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I. THE UNBEARABLE WEIGHT OF PAPER

Anyone involved with U.S. immigration law has likely heard of the recent surge in immigration litigation in the federal courts of appeals. In September 2005, one needed only to walk through the Second Circuit’s case management offices to get a feel for the magnitude of this surge: Mountains of briefs had formed in almost every available space. Narrow paths snaked through the valleys, leading to desks fortified on all sides by thick walls of administrative records. The topography of these offices had been shaped by massive quantities of paper, deposited over the previous four years by people seeking judicial review of Board of Immigration Appeals (“BIA”) decisions. Whereas the Second Circuit had rarely ever received more than thirty such cases in any given month before 2002, filings began to rise dramatically that year.\(^1\) Between April 2002 and September 2005, the court received more than three times as many petitions for review of BIA decisions as it had received during the previous thirty years combined.\(^2\) Similar increases have been felt in courts of appeals around the country, with the heaviest volume in the Second and Ninth Circuits.\(^3\) The surge has been widely reported, but it is hard not to be struck by its sheer weight when actually confronted by the stacks of paper working their way through the courts. When one considers that each administrative record represents the life of a person or family facing expulsion, all of that paper becomes even heavier.

What are the causes of the immigration surge? Why are so many people challenging BIA decisions in federal court? This essay discusses a recent empirical study aimed at answering that question.\(^4\) The study focuses specifically on one type of appeal: the petition for review of an expulsion order under the Hobbs Act.\(^5\) It draws on data from the federal courts and the Department of Justice to illustrate the dynamics of immigration litigation generally, and to explore a number of factors that might have contributed to the enormous increase in petitions for review that began in 2002. Although the study is only a starting point,

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1. See infra Figure 1.
2. Based on data collected by the Administrative Office of the United States Courts (AO), the Second Circuit received 2360 petitions for review between April 1, 1972 and April 1, 2002; it received 7723 petitions for review between April 1, 2002 and October 1, 2005. For a description of how these data were obtained and analyzed, see infra Part IV. Petitions for review continue to be filed in the Second Circuit in high volume. Since October 2005, however, the court has made significant progress in adjudicating these cases, largely eliminating the mountains of paper that had once dominated its offices. See John R.B. Palmer, The Second Circuit’s “New Asylum Seekers”: Responses to an Expanded Immigration Docket, 55 Cath. U. L. Rev. 965, 976 (2006).
3. The surge in the Ninth Circuit has been about twice as large as that in the Second Circuit. Based on the AO data discussed below in Part IV, the Ninth Circuit received 11,238 petitions for review between April 1, 1972 and April 1, 2002; it received 18,263 petitions for review between April 1, 2002 and October 1, 2005.
it provides some interesting insights into the nature and causes of this phenomenon.

Observers generally agree that the surge is closely linked to recent procedural changes at the BIA, which substantially increased the volume of decisions reached by that tribunal, and led litigants to appeal those decisions at a higher rate. The study addresses the increased appeal rate, and proposes three contributing factors. First, the BIA’s procedural changes have caused the BIA to deny a larger proportion of aliens’ appeals, and this has meant a larger proportion of decisions result in final expulsion orders. Second, when the BIA began adjudicating a higher volume of cases, it drew more heavily from the pool of non-detained aliens than it did from the pool of those in detention, and detained aliens appeal BIA decisions at a lower rate than non-detained aliens. Third, there has been a fundamental shift in behavior on the part of immigration lawyers and their clients. The high volume of BIA decisions, an initial rush to challenge streamlined BIA decisions on their face, and a general dissatisfaction with BIA review have all caused immigration lawyers to move significant segments of their practices into the federal courts for the first time.

Part II of this essay discusses the study’s methodology. Part III provides some background on the BIA’s procedural changes and the increase in appeal rate. Part IV looks closely at the three factors proposed as possible causes for that increase, and at a number of other factors explored in the study. The essay concludes that while there is still much uncertainty as to precise causation, it is nonetheless clear that the increased appeal rate is closely linked to the BIA’s procedural changes, and that the end result has been a major shift in the dynamics of immigration litigation.

II. A NOTE ON METHODOLOGY

The study focuses on why the rate of appeal of BIA decisions has increased. This is obviously a complicated question involving all of the complexity of human behavior, and the study does not purport to answer it. Instead, by compiling and analyzing the available data, the study simply assesses the degree to which various factors may have been influential.

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One of the primary sources of data on which the study relies is the Administrative Office of the U.S. Courts ("AO"). Among other things, the AO gathers and assembles data on every case filed and every case terminated in the U.S. Courts of Appeals. The AO data sets are sufficiently detailed to identify petitions for review of BIA decisions, but not sufficiently detailed to identify other types of immigration cases, such as habeas corpus petitions challenging expulsion orders.

The other key source of data is the Executive Office for Immigration Review ("EOIR"), which provided information on monthly BIA decisions in response to a Freedom of Information Act ("FOIA") request. This information is combined with the AO data to estimate overall monthly appeal rates — i.e., the proportion of BIA decisions issued each month that were challenged through petitions for review. These estimates are calculated as the ratio of the number of petitions for review filed in month \( m+1 \) to the number of BIA decisions issued in month \( m \).

While the AO and EOIR data provide the bulk of the information necessary to construct a broad picture of the immigration surge, the study also analyzes discrete samples of cases at both the BIA and federal court levels to obtain more detailed responses to specific questions. Samples of BIA decisions were obtained from an internal EOIR database, and the Public Access to Court Electronic

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8. These data sets are available to the public through the Inter-university Consortium for Political and Social Research (ICPSR) at http://www.icpsr.umich.edu. The AO data sets are listed under the title “Federal Court Cases: Integrated Database Series.”


10. The months are staggered in this manner on the assumption that people tend to wait more than 15 days from the date of their BIA decisions to file their petitions for review, and that no more BIA decisions are issued during the first half of the month than the second. If those assumptions hold (and the data suggest that they do), then staggered-month estimates will be more accurate than estimates using the same months. See Palmer, Yale-Loehr & Cronin, supra note 4, at 51 n.239. Nonetheless, these are still estimates, not exact rates. See id. at 52 n.240.

11. This database was relied on purely for statistical purposes and only for information that is a matter of public record. The database contains all decisions rendered after June 2004, see Update on the BIA, IMMIGR. LITIG. BULL., Sept. 2004, at 2 (internal Department of Justice publication released pursuant to a FOIA request and formerly available at http://www.usdoj.gov/civil/oi/I/September2004.pdf) (on file with author), and appears, based on a comparison with the figures provided in the EOIR’s FOIA response, to contain most decisions rendered after December 2003. See Palmer, Yale-Loehr & Cronin, supra note 4, at 37 n.196 and accompanying text.
Records (PACER) website was used to determine which of these decisions had been challenged in the courts of appeals. In addition, a sample of Second Circuit cases was taken from that court’s docket database and records room.

The study analyzes a large amount of data, but the conclusions that can be drawn from these data are limited for a number of reasons. First, the data represent only a miniscule proportion of the information that would be needed to provide a truly complete picture of the immigration surge and a full analysis of its causes. Second, they are subject to error at a number of stages, from collection to processing. While efforts were taken to minimize this error, there has not yet been any analysis of the degree to which error may exist, particularly in the reporting and collection phases.

III. “STREAMLINING” THE BIA

The story begins with the BIA, an administrative tribunal within the Department of Justice that provides appellate review over expulsion proceedings. Like most tribunals, the BIA has long been concerned with backlogs in its caseload, and this issue took center stage in the 1990s when an increase in challenges to immigration judge (IJ) rulings led to the accumulation of tens of thousands of appeals on the BIA’s docket.
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In October 1999, the Department of Justice responded with a regulation that attempted to streamline the BIA’s appellate review procedures. Among other things, the regulation authorized the Board Chairman to designate categories of cases as suitable for review by single board members, as opposed to the usual three-member panels, and it authorized those single board members to affirm IJ decisions in certain circumstances without writing any opinion. The BIA first began issuing these so-called affirmances without opinion (AWOs) in September 2000, but only in limited categories of cases.

The year 2002 is when streamlining really took off. In February of that year, with over 56,000 cases pending before the BIA, the Attorney General an-
nounced a proposed regulation to expand streamlining and clear the backlog. The next month, while the regulation was still in its notice and comment period, the BIA Chairman added two large categories to the list of appeals eligible for single-member AWOs: (1) cases involving claims for asylum, withholding, and CAT relief; and (2) cases involving claims for suspension of deportation or cancellation of removal. Expansion continued in May 2002, when the BIA Chairman designated as eligible for single-member AWOs all cases involving appeals of IJ or Immigration and Naturalization Service decisions over which the BIA had jurisdiction — essentially all cases. The Attorney General’s new regulation was published in August 2002, effectively codifying and further expanding the streamlining that had already occurred.

The 2002 regulation makes single-member adjudication the norm, with three-member panels the exception, and it maintains the broad availability of AWOs. The regulation also restricts the BIA’s standard of review of IJ factual findings. Whereas the BIA could previously review such findings de novo, it is now required to defer to them unless they are clearly erroneous and it may no longer engage in its own fact finding. Finally, the regulation reduces the number of authorized board members from twenty-three to eleven, with the stated rationale of improving “cohesiveness and collegiality.”

The purpose of the streamlining effort was to decide more cases in less time, and the BIA’s procedural changes have been very effective in that regard. In March 2002, the volume of BIA decisions approximately doubled from an aver-

22. See Memorandum from Paul W. Schmidt to all BIA Members (Aug. 28, 2000), reprinted in Dorsey & Whitney LLP, supra note 6, at app. 3; Memorandum from Paul W. Schmidt to all BIA Members (Nov. 1, 2000), reprinted in Dorsey & Whitney LLP, supra note 6, at app. 17.


24. See Memorandum of Lori L. Scialabba to all BIA Members (Mar. 15, 2002), reprinted in Dorsey & Whitney LLP, supra note 6, at app. 22.

25. Although the Chairman’s memorandum referred specifically to “Withholding of Deportation,” this, presumably, encompassed both the old INA section 243(h) relief as well as the current INA section 241(b)(3) relief.

26. See Memorandum of Lori L. Scialabba to all BIA Members (May 3, 2002), reprinted in Dorsey & Whitney LLP, supra note 6, at app. 23.

27. See Dorsey & Whitney LLP, supra note 6, at 19.

28. See Ghassan v. INS, 972 F.2d 631, 635 (5th Cir. 1992). Although the BIA had the authority to review IJ findings de novo, it often deferred to such findings in practice. See, e.g., In re O-D-, 21 I. & N. Dec. 1079, 1083–84 (BIA 1998); In re Burbano, 20 I. & N. Dec. 872, 874 (BIA 1994). See generally ILP, supra note 16, § 3.05[5][b].


30. Id. at 54,902, 54,905 (codified at 8 C.F.R. § 1003.1(d)(3)(iv)).

31. Id. at 54,894.
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age of almost 2,000 decisions per month to an average of over 4,000. As the Second Circuit's Judge Jon O. Newman described it, “[i]t's as if a dam had built up a massive amount of water over the years, and then suddenly the sluice gates were opened up and the water poured out.”

As one would expect, the volume of petitions for review reaching the federal courts began to rise almost immediately (see Figure 1). But rather than simply doubling in proportion to the increase in BIA decisions, the increase in petitions for review was about five-fold. That means that there are not only more BIA decisions potentially subject to challenge, but also a larger proportion of these decisions are actually being challenged. Whereas about 7% of the BIA's decisions were challenged nationwide before March 2002, about 25% are now being challenged (see Figure 2). For BIA decisions arising within the Second and Ninth Circuits, the appeal rate has now surpassed 40%.

FIGURE 1: MONTHLY PETITIONS FOR REVIEW OF BIA DECISIONS NATIONWIDE

January 1971 through September 2004


IV. EXPLAINING CHANGES IN OVERALL APPEAL RATE

The rate at which any pool of adjudicative decisions is appealed is ultimately a question of human behavior that depends on many individual choices.


33. See Palmer, Yale-Loehr & Cronin, supra note 4, at 54 tbl.1.
Each choice may be influenced by relatively fixed characteristics of the decision and the litigants in question, as well as a host of other factors. For instance, a BIA decision that does not leave the alien with a final order of removal generally cannot be challenged in a petition for review, so that fixed characteristic should have a large impact on the choice of whether or not to appeal.34 Similarly, an alien with no resources and no access to counsel will generally have a hard time filing a petition for review,35 so those relatively fixed characteristics should also have a large impact on the choice to appeal.

Changes in appeal rate may occur, in part, because of changes in the composition of the pool of decisions in terms of the characteristics described above. Such changes may be caused by the adjudicative body itself or by external forces. For instance, the BIA might cause an increase in appeal rate by affirming more expulsion orders against wealthy aliens who have easy access to counsel. Alterna-

34. See Palmer, Yale-Loehr & Cronin, supra note 4, at 20–21 nn.99–107 and accompanying text.

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tively, a legal aid provider might cause an increase in appeal rate by expanding its services to more indigent aliens; or, a change in law might cause an increase in appeal rate by making more decisions vulnerable to reversal. There may also be cross-effects among the factors affecting appeal rate, and feedback loops between appeal rate and many of those factors. For instance, an increase in expulsion orders against indigent aliens may cause legal aid providers to expand their services for this group. Or, an increase in appeal rate may result in more reversals by the circuit courts, and this, in turn, may encourage litigants to appeal even more. In other words, appeal rate is the product of a complex, dynamic process.

To assess the factors that may have contributed to the increase in the rate at which BIA decisions are being appealed, the study identifies a list of possibilities, and then analyzes the degree to which these possibilities are supported by the available data. The study looks at two types of simple mechanisms by which the change in appeal rate could have occurred: changes driven directly by the BIA in the composition of the pool of its decisions and broader changes in litigant behavior.

A. Proportion of Final Orders of Removal Within the Pool of BIA Decisions

Overall appeal rate is measured as the ratio of the number of petitions for review to the number of BIA decisions during a given period of time. This measurement treats BIA decisions as a homogenous group, masking the variation among decisions and litigants in terms of the types of characteristics just discussed. Yet, such variation is crucial to understanding changes in the overall appeal rate. If we were to separate the pool of BIA decisions into sub-groups according to certain characteristics, we would find that each sub-group has a different rate of appeal. Furthermore, we would find that the proportion of each sub-group within the pool of BIA decisions changes over time. This might result from changes in the way the BIA decides cases, the composition of the pool of cases that the BIA chooses to decide in a given period of time, or the composition of the pool of IJ decisions that are appealed to the BIA. Whatever the cause, a change in composition of BIA decisions would likely affect the overall rate of appeal.

The most straightforward characteristic that could affect appeal rate is outcome. A BIA decision that does not leave the alien with a final order of removal generally cannot be challenged in a petition for review, so we should expect attempts at such challenges to be extremely rare.36 If we were to divide the pool of BIA decisions into a sub-group of decisions that constitute final removal orders and a sub-group of those that do not, we would expect the appeal rate for the latter sub-group to be dramatically lower than the appeal rate for the former.

36. This is not to say that such challenges cannot be brought, simply that they generally cannot be brought as petitions for review, and so are not factored into the measurement of appeal rate. See Palmer, Yale-Loehr & Cronin, supra note 4, at 35 nn.188–91 and accompanying text.
Consequently, an increase in the proportion of BIA decisions that constitute final orders of removal should cause an increase in the overall rate of appeal.

There is not much data on the proportion of final orders of removal within the pool of BIA decisions, but the rate at which the BIA rejects appeals can be used as a good proxy. Because the vast majority of appeals at the BIA level are filed by aliens, as opposed to the government, an increase in rejection rate should mean an increase in the proportion of final orders of removal.

Two sources of empirical data suggest that the BIA’s rejection rate increased substantially in 2002. First, the Los Angeles Times reports that the BIA rejected 86% of its appeals in October 2002 as compared with 59% the previous October. Although the BIA disputes the accuracy of these figures, a subsequent study by the U.S. Commission on International Religious Freedom (USCIRF) also shows a substantial increase in the proportion of BIA decisions that reject aliens’ appeals: from 75% in fiscal year 2001, to 98% in fiscal year 2002, 97% in fiscal year 2003, and 94% in fiscal year 2004. The USCIRF study looks only at


38. Lisa Getter & Jonathan Peterson, Speedier Rate of Deportation Rulings Assailed, L.A. Times, Jan. 5, 2003, at A1. The paper also published a table on its website, showing, among other things, the BIA’s monthly rejection rate from June 2000 through October 2002. The figures for monthly rejection rate for 2001 ranged from 35% to 72%, with an average of 62%. For March through October 2002, they ranged from 78% to 86%, with an average of 81%. That table is no longer available online, but is on file with the author and reported graphically in Dorsey & Whitney LLP, supra note 6, at app. 24.

39. See Letter from Lori Scialabba, Chairman, Board of Immigration Appeals, to Los Angeles Times Editor (Jan. 9, 2003), available at http://www.usdoj.gov/eoir/press/03/getter.pdf; Letter from Lori Scialabba, Chairman, Board of Immigration Appeals, to The American Bar Association (Dec. 22, 2003), available at http://www.usdoj.gov/eoir/press/03/ABA.pdf (stating that the Los Angeles Times statistics were “unsubstantiated”). In criticizing the Los Angeles Times figures, Chairman Scialabba wrote that “the Board does not track decisions by outcome.” Id. The USCIRF study discussed below, however, indicates that the EOIR does track this information. See Kyle, Fleming & Scheuren, supra note 37, at 414 n.19.

40. These percentages are calculated from the numbers reported in United States Commission on International Religious Freedom, Report on Asylum Seekers in Expedited Removal 672 tbl.6 (Feb. 2005) [hereinafter USCIRF]. For the purpose of these calculations, rejection rate is defined as the proportion of BIA decisions in alien appeals that are listed in the USCIRF table under the categories “dismiss” or “other” (as opposed to “sustain” or “remand”). Earlier versions of this essay and the empirical study erroneously reported the percentages for fiscal years 2001 and 2004 as 87% and 96%, respectively. This was based on an obvious error in my calculations, compounded by a small rounding error in the USCIRF calculations. See E-mail from Mark Hetfield, ICPSR, to John R.B. Palmer (Feb. 1, 2006, 10:24:12 EST) (on file with author); cf. Kyle, Fleming & Scheuren, supra note 37, at 413–15 & tbl.T. An alternate definition of rejection rate would be simply the proportion listed under the category “dismiss,” in which case the percentages would be 66%, 93%, 94%, and 93% for fiscal years 2001, 2002, 2003, and 2004, respectively.
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asylum seekers subject to expedited removal proceedings, so these figures may not reflect the actual rejection rate for the overall pool of appeals. It is reasonable to assume, however, that whatever the overall rejection rate was, it increased between 2001 and 2002 for the same reasons that the rejection rate for expedited removal appeals increased.

One objection to these numbers may be that they only compare the periods immediately before and after 2002. It may be that the first phase of the BIA’s streamlining — from 2000 to 2002 — resulted in a decrease in rejection rate for a number of reasons, such as the types of cases chosen for streamlined review, their age, and their level of complexity. If that occurred, then the increase in rejection rate seen in 2002 may have been, at least in part, simply a return to the pre-2000 rate.

Even leaving the empirical evidence aside, however, one would expect the rejection rate to have increased above its historical levels because the BIA was directed to give more deference to IJ findings of fact. Whereas the BIA could previously review findings of fact de novo, it now reviews them only for clear error. Given this change in standards, it would be surprising if the BIA was not rejecting a larger proportion of appeals.

Finally, some observers have suggested that when the Attorney General reduced the size of the BIA from twenty-three authorized members to eleven, he did so, first, by removing those members who were most prone to disagree with his positions, and second, in such a way as to undermine the decisional independence of remaining members. While these propositions are likely to be disputed by the Department of Justice, the first one is not a big leap from the Department’s stated rationale for the reduction. In its supplemental information accompanying the 2002 regulation, the Department stated that the BIA’s expansion during the 1990s had degraded, among other things, the “cohesiveness and collegiality of [its] decision-making process, and . . . the uniformity of its decisions.” The BIA’s precedent decisions “indicate[d] an inability to reach consensus on even fundamental approaches to the law,” and the Department reasoned that reducing the number of Board members should “increase the coherence of Board decisions, and facilitate the en banc process, thereby improving the value of Board precedents.” While this says nothing about whether the smaller, more cohesive Board would tend to reach consensus in favor of the Attorney General’s positions, it suggests that it would be more consistent on each issue, one way

41. See supra notes 28–30 and accompanying text.
44. Id.
or the other. To the extent that it became more consistent in favor of the Attorney General’s positions (or, at least, against the positions of aliens bringing appeals), this would have caused an increase in the proportion of final orders of removal.

B. Proportion of Detained Cases Within the Pool of BIA Decisions

Another characteristic that could influence appeal rate through changes in the composition of the pool of BIA decisions is whether or not the alien in question is detained. BIA decisions involving detained aliens are probably appealed at a lower rate than other decisions for three reasons. First, people who are detained are probably inhibited from filing petitions for review by the fact that they have a harder time locating and affording counsel, a harder time meeting with counsel, and a harder time preparing their cases pro se.\footnote{See Wasem, supra note 35, at 6; Little Testimony, supra note 35, at 11. In this regard, a study by Georgetown University suggested that asylum-seekers in detention are more than twice as likely than non-detained asylum seekers to be unrepresented. Andrew I. Schoenholtz & Jonathan Jacobs, The State of Asylum Representation: Ideas for Change, 16 GEO. IMMIGR. L.J. 739, 748–49 & n.68, 772 tbl.8 (2002).} Second, detained aliens are probably more likely than non-detained aliens to have been convicted of crimes that trigger bars to the courts of appeals’ jurisdiction over petitions for review.\footnote{See 8 U.S.C. § 1252(a)(2)(C) (2000).} Third, people in detention may be less inclined than others to file petitions for review since the effect of such petitions is often to prolong their detention.\footnote{Although many aliens may prefer the conditions of U.S. detention facilities to what they would face in their countries of origin, see, e.g., In re J-E-, 23 I. & N. Dec. 291 (BIA 2002), there have also been a number of extremely disturbing reports on the treatment of aliens detained in the United States. See generally, Mark Dow, American Gulag (2004).} For all of these reasons, an increase in the proportion of BIA decisions involving non-detained aliens should cause an increase in the overall appeal rate.

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ranged from 86% to 88%, with the yearly average at 88%.49 Although this increase might seem surprising, it actually makes sense if one considers the BIA’s case management practices. The BIA was already deciding detained cases on a priority basis before 2002.50 Therefore, in order to increase its output under the streamlining procedures, it must have had to draw more heavily from its pool of pending non-detained cases, thereby increasing the proportion of these cases in its output. This increase in the proportion of non-detained aliens should account for at least some of the increase in appeal rate.51

C. Shift in Behavior Among Immigration Lawyers and Their Clients

The third factor that the study proposes is a broad shift in behavior among the litigants. Whereas the first two factors involve changes in the composition of the pool of BIA decisions, such that there are now simply more of the types of decisions that would have been appealed at a higher-than-average rate before 2002, the third factor involves changes that make litigants today more likely to appeal decisions that they would not have appealed before 2002. It appears that while the courts of appeals used to be viewed as a last resort in immigration litigation, reserved largely for exceptional cases, significant numbers of immigration lawyers and their clients are now focusing their efforts in this forum on a regular basis.

The stage for such a change was probably set with a general increase in the number of trained immigration lawyers over the past two decades. We take it for granted that most law schools today offer courses in immigration law, but that was not the case twenty years ago.52 As an academic field, immigration law has only recently begun to flourish,53 and there has been a huge growth in the prac-

49. These figures are calculated from the data in the sources cited above in note 48.
50. See, e.g., EOIR YB 2004, supra note 48, at XI.
51. This does not suggest that the solution to the immigration surge is to keep more aliens in detention. To the extent that jurisdictional bars are behind the lower appeal rate for detained aliens, detention itself should not make a difference, since it is the criminal convictions, not the detention, that trigger the bars. To the extent that fear of prolonged detention, lack of access to counsel and other difficulties in preparing appeals are the critical factors, then detaining more aliens as a way to decrease appeal rate would be immensely unjust. Indeed, the extent to which these factors already affect appeal rate raises serious concerns about the number of aliens currently detained.
52. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY vii (3d ed. 2002) (reporting that “the law school [in 1987] that offered a course in immigration was the exception rather than the norm,” whereas today immigration law is taught at “the vast majority of United States law schools, many of which also offer immigration clinics and specialized courses in refugee law or citizenship law”).
53. See id. (reporting that “[s]cholarship in this once unknown field is now abundant, sophisticated, and diverse”).
ticing bar since the 1980s. This growth can be seen at the administrative level, where there has been a steady increase, since 1996, in the proportion of appeals to the BIA by aliens represented by counsel. The growth must have had an impact in representation before the courts of appeals as well.

In addition to the expansion of the immigration bar, the 1996 amendments to the Immigration and Nationality Act (“INA”) may have created incentives to litigate an increasing number of issues in expulsion proceedings, and to litigate these issues as hard as possible. In this volume, Professor Lenni Benson describes how Congress’s restriction of available relief, its expansion of bars to re-entry following periods of unlawful presence, and its attempt to limit judicial review may have all had the unintended consequence of encouraging more litigation. She notes, for instance, that many attorneys would previously advise their clients to concede grounds of deportability and focus only on obtaining discretionary relief. Today, however, the tendency is to fight tooth and nail on every legal issue because the consequences of being found removable are so high, less relief is available, and the denial of much of the relief that is available is not subject to judicial review.

With an expanded and already increasingly litigious immigration bar, the actual triggering event for the 2002 shift in immigration litigation to the federal courts could have been a combination of the BIA’s increased output of final orders

54. See Lenni B. Benson, Making Paper Dolls: How Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts, 51 N.Y.L. SCH. L. REV. 37 (2006). There is also anecdotal evidence that students, and even prospective students, are increasingly expressing interest in immigration law classes and clinical programs. See E-mail from Estelle McKee, Co-Director, Cornell Asylum and Convention Against Torture Appellate Clinic, to John R.B. Palmer (Apr. 9, 2005, 09:39:02 EST) (on file with author).


57. Benson, supra note 54. This may also result from a reduction in the opportunities and incentives for settlement at the administrative level. See e-mail from Charles Roth, Midwest Immigrant & Human Rights Center, to Stephen W. Yale-Loehr (Sept. 4, 2005, 10:25 MT) (on file with author).

58. Benson, supra note 54.

59. Id.
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of removal, general dissatisfaction with the BIA, and the rush to challenge the BIA’s procedural changes on their face. For lawyers who practice in both the BIA and the courts of appeals, the sudden flood of BIA decisions in March 2002 meant a huge increase in work. Lawyers who had become accustomed to the BIA’s case-processing time before 2002 suddenly faced hundreds of BIA decisions, and thirty-day deadlines for filing petitions for review. Moreover, until the facial challenges were rejected by the courts of appeals, many of these new decisions were arguably vulnerable to attack regardless of the merits of the underlying cases. Indeed, many lawyers felt a deep sense of injustice at the BIA’s procedures, and were probably eager to challenge them as a matter of principle.

As a result, lawyers must have started to reflexively file petitions for review, to expand their practices in the courts of appeals, and to pass cases on to anyone else who had time to take them. Lawyers who had previously practiced only at the administrative level moved into the courts of appeals for the first time to fill the demand. Lawyers who had never filed more than a handful of petitions for review per year now began filing hundreds.

This was a break from the past. For a number of reasons, there had historically been hesitation among immigration lawyers to litigate in the courts of appeals. Professor David Martin remarked on this hesitation fifteen years ago, when asylum claims began to burgeon at the agency level but did not work their way into the federal courts as well. He sensed, at that time, that immigration lawyers were holding back on bringing their cases into federal court due to fear of adverse precedent. Many immigration lawyers may have felt that their best chances lay in persuading the BIA, and that judicial review should be saved for exceptional circumstances only. This attitude seems to have changed in 2002. Many lawyers appear to have lost faith in the BIA, and they are now concentrating their energy and resources on the federal courts instead.

Another factor that may have kept federal court litigation low in the past is economics. There simply may not have been enough work to make petitions for review economically viable. Many immigration practices overcome the problem of low-paying clients by utilizing economies of scale. Handling large numbers

60. See Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 280–83 (4th Cir. 2004); Zhang v. U.S. Dep’t of Justice, 362 F.3d 155, 156–59 (2d Cir. 2004); Yuk v. Ashcroft, 355 F.3d 1222, 1229–32 (10th Cir. 2004); Loulou v. Ashcroft, 354 F.3d 706, 708–09 (8th Cir. 2004); Dia v. Ashcroft, 353 F.3d 228, 238–45 (3d Cir. 2003); Denko v. INS, 351 F.3d 717, 725–30 (6th Cir. 2003); Falcon Carriche v. Ashcroft, 350 F.3d 845, 849–52 (9th Cir. 2003); Georgis v. Ashcroft, 328 F.3d 962, 966–67 (7th Cir. 2003); Mendoza v. U.S. Att’y Gen., 327 F.3d 1283, 1288–89 (11th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 831–33 (5th Cir. 2003); Alibhatani v. INS, 318 F.3d 365, 375–79 (1st Cir. 2003); see also Reyes Vasquez v. Ashcroft, 395 F.3d 903, 906 (8th Cir. 2005) (rejecting challenge based on separation of powers).

61. See Martin, supra note 17, at 1325.

of similar cases with similar procedural postures may be the only way to make ends meet. Until there were enough people willing to pay for petitions for review within a given geographic area, it may have been difficult for lawyers following this business model to spend time in an unfamiliar forum. This is not to say that the move into the federal courts was purely mercenary; it is simply that the removal of an economic obstacle may have been a necessary condition before the move could take place.

Of course, the shift in the immigration bar must have been accompanied by a shift within the population of potential clients. Increased interest in petitions for review among people faced with expulsion orders could have been driven partly by the shift in the immigration bar, and it could have also been partly responsible for driving that shift. It could be that the BIA's increased volume created, within certain communities, a “critical mass” of people who were all facing adverse BIA decisions at the same time. By word of mouth and local news stories, the petition for review may have suddenly appeared on the radar screen for many people who were previously unaware that they had the option to litigate beyond the administrative level. When these people then heard of friends or neighbors obtaining relief through such litigation, the draw may have been irresistible.

Whatever the initial reasons for the shift in immigration litigation, once the move into federal court began, it may have had a self-perpetuating effect. Even now that the facial challenges to the procedural changes have been rejected, the increased capacity to litigate in the courts of appeals may have a vacuum-like tendency to keep itself full. Lawyers are less afraid of adverse precedent, they have become comfortable with petitions for review, and they have geared their practices toward filing a large number of them. Clients may be demanding to go forward with petitions regardless of whether or not they have a realistic chance of success.

63. On the standardization of certain legal services generally, see Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services, 58 N.Y.U. L. Rev. 1084, 1089–94 (1983) (arguing, however, that whether a legal service is amenable to standardization “depends primarily on the degree of risk that the particular legal problem poses for the client,” a test that would appear to place expulsion proceedings in the non-standardizable category).

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This theory is supported, to a certain extent, by the empirical evidence analyzed in the study. For instance, most petitions for review in the Second Circuit are filed by lawyers, most are currently filed in high volume by a relatively small group of lawyers, and most of these lawyers had never filed a petition for review with the court prior to 2002. As Table 1 shows, 87% of the petitions for review pending on the Second Circuit’s docket on April 21, 2005 were brought by counsel. Further, 46% were brought by just twenty law offices, with many of these offices handling over 100 petitions each, and two handling close to 300. These are not large firms: most are solo practitioners, and the rest are small firms, generally employing only two or three attorneys. Second Circuit records indicate that fourteen of the law offices had not filed any petitions for review in the Second Circuit prior to 2002 (going back at least as far as 1989). Of those that had filed petitions for review, none had filed more than thirty petitions in any one year prior to 2002, and most had filed less than ten (again, going back as far as 1989). It is not that these lawyers were inexperienced — many of them had been litigating quite successfully before the immigration courts and the BIA, and their advocacy had led to important precedential decisions. It appears, however, that these lawyers simply began focusing their litigation in the Second Circuit for the first time in 2002.

In addition, the AO data suggest the increase in appeal rate nationwide is being driven more by counseled petitions than by pro se petitions. The study uses these data to break down appeal rate into counseled and pro se appeals, estimating counseled appeal rate by dividing the number of counseled petitions for review filed in month $m+1$ by the number of BIA decisions issued in month $m$, and estimating pro se appeal rate by dividing the number of pro se petitions for review filed in month $m+1$ by the number of BIA decisions issued in month $m$.

Counseled appeal rate is not only higher than pro se appeal rate, but also it increases more steeply after April 2002 than does pro se appeal rate (Figure 3). In other words, the overall increase in appeal rate has been caused more by counseled cases than by pro se ones. Although the counseled appeal rate dropped during the summer of 2003, it started rising again the following fall, and presumably continued to rise, along with the rise in overall appeal rate, throughout 2004.


66. The AO data indicate, starting in October 1997, whether “appellant,” “appellee,” or both were pro se at the time of filing. In the case of petitions for review, one would expect to find either the “appellant”—i.e., petitioner—pro se, or neither party pro se (since the respondent is the government), and this was mostly true. In the small number of cases that indicated a pro se “appellee,” the study assumed that this was a data-entry error due to confusion over who the “appellant” and “appellee” are in a petition for review; it therefore counted these cases as having pro se “appellants.”

67. Figure 2, above, shows the rise in overall appeal rate during fiscal year 2004. However, the study was conducted before information on the number of counseled cases after September 2003 became available.
NEW YORK LAW SCHOOL LAW REVIEW

TABLE 1: LAW OFFICES WITH MOST PETITIONS FOR REVIEW PENDING IN SECOND CIRCUIT

<table>
<thead>
<tr>
<th>Law Office</th>
<th>Petitions for review pending on April 21, 2005</th>
<th>Percent of total pending petitions for review on April 21, 2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>308</td>
<td>6.26%</td>
</tr>
<tr>
<td>B*</td>
<td>281</td>
<td>5.71%</td>
</tr>
<tr>
<td>C*</td>
<td>193</td>
<td>3.92%</td>
</tr>
<tr>
<td>D</td>
<td>182</td>
<td>3.70%</td>
</tr>
<tr>
<td>E*</td>
<td>168</td>
<td>3.42%</td>
</tr>
<tr>
<td>F</td>
<td>162</td>
<td>3.29%</td>
</tr>
<tr>
<td>G*</td>
<td>135</td>
<td>2.75%</td>
</tr>
<tr>
<td>H*</td>
<td>96</td>
<td>1.95%</td>
</tr>
<tr>
<td>I*</td>
<td>95</td>
<td>1.93%</td>
</tr>
<tr>
<td>J</td>
<td>95</td>
<td>1.93%</td>
</tr>
<tr>
<td>K*</td>
<td>90</td>
<td>1.83%</td>
</tr>
<tr>
<td>L</td>
<td>73</td>
<td>1.48%</td>
</tr>
<tr>
<td>M*</td>
<td>63</td>
<td>1.28%</td>
</tr>
<tr>
<td>N</td>
<td>58</td>
<td>1.18%</td>
</tr>
<tr>
<td>O*</td>
<td>53</td>
<td>1.08%</td>
</tr>
<tr>
<td>P*</td>
<td>53</td>
<td>1.08%</td>
</tr>
<tr>
<td>Q*</td>
<td>51</td>
<td>1.04%</td>
</tr>
<tr>
<td>R*</td>
<td>46</td>
<td>0.94%</td>
</tr>
<tr>
<td>S*</td>
<td>45</td>
<td>0.92%</td>
</tr>
<tr>
<td>T*</td>
<td>42</td>
<td>0.85%</td>
</tr>
<tr>
<td><strong>Total for top 10 offices</strong></td>
<td><strong>1,715</strong></td>
<td><strong>34.87%</strong></td>
</tr>
<tr>
<td><strong>Total for top 20 offices</strong></td>
<td><strong>2,289</strong></td>
<td><strong>46.54%</strong></td>
</tr>
<tr>
<td><strong>Total represented cases</strong></td>
<td><strong>4,290</strong></td>
<td><strong>87.23%</strong></td>
</tr>
<tr>
<td><strong>Total pro se cases</strong></td>
<td><strong>606</strong></td>
<td><strong>12.32%</strong></td>
</tr>
<tr>
<td><strong>Grand total</strong></td>
<td><strong>4,918</strong></td>
<td></td>
</tr>
</tbody>
</table>

*Source: Second Circuit internal docket database. Reprinted from Palmer, Yale-Loehr & Cronin, supra note 4.*

Note: "*" indicates law offices that had not filed any petitions for review in the Second Circuit prior to 2002. Letters are substituted in place of the names of the law offices because the purpose is to show the degree to which petitions for review are concentrated among a small number of lawyers, not to draw attention to who those lawyers are. Grand total includes 22 cases with missing data.

All of this supports the theory that there has been a shift in the immigration bar, and that this shift contributed to the increase in appeal rate. The role played by clients is less clear, but there is, at least, anecdotal evidence that certain communities of non-citizens are increasingly aware of the option of filing petitions for review.68

68. See supra note 64.
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D. Other Possibilities

The three factors that the study proposes as having influenced the increase in appeal rate are certainly not the only possible causes. The study identifies a number of other factors that might affect appeal rate, but that were not supported by the data on which the study relied. As more data become available, however, these factors and others may turn out to provide additional or alternative explanations for the surge. It is, therefore, worthwhile to look at some of them in more detail. In terms of the composition of the pool of BIA decisions, the study examines BIA error rate, adjudicatory procedure and form of decision, promptness of decision, substantive issues, and expulsion costs.

An increase in error rate would be an obvious explanation for an increase in appeal rate, but an objective measure of error rate is difficult to obtain. Although error rate might be estimated by the rate at which BIA decisions are reversed or vacated in the courts of appeals, the available data on such reversals and vacatures were limited in that vacatures stipulated in settlement agreements are currently difficult to count, and many of the BIA’s post-2002 decisions are still under review. From the available data, there was no indication of an increase in the rate of reversals or vacatures.

Adjudicatory procedure and the form of the decision are factors often suggested by immigration lawyers as causes of the increase in appeal rate. Immigration lawyers argue that single-member AWOs are more likely to be appealed
because they are more error-prone and are perceived as unfair. Based on a random sample of 428 BIA decisions issued during the summer of 2004, the study was unable to detect a statistically significant difference in appeal rate for AWOs versus final orders of expulsion accompanied by written decisions. It is likely, however, that such a difference would have been detected in data from earlier periods when lawyers were still challenging AWO decisions on their face.

Promptness of the decision is a factor put forward by the EOIR, which suggests that the BIA’s decreased case-processing time has led aliens to seek delay in the courts of appeals.69 Using the same sample of 428 BIA decisions from the summer of 2004, however, the study was unable to detect a correlation between the amount of time a case spent at the administrative level and the rate of appeal. If anything, there appeared to be a positive correlation, meaning that the longer a case had spent with the agency, the more likely it was to be appealed. As with the other factors, however, any conclusions about this one were limited by the available data. It may well be, for instance, that samples drawn from a longer time range would show something different, or that certain types of cases need to be filtered out before any meaningful results are possible. On this latter point, it is possible that the study’s results were skewed by cases involving detained aliens, which are processed relatively quickly but also have low rates of appeal.70

The substantive issues implicated by a BIA decision could well have a large effect on the likelihood of the decision being appealed, but there was simply insufficient data available at the time of the study to reach any conclusions on this point. It remains a very tempting possibility, however, especially given the likelihood that the BIA groups some of its decisions by issue. For instance, one reason why March 2002 was probably the critical month leading to the increased appeal rate is that this is when the BIA first expanded its streamlining procedures to asylum cases, and asylum denials are probably challenged at a higher rate than denials of certain other forms of relief.

Finally, the costs that an alien stands to incur if expelled from the United States may also affect the likelihood of that alien challenging a BIA decision,71 but this was not supported by the limited data available. Measuring expulsion costs is obviously extremely difficult, and as a proxy, the study looks simply at country of origin, relying on the very rough assumption that the further the distance from the United States, the higher the expulsion costs.72 In addition, in the absence of data on changes over time in the countries of origin of the aliens in the pool of BIA decisions, the study relies instead on inter-circuit variation in coun-

69. EOIR Streamlining Fact Sheet, supra note 6.
70. This was suggested by one of the BIA’s Attorney Advisors following the author’s presentation of the study at the BIA’s conference on October 21, 2005.
71. Schuck & Wang, supra note 18, at 134–35.
72. Id. at 134.
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tries of origin. The premise is that if country of origin can help explain the variation in appeal rates observed between the circuits, it might also help explain variation in appeal rate over time. Random samples of BIA decisions arising in the Second, Ninth and Eleventh Circuits showed marked variation between the circuits in terms of both country of origin and appeal rate. The Second Circuit’s BIA decisions have an appeal rate around 42% percent, with a high proportion of Chinese; the Ninth Circuit’s BIA decisions have an appeal rate around 45%, with a high proportion of Mexicans; and the Eleventh Circuit’s BIA decisions have an appeal rate of around 9%, with a high proportion of Haitians and Colombians. While this variation is fascinating, it does not support the proposition that expulsion costs are influential (at least if expulsion costs are assumed to depend on distance from the United States).

Apart from the composition of the pool of BIA decisions, the study also examines a number of other factors that could have influenced the behavior of the litigants. In particular, the courts of appeals could have influenced appeal rate through reversals and vacatures of BIA decisions, or delays in deciding cases. Indeed, differences between the circuits in both of these characteristics may help to explain inter-circuit differences in appeal rate. However, neither the rate nor the volume of reversals and vacatures, nor the amount of delay achievable in the courts of appeals, appear to have increased significantly in 2002 as compared to prior fluctuations. It therefore seems unlikely that these factors played a large role in the increase in appeal rate that year. On the other hand, it may be that changes in circuit court precedent or particular published opinions attracted attention and drew cases to the courts of appeals. The study did not examine this possibility closely.

Similarly, statutory changes may have also been influential. As already discussed, the restrictive 1996 legislation may have helped to set the stage for the surge by encouraging litigants to fight tooth and nail over every legal issue available. This might account for the smaller increase in petitions for review seen at the end of the 1990s (see Figure 1, above), but the timing does not appear to coincide with the 2002 change. It could be, however that much of the litigation caused by the 1996 legislation was tied up at the agency level for a number of years and hit the courts of appeals, in bulk, only in 2002. Similarly, a cause of the 2002 surge could have been a combination of the statutory changes and the new court precedent interpreting those changes, much of which was issued close in time to the 2002 surge. 73

V. CONCLUSIONS

It is easy to become overwhelmed by all of the data and all of the potential causes of the surge in immigration appeals. This is to be expected when trying to

answer a question that is bound up in all of the complexity of human behavior. Yet, for all of our uncertainty about the precise causes of the increase in appeal rate, it is still possible to identify some likely possibilities. The empirical study proposes an increase in the proportion of final orders of removal and non-detained cases within the pool of BIA decisions, and a fundamental shift in behavior on the part of dissatisfied litigants facing a high volume of BIA decisions. Furthermore, even if we remain uncertain as to precise causes, nobody disputes that the surge is closely linked to the expansion of the BIA’s streamlining procedures. Whether streamlining caused aliens to lose faith in the BIA, or whether some other mechanism was at work, the end result has been that the courts of appeals are now, for the first time, a major focal point for immigration litigation.