal order. The Judge’s plea for government lawyers, in this instance, OIL attorneys, to have the authority not to defend an obvious error in the Circuit Courts, echoes the efforts of outgoing INS Commissioner Doris Meissner to inject more discretion into the entire system. Most recently, John Morton of ICE, issued a reminder memorandum encouraging the appropriate use of prosecutorial discretion. This exhortation had an impact in Houston Immigration Court where, following a review of a docket that exceeded 7,000 matters, ICE dismissed 200 cases. Notwithstanding this localized effort, a renewed use of prosecutorial discretion along the lines of these longstanding policies has not spread in any notable fashion to other courts with equally crippling backlogs.

The cry for more discretion can be heard from all quarters—the bench, the bar and academia. Not only would the diversion of cases out of the adjudication of removal...
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system decrease the court backlog, the proper exercise of discretion could help achieve greater consistency of outcomes through the use of systematic prosecutorial policies and guidelines, an approach used with great frequency and little opposition in criminal cases. This might deflect the criticism of unfair disparities in adjudication.\textsuperscript{188}

IV. CONCLUSION

Hopes for comprehensive immigration reform are dimming. Even efforts to redress more limited aspects of the universally acknowledged broken system have failed.\textsuperscript{189} Immigration adjudication sits squarely in the middle of this glum and complex situation, yet structural reform is improbable. The pleas of academics, practitioners and leading NGOs and bar associations have not been heeded.

To the extent that there have been changes – adding judges and improving resources, creating systems for more accountability, better training and oversight, and greater transparency, we have the surge and its eye-opening effect on the Circuit Court judge’s to thank. The pressure endures as the circuit court docket remains swollen by immigration cases, as the Immigration Court backlog grows, and as more detainees are entering the system.\textsuperscript{190} It is unimaginable that the flaws of the system can be pushed back into the shadows after all of this exposure. The curtains – and perhaps the swords – are drawn. Unless improvement is visible and appreciable, the Circuit Court will keep blowing steam that cannot be ignored, and the ever-increasing segments of the bar engaged in trying to secure more access to justice for immigrants will continue to push for incremental but meaningful change.

\begin{thebibliography}{10}
\bibitem{188} See generally Ramji-Nogales, et al, supra note 168.
\bibitem{189} David M. Herszenhorn, Senate Blocks Bill for Young Illegal Immigrants, N.Y. Times, Dec. 18, 2010 at --.
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