THE CONTINUING SURGE IN IMMIGRATION APPEALS IN THE SECOND CIRCUIT: THE PAST, THE PRESENT AND THE FUTURE

By the Commercial and Federal Litigation Section of the New York State Bar Association

Executive Summary

The growth in immigration appeals in the Second Circuit is well documented, with a noticeable surge commencing in 2002 that quickly grew to represent more than 38% of all filings in 2004.[1] As we report below, these immigration appeals continue to be filed at elevated levels and continue to dominate the Second Circuit's docket. There is no apparent decline. Without changes in immigration law and policy, or structural changes in how immigration appeals are adjudicated, there is every indication that a sizable immigration docket will persist in the Second Circuit.

This report looks at the current state of affairs in the Second Circuit, identifying the measures taken by the court to handle the enormous volume of immigration appeals and how these measures are working. We also examine measures recently instituted or proposed that may improve the quality of legal representation and administrative case records in immigration appeals. The report offers several recommendations for the future that should permit greater case review at the administrative levels including expanding the size of the Board of Immigration Appeals and the number of immigration judges and support staff, creating a training and mentoring program for poorly performing

[1] U.S. Court of Appeals – BIA Appeals as % of Total Appeals Filed During the Twelve-Month Periods Ended December 31, 2001 through 2008 (April 15, 2009).

immigration attorneys, increasing the sanctioning power of members of the Board of Immigration Appeals and immigration judges, and encouraging either greater *pro bono* representation or providing indigent immigrants with government-funded attorneys. We believe greater administrative review will both discourage further appeals and ensure that cases that are appealed to the circuit courts contain more detailed case records whose merits may be more readily evaluated.

I. Background: The Problem of Immigration Appeals

Millions of foreign nationals currently reside in the United States without authorization or in violation of their status, some having entered without authorization, some having overstayed their admission period, and some having violated their status with, for example, a criminal conviction. Those detected are ordered to appear in deportation proceedings before immigration courts nationwide. Many of these foreign nationals resist removal by seeking asylum—a humanitarian ground of relief for immigrants who were persecuted, or fear persecution, in their home countries[2]—while asylum applicants whose cases are not granted administratively are also referred to immigration court. Immigration judges undoubtedly have a grave responsibility in adjudicating claims of asylum—where an incorrect denial returns an individual to his or her country of persecution. The fact that the immigration court system as a whole

[2] Judge 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, 429 (2008).

(including the Board of Immigration Appeals which oversees the immigration courts) lacks sufficient resources to handle the large case volume undermines the accuracy, legitimacy, and efficiency of decision-making in immigration cases.[3] Further complicating the task of identifying meritorious claims is the lack of financial resources of asylum applicants who often appear without counsel.[4]

By the late 1990's, the lack of judicial resources to handle the large number of immigration cases resulted in enormous administrative backlogs within the immigration courts and the Board of Immigration Appeals.[5] Seeking to reduce the growing backlog, Attorney General John Ashcroft instituted streamlining reforms in 1999 and 2002.[6] As a direct result of those reforms, the United States Courts of Appeals, particularly the Second and Ninth Circuits, witnessed an unprecedented surge in immigration appeals.[7] In

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[3] Reflecting on asylum cases, one immigration judge stated, "These are death penalty cases being handled with the resources of traffic court." APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 1 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf.

[4] Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* 18 (2004).

[5] 73 Fed. Reg. 34654 (June 18, 2008).

[6] Board of Immigration Appeals; Streamlining, 64 Fed. Reg. 56135 (Oct. 18, 1999); Board of Procedural Reforms To Improve Case Management Rule, 67 Fed. Reg. 54878 (Aug. 26, 2002).

[7] In a 2006 statement before the Senate Committee on the Judiciary, the Honorable Judge Jon O. Newman of the Second Circuit acknowledged that the courts of appeals were "currently overburdened with BIA appeals," particularly within the Second and Ninth Circuits. Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 3 (Apr. 3, 2006).

a 2004 article, the Association of the Bar of the City of New York reported on the Second Circuit's efforts to address the burgeoning immigration caseload through special case management measures and by coordinating with the Board of Immigration Appeals.[8]

Now, five years later, our review of the immigration appeal docket in the Second Circuit reveals that the volume of immigration appeals has not declined.[9] Furthermore, despite the measures instituted within the Second Circuit and the Board of Immigration Appeals, there continues to be concern regarding the competency of counsel appearing before the court on immigration matters[10] and the thoroughness of the record provided by the Board of Immigration Appeals.[11]

II. Overview of Immigration Appeals Processes and the 1999 and 2002 Streamlining Reforms

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[8] Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* (2004).

[9] U.S. Court of Appeals – Rate of Appeal for BIA Decisions – 12-Months Ended December 31, 2001-2008.

[10] *See* Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 9-10 (2008).

[11] *See, e.g.,* APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 32-34 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf; John M. Walker, Jr., US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 3-4 (Apr. 3, 2006); Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 8 (Apr. 3, 2006).

Under the authority of the Attorney General, the Executive Office for Immigration Review (EOIR) is charged with interpreting and administering U.S. immigration law on behalf of the U.S. Department of Justice (DOJ).[12] EOIR consists of more than 230 immigration judges who are responsible for issuing deportation orders in instances where there is no form of relief.[13] The Board of Immigration Appeals (BIA or the Board) hears appeals from immigration court decisions.[14] Its precedent decisions are binding on immigration courts nationwide, subject to the Attorney General's review. Respondents may also appeal to the U.S. Court of Appeals with jurisdiction, however, these decisions are only binding on immigration courts within that circuit.[15] Accordingly, uniformity of law nationwide is best achieved through BIA precedent.[16]

The Attorney General has authority to change the BIA's structure and internal processes. In both 1999 and 2002, he introduced streamlining procedures designed to

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[12] U.S. Department of Justice, Executive Office for Immigration Review, *Fact Sheet*, Aug. 2009, http://www.usdoj.gov/eoir/fs/biabios.htm.

[13] Julia Preston, *Study Finds Immigration Courtrooms Backlogged*, N.Y. TIMES, June 18, 2009, at A20.

[14] U.S. Department of Justice, Executive Office for Immigration Review, *Fact Sheet*, Aug. 2009, http://www.usdoj.gov/eoir/fs/biabios.htm.

[15] Government trial attorneys are not permitted to appeal adverse Board decisions; thus all appeals from BIA decisions are filed by immigrants who receive an adverse decision. 73 Fed. Reg. 34656 (June 18, 2008).

[16] *See* 73 Fed. Reg. 34659 (June 18, 2008).

reduce the enormous backlog in BIA cases—56,000 in March 2002.[17] The 1999 revisions permitted single board members to affirm immigration court decisions in one-line decisions without any legal analysis.[18] The use of Affirmances Without Opinion ("AWOs") subsequently increased due to the 2002 reforms and were mandated in certain instances.[19] In addition, the 2002 reforms reduced the BIA from 23 to 11 members, expanded single member as opposed to three-member panel review, and established time limits for adjudicating cases.[20] The 1999 and 2002 reforms have been roundly criticized by federal circuit courts.[21] Nevertheless, the federal courts have consistently affirmed the authority

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[17] Board of Immigration Appeals; Streamlining, 64 Fed. Reg. 56135 (Oct. 18, 1999); Board of Procedural Reforms To Improve Case Management Rule, 67 Fed. Reg. 54878 (Aug. 26, 2002); *see also,* 73 Fed. Reg. 34654 (June 18, 2008) (discussing earlier procedural reforms and their impact.); John R. B. Palmer, et al., *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, 5 (2005).

[18] Board of Immigration Appeals; Streamlining, 64 Fed. Reg. 56135 (Oct. 18, 1999).

[19] 73 Fed. Reg. 34655 (June 18, 2008).

[20] *Id.* at 34655-6.

[21] *See* Albathani v. INS, 318 F.3d 365, 378-9 (1st Cir. 2003). The Seventh Circuit noted in *Niam v. Ashcroft* that "the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases." 354 F.3d 652, 654 (7th Cir. 2004). Writing for the court in *Benslimane v. Gonzales*, Judge Posner noted that the

> tension between judicial and administrative adjudicators is not due to judicial hostility to the nation's immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases

of the Attorney General to amend and adopt rules to streamline the administrative process,[22] and some have praised the BIA for its efforts to reduce the administrative case backlog.[23]

III. Pre-2004 Surge in Immigration Appeals and 2004 City Bar Study

The Attorney General's efforts to reduce the administrative backlog of immigration cases by streamlining procedures had a direct and immediate impact on the

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at the administrative level has fallen below the minimum standards of legal justice. 430 F.3d 828, 29-30 (7th Cir. 2005).

Further, some federal circuit courts have held that AWOs contribute an element of confusion in the court record as to the actual basis for the BIA's decision and ultimately whether the federal court has jurisdiction to review the decision. *See* Lanza v. Ashcroft, 389 F. 3d 917 (9th Cir. 2004).

[22] Since the Immigration and Nationality Act is silent on procedures for administrative appeal, the "agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Zhang v. U.S. Dep't of Justice, 362 F.3d 155, 157 (2d Cir. 2004) (quoting Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council Inc., 435 U.S. 519, 543 (1978)). Legal challenges concerning the BIA's issuance of AWOs on due process grounds have also been repeatedly struck down since immigrants have the "opportunity to be heard" by an immigration judge. Denko v. INS, 351 F.3d 717, 730 n. 10 (6th Cir. 2003).

[23] In *Guyadin v. Gonzales*, Judge José A. Cabranes of the Second Circuit acknowledged that, "IJs and the BIA are to be commended for their efforts, in which the 'streamlining' policy plays an important role." 449 F.3d 465, 470 (2d Cir. 2006).

dockets of the federal circuit courts.[24] While only 6% of BIA cases were appealed prior to the reform measures, 20% were being appealed by the end of 2003.[25] Nationwide federal circuit courts experienced an increase of 294% in immigration appeals from 2001 to 2002, with an additional increase of 35% in 2003.[26] By 2003, immigration appeals represented 14.4% of all appeals filed in the federal circuit courts.[27] The growth was even more appreciable in the Second Circuit where administrative agency appeals constituted 4% of total appeals filed in 2001.[28] Just two years later, 34% of all appeals filed in the Second Circuit were administrative agency appeals, most of which were BIA appeals.[29]

The Committee on Federal Courts, Association of the Bar of the City of New York, undertook a study of the burgeoning immigration docket in the Second Circuit, publishing its findings in August 2004.[30] As noted in that report, the Second Circuit met the challenge of the massive influx of immigration appeals by instructing the DOJ to dedicate sufficient attorneys to the cases and urging the BIA to designate sufficient staff to

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[24] U.S. Court of Appeals – Rate of Appeal for BIA Decisions – 12-Months Ended December 31, 2001-2008.

[25] Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* 4 (2004).

[26] *Id.*

[27] *Id.* at 5.

[28] *Id.*

[29] *Id.*

[30] Committee on Federal Courts, Association of the Bar of the City of New York, The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals (2004).

expedite preparation of the records.[31] The Second Circuit added part-time attorneys to process the cases, and Second Circuit staff attorneys bundled cases together for conferencing where the petitioners were represented by the same attorney.[32] Status conferences with staff attorneys were ordered in an effort to resolve cases at the staff attorney level.[33] Despite these measures, however, the surge of appeals has continued.

IV. The Continued Surge in BIA Appeals to the Second Circuit: 2004 to Present

The rate at which BIA determinations are appealed has actually increased from 2004, producing even a larger impact on the Second Circuit's docket. While 29% of BIA cases within the Second Circuit were appealed in 2004, this percentage increased to 41% (2005), 43% (2006), 38% (2007) and 42% (2008).[34] This contrasts to the 3% appeal rate in BIA cases within the Second Circuit in 2001.[35]

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[31] *Id.* at 9-10; *see also*, David H. Tennant, *The Surge in Asylum Appeals: What does it Mean to Civil Appellate Litigation*, CERTWORTHY 4-5 (Defense Research Institute (DRI), March 2008); Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 3 (Apr. 3, 2006).

[32] Committee on Federal Courts, Association of the Bar of the City of New York, The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals 10 (2004).

[33] *Id.*

[34] In 2004, 2,602 out of 8,863 BIA decisions within the Second Circuit's jurisdiction were appealed. In 2005 and 2006 respectively, 2,710 out of 6,555 and 2,486 out of 5,849 BIA decisions within the Second Circuit's jurisdiction were appealed. In 2007 and 2008, 2,386 out of 6,361 and 2,606 out of 6,204 BIA

These elevated BIA appeal rates produced a 1470% increase in the number of BIA appeals in the Second Circuit from 2001 to 2008.[36] Immigration appeals have represented between 37% and 39% percent of all appeals filed within the Second Circuit between 2004 and 2008.[37] By contrast, only 4% of the Second Circuit's docket consisted of BIA cases in 2001.[38] The increase in BIA appeals is part of an overall increase in appeals to the Second Circuit, which now receives 2,000 more appeals each year than in 2001.[39]

The volume of BIA appeals shows few signs of abating.[40] Immigration and Customs Enforcement (ICE), the component of the Department of Homeland Security

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decisions within the Second Circuit's jurisdiction were appealed. U.S. Court of Appeals – Rate of Appeal for BIA Decisions – 12-Months Ended December 31, 2001-2008.

[35] *Id.*

[36] *Id.*

[37] U.S. Court of Appeals – BIA Appeals as % of Total Appeals Filed During the Twelve-Month Periods Ended December 31, 2001 through 2008 (April 15, 2009).

[38] *Id.*

[39] The Second Circuit received 4,460 appeals in total in 2001, 6,835 in 2004 and 6,708 in 2008. *Id.*

[40] *See* John R. B. Palmer, et al., *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 (2005). The government initiated approximately 30,000 removal proceedings in 1990 and approximately 185,000 in 2000. Judge 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, 430 (2008) (citing DORSEY & WHITNEY LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT app. 6 (2003)); *but see*

(DHS) responsible for enforcing immigration laws nationwide, has steadily increased enforcement action in recent years,[41] and appeals from the BIA continue to fall overwhelmingly within the jurisdiction of the Second and Ninth Circuits.[42]

It is not merely the volume of appeals and resulting stress on court resources that are of concern; rather, there is also apprehension regarding the quality of representation afforded immigrants appealing BIA decisions and the thoroughness of fact-finding and legal review conducted at the lower administrative levels. While there is no excuse for poor quality legal representation, it may be partially attributable to the meager financial resources of many immigrants in proceedings, as they have no right to government-appointed counsel.[43] Noting wide disparity in the quality of representation in immigration

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David H. Tennant, *The Surge in Asylum Appeals: What does it Mean to Civil Appellate Litigation*, CERTWORTHY 3-4 (Defense Research Institute (DRI), March 2008).

[41] U.S. Department of Justice, Executive Office for Immigration Review, FY 2004 STATISTICAL YEAR BOOK, B2 (Mar. 2005); U.S. Department of Justice, Executive Office for Immigration Review, FY 2008 STATISTICAL YEAR BOOK, B2 (Mar. 2009).

[42] U.S. Court of Appeals – Number of BIA Appeals by Circuit During the Twelve-Month Periods Ending During December 31, 2001 Through 2008. For a discussion of the Ninth Circuit's efforts to manage the surge in immigration appeals, *see* Anna O. Law, Institutional Growth and Innovation—The Ninth Circuit Court of Appeals and Immigration (2008), *available at http://www.allacademic.com//meta/p_mla_apa_research_citation/2/6/6/0/6/pages266061/p266061-1.php.*

[43] Whether there is a constitutional or statutory right to effective assistance of counsel in immigration has also been subject to recent debate. *See* Matter of Compean Bangaley & J-E-C, 24 I. & N. Dec. 710 (A.G. 2009) (holding that there is no constitutional or statutory right to effective assistance of counsel in

appeals, the Honorable Judge Robert A. Katzmann wrote ". . . too many of the briefs that I see are barely competent, often boilerplate submissions."[44] In fact, a study conducted of cases pending before the court on April 21, 2005, concluded that over one-third of the appeals were handled by the same ten law firms, most of which were run by solo practitioners.[45]

There is also concern regarding the quality of records received on appeal from the BIA. Speaking to the Senate Committee on the Judiciary, the Honorable Judge Jon O. Newman of the Second Circuit summarized the problem:

> When overburdened [immigration judges] decide their high volume of cases hurriedly with oral findings dictated into the record and then their decisions are affirmed in a one-word ruling, the courts of appeals often lack

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immigration including government appointed counsel provided for under the Sixth Amendment of the Constitution). In June 2009, Attorney General Eric Holder withdrew the *Compean* decision, and immigration judges and the BIA were instructed to apply the previously established standard of review for ineffective counsel. Matter of Enrique Salas Compean, 25 I. & N. Dec. 1, 2 (A.G. 2009).

[44] Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 10 (2008).

[45] *Id.* (citing John R. B. Palmer, et al., *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, 90 (2005)).

the reasoned explication that is to be expected of a properly functioning administrative process.[46]

Also speaking before the committee, the Honorable Chief Judge John M. Walker, Jr. of the Second Circuit noted "a severe lack of resources and manpower" within EOIR and reported that "one of [his] court's problems with the BIA is that it rarely seems to adjudicate the outstanding legal issues in a case, no doubt because the judges lack the time to do so."[47] Accordingly, further reform measures within the Second Circuit and the BIA appear necessary.[48]

V. The Second Circuit's Post-2004 Response to Chronic Elevation in Immigration Appeals: the NAC System

In response to the unabated surge in BIA appeals, the Second Circuit has instituted additional measures to reduce the case backlog. In 2005, the Second Circuit created a Backlog Reduction Committee (BRC) to assess how the court could modify its screening

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[46] Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on Judiciary 8 (Apr. 3, 2006).

[47] John M. Walker, Jr., US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on Judiciary 3-4 (Apr. 3, 2006).

[48] *See* APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 1 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf.

process to efficiently handle the influx of immigration cases.[49] Recognizing that the vast majority are asylum cases, the BRC implemented a Non-Argument Calendar (NAC) specifically for asylum appeals.[50] Because these cases share a common issue—whether the BIA's finding was supported by substantial evidence—the BRC determined that the judges and staff attorneys would refine their case-law expertise and be able to expedite their decision-making without sacrificing the fairness or quality of court opinions.[51] All asylum cases are initially sent to the NAC, which consists of panels of three judges.[52]

Materials submitted to the NAC include counsels' briefs, the BIA record, and a memorandum, draft summary order, and recommended disposition prepared by a law clerk within the Staff Attorney's Office.[53] Utilizing sequential voting, the panel of judges may vote to send to the Regular Argument Calendar (RAC), grant, deny, remand or other.[54] Any one of the judges can remove a case from the NAC, and counsel can request that a

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[49] Judge 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, 433 (2008).

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 434.

[54] *Id.*

case be sent to the RAC upon a showing of good cause.[55] Typically voting is completed within three weeks of case submission.[56]

Judge Newman, a member of the Second Circuit's BRC, reports that the NAC system has reduced significantly the court's backlog of pending cases.[57] When the NAC program commenced on September 30, 2005, there were 5299 pending agency cases within the Second Circuit.[58] Most were BIA asylum denials.[59] By September 30, 2007, there were only 1465 pending agency cases.[60] Judge Newman attributes the reverse in this trend in FY 2008 to the increase in new BIA appeals in 2008 and the purposeful reduction in the number of cases sent to the NAC each week.[61] During the first three months of FY 2009, the number of pending agency cases decreased, and the court has again increased the weekly assignment of NAC cases.[62]

The NAC program has undoubtedly been successful in reducing the backlog of cases pending within the Second Circuit.[63] It remains open to debate whether the NAC

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[55] *Id*. at 433-4.

[56] *Id*. at 434.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id*. at 434-5.

[61] *Id*. at 435.

[62] *Id.*

[63] *Id.* at 435.

system offers the same level of fairness and quality of decision-making as the RAC calendar.[64] In Judge Newman's view, had BIA asylum appeals remained within the RAC docket and been reviewed for oral argument, as a matter of course, the decisions reached by the judges would have remained the same.[65] Noting the inferior quality of many of the petitioners' briefs in NAC cases, in his view oral arguments would not have benefited the cases significantly.[66]

While Judge Newman's insight into the NAC system is assuring, practitioners appearing before the Second Circuit on non-BIA cases remain concerned about the potential impact of the surge on non-BIA cases.[67] While it is difficult to assess to what extent, if any, there has been an impact on non-BIA cases, it is worth noting that the Second Circuit adopted Interim Rule 34 in August 2007 requiring parties in all cases to assess whether oral arguments are warranted and affirmatively request the opportunity.[68] In certain instances, including where the appeal is determined to be frivolous, the rule also permits the court to dispense with oral arguments even where both parties desire to be

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[64] *Id.* at 436.

[65] *Id.*

[66] *Id*. at 436.

[67] *See, e.g.,* David Tennant, *The Surge in Asylum Appeals: What does it Mean to Civil Appellate Litigation*, CERTWORTHY 8-9 (Defense Research Institute (DRI), March 2008).

[68] United States Court of Appeals for the Second Circuit, Local Rule 34 (Aug 27, 2007), *available at* http://www.ca2.uscourts.gov/Docs/News/localrule34final.pdf.

heard.[69] The adoption of this interim rule is particularly significant considering the Second Circuit's historic practice to afford litigants the opportunity for oral argument in appeals.[70] The adoption of this rule is fairly strong evidence that the surge has impacted, at least procedurally, non-BIA cases pending before the court.

VI. New Measures that May Improve the Quality of Legal Representation in BIA Appeals before the Second Circuit

The Second Circuit recently promulgated new rules governing its Committee on Admissions and Grievances ("the Grievance Committee") and created a *pro bono* counsel program. In May 2007, the Grievance Committee issued new rules governing its proceedings, including the scope of matters that can be referred to it.[71] Attorneys may be referred to the committee for misconduct or for failing to meet a professional obligation to the court.[72] In December 2004, the Second Circuit also began receiving applications for

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[69] *Id.*

[70] Judge 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, 432-3 (2008).

[71] United States Court of Appeals for the Second Circuit, Rules of the Committee on Admissions and Grievances for the United States Court of Appeals for the Second Circuit (May 21, 2007), *available at http://www.ca2.uscourts.gov/Docs/AttDisc/Rules%20of%20the%20Committee%20on%20Admissions%20and%20Grievances.pdf.*

[72] *Id.*

its newly created Pro Bono Panel.[73] Panelists are appointed to represent *pro se* litigants in "meritorious or complex appeals."[74] They serve for up to three-year terms and must make themselves available to accept court assignments.[75] While there is no indication that these measures were instituted specifically to address BIA appeals, they should be useful tools in improving the quality of legal representation provided in them.

Judge Katzmann is also involved in his personal capacity with a study group, created in the aftermath of his 2007 Marden lecture at the Association of the Bar of the City of New York,[76] to examine barriers to effective representation of immigrants.[77] The study group hosted a working colloquium at Fordham Law School in March 2009 where

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[73] PRO BONO CONNECTION, AMERICAN BAR ASSOCIATION, PRO BONO POLICY NEWS 3, *available at* http://www.abanet.org/legalservices/probono/publications/pro_bono_connections/pbconsp05.pdf.

[74] United States Court of Appeals for the Second Circuit, Plan for Appointment of Pro Bono Counsel (revised April 2006), *available at* http://www.ca2.uscourts.gov/Docs/ProBono/Copy%20of%20Plan%20and%20Application.pdf.

[75] *Id.* This program has been criticized for requiring the Pro Bono Panel member assigned to the case to appear for oral argument. Firm partners appointed by the court cannot assign the presentation of oral argument to an associate attorney. Allowing greater associate involvement could increase participation in the program.

[76] Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3 (2008).

[77] Nina Bernstein, *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. TIMES, Mar. 13, 2009. The study group was not commissioned by the Second Circuit. Judge Katzmann is involved exclusively in his personal capacity, not on behalf of the court.

key participants in the field discussed ways to: (1) encourage private bar participation; (2) address institutional barriers to high quality legal representation; and, (3) address inadequate legal representation, and attorney and notario fraud.[78] The group has published articles on these subjects in the Fordham Law Journal[79] and will be continuing its efforts to promote reform.

It also should be noted that the DOJ has proposed measures that may improve the quality of legal representation in immigration appeals.[80] In 2006, Attorney General Alberto R. Gonzales directed EOIR to develop regulations equipping immigration judges with the authority to sanction individuals for filing false or frivolous cases or engaging in other gross misconduct.[81] He also directed the development of similar regulations for the BIA.[82] EOIR has not issued proposed regulations to date, although it has increased the

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[78] *Id.*; Fordham Law Review, Event Details, Overcoming Barriers to Immigrant Representation: Exploring Solutions, *available at* http://law2.fordham.edu/ihtml/page3.ihtml?imac=1168&calID=9840.

[79] 78 Fordham L. Rev. 101 (2009).

[80] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), *available at* http://trac.syr.edu/ immigration/reports/210/.

[81] Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 5-6 (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf. The U.S. Courts of Appeals already have such power. *See* Muigai v. INS, 682 F.2d 334 (2d Cir. 1982).

[82] Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 6 (Aug. 9, 2006), *available* at http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

grounds for disciplining attorneys who appear before immigration courts and the BIA.[83] Increasing the sanctioning power of immigration judges and the BIA may also discourage the filing of frivolous appeals with the circuit courts, but, of course, should not be used to sanction competent counsel who are providing zealous advocacy for their clients within the rules of professional conduct.

VII. Strategies to Improve the Quality of the Legal and Factual Record

Recognizing that only reform measures within EOIR will improve the quality of the legal and factual records received, the Second Circuit has continued to meet with BIA leadership to discuss how to remedy the surge in immigration appeals.[84] The DOJ has also recognized the necessity of further reform within EOIR. In August 2006, Attorney General Gonzales instructed immigration courts and the BIA to implement 22 new

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[83] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), *available at* http://trac.syr.edu/immigration/reports/210/; Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update 4 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf. One stumbling block in this area has been whether this power should extend to sanctioning government attorneys.

[84] News Release, Meeting with Second Circuit Judges Latest in Series to Improve understanding of Immigration Court System (June 15, 2006), *available at* http://www.usdoj.gov/eoir/press/06/Meetingwith2ndCircuit.htm.

measures designed to improve the administration of justice in immigration matters.[85] The 2006 directive mandates technological and support improvements, as well as the implementation of performance evaluations and required passage of an immigration law exam by immigration judges and BIA members.[86] Additional measures proposed included drafting a new code of conduct for immigration judges and BIA members and an improved procedure for reporting complaints about adjudicators.[87] In June 2009, EOIR issued a status report detailing the implementation of the 22 measures and indicated that many had been completed including exam testing of new immigration judges, a training plan for immigration judges, BIA members, and their staff, improved complaint procedures, and enhanced transcription services and interpreter selection processes.[88] While critics argue that EOIR has not fully implemented the 22 measures, [89] a detailed discussion of these

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[85] Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

[86] *Id.*

[87] *Id.*

[88] Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

[89] *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), http://trac.syr.edu/immigration/reports/210/ and APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 1 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf

measures and the extent to which they have been implemented is beyond the scope of this report. Instead, we focus below on EOIR's progress in implementing two measures believed most likely to improve the quality of appellate records: (i) increasing the number of immigration judges, BIA members and support staff; and, (ii) reducing the number of AWOs and increasing the number of precedent decisions.

a. Increasing the Number of Judges and Staff

The Attorney General's August 2006 memorandum proposed increasing the BIA from 11 to 15 permanent members.[90] The DOJ published final regulations authorizing this expansion in June 2008, and Attorney General Michael B. Mukasey appointed new members to the Board the same year.[91] Prior to the 2002 reforms, however, there were 23

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[90] Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 6 (Aug. 9, 2006), *available at* http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.

[91] Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Progress Overview 6 (Sept. 8, 2008) *available at* http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf; Press Release, U.S. Department of Justice, Attorney General Mukasey Appoints Five New Members to the Board of Immigration Appeals (May 30, 2008) *available at* http://www.usdoj.gov/eoir/press/08/AG-BIAAppointments.pdf.

BIA members.[92] The 2006 memorandum also instructed EOIR to seek budgetary increases to hire more immigration judges, law clerks, and BIA staff attorneys.[93] There were 238 immigration judges as of May 15, 2009, an increase of only 8 judges since 2006, and the DOJ has been criticized for failing to consistently request budgetary increases to support this initiative and failing to quickly fill open positions.[94] Nevertheless, EOIR continues to express its commitment to increasing the number of immigration judges and staff.[95] For FY 2010, EOIR has requested funding for an additional 28 immigration judges and 28 law clerk positions, as well as support staff.[96] EOIR acknowledges the slow pace of hiring,

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[92] Committee on Federal Courts, Association of the Bar of the City of New York, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals* 3 (2004).

[93] Memorandum from the Attorney General, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 6 (Aug. 9, 2006), *available at http://www.usdoj.gov/ag/readingroom/ag-080906.pdf.*

[94] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CASE BACKLOGS IN IMMIGRATION COURTS EXPAND, RESULTING WAIT TIMES GROW (2009), *available at* http://trac.syr.edu/immigration/reports/208/; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), *available at* http://trac.syr.edu/ immigration/reports/210/.

[95] Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update 4 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

[96] *Id.*

attributing it to the amount of time involved in scrutinizing candidates carefully.[97] One of the chief reform proposals at present is to further increase the size of the BIA, the number of immigration judges, and their support staff.[98]

b. Reducing AWOs and Increasing the Number of Precedent Decisions

Following the Attorney General's 2006 memorandum, EOIR issued proposed regulations in 2008 that would make AWOs discretionary under all circumstances and encourage the increased publication of precedent decisions.[99] The regulations are currently awaiting final approval.[100] Pursuant to the 2002 reforms, AWOs are mandatory in certain instances, whereas the 2008 proposed regulations would give the BIA more flexibility and single board members more discretion to choose between issuing an AWO or a single-member written opinion.[101] The rule seeks to improve the quality of decision-

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[97] TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), *available at* http://trac.syr.edu/ immigration/reports/210/.

[98] APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 10, 34 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf. The proposal is favorably viewed by Judge Jon O. Newman of the Second Circuit. Jon O. Newman, US Circuit Judge, Second Circuit Court of Appeals, Statement before the Senate Committee on the Judiciary 7-9 (Apr. 3, 2006).

[99] *See* 73 Fed. Reg. 34654 (June 18, 2008).

[100] Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update 4 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

[101] 67 Fed. Reg. 54878 (Aug. 26, 2002); 73 Fed. Reg. 34656 (June 18, 2008).

making for "complex or problematic" cases and better equip the BIA to address the poor quality of some immigration judge decisions, as well as instances of "intemperate or abusive" judicial behavior.[102] Although these regulations await final approval, the BIA's utilization of AWOs has already declined substantially. AWOs accounted for 36% of BIA decisions in 2003, but only 10% in 2007.[103] EOIR had decreased AWOs to less than 4% by the beginning of 2009.[104] While single-member opinions have risen correspondingly, critics contend that these decisions can be equally lacking in substantive legal analysis.[105] To the extent that the BIA increases its issuance of thorough written opinions, the Second Circuit may see a reduction in BIA appeals, as respondents may conclude with greater frequency that their cases do not warrant further review. In instances where immigrants are appealing BIA denials merely to delay their removal from the United States, the

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[102] 73 Fed. Reg. 34656 (June 18, 2008).

[103] *Id.*

[104] Press Release, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Director, EOIR's Improvement Measures—Update 3 (June 5, 2009), *available at* http://www.usdoj.gov/eoir/press/09/EOIRs22ImprovementsProgress060509FINAL.pdf.

[105] *See* APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 32-33 (2009), *available at* http://www.asserlaw.com/articles/article_164.pdf. This report summarizes findings drawn from structured interview questionnaires of stakeholders. One stakeholder interview noted the issuance of "many one or two-paragraph decisions where it is clear that the [member] has not reviewed the record and there has been no meaningful review." *Id.* at 33.

Second Circuit would at least have a more thorough record to review on appeal and have appropriate tools to address frivolous appeals.[106]

The 2008 proposed regulations also seek to increase the issuance of BIA precedent decisions. Currently, single-member opinions are not considered for publication as precedent, and only certain types of cases may be referred to three-member panels.[107] The proposed regulations would permit BIA members greater discretion in referring cases to three-member panels when "the case presents a complex, novel or unusual legal or factual issue."[108] Furthermore, under the proposed regulations, a majority of the permanent board members on the presiding three-member panel could authorize the publication of precedent, in contrast to current regulations that only permit the publication of precedent upon approval of a majority of permanent board members.[109] The Second Circuit has recognized the important role that BIA legal precedent plays in promoting nationwide uniformity in the adjudication of immigration cases and offering guidance to immigration courts.[110] Proponents of these proposed regulations argue that additional

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[106] Jonathan Cohn, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, Statement before the Senate Committee on the Judiciary 3 (Apr. 3, 2006) (citing INS v. Doherty, 502 U.S. 314, 321-325 (1992)).

[107] 73 Fed. Reg. 34659 (June 18, 2008).

[108] *Id.*

[109] *Id.* at 34661.

[110] *See* Liu v. U.S. Dep't. Of Justice, 455 F.3d 106 (2d Cir. 2006) (remanding the case for the BIA to determine the legal standard).

BIA precedent will clarify the law and reduce the grounds of appeal to the circuit courts.[111]

VIII. Conclusion and Recommendations

We commend the Second Circuit for its successful measures to address the surge in immigration appeals. Through implementation of the NAC system, the court appears to have successfully reduced the backlog in pending cases. The continued high volume of BIA appeals to the Second Circuit, however, is alarming. Furthermore, it appears that a number of immigration practitioners are filing immigration appeals merely to extend the stay of their clients. Their appeals are poorly-briefed, and we encourage the court to implement any additional measures that will discourage this practice. Measures also must be taken to improve the quality of legal representation at the administrative levels and the thoroughness of administrative review conducted by immigration judges and the BIA.

Our principal recommendation is to increase the size of the BIA, as well as the number of immigration judges and support staff.[112] Immigration judges and Board

[111] 73 Fed. Reg. 34659 (June 18, 2008).

[112] We recommend increasing the BIA from 15 members to at least 23 members, the size of the BIA prior to the 2002 reforms. There are currently over 230 immigration judges nationwide. In order to reduce their caseload, we recommend an increase of at least 75 immigration judges. Appropriate increases in staff and law clerk support are also necessary.

members are clearly overburdened.[113] By increasing their ranks, immigration judges would have more time to devote to each case on their docket. Similarly, BIA members would be able to issue more detailed written opinions and precedent decisions, thereby reducing the incentive to appeal further. It would also be easier for the circuit courts to evaluate decisions upon appeal and more quickly identify meritless and frivolous filings.

Our remaining recommendations seek to improve the quality of legal representation of immigrants. First, we commend the private firms that have *pro bono* programs encouraging participation in immigration cases including appeals before the Second Circuit and hope they continue even in this difficult economic climate. Second, to improve the quality of representation before the Second Circuit, we support the establishment of a training and mentorship program for poorly performing attorneys. Greater training (and even mentorship) should be available at the administrative levels as well. These programs may assist attorneys who lack familiarity with the court system, but want to provide their clients with high quality legal representation. We concede, however, that a number of the most poorly performing attorneys simply may not care about the quality of representation they provide and may not participate in these programs unless forced. For this reason, the Second Circuit should continue to use its Grievance

[113] Exemplifying this is a recent psychological study of immigration judges conducted by the University of California at San Francisco, which determined that burnout levels among immigration judges were higher than hospital physicians and prison wardens. *Burnout Rate High Among Immigration Judges*, 35 A.B.A. J. 1, 13 (2009) (citing Stuart 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. 1 (2009)).

Committee where appropriate, as well as other tools, and EOIR should develop corresponding regulations to increase the sanctioning power of immigration judges and the BIA. We also endorse increased sanctioning by state attorney discipline committees.

Lastly, aggressive measures need to be undertaken to provide poor immigrants with greater access to high quality legal representation at the administrative levels. This could be accomplished either through increased *pro bono* representation or funding for government-appointed attorneys for the indigent.[114] Only by offering immigrants better quality legal representation from the outset can we ensure that the merits of their cases will be adequately presented and advocated.

IX. Addendum

This report relies on data available from the Second Circuit, which was taken from the Office of Planning, Analysis and Technology, Executive Office of Immigration Review and the Administrative Office of U.S. Courts. Research for this report also includes newspaper articles, recent reports on the volume of BIA appeals nationwide, law review articles, regulations, and press releases. We obtained feedback from various stakeholders including immigration practitioners and federal practitioners who appear before the Second Circuit.

[114] The extent to which greater consideration should be given to providing government-appointed counsel to individuals in immigration proceedings is beyond the scope of this article.

This report was prepared by the Immigration Litigation Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, co-chaired by Michael D. Patrick and Clarence Smith, Jr. The Executive Committee of the Section adopted the report by unanimous vote on November 17, 2009. The Immigration Litigation Committee includes Michael P. DiRaimondo, Judge Noel Anne Ferris, Sophia M. Goring-Piard, Kamaka R. Martin, Thomas Moseley, Eva Saltzman, Charlotte W. Smith, and David H. Tennant. The principal author was Charlotte W. Smith with assistance from Kamaka R. Martin. Committee members Judge Noel Anne Ferris and Eva Saltzman recused themselves in the preparation of this report.

On January 28, 2010, the report received the approval of the Executive Committee of the New York State Bar Association. On January 29, 2010, by a unanimous vote in the House of Delegates, the New York State Bar Association approved the report and recommendations of the Section. It also approved the recommendations made in a report issued by of the Committee on the Federal Courts of the New York County Lawyers' Association, a copy of which is appended to this report.

APPENDIX

Report on the New York State Bar Association Commercial and Federal Litigation Section Report: *The Continuing Surge in Immigration Appeals in the Second Circuit: The Past, the Present and the Future*

A Report of the Committee on the Federal Courts
of the New York County Lawyers' Association
January 27, 2010

The Committee on the Federal Courts endorses the report entitled *The Continuing Surge in Immigration Appeals in the Second Circuit: The Past, the Present and the Future* (the "Report"). While the Committee agrees with the proposals in the Report, we believe that these proposals do not go far enough and should include the following additional recommendations for managing and reducing the Second Circuit's immigration docket while ensuring that the interests of justice, fairness and due process are not adversely affected:

1) The Second Circuit should adopt a liberal remand policy for decisions that lack sufficient clarity and reasoning to enable the Second Circuit to provide effective and meaningful review;

2) The Second Circuit should discourage government opposition to motions to stay;

3) The Second Circuit should amend its *Pro Bono* Panel Plan to provide opportunity to a larger pool of attorneys to engage in *pro bono* representation before it;

4) The Board of Immigration Appeals ("BIA") should be required to make all of its decisions available to the public;

5) The Department of Homeland Security ("DHS") should be encouraged to exercise its prosecutorial discretion and allow eligible aliens to apply for relief from removal despite possible procedural bars;

6) The BIA's practice of issuing affirmances without opinion ("AWO") should be entirely eliminated, and the BIA should be required to issue fully reasoned decisions in all cases.

Background

The Report details the dramatic surge in the Second Circuit's immigration case docket between 2002 and the present. Immigration cases, including primarily petitions for review of decisions of the BIA,[115] currently make up an astounding 30-40 percent of the Second Circuit's docket each year.[116] These cases involve challenges by aliens to final orders of removal[117] issued by the BIA and to the BIA's denial of motions to reopen removal proceedings.

Removal proceedings begin when DHS serves an alien with a charging document (currently a Notice to Appear) and then files that charging document with the Immigration Court. The Immigration Courts and the BIA are part of the Department of Justice's Executive Office for Immigration Review ("EOIR"). Once the charging document is filed, an alien appears before an Immigration Judge (IJ) for a series of hearings to determine that alien's removability and whether or not that alien is entitled to any form of relief from removal.

It is important to note the Immigration Court is an administrative tribunal not subject to many statutory and constitutional provisions. The Federal Rules of Evidence do not apply and the application of the Fourth, Fifth and Sixth Amendments is severely limited.[118] According to the BIA, Department of Justice and DHS, there is only a privilege and not a right of an alien to representation by counsel at no expense to the

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[115] There are also a number of appeals from decisions of the District Courts in immigration-related matters, but it appears that these appeals make up a small percentage of all immigration cases before the Second Circuit. Appeals of District Court actions typically do not challenge orders of removal issued by the BIA, as jurisdiction to review orders of removals is exclusively within the Courts of Appeals subsequent to the provisions of the REAL ID Act of 2005. *See* Section 106(c) of the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, 302 (May 11, 2005) (eliminating District Court jurisdiction over challenges to final orders of removal and transferring existing District Court cases to the Courts of Appeals for adjudication). For the purposes of this article, review of orders of removal are analytically distinct from immigration-related appeals from the District Courts. The issue discussed herein is related to cases involving review of orders of removal, and any proposed actions should not include District Court appeals of immigration matters, which should be treated as traditional civil appeals.

[116] Report at 10.

[117] Prior to 1996, immigration proceedings were divided into two types – exclusion proceedings for aliens seeking entry to the United States and deportation proceedings for aliens already in the United States whom the government wished to remove. These two types of proceedings have been consolidated into the current proceeding under the general label "removal." However, cases initiated prior to 1996 retain the exclusion and deportation labels and have certain procedural and substantive differences from removal proceedings. For the instant purposes, the distinction is not important, and we will use the general term, removal, to refer to all three types of proceedings.

[118] *See Doumbia v. Gonzales*, 472 F.3d 957, 962-63 (7th Cir. 2007).

alien.[119] The protections of the Fourth Amendment have little application in removal proceedings, and the exclusionary rule does not apply.[120] The Sixth Amendment is completely inapplicable to removal proceedings, and the Fifth Amendment only has limited applicability. An IJ is permitted to draw a negative inference where an alien refuses to testify on the basis of the Fifth Amendment's protection against self incrimination, an especially problematic situation where an alien may be facing both removal proceedings and criminal prosecution at the same time.

If the IJ finds an alien removable and determines that he or she is ineligible for relief, the IJ will enter an order of removal against the alien. The alien has 30 days from the decision to file an appeal with the BIA. If the IJ finds an alien is not removable or he or she is eligible for relief from removal, the attorney for the government can appeal the IJ's decision to the BIA. Once the BIA decides the case, the alien has a statutory right to petition for review to the United States Court of Appeals with jurisdiction over the case.[121] Similarly, an alien with a final order of removal may move either the IJ or the BIA to reopen the proceedings. If the motion is denied, the same chain of appeals follows.

The Report describes the Second Circuit's immigration caseload as "The Problem of Immigration Appeals."[122] Despite this characterization, it is important to note the substantial nature of the interests at stake in removal proceedings and the essentiality of judicial review. An alien seeking asylum, withholding of removal or protection under the Convention Against Torture is claiming a fear of torture or persecution in his or her homeland if returned. Persecution is defined as threats to an alien's life or freedom. Thus, an erroneous determination of an alien's claims (which can be caused by overwhelming dockets, limited staffing and decisions with limited reasoning) will likely send the alien back and place him or her directly in the hands of the alleged persecutor or torturer.[123]

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[119] *See* 8 U.S.C. § 1229a(b)(4)(B); *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009) (holding that aliens have no constitutional right to effective assistance of counsel in removal proceedings*), overruled by Matter of Compean*, 25 I&N Dec. 1 (A.G. 2009) (overruling *Compean* 1 but declining to reach the constitutional issues).

[120] *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). However, an IJ may grant a motion to exclude evidence obtained as the result of a constitutional violation where the violation is "egregious." *See Orhorhage v. INS*, 38 F.3d 488 (9th Cir. 1994). The standard is high and motions to suppress are granted infrequently.

[121] *See* 8 U.S.C. § 1252.

[122] Report at 2.

[123] *See Bridges v. Wixon*, 326 U.S. 136, 163-64 (1945) (Murphy, J. concurring) ("It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime.' Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation.").

In non-asylum cases, removal proceedings usually involve the question of whether an alien may remain in the United States with his or her family. When an alien is removed, the alien and his or her family face two choices: separation from the family or relocation of the entire family, which frequently includes United States citizens and permanent residents, to another country. Once an alien is removed, he or she is ineligible to return to the United States for a minimum of ten years. He or she simply cannot come to the United States to visit family. Further, the cost of air travel for a family may be so prohibitive the alien will be unable to see his or her family unless they leave together.[124] Thus, practically, removal often results in either the destruction of the family unit or the *de facto* deportation of United States family members with the alien. This penalty is perhaps significantly more severe than the penalties in many criminal cases.

The stakes in immigration cases are high, yet the agency involved in adjudicating these cases has a demonstrated track record of inconsistency in the quality of its decision making. According to statistics compiled by the Office of Immigration Litigation ("OIL")[125] with respect to the BIA's determinations of an alien's credibility, the Second Circuit, despite review under the highly deferential substantial evidence test, overturned the BIA's credibility determinations in 46 percent of cases it reviewed in 2007; 86 percent of cases reviewed in 2006; and 37 percent of cases reviewed in 2005. Thus, over a three year period, with regard to credibility determinations,[126] the BIA had an accuracy rate of 63 percent at best and 14 percent at worst.

A study by Syracuse University found that the single best predictor of the outcome of an asylum case was not the alien's country of origin or the nature of the claim itself, but the identity of the particular IJ to whom the case was assigned.[127] Another recent study

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[124] For instance, a round-trip plane ticket to China costs between $1,000 and $1,500 on average. To fly a wife and three children to China to visit their deported husband/father, would cost between $4,000 and $6,000 (possibly more). Many immigrant families cannot afford this. Further, on average, the alien deported to China can expect to make the equivalent of $2,000 or less per year in China, depending on region. Such an alien would not be able to meaningfully contribute to the airfare of family members.

[125] OIL is the component of the Department of Justice that now litigates immigration cases on behalf of the government in the Second Circuit and other Courts of Appeals.

[126] United States Department of Justice, Immigration Litigation Bulletin, Vol. 12, No. 11, pp. 4-5 (November 2008). Available at: http://www.ilw.com/immigdaily/news/2009,0917-OIL.pdf (last visited 12/16/09). The study related to credibility determinations only, not the final outcome of the case.

[127] *See Judges Show Disparities in Denying Asylum*, Transactional Records Access Clearinghouse, Syracuse University (July 31, 2006) (noting that denial rates in randomly assigned asylum cases for the 208 judges compared ranged from a low of 10 percent to a high of 98 percent) available at http://trac.syr.edu/immigration/reports/160/.

that included anonymous reporting by IJs, indicated the IJs feel so pressured to comply with case-completion goals that they lack confidence in the accuracy of their decisions.[128]

As the Report indicates, the Immigration Courts and the BIA are consistently overburdened, under staffed and under funded,[129] but DHS continues to increase the number of aliens it places in removal proceedings each year. It is against this background that the Second Circuit's immigration docket must be evaluated. If the entire system of adjudication of removal cases is to resemble the kind of justice we expect from our system of government, judicial oversight of the agencies involved is absolutely essential. Without it, the system and the quality of its adjudications are likely to deteriorate further. While the Report addresses some of these issues, it does not fully articulate the state of the current system.

Recommendations of the Report

The Report notes the contribution of several factors towards the surge in immigration appeals before the Second Circuit, including the BIA's previous streamlining procedures, a continuing lack of resources for the BIA and the Immigration Courts, the BIA's AWO procedure, and problems with access to quality legal representation before the agency and the Second Circuit.[130] In response, the Report makes several recommendations, most of which are targeted at reforming practices of and before the agency.

The Report's primary suggestion, with which we concur, is that the resources of the Immigration Courts and the BIA should be increased, and the number of Board Members, IJs and support staff should be substantially increased from current levels. This would allow both the IJs and the BIA to issue more reasoned decisions, which, according to the Report, would aid in the identification and disposal of non-meritorious' claims. We note also that reasoned decisions that cite to the record and are supported by legal authority also increase the perception of fairness in the process, a lack of which may be a contributing factor in the increase in the Second Circuit's immigration docket. The quality and consistency of the agency's decisions need improvement, which is only possible if Board Members and IJs have the time and resources they need to devote to hearing cases and issuing decisions. Without more IJs and Board Members, the only way to increase the time and resources devoted to each case would be to significantly reduce the pace of

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[128] Stuart L. Lustig, et al, *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 Georgetown Immigration Law Journal 57 (Fall 2008). Available at: www.ilw.com/articles/2009,0811-lustig.pdf.
[129] Report at 22; *see also* Lustig, et al, supra.
[130] Report at 3, 24-25, 26-27.

adjudications, which would lead to a substantial increase in the backlog of pending cases.[131]

In a related recommendation, the Report suggests the BIA designate more of its decisions as precedential decisions to provide a uniform interpretation of the immigration laws. We concur with this recommendation. More precedential decisions result in more clarity in the legal standards, which allows the IJs to apply the immigration laws in a more consistent manner and also provides aliens, their attorneys and the courts with meaningful standards against which to assess a given case. Increased clarity makes it easier to detect frivolous appeals and serves as a disincentive for filing such appeals.

The Report also recommends that law firms with *pro bono* programs take additional immigration cases at the agency and federal court level. We concur with this commendable goal. The Report, however, does not suggest how to implement this suggestion (something we address below).

The Report suggests attorney mentoring programs for poorly performing attorneys, but notes that some attorneys may not be interested in using such a program. We concur with this suggestion but would like to see a more detailed proposal.

The Report recommends further use of agency, state and Circuit disciplinary procedures against attorneys providing sub-standard representation or those who file fraudulent or frivolous applications. We concur, with caution. Poor performing attorneys do a disservice to their clients, and often may end up putting their clients in a worse position than the clients were in at the beginning of the representation. More problematic are *notarios*, service centers, travel agents and other non-attorney service providers, who often file fraudulent, frivolous or poorly prepared applications on behalf of alien clients. While we recommend vigilant prosecution of individuals and entities engaged in the unauthorized practice of law, and we support the use of disciplinary measures against poor performing attorneys, we caution that attorney discipline measures should comport with the applicable due process standards applied by state disciplinary committees and the federal courts. Such procedural safeguards are not typical of the abbreviated format of the administrative proceedings held before the IJs and the BIA, and the fairness of the system must be maintained. The sanctions power of the BIA and the Immigration Courts should apply to both private attorneys and government attorneys.

Finally, the Report suggests that access to quality legal representation for individuals appearing before the IJs and the BIA should be improved, either through increased *pro bono* representation or by government-funded attorneys. We concur with this recommendation. Quality representation is often most essential before the

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[131] Some IJs in the New York Immigration Court have already begun scheduling hearings in 2012, as earlier dates are not available.

Immigration Courts, where the alien will contest removability and/or apply for relief from removal. It is at this stage that the alien is able to submit evidence, present witnesses and testify regarding his or her claim. It is also the stage of the proceedings where the rules and procedures are often the most complex, and where an alien is most able to benefit from representation by an attorney familiar with the procedures and applicable legal standards. Without competent representation, an alien may not have any idea what kind of evidence he or she needs to submit, or even where and how to file or pay for an application. Unfortunately, providing government-funded attorneys in immigration proceedings would require an act of Congress, which is unlikely to occur. On the other hand, we would welcome a proposal on how to increase *pro bono* representation before the agency, as this may be an obtainable goal if the Second Circuit, the EOIR and local bar associations coordinate.[132]

Additional Proposals

While the Report makes several worthwhile proposals, we note that most of the proposals appear to be outside the scope of the Second Circuit's ability to manage its own docket. Our first three proposals concern the Second Circuit's inherent power to control its docket. Our next three proposals expand on a few of the Report's proposals relating to EOIR reform.

1) Adopt a liberal remand policy

A significant problem in the adjudication of BIA appeals by the Second Circuit is that many BIA decisions (or IJ decisions where the BIA has issued an AWO) lack clear reasoning that allows the Second Circuit to reasonably evaluate the basis of the decisions. Many of these decisions are easily identifiable prior to the briefing and consideration of the case on the merits. Such decisions could be summarily remanded for clarification upon inclusion in the Petition for Review of such decisions.[133]

Additionally, notwithstanding the numerous and complex standards of review that apply to various components of a BIA decision, the Second Circuit maintains the inherent power to remand cases to the BIA where the BIA's decision is not sufficiently clear to allow for meaningful review. We propose that, as a matter of policy, the Second Circuit

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[132] We note that some of the local law schools, such as New York Law School, operate immigration law clinics. It may be worth including these schools in any dialogue regarding this proposal.

[133] We contemplate a simple screening process, not motion practice, that would defeat the efficiency interest this proposal serves. A decision that is not sufficiently clear on its face to apprise the Court of the basis for the decision is flawed as a matter of law and difficult to review in a meaningful way. We anticipate a small but meaningful number of the BIA's decisions will fit this criteria. Under this proposal, the Court would be able to clear these cases from the docket with minimal effort while at the same time assuring aliens are provided with a fair opportunity to be heard on their cases.

remand these cases. A liberal remand policy would help to preserve the Second Circuit's resources while protecting the important due process rights of the individual aliens whose cases are before it. It will also send a strong message to the BIA that its decisions must be clear and sufficiently well reasoned to allow the Second Circuit the opportunity for meaningful review. While this will increase the expenditure of resources by the BIA, this additional expenditure is likely to motivate the BIA to issue better decisions initially so that it does not have to revisit cases upon remand. The increased administrative burden on the BIA is also preferable to either an increased burden on the Second Circuit, or the problems with fundamental fairness and due process that would occur if the Second Circuit adopted an approach targeted at either discouraging or dismissing alien appeals.

2) Discourage motion practice and other abusive tactics by the government

OIL has recently begun opposing motions for a stay of removal filed by aliens and has also increased its use of motions for summary affirmance and motions to dismiss. Previously, the Second Circuit and DHS arranged a forbearance policy where DHS would agree not to deport an alien while his or her appeal was pending if a motion for stay was filed. This was done to prevent the Second Circuit from expending its resources adjudicating stay motions. OIL has begun opposing motions to stay. As a result, notwithstanding the DHS and Second Circuit forbearance policy, the Second Circuit is now faced with the prospect of having to adjudicate motions it had arranged not to adjudicate.

Additionally, OIL has been filing motions to dismiss and motions for summary affirmance with increasing frequency. The result is many immigration appeals now involve significant motion practice, whereas six months to a year ago such motions were exceedingly rare. The standard for surviving a motion for summary affirmance is very low. An alien need only show that his or her appeal is not frivolous.[134] However, responding to the motion is time consuming and requires a recitation of the facts and issues of the case similar to that required in a brief on the merits, as well as substantial research and drafting of issues that will not be explored in the merits brief. The result is that many hours of additional time are required to represent an alien in a BIA appeal before the Second Circuit, a fact that is ultimately likely to affect the legal fees involved.

Additionally, if such a motion is denied and the case is heard on the merits, it essentially requires twice the amount of effort from the Second Circuit as hearing the case on the merits alone. Such motions place an additional burden on the Second Circuit and

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[134] Summary affirmance is appropriate only in cases where a petitioner can raise no non-frivolous grounds for appeal. *See Love v. McCray*, 413 F.3d 192, 194 (2d Cir. 2005); *United States v. Monsalve*, 388 F.3d 71, 73 (2d Cir. 2004). The standard for summary affirmance mirrors the standard for advancing an Anders motion. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (superseded by statute on other grounds).

on the aliens before it (who, as the Report notes, are often faced with difficulty in obtaining affordable legal representation). While the government claims that its motion practice is intended to preserve the resources of the Second Circuit, members of the bar have speculated that the real intent is to increase the cost and difficulty of seeking review of BIA decisions in light of indications of the Second Circuit's growing frustration with its immigration docket.

The government may save many arguments for its merits brief without risk of waiver. For example, frivolousness is an issue that can be raised in a principal brief, as well as the fugitive disentitlement doctrine. Eliminating or restricting motion practice in immigration cases would substantially benefit the efficient disposition of immigration cases by reducing the amount of the Second Circuit's resources consumed by each case.

3) Expand the Second Circuit's *Pro Bono* panel

The Second Circuit maintains a list of attorneys it has determined meet necessary levels of immigration and appellate experience to represent a petitioner on appeal: the *Pro Bono* Panel (hereinafter "the Second Circuit Plan").[135] Eligibility is open to private attorneys with at least three years of appellate experience.[136] The application process requires completion of a four-page application, submission of three writing samples, preferably appellate briefs in which the applicant was the prime author, admission to the bar of the Second Circuit and application within a particular time period.[137] The goal of the Second Circuit plan is to "provide *pro bono* counsel to *pro se* parties in civil appeals in which briefing and argument by counsel would benefit the Court's review."[138] The Second Circuit acknowledges the program depends both upon the volunteer efforts of the private bar and the Second Circuit's commitment to providing service opportunities to attorneys.[139]

The Second Circuit is not the only United States Circuit Court of Appeals with such a panel, but from a review of the other federal circuit courts' web sites, only two conspicuously advertise their panels: the Seventh Circuit[140] and the Ninth Circuit.[141] The Ninth Circuit's immigration docket is the largest of the federal circuit courts of appeals;

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[135] United States Court of Appeals for the Second Circuit Plan for the Appointment of *Pro Bono* Counsel (revised 2006), at 2 available at http://www.ca2.uscourts.gov/Docs/ProBono/Copy%20of%20Plan%20and%20Application.pdf.

[136] *Id*. at 2.

[137] *Id*.

[138] *Id*.

[139] *Id*.

[140] United States Court of Appeals for the Seventh Circuit Volunteer Panel Attorney Questionnaire available at http://www.ca7.uscourts.gov/forms/cjaques.htm.

[141] United States Court of Appeals for the Ninth Circuit *Pro Bono* Program Handbook, at 4 available at http://www.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf.

the Second Circuit occupies second place, while the remaining Circuits' dockets are much smaller. The Ninth Circuit *Pro Bono* Program (hereinafter "the Ninth Circuit Plan") has been in existence since 1993, and participants praise it.[142] Thus, it may be an acceptable model for handling extremely large dockets.

The Ninth Circuit Plan differs from the Second Circuit Plan in a few aspects. One is purpose: the Ninth Circuit Plan was born of the idea to give young lawyers and law students early experience,[143] while the Second Circuit Plan's chief goal is to provide *pro se* parties with counsel and assist the Court with reducing its *pro se* docket.[144] Second, the Ninth Circuit Plan reimburses attorneys for travel within the Circuit, accommodation in a hotel and meals. It also reimburses attorneys for other expenses related to representation, such as:

- Photocopying and/or necessary printing costs for briefs and excerpts of record, motions and a petition for rehearing. (*See* 9th Cir. R. 39-1.2 and 39-1.3.)
- Computer-assisted legal research costs, not to exceed $1000.
- PACER fees incurred for accessing the District Court record of the case on appeal, not to exceed $1000.
- Documented long-distance telephone toll calls to the client.
- Postage and delivery up to $1000 for reasonable fees.[145]

Third, the eligibility requirements for the Ninth Circuit Plan differ. The Ninth Circuit Plan is open to any attorney in good standing who is a member of the Ninth Circuit bar and advises a District Coordinator (attorneys who volunteer to locate interested counsel within their respective lists) that the attorney wishes to accept Ninth Circuit appeals *pro bono*.[146] The District Coordinator distributes the cases to attorneys on the panel.[147]

By using the Ninth Circuit Plan as a model on reimbursement and eligibility, the Second Circuit may reduce the backlog in its immigration docket and receive better briefed cases. Specifically, adopting the Ninth Circuit Plan will allow an influx of attorneys willing to take cases *pro bono*, less-experienced but eager and competent

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[142] Letter from Leonard J. Feldman, Esq. to Washington State Bar Association, December 2003, available at http://www.wsba.org/media/publications/barnews/2003/dec-03-feldman.htm.
[143] United States Court of Appeals for the Ninth Circuit *Pro Bono* Program Handbook, at 1.
[144] United States Court of Appeals for the Second Circuit Plan for the Appointment of *Pro Bono* Counsel (revised 2006), at 1.
[145] United States Court of Appeals for the Ninth Circuit *Pro Bono* Program Handbook, at 8-9.
[146] *Id*. at 4; Letter from Leonard J. Feldman, Esq., to Washington State Bar Association, December 2003.
[147] Letter from Leonard J. Feldman, Esq., to Washington State Bar Association, December 2003.

attorneys will be able to participate, and all participating attorneys will be able to recoup some costs.

The objection that reducing the eligibility barrier as described will add to the number of poorly written briefs is understandable. However, the Ninth Circuit does not report an increase in poorly written briefs and, in fact, reports about a 50 percent rate of relief (at least partial
reversal or other termination favorable to *pro bono* client) for those petitioners whose cases are part of the Ninth Circuit Plan.[148] Other courts do not require several years' experience in the particular field for inclusion on their *Pro Bono* Panels. For example, the Southern District of New York appears to allow on its *pro bono* panel any attorney who is a member of the bar of that court in good standing and willing to accept cases, including newly admitted attorneys subject to the Court's approval.[149] In addition, some states appear to allow less-experienced criminal attorneys to receive appointments for criminal trials, appeals and post-conviction petitions, cases for which the attorneys may bill the respective court or public defender office.[150] Thus, allowing less-experienced attorneys to be eligible to receive cases *pro bono* is not new and any fear of the Second Circuit encouraging incompetent briefs may be unfounded.

An alternative to reducing the barrier completely to the level of the Ninth Circuit Plan is to allow eligibility upon completion of a training program between an aspiring applicant with less experience and one or more approved experienced immigration appellate attorneys. Such an idea is not new. Several United States District Courts maintain Criminal Justice Act ("CJA") Panel lists of attorneys willing and qualified by the respective District Courts to accept paid appointments of criminal defendants. Several of those District Courts allow for aspiring applicants to obtain the needed experience by 1) operating as second-chair attorneys to members of the CJA Panel on a limited number of cases and 2) completion of CLE courses on criminal defense and the Federal Sentencing Guidelines. For instance, the Southern District of New York and the District of New Jersey have such a training program.[151] The Southern District of New York even allows the trainee attorney to bill for his or her time (at a reduced rate).[152]

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[148] United States Court of Appeals for the Ninth Circuit *Pro Bono* Program Handbook, at 3, available at the Southern District of New York *Pro Se* Clerk's office.

[149] United States District Court for the Southern District of New York Information Guide for the *Pro Bono* Panel (Rev. 2/017) at i available at the *Pro Se* Office of the Southern District of New York.

[150] Virginia Indigent Commission Certification Application for Court Appointed Counsel, Available at: http://www.publicdefender.state.va.us/certapp.htm; Office of the Public Defender, State of New Jersey Pool Attorney Application Process available at: < http://www.state.nj.us/defender/PoolAttorneyApplicationProcess_8-25-08.rtf>

[151] Press Release, *Criminal Justice Act Mentoring Program Approved for the Southern District of New York*, Oct. 23, 2008, available at: http://www.nysd.uscourts.gov/cases/show.php?db=notice_cja&id=18.

[152] *Id*.

The training requirement can vary for attorneys of different experience levels. This model of training is similar to that in some states allowing attorneys to receive state criminal appointments. For example, for the newest or least experienced attorneys in criminal law, a state may require several CLE hours and limit appointments to misdemeanors.[153] Those with substantial criminal experience may receive homicide or capital appointments.

The aspiring applicant would bear the burden of beginning and completing the training process. At application, the aspiring applicant would certify, along with the mentor(s), that he or she completed the training program. Specifically, the Circuit could require an aspiring applicant to find a Second Circuit Plan attorney who is willing to mentor/supervise through a certain number of immigration appeals and to attend a CLE specifically focused on Second Circuit immigration practice. To aid aspiring applicants in locating Plan attorneys willing to mentor/supervise, the Second Circuit could publish the contact information of the Second Circuit Plan members on its website and indicate those willing to mentor/supervise,[154] allowing aspiring applicants the opportunity to contact those Plan attorneys on their own. In addition, the mentoring/supervising attorney may also, upon prior approval by the Circuit, be an experienced practitioner who is not a member of the Plan. After completion of the training, the Second Circuit should allow the aspiring attorney to immediately apply for inclusion on the Plan list and should accept rolling admissions.

The Second Circuit's Plan explicitly acknowledges expenses are not generally reimbursable, though some might be upon an application to the Office of Legal Affairs showing undue hardship on the attorney.[155] By reimbursing attorneys to a limited extent, the Second Circuit should be able to attract additional attorneys to its *Pro Bono* Plan. Also, the Ninth Circuit's Program actively encourages prevailing attorneys to seek statutory attorneys' fees and then offset the Court's reimbursement against them. The Second Circuit should similarly encourage prevailing attorneys to seek statutory attorneys' fees, because Plan members may be unaware they are allowed to seek such fees.

4) Require the BIA to make all of its decisions available to the public

While the Report stresses the importance of having the BIA issue precedential decisions, it does not mention the BIA's numerous other decisions. Some of the BIA's non-precedential decisions are available from electronic databases like Lexis and Westlaw, however, the number is substantially limited and the process by which such decisions are

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[153] Virginia Indigent Commission Certification Application for Court Appointed Counsel, *see* note 31.
[154] The District of New Jersey similarly publishes the names and contact information of CJA Panel attorneys in its district and leaves it to aspiring applicants to contact those attorneys willing to mentor.
[155] United States Court of Appeals for the Second Circuit Plan for the Appointment of *Pro Bono* Counsel (revised 2006), at 4 (page 4 not numbered, but follows numbered page 3).

chosen for public release is unclear. As noted above, the BIA's decisions suffer from a marked lack of consistency. This is due, in part, to the lack of guidance in the form of precedential decisions.

However, the lack of consistency is also due to the fact the vast majority of BIA decisions are not subject to public scrutiny because they are unavailable to the public to review and compare. Thus, it is difficult to determine how (and often *if*) the BIA is applying its own precedents. This makes it difficult for aliens and their attorneys to evaluate a claim to predict the likely outcome, and it also makes it difficult to spot when the BIA is diverging from its established standards. To rectify this situation, the BIA should be required to publish all of its decisions, even if they are not designated as precedential decisions. The agency, the Second Circuit, the bar and the aliens involved will all benefit from the additional transparency in the system, the consistency in adjudications and the applications of the legal standards developed by the BIA that would be promoted by this proposal.

5) Persuade DHS to review its policies regarding reopening cases in which an alien is eligible for relief but precluded from applying due to the procedural posture of the case

The statute and regulations allow an alien to file one motion to reopen his or her removal proceedings within 90 days of the BIA's final decision in the case.[156] However, there are exceptions. The most notable exception is where an alien is seeking to reopen proceedings in order to apply for asylum based on changed country conditions. The time and number limits may also be tolled where the alien has been adversely affected by ineffective assistance of counsel.

However, it is not uncommon for an alien to become eligible to apply for lawful permanent residency status after proceedings have concluded and after the expiration of the 90-day period. The BIA may reopen an alien's removal proceedings in such a circumstance if an exception applies or the parties file a joint motion – that is, if the ICE Assistant Chief Counsel[157] in the case consents to joining in a motion to reopen. To this end, ICE previously had a policy to join in motions to reopen where an alien became eligible to adjust status, was not eligible at the time of the prior hearing and merited a favorable exercise of discretion. However, it appears that ICE policy, at least at the local level, strongly disfavors joining in motions to reopen. The result is that aliens who are eligible to adjust status are left without a forum for doing so because more than 90 days have passed since the BIA's decision, ICE refuses to join in a motion to reopen and no

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[156] *See* 8 U.S.C. §§ 1229a(c)(7); 8 C.F.R. § 1003.2(c).

[157] ICE (Immigration and Customs Enforcement) is the DHS agency that prosecutes removal proceedings and arrests, detains and ultimately deports aliens. The government is represented by the ICE Office of Chief Counsel in removal proceedings, with an Assistant Chief Counsel serving as the prosecutor.

exceptions apply. It is not difficult to imagine that this creates an incentive to file motions to reopen based on asylum claims that are either weak or lacking in merit. Many of these motions to reopen are denied by the BIA and then appealed to the Second Circuit.[158]

Compounding the problem is OIL's apparent policy of limiting settlement. Only cases that would clearly be the subject of an adverse decision by the Second Circuit and would result in criticism by the Second Circuit or in bad publicity seem to qualify for settlement consideration. Decisions that could result in bad publicity might be those in which an IJ has acted in a biased, hostile or inappropriate manner, or the BIA has clearly and obviously applied the wrong legal standard to a case.[159] This apparent policy has limited the effectiveness of the Second Circuit's Civil Appeals Management Plan (CAMP) program in immigration cases.

The result of these two DHS policies is an overburdened immigration docket in the Second Circuit. Cases that could be resolved through the joint motion process often unnecessarily end up before the Second Circuit, and cases before the Second Circuit stay before it rather than being resolved by the parties. This often happens even though the alien is eligible to legalize his or her status. The Second Circuit should attempt to persuade ICE that it is not in the best interests of the Second Circuit or the system as a whole to maintain policies that promote litigation and prevent eligible aliens from legalizing their status.[160]

6) Eliminate entirely the Affirmance Without Opinion procedure and require the BIA to explain its reasoning in all cases

The BIA's AWO procedure is commonly cited as a principal cause of the initial surge in the Second Circuit's immigration docket. However, as noted by the Report, even though the BIA's use of AWOs has declined, the BIA often issues cursory decisions that contain little reasoning and leave the alien with little confidence that the BIA actually considered the facts, arguments and evidence in the case. The entire administrative system involved has been operating in accordance with an emphasis on speed and efficiency since 2002 or earlier. The result is numerous decisions of the federal courts criticizing the decisions of the BIA and IJs, a massive surge in the number of immigration appeals before the Second Circuit, and a lack of faith in the fairness of the system by most of the parties involved. The BIA's decisions show a demonstrated lack of quality and consistency that raises questions about whether or not its adjudications meet basic standards of justice.

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[158] It is important to note that the appeals are usually out of desperation to remain in the United States with the alien's family members, not a desire to game the system or file frivolous paperwork, as the filing of a petition for review does not actually prolong an alien's stay in the United States.

[159] It is the authors' experience that OIL will nevertheless not settle a case prior to the filing of the alien's brief in such cases, even where the error is brought to its attention at the beginning of the case.

[160] This is especially so since the aliens are often only eligible to legalize their status as a result of having a United States citizen spouse or child that has filed an immigrant petition on their behalf.

There appears to be a correlation between the agency's emphasis on speed and the criticism of its decisions. It is time for the agency to slow down and issue reasoned decisions to ensure that the interests of justice, and not just case-completion goals, are served.

Conclusion

The Committee recommends the adoption of the Report and the additional proposals discussed above.

While there are systematic and pervasive problems in the administrative adjudication system that contribute to the Second Circuit's immigration docket, these problems militate in favor of judicial oversight of the BIA's decisions and decision-making process. However, the Second Circuit has the ability to control its docket to minimize the impact of the immigration docket, assure the fair and efficient adjudication of immigration appeals, and encourage the agencies involved to adopt policy and structural changes to improve the fairness and accuracy of the system as a whole. Further, the agencies involved have the ability to initiate changes to begin to fix some of the current flaws in the system that have caused the Second Circuit's large immigration docket. The proposals in the Report, and the additional proposals herein, provide a useful starting point for reform of agency practices and enhancement of the Second Circuit's docket-control measures.

New York County Lawyers' Association
Committee on the Federal Courts
Gregg Kanter, Chair

Subcommittee on Immigration Report
Recommendations
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