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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^{*}

ABSTRACT

For many years, the big news in the United States courts of appeal was the skyrocketing immigration caseload. For courts that traditionally had busy immigration dockets, the effect was tsunamic. 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. This 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 Article examines the legacy of this exposure and its positive impact on the quest for better access to justice for immigrants facing removal.

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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 3300 administrative appeals nationwide, of which 1760 (53.3%) involved the legacy Immigration and Naturalization Service.² By 2004, the number of immigration cases in the federal appeals courts soared to 10,812 (88.2% of all administrative appeals and

¹ See John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005) [hereinafter Palmer et al., *Surge in Petitions*]; John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14–15 (2006); Comm. on Fed. Cts., Ass’n of the Bar of the City of N.Y., *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* (Aug. 31, 2004), available at <http://www.abcnyc.org/pdf/report/AppealSurgeReport.pdf> [hereinafter Fed. Cts. Comm. Rep.]; *Immigration Appeals Surge in Courts*, THE THIRD BRANCH (Sept. 2003), http://www.uscourts.gov/News/TheThirdBranch/03-09-01/Immigration_Appeals_Surge_in_Courts.aspx [hereinafter THIRD BRANCH]; Marcia Coyle, *Immigration Appeals Surge*, NAT’L L.J., Nov. 3, 2003, ; Claire Cooper & Emily Bazar, *Immigration Appeals Swamp Federal Courts*, SACRAMENTO BEE, Sept. 5, 2004, at A1, available at <http://www.justice.gov/eoir/press/04/ImmigrationAppealsSacBee.pdf>; Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, N.Y. L.J., Dec. 27, 2004, available at <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=900005420783&slreturn=1>; Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Continue to Overwhelm Federal Courts*, THE LEGAL INTELLIGENCER, Jan. 19, 2005, available at <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=900005421969>; Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, at A1, available at <http://articles.latimes.com/print/2005/may/02/local/me-backlog2>.

² LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR Table B-3 (2004), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/b3.pdf> [hereinafter JUDICIAL BUSINESS, 2004].

17.2% of all appeals nationwide).³ The rate, as well as the volume, of appeals nationwide from adverse decisions of the Board of Immigration Appeals (BIA or Board) rose extraordinarily.⁴ Although the drastic spike has leveled off, record numbers of noncitizens facing final orders of removal continue to file petitions for review:⁵ 12,349 in 2005, 11,911 in 2006, 9123 in 2007, 10,280 in 2008, abating slightly to 7518 in 2009.⁶

Today, we can see clearly that the surge is not temporary and continues to burden the courts.⁷ More than seven years after the floodgates opened, the steady flow of cases has inexorably 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 for 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 assuring effective legal representation. At the time of the initial influx of cases, no one could have predicted the variety of voices that now participate in the conversation about immigration adjudication, nor could they have anticipated the intensity and perseverance of the responses or foreseen some of the proposed or actual reforms. The surge has had a catalytic effect on several important institutional changes and reform initiatives, and even more are likely to happen. Given this new climate, it is time to move beyond examining the causes of the surge to study its impact, particularly on the public discourse within the legal profession about immigration court practice.⁸

³ *Id.*

⁴ 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*, THE THIRD BRANCH (Nov. 2007), http://www.uscourts.gov/News/TheThirdBranch/07-1101/A_Decade_of_Change_in_the_Federal_Courts_Caseload_Fiscal_Years_1997-2006.aspx. By 2006, the number of BIA decisions appealed to the federal courts out of the total number of BIA decisions had increased from a historical 5% (before 2002) to approximately 30%. Fact Sheet, U.S. Dep’t of Justice, BIA Restructuring and Streamlining Procedures (Mar. 9, 2006), *available at* <http://www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf> [hereinafter Fact Sheet, U.S. Dep’t of Justice]. Prior to 2002, federal courts were receiving about 125 BIA case appeals per month. *Id.* By 2006, they were receiving more than one thousand per month. If the rate of appeal had remained constant at its pre-2002 level, only about two hundred cases would have been filed monthly. *Id.*

⁵ 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 has been the only way a respondent in immigration proceedings can request judicial review of a final order of removal. 8 U.S.C. § 1252(a)(5) (2010).

⁶ JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR Table B-3 (2009), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf> [hereinafter JUDICIAL BUSINESS, 2009]. As of September 2009, 12,303 administrative agency appeals were pending in the circuit courts. *Id.* at Table B-6. This contrasts to the 8446 appeals pending five years earlier, which, at the time, already represented a 379% increase from the previous year. THIRD BRANCH, *supra* note 1.

⁷ As recently as August 2008, judges from the Second and Ninth Circuits “painted a bleak picture . . . of a growing crisis in the adjudication of immigration cases . . .” Tony Mauro, *Circuit Judges Decry Immigration Case ‘Tsunami,’* LEGAL TIMES, Aug. 12, 2008, <http://www.law.com/jsp/article.jsp?id=1202423697849>.

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*

This Article briefly describes the surge and the responses to it, 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, laden with the country's second highest immigration docket,⁹ 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. The response of federal judges to their burgeoning and burdensome immigration caseloads has brought the sorry state of immigration adjudication out of the shadows and exposed its imperfections, inefficiencies, and inadequacies. This response demonstrates how pressures on the adjudication system may bring about some welcome improvements.

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 BIA procedures effective on September 25, 2002.¹⁰ For most of its existence, the Board had performed its critical appellate functions

Asylum Seekers": Responses to an Expanded Immigration Docket, 55 CATH. U. L. REV. 965, 965 (2006) (describing the consequences 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, United States Court of Appeals for the Second Circuit. *Id.* at 547 n.a1. See also Erick Rivero, Note, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497, 1521 (2006) (criticizing the non-argument calendar on due process grounds).

⁹ The immigration caseload of all of the other circuits combined, excluding the Ninth, consistently is less than the caseload in the Second. JUDICIAL BUSINESS, 2009, *supra* note 6, at Table B-3; see also Fed. Cts. Comm. Rep., *supra* note 1, at 5; Tom Perrotta, *Immigration Appeals Surge in Second Circuit*, N.Y. L.J., Nov. 4, 2004, at 1, col. 4; Mark Hamblett, *Circuit Struggles to Cope with Upsurge in Asylum Appeals*, N.Y. L.J., Nov. 25, 2005, at 1, col. 3. The Ninth Circuit historically has the largest immigration docket. Its administrative appeals caseload grew from 1063 in 2001, to a high of 6583 in 2005, then declined to a still considerable 4625 cases in 2008. The comparison across this time period is a bit skewed because through 2004, appeals from the BIA were not separately reported. After the surge hit with full force, BIA appeals were broken out from the total. This discrepancy is really not that significant, since less than 10% of these appeals were from other agencies between 2005 and 2009. Compare JUDICIAL BUSINESS, 2004 *supra* note 2, at Table B-3, with JUDICIAL BUSINESS, 2009, *supra* note 6, at 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, at Table B-3. 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).

¹⁰ 8 C.F.R. § 1003.1 (2010). The history and details of the streamlining initiative are described fully in many sources: Palmer et al., *supra* note 1, at 23-29; John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991, 1994-99 (2009); Edward R. Grant, *Laws of Unintended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 945-52 (2006) (The author is a BIA Member.); Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1004-06 (2006); Fact Sheet, U.S. Dep't of Justice, *supra* note 4; DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASS'N COMM'N ON IMMIGRATION POLICY, PRACTICE AND PRO BONO, RE: BOARD OF IMMIGRATION

sitting in three-member panels. With the exception of a few non-mandatory categories of cases, the streamlining regulations created a new norm of single-member panels and changed the standard of review of immigration court fact-finding from *de novo* to “clearly erroneous.”¹¹ Post-streamlining, the single-member panel could, and actually was prompted to, write affirmances without opinion (AWO) in the majority of cases. Although the goal of the new regime was to reduce a crushing backlog, it reduced the size of the Board from twenty-three to eleven members. This encouraged the use of expedient one-member review and single-sentence decisions simply to keep up with the pace of incoming cases.

The timing of the surge, right on the heels of the BIA streamlining regulations, implies an inescapable and, to this day, unrefuted cause-and-effect relationship.¹² 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.¹³ 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.”¹⁴

The new regulations had an impact on both the quality and 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 United States Government and Accountability Office (GAO) found that AWOs rose from 44% to 77% over a four-year period.¹⁵ These cursory AWOs were essentially 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 was granted, whereas after that date only one in ten was granted.¹⁶ The impact of moving from a panel to a single judge was similar: three-member panels favored noncitizens in 52% of the cases while single-judge decisions had an approval rate of only 7%.¹⁷

APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 16–30 (2003), *available at* http://www.dorsey.com/files/Publication/e649960f-30c0-408f-8965-0df604f69523/Presentation/PublicationAttachment/690ec02a-94b9-4115-a1a0-5d14cf0d7a6d/DorseyStudyABA_8mgPDF.pdf. [hereinafter DORSEY & WHITNEY].

¹¹ 8 C.F.R. § 1003.1(d)(3)(i) (2010).

¹² See Fed. Cts. Comm. Rep. *supra* note 1, at 1–4. DORSEY & WHITNEY, *supra* note 10, at 40–41; A.B.A. COMM’N ON IMMIGRATION POLICY, PRACTICE & PRO BONO, SEEKING MEANINGFUL REVIEW: FINDINGS AND RECOMMENDATIONS IN RESPONSE TO DORSEY & WHITNEY STUDY OF BOARD OF IMMIGRATION APPEALS PROCEDURAL REFORMS 2–3 (2003), *available at* <http://www.americanbar.org/content/dam/aba/migrated/publicserv/immigration/bia.authcheckdam.pdf> [hereinafter A.B.A. COMM’N].

¹³ DORSEY & WHITNEY, *supra* note 10, at 39.

¹⁴ Ashcroft & Kobach, *supra* note 10, at 2004. Another apologist of the streamlining regulations argues that the federal appeals courts are partly responsible for their own crisis. Hethmon, *supra* note 10, at 1001.

¹⁵ GOV’T ACCOUNTABILITY OFFICE, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES (Sept. 2008), *available at* <http://www.gao.gov/new.items/d08940.pdf> [hereinafter GAO REPORT]. The decrease in the percentage of BIA asylum decisions favoring the alien occurred in both affirmative and defensive cases, and the decreases were significantly greater for those who applied defensively. *Id.* at 10.

¹⁶ DORSEY & WHITNEY, *supra* note 10, at 40.

¹⁷ GAO REPORT, *supra* note 15, at 10.

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.¹⁸ 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 had to look at the record of proceedings at the immigration court without the benefit of an adequate appellate review filter. In many cases, the circuit courts engaged in a two-tiered inquiry resulting in a series of rules regarding the nature of the review required.¹⁹ Federal judges had 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.²⁰ This placed an extra burden on circuit courts to make determinations on issues of fact, including credibility findings, rather than concentrating on their main function of deciding questions of law.

Additional, albeit less directly influential, factors played a role in causing the surge. First, litigation in the aftermath of many new and complex changes contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)²¹ inevitably contributed to some increase in judicial review as new proceedings were challenged and the BIA and the courts interpreted new statutory provisions.²² Second, the

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 immigration judge’s (IJ) reasoning, the court of appeals will review the BIA opinion alone. *Belortaja v. Gonzales*, 484 F.3d 619, 622–23 (2d Cir. 2007) (quoting *Mu Xiang Lin v. U.S. Dep’t. of Justice*, 432 F.3d 156, 159 (2d Cir. 2005)). More often, however, the BIA’s affirmance relates back to the immigration court’s rationale, but is ambiguous and thus necessitates 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); *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. However, the review is confined to those reasons for denying relief that were adopted by the BIA. *See, e.g., Yang v. U.S. 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 fact finding or impermissible speculation. *See Hu v. Holder*, 579 F.3d 155, 158 (2d Cir. 2009).

²¹ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). “Massive changes in immigration law . . . required review of many questions of first impression and development of case law to resolve complex statutory interpretation questions.” A.B.A. COMM’N, *supra* note 12, at 3.

²² DORSEY & WHITNEY, *supra* note 10, at 19. Examples of these issues include the repeal of previously available forms of relief leaving immigrants no option other than to raise legal challenges to statutory terms

most extensive empirical study on 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.²³ The study argues that the transfer of the action from the BIA to the Courts of Appeals caused immigration lawyers to recalibrate their practice to concentrate on federal appeals, whereas previously they had only handled immigration matters at the administrative level.²⁴ 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 as a whole, 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.²⁵ 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, or obtaining a remand.²⁶ 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.”²⁷

The population of lawyers filing petitions for review has also changed since the 2005 Palmer report. Many more firms and individual attorneys are handling cases. Of the 1113 notices of appearance filed on immigration cases before the Second Circuit in 2009, few lawyers handled more than one or two cases.²⁸ No nonprofit organization, legal services office, law school clinic, or other pro bono counsel handled more than four appeals. A significant number of lawyers continued to file petitions for multiple clients:

and the preclusion of judicial review of discretionary decisions leading to litigation on the question of the characterization of a ruling. Lenni B. 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).

²³ Palmer et al., *Surge in Petitions*, *supra* note 1, at 93–94; Palmer, *supra* note 1, at 14–15.

²⁴ Palmer et al., *Surge in Petitions*, *supra* note 1, at 93–94.

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

²⁶ Benson, *supra* note 22, at 53.

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: “We expected that most of these petitions [immigration appeals] would be *pro se*. However, 80 percent of the petitioners are 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>.

²⁸ On October 29, 2010, the Clerk of the Second Circuit Court of Appeals compiled a list of all notices of appearance filed on immigration petitions for review. The table below is drawn from that information for 2009.

Number of Cases per Attorney	Number of Attorneys Handling this Number of Cases
60+	3
40–60	0
30–40	2
20–30	2
10–20	15
5–10	27

(Information on file with author).

Forty-six lawyers represented more than five clients, while three lawyers astonishingly handled more than sixty appeals.

A quick look at the immigration cases decided by the Second Circuit in the single month of June 2009 offers an even clearer picture of the trend of dispersing representation among more lawyers.²⁹ During that month, approximately 130 different lawyers were counsel of record for the petitioners in the 150 immigration cases decided by the court. Very few lawyers appeared on more than a single case. It seems that the New York immigration bar has developed a culture in which lawyers regularly seek federal court review, contributing to the endurance of the surge.

The surge has also altered the government's approach to immigration appeals. Crushed by the volume of cases in the Second Circuit, local assistant United States attorneys (AUSA), who had traditionally handled immigration matters, could no longer manage the caseload. In a major shift of responsibility, by May 2006, the Department of Justice Office of Immigration Litigation (OIL) represented the government on cases filed in the Second Circuit, reflecting an important transfer of resources from the overburdened U.S. Attorney's Office to the centralized Department of Justice (DOJ) immigration specialists.³⁰ While this change may increase efficiency by centralizing and standardizing litigation due to the DOJ's immigration expertise, a high-volume centralized practice may actually inhibit the kind of discretionary decisions that occur with more individualized, localized case handling that helps to reduce the caseload by stipulation or other settlement.³¹

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.³² To achieve this, the Second Circuit radically transformed its practices. Although the new system prompted a few reservations concerning its potential for unfairness in light of the high volume of cases, there were no significant voices of protest or objection.³³

²⁹ June 2009 also marked the beginning of this writing project. I closely examined the 150 immigration cases decided between June 1, 2009 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 subpart II.B.2 of this Article.

³⁰ Elizabeth Cronin, *Immigration Practice in the Second Circuit: From Filing to Oral Argument and Everything in Between*, in DEFENDING IMMIGRATION REMOVAL PROCEEDINGS 2009 229, 232–33 n.6 (Practicing Law Inst. 2009).

³¹ 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 in the first place. Benson, *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, its litigation posture can contribute to the flow by taking intransigent adversarial positions. See John T. Noonan, Jr., *Immigration Law 2006*, 55 CATH. U. L. REV. 905, 913 (2006); see, e.g., Pareja v. Att'y Gen. 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 courts of appeals 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 cannot be counted in the court's decision statistics of published opinions or summary orders.

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 to May 31, 2005]." Palmer, *supra* note 8, at 976.

³³ See, e.g., Rivero, *supra* note 8, at 1521–24.

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 were the Second³⁴ and the Ninth.³⁵ The Second Circuit responded to its overwhelming immigration caseload with a significant structural change to its core principles and operations.

After several unsuccessful efforts to regain control, including meetings with senior representatives of the Executive Office of Immigration Review (EOIR), the court implemented 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 implementation took place between May 2005 and October 3, 2005 when the new rule went into effect.³⁶ Under the new rule, those appealing denials of asylum and related relief are not entitled to oral argument in the ordinary course.³⁷ This was a radical change

³⁴ The immigration caseload of the Second Circuit amounts to 21.6% of all appeals from the BIA. JUDICIAL BUSINESS, 2009, *supra* note 6, at Table B-3; Perrotta, *supra* note 9; Hamblett, *supra* note 9.

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 1063 in 2001, to a high of 6583 in 2005, then declined to a still considerable 3351 cases in 2009. Compare JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2006 ANNUAL REPORT OF THE DIRECTOR Table B-3 (2006), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2006.aspx> [hereinafter JUDICIAL BUSINESS, 2006], with JUDICIAL BUSINESS, 2009, *supra* note 6, at Table B-3. See *supra* text accompanying note 9. In 2009, appeals from BIA decisions in the Ninth Circuit (3351) amounted to approximately 45% of all BIA appeals (7518). JUDICIAL BUSINESS, 2009, *supra* note 6, at Table B-3. Although both circuits employ case management mechanisms to cope with their crushing immigration dockets, the Ninth built on a well-established system that permits the court’s staff to screen cases of all types. This Article focuses on the Second Circuit, but for a more detailed description of the Ninth Circuit’s case inventory system, see LAW, *supra* note 18, at 158–66. See also 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, 213–16 (2008). In brief, the Ninth 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, at 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). After interviewing Ninth Circuit judges, one author concluded that the court’s “coping strategy” may have helped manage the exploding caseload, but in doing so, may have also resulted in a less thorough and less careful scrutiny of the screened cases. Anna O. Law, *Rationing Justice?: The Effect of Caseload Pressures on the U.S. Court of Appeal in Immigration Cases* 47 (2010), http://works.bepress.com/anna_law/1 [hereinafter Law, *Rationing Justice*].

³⁶ See Jon O. Newman, *The Second Circuit’s Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 432–35 (2009).

³⁷ The Rule states:

(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;

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.”³⁸

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.³⁹ Oral argument in asylum cases will occur only at the discretion of the judges. Non-asylum immigration cases are not affected by the rule and would be scheduled for oral argument, although these cases too might result in a summary order. It is likely that the circuit’s judges consider the alleviation of the burdensome caseload to be worth the sacrifice of oral argument because the majority of asylum appeals raise claims of error due to improper evidentiary analysis by the hearing judge, requiring a heavily fact-based review of the written record rather than rulings on novel or unsettled legal issues that might benefit from the give-and-take of argument.

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.⁴⁰ 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 non-argument calendar. After reviewing a SAO memorandum, the panel assigned to the case generally issues an unpublished summary order.⁴¹ The NAC benefits from the professionalism of the staff attorneys whose memorandum may often be “more insightful and comprehensive” than the briefs or arguments of counsel.⁴²

Without oral argument and with the screening assistance of the SAC, the output of the court has been prodigious, relying heavily on unpublished summary orders that do not have precedential authority.⁴³ 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. Meanwhile, the number of summary orders has more than doubled, reaching almost 3000 in 2006, the

(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.

2D CIR. LOCAL R. § 34.2. Non-Argument Calendar.

³⁸ Newman, *supra* note 36, at 433.

³⁹ *Id.* at 434; Palmer, *supra* note 8, at 975.

⁴⁰ Cronin, *supra* note 8, at 555.

⁴¹ Palmer, *supra* note 8, at 975–76.

⁴² Newman, *supra* note 36, at 436.

⁴³ “A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘nonprecedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.” FED. R. APP. P. 32.1.

first full year that the SAO tackled the backlog. The percentage of summary orders has also increased significantly.

*Table 1: Second Circuit—Methods of Rendering Decisions*⁴⁴

Year	Total Decisions	Signed Opinions Number (% of total)	Summary Orders Number (% of total)
2002	1411	342 (24.2)	1062 (75.3)
2003	1481	381 (25.7)	1028 (69.4)
2004	1533	446 (29.1)	1001 (65.3)
2005	1921	525 (27.3)	1321 (68.8)
2006	3479	505 (14.5)	2871 (82.5)
2007	2441	366 (15.0)	1987 (81.4)
2008	2631	415 (15.8)	2108 (80.1)

The NAC has celebrated its sixth anniversary and deserves credit for rescuing the circuit from drowning. It has helped the court render more decisions and leave fewer cases pending. While the circuit does issue a significant number of immigration published decisions on non-asylum matters, the vast majority of asylum cases are decided by summary order from the NAC.

2. Inside the Lifeboat: An Even Closer Look at the Second Circuit

Between 2002 and 2008, the number of appeals *filed* from BIA decisions skyrocketed from 533 to 2865,⁴⁵ steadily increasing after a mind-boggling one-year jump of 290% (1548 cases) between 2002 and 2003.⁴⁶ In 2009, that number dropped to 1624, 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.⁴⁷ 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.⁴⁸ Table 2 illustrates the growth of the Second Circuit's immigration docket.

⁴⁴ See *Second Circuit Annual Report Statistics, 2003–2008*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/annualreports.htm> (last visited Jan. 19, 2012); see also JUDICIAL BUSINESS, 2009, *supra* note 6, at Table S-3 (reporting that 89.2% of the Second Circuit decisions are unpublished).

⁴⁵ JUDICIAL BUSINESS, 2009, *supra* note 6, at Table B-3; JUDICIAL BUSINESS, 2006, *supra* note 35, at Table B-3; JUDICIAL BUSINESS, 2004, *supra* note 2, at Table B-3.

⁴⁶ JUDICIAL BUSINESS, 2006, *supra* note 35, at Table B-3. 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 36, at 431.

⁴⁷ JUDICIAL BUSINESS, 2009, *supra* note 6, at 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.

⁴⁸ New York's immigration court presides over 25% of all immigration proceedings. The Second Circuit also has jurisdiction over cases heard in the immigration courts of Batavia, Buffalo, and Hartford, as well as courts located in three detention or correctional facilities. See Executive Office for Immigration Review, *EOIR Immigration Court Listing*, U.S. DEP'T OF JUSTICE, <http://www.usdoj.gov/eoir/sibpages/ICadr.htm>

*Table 2: Second Circuit Immigration Appeals Filed from BIA Decisions, FY 2001–2009*⁴⁹

Date FY	'01	'02	'03	'04	'05	'06	'07	'08	'09
BIA	184	533	2081	2632	2550	2640	2177	2865	1624

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. In 2009, 2448 administrative appeals were terminated.⁵⁰ A Lexis search for immigration cases appealed from the BIA decided during that time period turned up 1380 opinions issued by the Second Circuit in the Federal Reporter and the Federal Appendix combined. Of those, fifty-four were published decisions; the balance consisted of summary orders with short unpublished opinions.

The new rule and the NAC are entrenched by now, and 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-long and month-long vantage point, providing a more detailed impression of this progress. To begin, an overview of the cases in 2009 reveals some patterns and categories. The following typology of issues appears to be common to both calendars:

- 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 even 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.⁵¹ A handful involved jurisdictional questions.⁵²

(last visited Sept. 28, 2011). “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 twenty-five judges carries 1000 cases on his or her docket, the majority of which are asylum matters. *Id.*

⁴⁹ JUDICIAL BUSINESS, 2009, *supra* note 6, at Table B-3; JUDICIAL BUSINESS, 2006, *supra* note 35, at Table B-3; JUDICIAL BUSINESS, 2004, *supra* note 2, at Table B-3.

⁵⁰ JUDICIAL BUSINESS, 2009, *supra* note 6, at Table B-6. Again, BIA cases account for the majority of the administrative appeals.

⁵¹ See, e.g., *Rotimi v. Holder*, 577 F.3d 133, 134 (2d Cir. 2009) (addressing question of eligibility for waiver of conviction under INA § 212(h)); *Almeida v. Holder*, 588 F.3d 778, 790 (2d Cir. 2009) (addressing eligibility for cancellation of removal); *Lanferman v. B.I.A.*, 576 F.3d 84, 88–93 (2d Cir. 2009) (analyzing the BIA’s interpretation of criminal statute regarding firearm offenses); *Pierre v. Holder*, 588 F.3d 767, 770 (2d Cir. 2009) (finding that petitioner was denied due process when BIA found her

Although most asylum cases are adjudicated on the NAC, about one-third of the published Second Circuit immigration opinions in 2009 were asylum-related.⁵³ This suggests that quite a number of asylum cases are moved from the NAC because they warrant greater scrutiny and more authoritative resolutions. Several published decisions raised legal questions related to the definition of a refugee or to bars to relief.⁵⁴ Several concerned the adequacy of the immigration judge's (IJ) credibility determination.⁵⁵ A few cases found that the BIA had engaged in impermissible fact-finding.⁵⁶ On the surface, it is not always obvious why particular asylum cases are transferred from their presumptive berth on the NAC to the regular argument calendar (RAC), since the local rule does not require the judges to explain this decision. Their most obvious common denominator, however, is their high rate of remand.

A close-up single-month snapshot provides a more focused impression of the court's quantitative and qualitative workload.⁵⁷ In June 2009, the Second Circuit issued 305 decisions in total, a sizeable increase in output over prior monthly dockets.⁵⁸ 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

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) (addressing petitioner's eligibility for waiver of inadmissibility under INA § 212(c)).

⁵² See, e.g., *Chupina v. Holder*, 570 F.3d 99, 100 (2d Cir. 2009) (no jurisdiction without final removal order); *Contreras-Salinas v. Holder*, 585 F.3d 710, 713–14 (2d Cir. 2009) (no jurisdiction to review discretionary decision of agency).

⁵³ This approximation is based on a review on LEXIS of all 2009 published decisions in appeals from the BIA.

⁵⁴ 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*, 558 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").

⁵⁵ See, e.g., *Hu v. Holder*, 579 F.3d 155, 160 (2d Cir. 2009) (remanded); *Zheng v. Holder*, 349 F. App'x 619, 621 (2d Cir. 2009); *Singh v. Mukasey*, 553 F.3d 207, 214 (2d Cir. 2009) (holding that substantial evidence did not support adverse credibility finding).

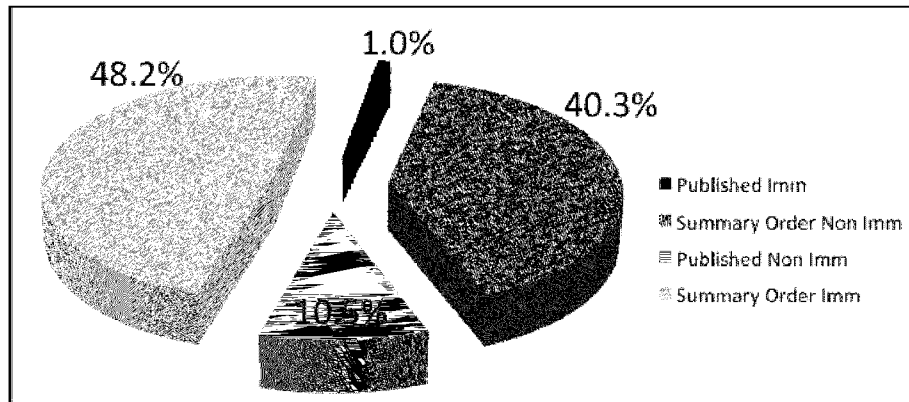
⁵⁶ See, e.g., *Mendez v. Holder*, 566 F.3d 316, 322–23 (2d Cir. 2009); *Guzman v. Holder*, 568 F.3d 61, 63 (2d Cir. 2009), *vacated*, 340 F. App'x 679 (2d Cir. 2009); *Lin v. Holder*, 347 F. App'x 716, 718–19 (2d Cir. 2009).

⁵⁷ According to the *Immigration Law Advisor*, the EOIR in-house newsletter, 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 Ninth, six cases in the Second, four in the Third, two each in the Fifth and Eleventh and one in the Eighth. No cases were reversed in the First, Fourth, Sixth, Seventh, or Tenth Circuits. John Guendelsberger, *Circuit Court Decisions for June 2009*, IMMIGR. L. ADVISOR, July 2009, at 6, available at <http://www.justice.gov/eoir/vii/ILA-Newsletter/ILA%202009/vol3no7.pdf>.

⁵⁸ 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. See *Decisions*, U. S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/opinions.htm> (last visited Sept. 28, 2011).

new factual or legal developments.⁵⁹ Only seven petitions for review in immigration matters were granted and remanded, two on the RAC and five on the NAC.

Figure 1: June 2009—Distribution of Published and Summary Order Cases



Of the thirty-five published opinions issued by the court in June 2009, only three (8.5%) were immigration matters.⁶⁰ One was dismissed on procedural grounds.⁶¹ The second was remanded because the BIA engaged in impermissible fact-finding in a cancellation of removal application.⁶² 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.⁶³ 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. The near-total success of immigration petitioners whose cases are published may be strong evidence that the system is working effectively for the massive number of asylum cases since the court identified for published decision matters that raise issues warranting more than summary consideration.

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 denied or dismissed the petition for review, representing an affirmance remand rate of 96.6%. The vast difference in output demonstrates the capacity of the NAC to dispose of what the court considers to be routine asylum cases. A comparison of the issues raised in the asylum cases on the NAC where the court remanded to the BIA, as well as the quality of

⁵⁹ *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 F. App'x 668, 669 (2d Cir. 2009) (summary order issued for appeal from denial of an application for cancellation of removal).

⁶⁰ 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).

⁶¹ *Chupina v. Holder*, 570 F.3d 99, 103–04 (2d Cir. 2009) (no final order of removal). Although the court dismissed on procedural grounds, it left open the possibility that were the petitioner to properly exhaust his administrative remedies, the court would reconsider aspects of his claim. *Id.* at 105.

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

⁶³ 569 F.3d 79, 86–87 (2d Cir. 2009).

the decisions themselves, suggests that the court is capable of culling meritorious claims from the mass of NAC cases. But without a thorough examination of the entire record on appeal of every NAC petition, it is impossible to determine whether or not the court overlooked other viable claims.

In three of the successful cases, 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 intrauterine device (IUD) against the will of a Chinese woman.⁶⁴ The BIA previously had held that insertion of an IUD was not persecution per se without other aggravating circumstances, such as resistance.⁶⁵ 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."⁶⁶ 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.⁶⁷ 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.⁶⁸ 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.⁶⁹

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 the Board's analysis regarding his well-founded fear of future persecution was legally flawed because it ignored significant facts and country conditions evidence.⁷⁰

The fifth remanded summary order concerned the agency's credibility determination.⁷¹ This is an area in which the court has written with increasing frequency, creating considerable jurisprudence on standards for reviewing credibility.⁷² 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, cases challenging the IJ credibility determination land on the NAC, which usually finds that there was substantial evidence to support an adverse credibility finding. In June 2009, it did so in forty-six cases. In one case, however, 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 IJ's negative credibility finding. It concluded that the IJ erred by relying on records that

⁶⁴ *Xia v. Holder*, 330 F. App'x 277, 278–79 (2d Cir. 2009).

⁶⁵ *In re M-F-W & L-G*, 24 I. & N. Dec. 633, 638 (B.I.A. 2008).

⁶⁶ *Xia*, 330 F. App'x at 279 (citing *Beskovic v. Gonzales*, 467 F.3d 223, 227 (2d Cir. 2006)).

⁶⁷ *Chen v. Holder*, 335 F. App'x 114, 115–16 (2d Cir. 2009).

⁶⁸ *Id.* at 116.

⁶⁹ *Huang v. Holder*, 330 F. App'x 275, 276 (2d Cir. 2009).

⁷⁰ *Sangare v. Holder*, 330 F. App'x 320, 321–323 (2d Cir. 2009).

⁷¹ *Zheng v. U.S. Dep't of Homeland Sec.*, 332 F. App'x 696, 698–700 (2d Cir. 2009).

⁷² For example, in *Lin v. Mukasey*, 534 F.3d 162, 165 (2d Cir. 2008), the Second Circuit adopted a "totality of the circumstances" test post-REAL ID Act that abrogated the nexus requirement of its earlier significant credibility precedential decision. In that earlier case, *Secaída-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 or conjecture." See also *Palmer*, *supra* note 8, at 984–88.

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."⁷³

From studying this monthly inventory, some other facts and patterns emerge that contribute to a better understanding of the court's docket. The petitioners in fifty-three cases were Chinese nationals.⁷⁴ In most cases, the court found that the IJ and the BIA committed no error either in applying the asylum standards (thirty cases) or in judging the sufficiency of evidence or credibility (forty-six cases). Many cases reflected some inadequacies in representation. For example, in at least fourteen 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 (fifty-eight) arose following a denial of a motion to reopen or reconsider; in all of them, the court found either no abuse of discretion, or that the motion was untimely, or both.

The numbers above show how the circuit has altered its practices in order to survive the surge. Its revised case management organization affects at least 50% of all petitions for review, and almost all of those filed in immigration matters. This regime heavily routinizes these cases by utilizing court staff as screeners, dispensing with oral argument, and issuing summary orders. These efficiency measures have potential costs on the quality and individuality of the decision-making process. Despite these risks, the court appears to be dealing responsibly and fairly with the caseload and has authored considerable amounts of significant jurisprudence on a wide range of immigration issues.⁷⁵ Any fear that the quality of decision making would deteriorate has not been realized, judging, at least, from the relative silence and lack of complaint from the immigration advocacy community in response to the output of the NAC and the SAO.⁷⁶

⁷³ *Zheng*, 332 F. App'x at 699.

⁷⁴ 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), Jamaica (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), and Russia (1).

⁷⁵ 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, 767 (2d Cir. 2009), and *Almeida v. Holder*, 588 F.3d 778, 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, 322 (2d Cir. 2009); and addressed the applicability of certain bars to asylum, see, e.g., *Weng v. Holder*, 562 F.3d 510, 513–16 (2d Cir. 2009), and *Lin v. Holder*, 584 F.3d 75, 79–82 (2d Cir. 2009) (the persecutor bar); *Wang v. Holder*, 583 F.3d 86, 90–91 (2d Cir. 2009) (the serious non-political crime bar); *Liao v. Holder*, 558 F.3d 152, 157–59 (2d Cir. 2009) (the firm resettlement bar).

⁷⁶ *But see* Law, *Rationing Justice*, *supra* note 35, at 38. Writing about screening panels in the Ninth Circuit, Law fears that they raise "the risk of missing routine[-]looking cases that may have complex legal issues buried, taxes the cognitive functions of the judges because of the repetitive nature of the bundled cases, and can stew the eventual outcome of the cases by limiting the level of judicial scrutiny an appeal receives." *Id.*

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 fluctuated a bit, they remained extraordinarily high until this past year. In FY 2009, the number of immigration appeals filed nationwide decreased noticeably from 10,280 in 2008 to 7518 and continue to drop.⁷⁷ In the Second Circuit, filings declined from 2865 in 2008 to 1624; in the Ninth, from 4625 to 3351.⁷⁸

This decrease raises many questions. Why is the number of appeals declining? Are the reasons for the falling-off mirror images 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 newness of this development renders definitive conclusions premature and elusive. Four recent developments may account for the sharp decline of federal appeals: 1) an overall drop 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 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 account.

1. A System-Wide Decline

The immigration adjudication process begins in the fifty-eight immigration courts nationwide that handle approximately one-quarter of a million cases annually. The vast majority of these cases are removal proceedings,⁷⁹ of which about 80% result in IJ decisions, either oral or written.⁸⁰ In the five-year period between 2005 and 2009, EOIR statistics show a drop in the number and percent of IJ decisions appealed to the BIA.⁸¹ The fairly low rate of appeals to the board does not signify satisfaction with the result of immigration proceedings. The huge gap between the caseloads of the board versus the courts is more likely because most individuals in proceedings do not request relief, thus they have no basis for appealing.⁸² Only those respondents for whom the immigration court proceeding results in an order of removal would appeal an IJ decision; respondents

⁷⁷ In testimony on May 18, 2011, before the Senate Judiciary Committee, EOIR Director Juan P. Osuna stated, "Overall, the number of BIA appeals going to the federal courts today are about half what they were at the high-water mark in 2005." *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Juan P. Osuna, Director, Executive Office For Immigration Review), available at www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf [hereinafter Osuna Statement].

⁷⁸ JUDICIAL BUSINESS, 2009, *supra* note 6, at Table B-3.

⁷⁹ FY 2009 STATISTICAL YEAR BOOK, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, C3, Table 3 (2010).

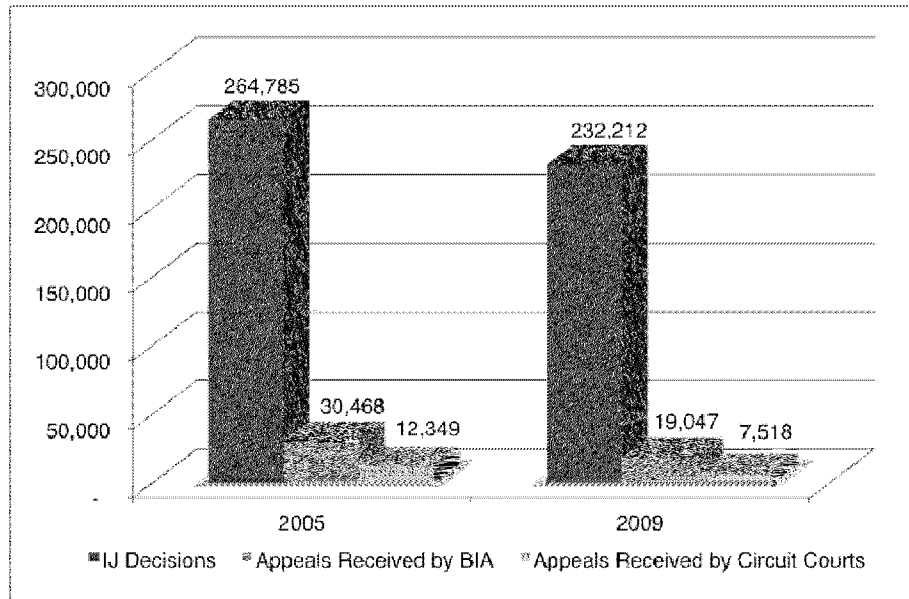
⁸⁰ *Id.* at D1, Fig. 4.

⁸¹ *Id.* at Y1, Fig. 32.

⁸² In FY 2009, respondents in 76% of all immigration proceedings, 290, 233 cases, filed no applications for relief. *Id.* at N1.

receiving relief obviously are not going to appeal a favorable decision. Government appeals from IJ decisions amount to only a small fraction of the BIA's caseload and are not even reported separately by the EOIR. Moreover, to the extent that many respondents are unrepresented in immigration court, the odds against finding pro bono counsel to appeal to the BIA after a final order of removal has been entered are high.⁸³

Figure 2: IJ Decisions (Proceedings) Appealed to BIA and to Circuit Courts⁸⁴



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 for several reasons: some immigration cases are appealed directly from district courts, many types of decisions are barred by statute from judicial review, and some cases are remanded to immigration court following a motion rather than an appeal. While the absolute numbers have declined somewhat, the circuit courts continue to grapple with a huge immigration caseload as many noncitizens persist in seeking more meaningful review in federal court following summary BIA decisions. Even the likelihood that the ensuing review will not be fruitful is an insufficient deterrent to the consistent flow of petitions for review.⁸⁵

⁸³ In 2009, only 24% of respondents made applications for relief, FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at N-1, Fig. 22. Only 39% of respondents were represented. *Id.* at 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).

⁸⁴ These figures were derived from two sources: JUDICIAL BUSINESS, 2009 *supra* note 6, at Table B-3 and FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at Y1, Fig. 32.

⁸⁵ The BIA's own internal figures reported in the *Immigration Law Advisor*, an in-house newsletter, indicate 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 Figure 2).

FY 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%.⁸⁶ 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 2009.⁸⁷ 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 1936 in 1998, 1731 in 1999, 1723 in 2000, and 1760 in 2001, the final year before the surge.⁸⁸

One measure of the effectiveness of the BIA's appellate role is the number of cases remanded by the circuit courts. With its emphasis on productivity, streamlining depends on speed and the routinized review of a high volume of cases. This raised the concern that individual board members would be unable to devote adequate attention and concentration to all cases. As a result, board review would be less thoughtful, thorough and nuanced, resulting in more error-correction by the federal courts.

This prophecy 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.⁸⁹ A disturbing number of those reversals, as well as reversals in other circuits, derived from problems with adverse credibility determinations in asylum cases. These decisions are more subjective and depend on an IJ's personal inferences and logic. Thus, they may not be supportable in the cold light of the record on appeal.⁹⁰ These decisions were then routinely affirmed by the BIA, often by an AWO. Writing about the Second Circuit, John

2007	2008	2009
4932	4510	4829

John Guendelsberger, *Circuit Court Decisions for December 2007*, IMMIGR. L. ADVISOR, Jan. 2008, at 5 [hereinafter Guendelsberger 2007]; John Guendelsberger, *Circuit Court Decisions for December 2008*, IMMIGR. L. ADVISOR, Jan. 2009, at 6 [hereinafter Guendelsberger 2008]; John Guendelsberger, *Circuit Court Decisions for December 2009*, IMMIGR. L. ADVISOR, Jan. 2010, at 4 [hereinafter Guendelsberger 2009].

⁸⁶ JUDICIAL BUSINESS, 2009, *supra* note 6, at 5.

⁸⁷ This figure was obtained by dividing the number of appeals from the board filed in the circuit courts by the number of appeals received by the BIA. *See supra* Figure 2.

⁸⁸ LEONIDAS RALPH MECHAM, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2002 ANNUAL REPORT OF THE DIRECTOR Table B-3 (2002), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2002/front/jdbusiness.pdf> [hereinafter JUDICIAL BUSINESS, 2002].

⁸⁹ Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005).

⁹⁰ 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 seventy 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 to 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.

Palmer describes an “explosion of precedential decisions addressing issues of credibility,” that in turn guide the volumes of summary orders.⁹¹

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.⁹² In early post-streamlining years, this confidence certainly was not justified, given the 17.5% reversal rate. The BIA’s performance has improved more recently. According to 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.⁹³ Table 3 shows a decline in the reversal rate over the past four years, although the numbers in the individual circuits fluctuate. Optimistically, this drop could be attributed to improved performance by the BIA and the IJs in response to the criticisms of the federal bench as well as the effect of some reforms instituted after 2006 as responses to those criticisms. The BIA’s reduced use of AWOs, allowing circuit courts to rely on more developed reasoning, could offer another explanation. Finally, there might be more reliance on discretion at the federal appellate level resulting in a greater use of stipulated remands without court involvement. None of these hypotheses have been tested, but all individually or in combination might contribute to the decline.

Table 3: Circuit Court Reversal Rate by Circuit 2006–2009⁹⁴

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

A closer look at just 2009 shows an interesting relationship between the volume of appeals and the rate of reversals 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 benches vocal in their criticisms of immigration court decision making, the reversal rate is consistently higher than the average. Although it might appear from these numbers that the Second Circuit is less inclined to reverse the BIA than other circuits, when the

⁹¹ Palmer, *supra* note 8, at 997. During a four and a half year period ending in mid-2006, he reports twenty-two decisions in which the Second Circuit was critical of the agency’s credibility findings, seventeen of which were reversed. *Id.* at 987.

⁹² Ashcroft & Kobach, *supra* note 10, at 2009, citing Fact Sheet, U.S. Dep’t of Justice, *supra* note 4; see also, Palmer, *supra* note 1, at 61.

⁹³ Guendelsberger 2009, *supra* note 85.

⁹⁴ Guendelsberger 2007, *supra* note 85, at 5; Guendelsberger 2008, *supra* note 85, at 6; Guendelsberger 2009, *supra* note 85, at 4.

number of reversals is examined rather than the rate of reversals, the picture becomes more nuanced.

*Table 4: EOIR—Total Numbers of Cases Affirmed or Reversed by Circuit Courts, 2009*⁹⁵

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

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.⁹⁶

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

*Table 5: BIA Receipts by Type—Circuit Court Remand*⁹⁷

FY 2005	2006	2007	2008	2009
1290	1792	2155	1457	997

It is difficult to explain the difference in these figures unless there is a distinction between “remand” and “reversal.”⁹⁸ Reports seem to use these two terms interchangeably. Possibly, the former signifies 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. Even accounting for a certain number of abandoned appeals, this suggests that there could be considerable informal activity between the circuits and the

⁹⁵ Guendelsberger 2009, *supra* note 85, at 4.

⁹⁶ *Id.*

⁹⁷ FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at T2, Table 16. It is also possible that some cases are appealed to the circuit courts more than once.

⁹⁸ Various sources use the terms “remand” and “reverse” without explanation of the differences, leading to the conclusion that they are not consistently or accurately used. Generally, a “remand” means that the court sends a case back to the EOIR for further proceedings, whether following a decision in favor of the petitioner or an order granting a remand based on the government’s motion or stipulation. The outcome of the remand might even be to reach the same conclusion but with a bettered reasoned decision. The term “reversal” might be used to describe a decision that is found erroneous on the law, requiring a “remand” for proceedings, or in some instances, a final ruling. For the purpose of this Article, the use of either term signifies at least a temporary disagreement between the circuit court and the BIA.

BIA when Department of Justice lawyers become involved in assessing potential errors, thus consent to remand. In contrast, a “reversal” may relate only to substantive legal decisions, including final orders in addition to remands. Regardless of the terminology, these two categories represent cases in which the circuit courts found error.

2. Four Possible Reasons for the System-Wide Decline

i. Decrease in Cases and Appeals at the Agency Level

As discussed above, the flood of immigration cases filed in a 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 contributed the most to the spike.⁹⁹ This led to the creation of the Second Circuit NAC, which hears all asylum cases 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 69,442.¹⁰⁰ During this period, the number of asylum cases received in immigration court, both affirmative and defensive, declined substantially from 53,904 to 39,279 (27%) while the rate of completions dropped by 26%.¹⁰¹

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 17,866.¹⁰² A straightforward conclusion to draw from these figures is that the pipeline from application through agency adjudication to circuit court review is less clogged.

ii. Decrease in Asylum Denials, Increase in Representation

In addition to fewer cases overall, the rate of asylum cases favorably decided on the merits in immigration court “significantly increased” between 2005 and 2009 from 38% to 47%.¹⁰³ 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 7671 to only 11,358.¹⁰⁴ In addition, approximately 2000 applicants were granted withholding of removal under the Immigration and Naturalization Act (INA),¹⁰⁵ and almost 400 were granted relief under the Convention Against Torture (CAT),¹⁰⁶ further reducing the combined denial rate. While not everyone whose asylum application is

⁹⁹ See Newman, *supra* note 36, at 430; JOHN M. WALKER, CHIEF JUDGE’S REPORTS OF THE SECOND CIRCUIT (2005), available at <http://www.ca2.uscourts.gov/Reports/05/open.htm> (last visited Jan. 4, 2012).

¹⁰⁰ FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at N1, Fig. 22.

¹⁰¹ *Id.* at I1, Fig. 13; I2, Fig. 14.

¹⁰² *Id.* at T2, Table 17.

¹⁰³ *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*, SYRACUSE UNIV. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, <http://trac.syr.edu/immigration/reports/240/include/asylumtime.html> (last visited Jan. 4, 2012).

¹⁰⁴ FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at K1, Fig. 16.

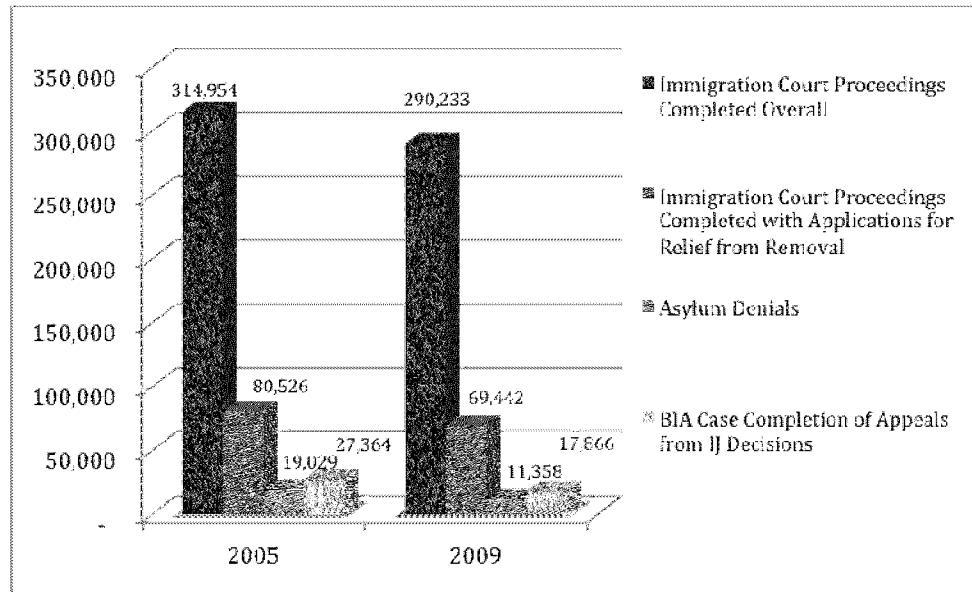
¹⁰⁵ *Id.* at K4, Fig. 19-A; 8 U.S.C. § 1231(b)(3) (2011).

¹⁰⁶ FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at M1, Table 9; 8 C.F.R. § 208.16 (2011).

denied appeals to the BIA and beyond, this sharp increase in grant rates translates into far fewer appeals at all levels.

Putting these pieces together, Figure 3 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.

Figure 3: Comparison of Immigration Court and BIA Completions, 2005 and 2009¹⁰⁷



iii. 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.¹⁰⁸ During the first nine months of 2010, New York State was second only to California in the number of pending cases: 42,256.¹⁰⁹ Connecticut, whose immigration cases also are appealed to the Second Circuit, had 1432 pending cases.¹¹⁰ More critically, in New York, the average time from commencement of a case to its resolution is 469 days and, in Connecticut, 266 days.¹¹¹ Although the statistics do not break down according to type of

¹⁰⁷ FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at N1, Fig. 22. 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. FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at N2, Table 11.

¹⁰⁸ *Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Courts (through Sept. 27, 2010)*, SYRACUSE UNIV. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/court_backlog/.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*; see generally Julia Preston, *Study Finds Immigration Courtrooms Backlogged*, N.Y. TIMES, June 18, 2010, at A20, available at <http://www.nytimes.com/2009/06/18/us/18immig.html>.

case, presumably cases in which relief is requested, a relatively small fraction of the total number of immigration court matters¹¹² 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.¹¹³ Immigration court resources are inadequate.¹¹⁴ The size of the dockets, the absence 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 in cases with serious human consequences all contribute to IJs’ sub-par performance.¹¹⁵ Often a hearing consumes many hours, so only a few cases can be finished each day. Although respondents may have incentives to delay in order to postpone an anticipated removal order, 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 are not enough effective active IJs to efficiently and fairly handle this taxing caseload. In the face of this deficiency, the EOIR has made hiring judges a priority.¹¹⁶ But hiring has not kept pace with attrition or with the number of allocated positions, so little progress has occurred. Despite this commitment to hiring and some hiring success, the total number of judges increased by only nine over the past five years and unfilled positions remain.¹¹⁷

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 appeals to the BIA and then to the circuit courts. Although the BIA appears productive due in large part to the immigration court’s bottleneck and to the impact of streamlining, this impression is illusory. If more IJs are appointed, presumably the backlog will lessen once the immigration court has more capacity. Sooner or later the immigration court cases will be completed, resulting in an increase in BIA and circuit court appeals.

¹¹² See *supra* Figure 3.

¹¹³ *Apouviapseakoda v. Gonzales*, 475 F.3d 881, 886 n.2 (7th Cir. 2007).

¹¹⁴ *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 184–94 (2006) (statement of Judge John J. Walker, C. J., U.S. Court of Appeals for 2d. Cir.) [hereinafter *Hearing*].

¹¹⁵ A recent study reported considerable burnout on the immigration bench as a result of the stress of the decisions made daily as well as the lack of support or rewards on the job. Stuart L. Lustig, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul, Dana Leigh Marks & Denise Slavin, *Burnout and Stress Among Immigration Judges*, BENDER’S IMMIGR. BULL., Jan. 1, 2008, at 2. 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 IJs since 1979. See NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, <http://www.fairness.com/> (last visited Jan. 4, 2012). The NAIJ 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). The recommendations of the burnout survey correspond in large part to the kinds of reforms urged by the judges’ union.

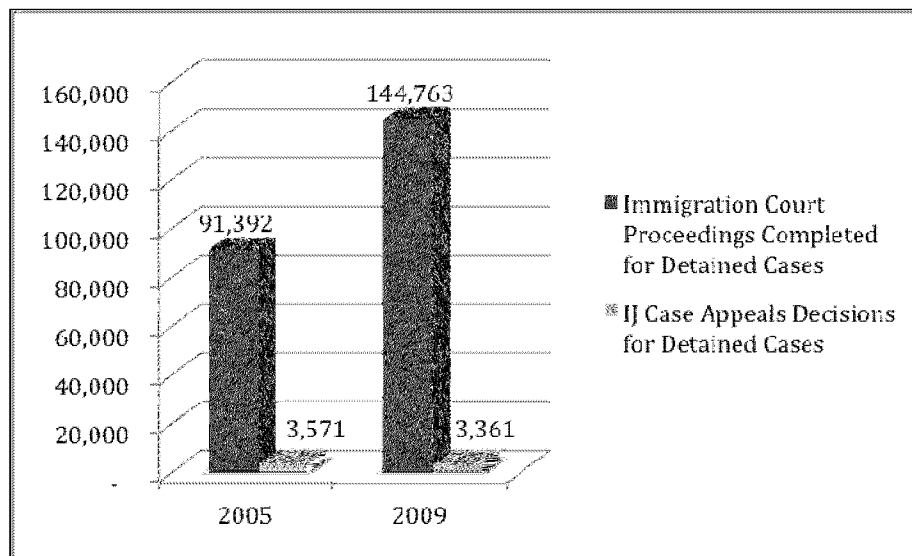
¹¹⁶ See Osuna Statement, *supra* note 77.

¹¹⁷ One out of every six positions is vacant. *Immigration Case Backlog Continues to Grow*, SYRACUSE UNIV. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Mar. 2010), <http://trac.syr.edu/immigration/reports/225/>.

iv. 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.¹¹⁸ Although not all non-detained respondents are in the same situation, generally they have greater access to counsel, continue to earn money for legal fees while awaiting the outcome of the cases over several years, are able to remain with their families, and might use the extra time to make arrangements for departure if all else fails. For detainees, however, the protracted time accompanying multiple appeals will be spent in custody, an enormous deterrent to continuing the case. Since most detainees face removal for criminal grounds, they have fewer reasons to hope for a favorable outcome and they are legally precluded from release during the pendency of their proceedings. Furthermore, detainees have less access to counsel, either as a result of a transfer to an out-of-state ICE facility or simply because visiting detention centers is more difficult, increasing the difficulty of raising potential claims at the immigration court or on appeal.¹¹⁹ These are all powerful disincentives to appeal, particularly to the federal courts.

Figure 4: Immigration Court and BIA Completions for Detained Cases¹²⁰



During the four years from 2005 to 2009, there was a substantial increase in the number 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. The mandatory detention provisions of the INA led to

¹¹⁸ The Palmer study found that the increase in appeals largely occurred in cases where the respondent was not detained. Palmer et al., *Surge in Petitions*, *supra* note 1, at 7.

¹¹⁹ The BIA sponsors a pro bono project in an effort to secure more representation. See *Legal Orientation and Pro Bono Program*, OFFICE OF LEGAL ACCESS PROGRAMS, U.S. DEP'T OF JUSTICE, <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. FY 2009 STATISTICAL YEAR BOOK, *supra* note 79 at W1, Fig. 30.

¹²⁰ FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at O1, Fig. 23; *id.* at X1, Fig. 31.

this noticeable increase.¹²¹ In addition, several DHS programs whose goals are the apprehension and removal of individuals likely or required to be detained pending their case completion complemented the statutory requirements.¹²² As Figure 4 shows, BIA completions of removal cases, however, remained static with a slight decrease from 3571 cases in 2005 to 3361 cases in 2009. EOIR statistics do not detail how many detained cases involved applications for relief or the percent in which relief was granted at either the immigration court of the BIA. However, the small fraction of cases appealed from the growing detained docket implies that many detainees do not request relief; in addition, 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 which point to an obvious causal link. The volume of cases, the grant rate for asylum claims, the court backlog, and the number of detained cases are factors not grounded in law. Rather, they reflect individual agency decisions, programs, and priorities that could be compounded or ameliorated by changes of policy rather than law. With these changes, the adjudication picture could react once again.

B. Pressures on the Agency to Respond

The flood of circuit court immigration cases has had an ineluctable 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 insular 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 levels. 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, though much remains to be accomplished.

1. Pressures on Immigration Judges to Improve Their Performance

i. 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 leading to decisions that were inadequately or

¹²¹ Immigration and Nationality Act § 236 (c), 8 U.S.C. § 1226 (2010).

¹²² See, e.g., *Criminal Alien Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program/> (last visited Jan. 4, 2012).

illogically reasoned.¹²³ Because the board's analysis often lacked substance, or was incomplete and/or inconsistent with the IJ's reasoning, circuit courts have borne the 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.¹²⁴ In some circuits, most notably the Seventh, criticism has been sharp and unrelenting.¹²⁵ The Second,¹²⁶ Third,¹²⁷ and Ninth¹²⁸ 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 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. On occasion, the proceedings in immigration court were so unfair that the circuit court found a due process violation.¹²⁹ In some cases, the circuit judges were so troubled by the

¹²³ Lindsey R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1012, 1023–27 (2007).

¹²⁴ See Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A6, available at <http://www.nytimes.com/2005/12/26/national/26immigration.html?pagewanted=all>.

¹²⁵ 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).

¹²⁶ See, e.g., *Huang v. Gonzales*, 453 F.3d 142, 148–51 (2d Cir. 2006); *Meizi Liu v. B.I.A.*, 167 F. App'x. 871, 873 (2d Cir. 2006) (IJ showed “pervasive bias and hostility”); *Hajderasi v. Gonzales*, 166 F. App'x. 580, 582 (2d Cir. 2006) (judge was sarcastic and badgering); *Sun v. B.I.A.*, 247 Fed. App'x. 275, 276–78 (2d Cir. 2007) (resulting in removal of judge from case); see also, Marc Hurwitz, *Removing Judges: The Cases of Immigration Judges Jeffrey Chase and Noel Ferris*, 31 JUST. SYS. J. 114, 114 (2010).

¹²⁷ The Third Circuit also described patterns of unacceptable misconduct in several decisions. See, e.g., *Wang v. Att'y Gen. of U.S.*, 423 F.3d 260, 261 (3d Cir. 2005); *Zhang v. Gonzales*, 405 F.3d 150, 159 (3d Cir. 2005); *Fiadjoe v. Att'y Gen. of U.S.*, 411 F.3d 135, 154–55 (3d Cir. 2005). Several other Third Circuit opinions chastised immigration judges for lacking neutrality, interjecting intemperate remarks, and being sarcastic. See, e.g., *Sukwanputra v. Gonzales*, 434 F.3d 627, 638 (3d Cir. 2006); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005); *Wang*, 423 F.3d at 269. The Third Circuit's patience was sorely tried by one Philadelphia immigration court judge in particular. The circuit court's repeated castigation of this judge, personally named in four decisions, appears to have led to his removal from the Philadelphia immigration court. *Third Circuit's New Role as Activist Court on Immigration Issue*, 51 VILL. L. REV. 981, 986 (2006); Marisa Taylor, *Immigration Judges Under Scrutiny*, MIAMI HERALD, July 5, 2006, at 9A; see, e.g., *Cham v. Att'y Gen. of U.S.*, 445 F.3d 683, 686 (3d Cir. 2006); *Shah v. Att'y Gen. of U.S.*, 446 F.3d 429, 436 (3d Cir. 2006); *Sukwanputra*, 434 F.3d at 638 n.11; *Fiadjoe*, 411 F.3d at 154 (3d Cir. 2005). He was described in each of these decisions as a bullying and insensitive. See, e.g., *Fiadjoe*, 411 F.3d at 154; see also Recent Case, *Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*, 119 HARV. L. REV. 2596, 2597–99 (2006).

¹²⁸ See, e.g., *Recinos De Leon v. Gonzales*, 400 F. 3d 1185, 1187 (9th Cir. 2005); *Rivera v. Ashcroft*, 387 F.3d 835, 842 (criticized for acting as prosecutor) (9th Cir. 2004), *rev'd on other grounds*, 394 F.3d 1129 (9th Cir. 2005); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007 (9th Cir. 2003) (criticized for being impartial and hostile); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (criticized for “prejudgment, personal speculation, bias, and conjecture”).

¹²⁹ See, e.g., *Hassani v. Mukasey*, 301 F. App'x. 602, 603 (9th Cir. 2008) (IJ excluded testimony of several witnesses).

conduct of the IJ that they remanded for reconsideration before a different judge, an unusual interference with administrative authority by the agency.¹³⁰ Even if some federal judges expressed an understanding for the pressures of the overworked, under-resourced immigration bench,¹³¹ most comments were embarrassing and even damning.

The loud denunciations by prestigious federal circuit courts have cast a much-needed spotlight on the quality of the immigration bench. The outcry drew attention from the legal profession at large and finally captured the attention of someone with power to respond: the Attorney General, under whose authority the EOIR functions.

ii. 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 on individual performance in applying the law and assessing facts.¹³² As new and upsetting attention from prestigious and vocal circuit court judges widened the window of immigration court scrutiny, 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.¹³³ About eight months later, he publicized his twenty-two measures to improve the quality and efficiency of immigration courts and the BIA.¹³⁴

¹³⁰ See, e.g., *Huang v. Gonzales*, 453 F.3d 142, 150–51 (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).

¹³¹ 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 . . . [l]et 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.”); see also *N'Diom v. Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Boyce, J., concurring) (“There are no doubt many conscientious, dedicated, and thorough immigration courts across the country. Unfortunately, their hard work is overshadowed by the significantly increasing rate at which adjudication lacking in reason, logic and effort . . . is reaching the federal circuits.”).

¹³² In 1990, Professor Deborah Anker concluded, “[T]he current adjudicatory system remains one of *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, *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).

¹³³ In making the announcement, Gonzales noted:

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 intemperate or even abusive and whose work must improve.

Memorandum of Alberto Gonzalez, U.S. Attorney Gen., to Immigration Judges (Jan. 9, 2006) (announcing a “comprehensive review of the immigration courts”), available at www.justice.gov/ag/readingroom/ag-010906.pdf; see also Ann M. Simmons, *Some Immigrants Meet Harsh Face of Justice*, L.A. TIMES, Feb. 12, 2006, <http://articles.latimes.com/2006/feb/12/nation/na-judges12>; Pamela MacLean, *Nonjudicial, Injudicious Complaints Spur Attorney General to Investigate Lawyers Serving as Immigration Judges*, MIAMI DAILY BUS. REV., Feb. 2, 2006; Pamela MacLean, *Immigration Judges Come Under Fire*, NAT’L L. J., Jan. 30, 2006, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005446065>.

This 2006 initiative sowed seeds for reform from within, strengthened arguments for an infusion of more resources into the courts, and highlighted the need for mechanisms to monitor IJ performance.¹³⁵ According to EOIR leadership, many improvement measures have been accomplished: an updated *Immigration Judge Benchbook*,¹³⁶ an *Immigration Court Practice Manual*,¹³⁷ a *Code of Conduct for Immigration Judges and Board Members*,¹³⁸ a published procedure for lodging complaints against IJs,¹³⁹ and the establishment of a regional system of supervisory IJs.¹⁴⁰

The EOIR's efforts have received mixed reviews. Some real progress has taken place, but significant deficiencies remain, particularly in hiring new IJs and in assuring the performance quality of newly appointed and existing IJs.¹⁴¹ Although the appointment

¹³⁴ Press Release, Dept. of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), *available at* http://www.doj.gov/opa/pr2006/August06_ag_520.html; *see also* Nina Bernstein, *Immigration Judges Facing Yearly Performance Reviews*, N.Y. TIMES, Aug. 10, 2006, at A15, <http://query.nytimes.com/gst/fullpage.html?res=9406E0DB1F3FF933A2575BC0A9609C8B63>.

¹³⁵ 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 reported: "[T]he 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).

¹³⁶ *Immigration Judge Benchbook*, U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REV., <http://www.justice.gov/eoir/vll/benchbook/index.html> (last accessed Oct. 1, 2011).

¹³⁷ U.S. DEP'T OF JUSTICE, OFF. OF THE CHIEF IMMIGR. JUDGE, IMMIGRATION COURT PRACTICE MANUAL, http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (last updated April 1, 2008).

¹³⁸ Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35510 (June 28, 2007). This code has been incorporated into the U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REV., ETHICS MANUAL (2001), *available at* <http://www.justice.gov/eoir/statpub/handbook.pdf>.

¹³⁹ *Immigration Judge Conduct and Professionalism*, U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REV., <http://www.justice.gov/eoir/sibpages/IJConduct/IJConduct.htm> (last visited Jan. 4, 2012).

¹⁴⁰ For a general progress report, see Report from U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., to U.S. Congress (May 2009), *available at* http://trac.syr.edu/immigration/reports/210/include/EOIR_Report_to_Congress_0905.pdf; Fact Sheet, U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., *EOIR's Improvement Measures—Update* (June 5, 2009), *available at* www.justice.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf; Memorandum from Kevin Rooney, Director, U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., to All Exec. Off. for Immigr. Rev. Employees (March 2007), *available at* <http://trac.syr.edu/immigration/reports/194/include/rooneymemoMarch2007.pdf> (claiming that nine of twenty-two improvement measures had been fully implemented).

¹⁴¹ *Immigration Courts: Still a Troubled Institution*, SYRACUSE UNIV. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (June 9, 2009), <http://trac.syr.edu/immigration/reports/210>. In 2010 alone, the Attorney General appointed forty-two new IJs. *See* News Release, U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., EOIR Swears in New Immigration Judge (Apr. 21, 2010), *available at* <http://www.justice.gov/eoir/press/2010/YorkIJClementeInvestiture04212010.pdf>; News Release, U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., The Executive Office for Immigration Review Swears in Four New Immigration Judges (May 17, 2010), *available at* <http://www.justice.gov/eoir/press/2010/IJInvestiture05142010.htm>; News Release, U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., The Executive Office for Immigration Review Swears in Six New Immigration Judges (Sept. 20, 2010), *available at* <http://www.justice.gov/eoir/press/2010/IJInvestiture09172010.pdf>; News Release, U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., The Executive Office for Immigration Review Swears in 23 New Immigration Judges (Nov. 8, 2010), *available at* <http://www.justice.gov/eoir/press/2010/IJInvestiture11052010.pdf>

and attrition rates for IJs thwarted real progress in increasing the number of judges, in 2010 and 2011, Attorney General Eric Holder appointed fifty new IJs, bringing the total to an all-time high of 272.¹⁴² Perhaps even more significantly, the details of the hiring process were made public.¹⁴³ This represents meaningful progress toward greater transparency and, was likely a response to the 2008 disclosure of blatant and improper use of political criteria for EOIR appointments under the Bush Administration.¹⁴⁴

While the criticisms against immigration court adjudication lodged by circuit court judges were most vociferous during the early days of the surge, they have not disappeared entirely. Despite the efforts of the EOIR to improve performance through better training, improved complaint mechanisms, and more effective monitoring, deep problems remain. Some immigration judges' behavior continues to be antagonistic, inquisitorial, and biased, provoking ongoing negative attention from the federal courts and others.¹⁴⁵

2. Pressures on the BIA

Critics of BIA streamlining focused their disapproval on the regulations permitting single-judge AWOs and the reduction in the number of board members from twenty-three

[hereinafter November News Release]; News Release, U.S. Dep't of Justice, Exec. Off. for Immigr. Rev., The Executive Office for Immigration Review Swears in Nine New Immigration Judges (Dec. 20, 2010), available at <http://www.justice.gov/eoir/press/2010/IJInvestiture12172010.pdf>.

¹⁴² See Osuna Statement, *supra* note 77, at 3 (reporting that although budgetary constraints on hiring ended this initiative, allowing for attrition, the overall number of judges had increased by thirty-six).

¹⁴³ In a press release, the EOIR announced:

The hiring process for most of these new immigration judges began in December 2009. After initial screening, EOIR's human resources section referred 1782 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.

November News Release, *supra* note 141.

¹⁴⁴ See generally OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (July 28, 2008), available at <http://www.justice.gov/oig/special/s0807/final.pdf>; PA. STATE UNIV., DICKINSON SCH. OF LAW, CTR. FOR IMMIGRANTS' RIGHTS & NAT'L IMMIGR. PROJECT OF THE NAT'L LAWYERS GUILD, PLAYING POLITICS AT THE BENCH: A WHITE PAPER ON THE JUSTICE DEPARTMENT'S INVESTIGATION INTO THE HIRING PRACTICES OF IMMIGRATION JUDGES (2009).

¹⁴⁵ See, e.g., *Ali v. Mukasey*, 529 F.3d 478, 491–92 (2d Cir. 2008) (judge's remarks about homosexuals so offensive as to abrogate impartiality); *Issiaka v. Att'y Gen. of the U.S.*, 569 F.3d 135, 143 (3d Cir. 2009) (critical of IJ's "prosecutorial manner" and "inquisitorial inquiry"); *Kaita v. Att'y Gen. of U.S.*, 522 F.3d 288, 301(3d Cir. 2008) (faulting the IJ's antagonistic interruptions for "seriously impeded[ing]" review); *Zuh v. Mukasey*, 547 F.3d 504, 508–10, 513 (4th Cir. 2008) ("This judicial sleight of hand constitutes the very definition of an abuse of discretion."); Marcia Coyle, *Bad Behavior by Judge Reverses Asylum Ruling*, NAT'L L. J. (ONLINE), Jan. 25, 2010 (describing investigation of IJ by Department of Justice's Office of Professional Responsibility). In 2010, a legal services organization in Los Angeles lodged a complaint with the United States Department of Justice about a judge who was described as "rude and intemperate." Sandra Hernandez, *Complaint Targets Immigration Judge*, L.A. DAILY J., Mar. 8, 2010.

to eleven.¹⁴⁶ In addition, the modified standard of review limited the BIA's authority to review an IJ's findings of fact de novo.¹⁴⁷ The combination of loss of power, resources, and attention to individual cases raised fears that the board would engage in assembly-line justice and issue poorly reasoned, hasty decisions. Unfortunately, this well-founded fear has been realized. A few years into the streamlining era, Judge Posner assessed the situation: "[T]he adjudication of these cases . . . has fallen below the minimum standards of legal justice."¹⁴⁸

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. As one researcher pointed out, "[o]n a macro level, the BIA reforms are reshaping circuit courts."¹⁴⁹

The BIA persists in defending its productivity and the quality of its decisions, but 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 three-member panels and give board members discretion on whether to issue an AWO or write an opinion.¹⁵⁰ The size of the BIA also increased to fifteen members.¹⁵¹

EOIR claims that in March 2011, the use of AWOs had declined to 2% of the BIA's output.¹⁵² This marks a remarkable decrease in a strongly disfavored approach to decision making. Whether there have been real improvements is less clear. Ninth Circuit judges expressed mixed opinions as to whether there were actually fewer AWO or streamlined cases.¹⁵³ These judges did predict that adding resources to the BIA, so that cases could be "properly decided," would alleviate the burdens on the circuit courts.¹⁵⁴ Since the new regulations only went into effect in 2008, it may be too soon to measure their impact. However, any reduction in AWOs and any expansion of capacity are undoubtedly improvements.

Because the federal courts will only tolerate so much interference with their business, and because the circuit court judges have expressed their distress so vocally, the BIA was forced to retrench. However, neither the courts nor the EOIR are in a position to publicly acknowledge that the fallout from the surge—including a barrage of judicial scrutiny of immigration adjudication practices and frequent censure of the reasoning and processes in hearings and BIA review—caused the agency to respond, retrench, and reform.

¹⁴⁶ See generally DORSEY & WHITNEY, *supra* note 10.

¹⁴⁷ 8 C.F.R. § 1003.1(D)(3)(ii) (2011).

¹⁴⁸ Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005) (citing Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2003)).

¹⁴⁹ Chad Westerland, *The Consequences of Immigration Reform for the U.S. Courts of Appeals* 12 (Aug. 3, 2009) (unpublished working paper, University of Arizona), available at <http://ssrn.com/abstract=1443381>.

¹⁵⁰ Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34654 (June 18, 2008).

¹⁵¹ Press Release, U.S. Dep't of Justice, Attorney General Mukasey Appoints Five New Members to the Board of Immigration Appeals (May 30, 2010), available at <http://www.justice.gov/eoir/press/08/AG-BIAAppointments.pdf>.

¹⁵² See Osuna Statement, *supra* note 77, at 5.

¹⁵³ Law, *Rationing Justice*, *supra* note 35, at 37.

¹⁵⁴ *Id.* at 37–38.

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

The surge of immigration appeals is responsible for changes far beyond court administration and doctrine. The unprecedented volume of cases, particularly asylum claims, has exposed circuit court judges to the true state of the previously overlooked immigration courts and immigration bar. As persistent attention from circuit court judges raised public awareness of the flaws in the adjudication system, the EOIR has been forced to respond. The compounding revelations of inadequacies in the quality of adjudication, resources made available to the immigration courts, and plight of litigants became impossible to ignore. As a result, seeds of reform were sown from within the system, the call for additional resources grew stronger, and attention from the public and the legal profession was increasingly drawn to the need for more access to better representation.

The impact of the surge has reverberated outside of the self-contained world of the agency and immigration practitioners. While immigration adjudication reform has never been far from the sights of some organizations, such as the ABA, the post-surge community of proponents for reform has expanded markedly.

A. Stimulating Renewed Civic Engagement in Support of Fairer Proceedings and More Due Process for Immigrants

The INA recognizes a privilege to representation at a removal proceeding but not a right to appointed counsel at the expense of the government.¹⁵⁵ 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.”¹⁵⁶ Unfortunately, this ideal has failed to gain traction. As a result, while many individuals retain counsel and some are represented pro bono, a large number appear pro se. The overwhelming lack of counsel worries advocacy groups, professional associations, and even legislators about access to justice and due process for immigrants facing deportation.

Rates of representation in immigration court have not improved significantly over the 2005 to 2009 time period: from a low of 35% in 2005 to a high of 43% in 2007. In 2009, the rate of representation in completed cases fell to 39%.¹⁵⁷ However, individuals in removal proceedings, particularly when relief is requested, fare much better if represented by counsel.¹⁵⁸ One study describes representation as the “single most important factor affecting an asylum case.”¹⁵⁹ The percentage of represented cases at the BIA is higher than at immigration court, ranging from 62% to 77%. This is likely

¹⁵⁵ 8 U.S.C. § 1229a (b)(4)(A) (2011).

¹⁵⁶ *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975).

¹⁵⁷ FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, at G1, Fig. 3.

¹⁵⁸ Donald Kerwin, *Revisiting the Need for Appointed Counsel*, INSIGHT, 5–6 (Apr. 2005)

http://migrationpolicy.org/insight/insight_kerwin.pdf. One study found that asylum is four to six times more likely to be 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).

¹⁵⁹ Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

attributable to the fact that increased difficulty in finding counsel leads many to simply forego an appeal to the BIA.¹⁶⁰

In addition to the likelihood of a more favorable outcome for the respondent, the presence of counsel generally leads to greater accuracy, as issues are presented more clearly and thoroughly. Moreover, for every case in which relief is granted due to the assistance of counsel, there is one less case to climb the ladder of appellate review.

1. Access to Legal Representation

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.¹⁶¹ Using an image of a burst dam after years of buildup, 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.¹⁶²

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.¹⁶³ The study group’s task forces authored substantial reports presented at a spring 2009 symposium¹⁶⁴ that were later published in *Fordham Law Review*. The reports not only focused on expanding options for pro bono representation, but also on identifying and overcoming existing barriers to effective representation, problems of ineffective representation from incompetent lawyers, and the largely unregulated non-lawyers who provide assistance to, and often take advantage of, immigrants.¹⁶⁵

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

¹⁶⁰ FY 2009 STATISTICAL YEAR BOOK, *supra* note 79, 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).

¹⁶¹ A footnoted version appears in Robert A. Katzmann, Lecture, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3 (2008).

¹⁶² *See id.* at 6.

¹⁶³ For a description of the mission, the history and the work of the study group, see Robert A. Katzmann, Lecture, *Deepening the Legal Profession’s Pro Bono Commitment to the Immigrant Poor*, 78 FORDHAM L. REV. 453, 455–57 (2009). I am a member of the study group.

¹⁶⁴ 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 City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. TIMES, Mar. 13, 2009, at A21, available at <http://www.nytimes.com/2009/03/13/nyregion/13immigration.html>.

¹⁶⁵ *See, e.g.*, Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 468–69 (2009); JoJo Annobil, *The Immigration Representation Project: Meeting the Critical Needs of Low-Wage and Indigent New Yorkers Facing Removal*, 78 FORDHAM L. REV. 517, 523 (2009); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 543 n.10 (2009); Careen Shannon, *Regulating Immigration Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577, 583 (2009).

same: to assure competent counsel to individuals in the immigration process at the earliest possible time.

A second conference convened on May 3, 2011 at Cardozo Law School. The keynote speaker, retired Justice John Paul Stevens, author of the much-heralded decision of *Padilla v. Kentucky*,¹⁶⁶ decried the lack of quality legal representation for immigrants.¹⁶⁷ The preliminary findings of the New York Immigrant Representation Study presented at the conference highlighted the disparity in successful outcomes created by the lack of representation, particularly in detained cases.¹⁶⁸

The call for an appointed counsel system has become more resounding since the surge introduced Judge Katzmman and so many other federal 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 proceedings.¹⁶⁹ A coalition of nonprofit 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.¹⁷⁰ No response was issued, nor are there any signs that the agency will ever consider such a dramatic step.

A system of appointed counsel at government expense for any respondent unable to afford a lawyer may be a quixotic goal. But, with enough pressure from external forces, some less radical goals might be attainable. For example, in a recent class action on

¹⁶⁶ 130 S. Ct. 1473 (2010) (holding that failure to advise criminal defendant of immigration consequences of a conviction can amount to ineffective assistance of counsel).

¹⁶⁷ Cardozo Law School, *Immigration Conference at Cardozo, May 3, 2011*, YOUTUBE, <http://www.youtube.com/watch?v=6fKEzQdbcXQ>.

¹⁶⁸ In cases in which individuals are both represented and not detained, the study found a 74% rate of successful outcome, whereas for those individuals who are both unrepresented and detained, the success rate was a mere 3%. KATZMANN IMMIGR. REPRESENTATION STUDY GRP. & VERA INST. OF JUSTICE, THE NEW YORK IMMIGRATION REPRESENTATION STUDY: PRELIMINARY FINDINGS (2011), available at <http://graphics8.nytimes.com/packages/pdf/nyregion/050411immigrant.pdf>; see Sam Dolnick, *As Barriers to Lawyers Persist, Immigrant Advocates Ponder Solutions*, N.Y. TIMES, May 4, 2011, at A24, available at http://www.nytimes.com/2011/05/04/nyregion/barriers-to-lawyers-persist-for-immigrants.html?_r=1; Mark Hamblett, *Study, Forum Stress Plight of Unrepresented Immigrants*, N.Y. L.J., May 6, 2011, <http://www.law.com/jsp/article.jsp?id=1202493130604&slreturn=1>.

¹⁶⁹ ABA COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM §§ 5.10–5.15 (2010). The ABA is not alone. This recommendation also appears in Ramji-Nogales et al., *supra* note 159, at 384. There is a National Working Group on Appointed Counsel in Immigration Proceedings composed of high-level practitioners. See NAT'L WORKING GRP. ON APPOINTED COUNSEL IN IMMIGR. PROCEEDINGS, MEETING MATERIALS (2006), available at <http://www.civilrighttocounsel.org/pdfs/ImmigrantCounselBinder.pdf> [hereinafter NAT'L WORKING GRP.]; see also Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, IMMIGR. BRIEFINGS, June 2004, at 1, 9; N.Y. STATE BAR ASS'N, THE CONTINUING SURGE IN IMMIGRATION APPEALS IN THE SECOND CIRCUIT: THE PAST, THE PRESENT AND THE FUTURE 29 (2010), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=35864&Template=/CM/ContentDisplay.cfm> (recommending “aggressive measures . . . to provide poor immigrants with greater access to high quality legal representation at the administrative levels.”). See generally NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL, <http://www.civilrighttocounsel.org> (last visited Sept. 28, 2011).

¹⁷⁰ See Chuck Roth, *Group Including NIJC Files Petition for Rulemaking Seeking Appointed Counsel*, NAT'L IMMIGR. JUST. CTR. (June 30, 2009), <http://www.immigrantjustice.org/litigation/blog/group-including-nijc-files-petition-rulemaking-seeking-appointed-counsel> (full text on file with author).

behalf of detained, incompetent noncitizens in immigration proceedings, a district court judge ordered appointed counsel for some individuals in that class.¹⁷¹ Although some IJs may be more open to the argument that in some cases proceeding without counsel would violate norms of fundamental fairness, it is unclear whether they could act on this instinct without at least some regulatory changes authorizing them to do so and, most importantly, a way to secure financial support from EOIR. Thus far EOIR leadership has been unwilling 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.

i. 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.¹⁷² A majority of circuits have recognized the possibility that due process requires effective assistance of counsel, a claim that usually arises in the context of a motion to reopen a removal order.¹⁷³ Although it is rare for a claim of ineffectiveness to be so egregious as to violate the demanding “fundamental fairness” standard, many

¹⁷¹ 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-CV-02211 (C.D. Cal. Aug. 2, 2010), available at <http://www.aclu-sc.org/releases/view/103035>. Although the litigation is still pending, 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 *Order, Gokce v. Ashcroft*, C02-2568 (W.D. Wash. Nov. 17, 2003) reprinted in *NAT’L WORKING GRP.*, *supra* note 169, at Table 11 (not adopting Report and Recommendation of magistrate judge to appoint counsel, but agreeing to “lend assistance” to secure pro bono counsel).

¹⁷² In a recent survey, judges reported that immigration is the civil practice area in which they 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, 330–33 (2011).

¹⁷³ See, e.g., *Stroe v. INS*, 256 F.3d 498, 500–01 (7th Cir. 2001); *Saleh v. U.S. Dep’t of Justice*, 962 F.2d 234, 241 (2d Cir. 1992). For twenty 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. *In re 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-Barrera*, 21 I. & N. Dec. 472, 473–74 (B.I.A. 1996). In 2009, outgoing Attorney General Michael Mukasey issued *In re Compean*, 24 I. & N. Dec. 710, 714 (B.I.A. 2009), rejecting the constitutional basis of the twenty-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. *In re Compean*, 25 I. & N. Dec. 1, 3 (A.G. 2009) (vacating *In re Compean*, 24 I. & N. Dec. 710).

cases allege misconduct as a basis of a motion to reopen.¹⁷⁴ These claims are rarely successful at the circuit level,¹⁷⁵ but on occasion the frustration of the judges becomes very clear. Judge Katzmman 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.”¹⁷⁶

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.¹⁷⁷

ii. 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.¹⁷⁸ 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.”¹⁷⁹ The Ninth Circuit also maintains a “watch list” of

¹⁷⁴ Immigration and Nationality Act § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2010); 8 C.F.R. § 1003.2 (2011) (before the BIA); 8 C.F.R. § 1003.23 (2011) (before the IJ).

¹⁷⁵ In 2009, petitioners in more than fifty cases raised ineffective assistance of counsel claims as a basis for reopening. All but one was unsuccessful, and that case was remanded on a procedural ground rather than the merits. *Herrera v. Holder*, 340 Fed. Appx. 21 (2d Cir. 2009) (remanded as a result of change in agency policy respecting standard of review of these claims).

¹⁷⁶ *Aris v. Mukasey*, 517 F.3d 595, 600–01 (2d Cir. 2008) (quoting *Saleh*, 962 F.2d at 241).

¹⁷⁷ *United States v. Cerna*, 603 F.3d 32, 35 (2d Cir. 2010).

¹⁷⁸ 2D CIR. R. 46.2(b) (Attorney Discipline).

¹⁷⁹ *In re Jaffe*, 585 F.3d 118, 125 (2d Cir. 2009). Subsequent to her disbarment from the circuit, Ms. Jaffe was disbarred from practicing law in New York. *See also In re Koenig*, 592 F.3d 376, 386 (2d Cir. 2010); *In re DeMell*, 589 F.3d 569, 584–85 (2d Cir. 2009) (both attorneys defalcated on immigration matters). The disciplinary proceeding *In re Cox*, No. 08–9050–am, 2010 U.S. App. LEXIS 8939, at *1 (2d Cir. Apr., 29 2010), involved a lawyer who had, and continues to have, an enormous practice before the Second Circuit. *Id.* at *9. He was sanctioned for missing deadlines. *Id.* at *18; *see also In re Salomon*, 402 Fed. Appx. 546, 549–50 (2d Cir. 2010).

lawyers who, after several infractions, are noted by the judges and subject to sanctions.¹⁸⁰

The EOIR also polices both attorneys and the other representatives qualified to appear in immigration court and before the BIA.¹⁸¹ The EOIR published a final rule amending its prior regulations governing standards of professional conduct.¹⁸² 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.¹⁸³

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.¹⁸⁴ But such charges are unusual and only can be brought when the conduct comes to light, a difficult step for any member of the immigrant community who fears that their own status would be jeopardized by coming forward.¹⁸⁵

B. Stimulating Renewed Calls for Systemic Reform

The dysfunction of immigration courts and the BIA has been the subject of sporadic concern for many years.¹⁸⁶ Periodically, the calls for change amplify as a 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.

¹⁸⁰ Noonan, *supra* note 31, at 912.

¹⁸¹ By regulation, non-attorneys may also represent individuals in proceedings. 8 C.F.R. § 1292 (2011) permits recognized organizations, supervised law students or “reputable individuals of good moral character” to appear in immigration court.

¹⁸² Codified as 8. C.F.R. §§ 1001, 1003, 1292 (2011).

¹⁸³ See *List of Currently Disciplined Practitioners*, U.S. DEP’T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REV., <http://www.justice.gov/eoir/discipline.htm> (last visited Sept. 29, 2011).

¹⁸⁴ See, e.g., Nina Bernstein, *An Immigration Attorney Is Accused of Being a Fraud, and His Clients Scramble for Help*, N.Y. TIMES, Feb. 25, 2009, <http://www.nytimes.com/2009/02/25/nyregion/25immigration.html>; Press Release, U.S. Att’y’s Office, Immigration Attorney and Wife Found Guilty of Asylum Fraud (Apr. 3, 2009), *available at* <http://www.fbi.gov/newyork/press-releases/2009/nyfo040309b.htm>. Many unlicensed and unregulated individuals and businesses prey on immigrants with false and fraudulent promises of assistance. Recently, government agencies have become more aggressive in detecting and prosecuting these offenders. See, e.g., Fact Sheet, U.S. Citizenship & Immigr. Services, USCIS Initiative to Combat the Unauthorized Practice of Immigration Law (Dec. 8, 2010) (on file with author); Press Release, Dist. Att’y, N.Y. Cnty., District Attorney Vance Announces Guilty Verdict in Case of Phony Chinatown Immigration Consultant, (Dec. 7, 2010) (on file with author); John Council, *UPLC Wins Contempt Case Against Nonlawyer*, TEXAS LAWYER, Sept. 13, 2010, <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202471874163&slreturn=1>.

¹⁸⁵ There are some potential visa benefits under the INA that might induce even an undocumented noncitizen to cooperate with a criminal investigation. 8 U.S.C. § 1101(a)(15)(T) (2011) (“snitch visa”). But these options apparently have not been utilized to any noticeable degree.

¹⁸⁶ 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, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1678–85 (2010) (reviewing and critiquing standard proposed structural reforms).

1. Restructuring Immigration Adjudication

In the post-surge era, several unsuccessful efforts to redress immigration litigation appeared in congressional bills between 2004 and 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, which essentially preserved the existing structure while expanding the number of BIA members in a return to more comprehensive administrative appellate review.¹⁸⁷ 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 United States Court of Appeals for the Federal Circuit.¹⁸⁸ This proposal failed to gain support either in the Senate, with immigration experts, or with the public.¹⁸⁹ 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.¹⁹⁰ This legislation also increased the number of BIA members and revived the practice of three-judge panels.¹⁹¹ 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.”¹⁹²

Persistent but as yet unrewarded efforts to achieve change resurface with regularity in the post-surge fallout era. Congress periodically holds hearings. The National Association of Immigration Judges (NAIJ) continues its push for an independent agency or Article I court.¹⁹³ Other new reports and recommendations from both academics¹⁹⁴ and

¹⁸⁷ Civil Liberties Restoration Act of 2005, H.R. 1502, 109th Cong. § 204 (2005); The Civil Liberties Restoration Act of 2004, S. 2528, 108th Cong. § 204 (2004), responds to many post-9/11 policies and practices that are perceived to jeopardize civil liberties. In addition to amendments that address such developments as mandatory and indefinite detention, closed hearings, and elimination of individualized detention decisions, the statute attempts to return administrative appellate review to its pre-2003 organization, requiring three-judge panels in all cases and eschewing the practice of affirming without opinion when the immigration judge has resolved all of the issues in the case. The statute restores the board to fourteen members who would serve for six-year terms. Immigration judges would be appointed to a term of twelve years by the head of the commission. The statute provides one feature that has long been sought by immigration judges and critics of the court: contempt authority. *See* Am. Immigr. Lawyers Ass’n, Position Paper, *The Civil Liberties Restoration Act: A Response to Counterproductive Post-9/11 Policies* (updated July 20, 2006), available at <http://www.aila.org/content/default.aspx?docid=8380>.

¹⁸⁸ Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 707 (2006). This proposal was criticized by many. *See generally* *Hearing*, *supra* note 114.

¹⁸⁹ *See generally* *Hearing*, *supra* note 114; Rachel Swarns, *In Bill’s Small Print, Critics See a Threat to Immigration*, N.Y. TIMES, Mar. 24, 2006, at A11; Editorial, *Don’t Tamper with the Courts*, N.Y. TIMES, Apr. 7, 2006, at A24.

¹⁹⁰ Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong., §§ 701–07 (2007).

¹⁹¹ *Id.* at § 702.

¹⁹² *Id.* at § 704.

¹⁹³ *See Executive Office for Immigration Review: Oversight Hearing Before the Subcomm. on Immigr., Citizenship, Refugees, Border Sec., and Int’l Law of the H. Comm. on the Judiciary*, 111th Cong. 55–62 (2010) (statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges).

¹⁹⁴ Legomsky, *supra* note 186, at 1686–96, 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. *Id.* at 1689–92.

professional organizations¹⁹⁵ have 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 principles of quality of adjudicative performance and accountability.¹⁹⁶

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.¹⁹⁷ Thus, 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, the immigrants in the system, 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 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 their discretion daily over such forms of relief as asylum,¹⁹⁸ adjustment of status,¹⁹⁹ cancellation of removal,²⁰⁰ or bond determinations.²⁰¹ In contrast, prosecutorial discretion—the willingness of the agency to terminate or administratively close proceedings, to consent

¹⁹⁵ After an extensive review of all varieties of reform models (with the exception of Prof. Legomsky's, proposal, *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. ABA COMM'N ON IMMIGR., *supra* note 169, at § 6-35.

¹⁹⁶ 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. Russell R. Wheeler, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L.J. 1847, 1869 (2010). 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, *Consistency Credibility, and Culture*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 187–201 (NYU Press ed. 2009).

¹⁹⁷ The White House has made well-publicized efforts in the area. See Press Release, The White House, Background on the President's Meeting with Senior Administration Officials and Stakeholders on Immigration (Apr. 19, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/04/19/background-presidents-meeting-senior-administration-officials-and-stakeholders>. However, none of the President's talking points address immigration adjudication. The most recent legislative push, the Comprehensive Immigration Reform Act of 2011, merely includes a provision to increase resources for DOJ attorneys and IJs, providing an infusion of some additional resources but no structural changes. S. 1258, 112th Cong. § 207 (2011).

¹⁹⁸ 8 U.S.C. § 1158(b) (2011).

¹⁹⁹ 8 U.S.C. § 1255(a) (2011).

²⁰⁰ 8 U.S.C. § 1229b(a)–(b) (2011).

²⁰¹ 8 U.S.C. § 1226(a)(2)(A) (2011).

to relief, or to stipulate to particular issues—is virtually absent in the everyday practice of trial attorneys in immigration court despite several aspirational directives from the highest levels of the Departments of Justice and Homeland Security between 2000 and 2007.²⁰²

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 “[l]awyers—real lawyers, lawyers exercising discretion, candid with their departmental client—are the key.”²⁰³ He cites a transcript of a particularly egregious hearing at which the government attorney was groundlessly recalcitrant in his defense of the removal order. Judge Noonan’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.²⁰⁴ Most recently, John Morton, the director of ICE, issued several reminder memoranda encouraging the appropriate use of prosecutorial discretion.²⁰⁵ This exhortation had an impact in Houston’s immigration court where, following a review of a docket that exceeded 7000 matters, ICE dismissed 200 cases.²⁰⁶ 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.²⁰⁷ Not only would the diversion of cases out of the adjudication system

²⁰² Memorandum from Doris Meissner, Comm’r, Immigr. & Naturalization Serv., to Immigr. & Naturalization Serv. Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, and Reg’l and Dist. Counsel (Nov. 17, 2000), *available at* <http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf>; Memorandum from William J. Howard, Principal Legal Advisor, U.S. Dep’t of Homeland Sec., to all Office of the Principal Legal Advisor Chief Counsel (Oct. 24, 2005), *available at* <http://shusterman.com/pdf/prosecutorialdiscretionimmigration2005.pdf>; Memorandum from Julie L. Myers, Assistant Sec’y, U.S. Immigr. & Customs Enforcement, to all Field Office Dirs. and Special Agents in Charge (Nov. 7, 2007), *available at* <http://shusterman.com/pdf/prosecutorialdiscretionimmigration110707.pdf>.

²⁰³ Noonan, *supra* note 31, at 915.

²⁰⁴ See Meissner, *supra* note 202.

²⁰⁵ Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enforcement, to all Field Office Dirs., Special Agents in Charge, and Chief Counsel (June 17, 2011), *available at* <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; *see also* SHOBA SIVAPRASAD WADHIA, THE MORTON MEMO AND PROSECUTORIAL DISCRETION: AN OVERVIEW (2011), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Prosecutorial_Discretion_072011_0.pdf. This memorandum builds on earlier memoranda, the most recent of which was issued in June 2010. Memorandum from John Morton, Dir., U.S. Immigr. & Customs Enforcement, to all U.S. Immigr. & Customs Enforcement Employees 4 (June 30, 2010), *available at* http://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf; *see also* SHOBA SIVAPRASAD WADHIA, READING THE MORTON MEMO: FEDERAL PRIORITIES AND PROSECUTORIAL DISCRETION 8–10 (2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Shoba_-_Reading_the_Morton_Memo_120110.pdf.

²⁰⁶ Susan Carroll, *Houston Immigration Cases Tossed by the Hundreds*, HOUS. CHRON., Oct. 16, 2010, at A1.

²⁰⁷ ABA COMM’N ON IMMIGR., *supra* note 169, at §§ 1-60–61; APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA’S IMMIGRATION COURTS 17 (2009), *available at* <http://www.appleseednetwork.org/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf>; Benson, *supra* note 27, at 425.

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.²⁰⁸

V. CONCLUSION

Hopes for comprehensive immigration reform are dimming. Even efforts to redress more limited aspects of the universally acknowledged broken system have failed.²⁰⁹ Immigration adjudication sits squarely in the middle of this glum and complex situation, yet structural reform is improbable. The pleas of judges, academics, practitioners, 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 judges to thank. The pressure endures as the circuit court docket remains swollen by immigration cases, as immigration court backlog grows, and as more detainees are entering the system.²¹⁰ 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 courts will keep blowing steam that cannot be ignored.

The Second Circuit's asylum case management plan appears to have triaged the court's overload crisis. But the surge has exposed a different crisis that court administrators alone cannot solve. Fortunately, ever-increasing segments of the bar are engaged in trying to secure more access to justice for immigrants in a top-down campaign. These efforts will continue to push for incremental but meaningful changes that aim to change the system from the bottom up.

²⁰⁸ See generally Ramji-Nogales et al., *supra* note 159.

²⁰⁹ David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES, Dec. 18, 2010, <http://www.nytimes.com/2010/12/19/us/politics/19immig.html>.

²¹⁰ Jennifer Ludden, *Immigration Crackdown Overwhelms Judges*, NAT'L PUB. RADIO (Feb. 9, 2009), <http://www.npr.org/templates/story/story.php?storyId=100420476>.