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## The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis

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JOHN R.B. PALMER

## The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis

ABOUT THE AUTHOR: John R.B. Palmer is an Associate Supervisory Staff Attorney, U.S. Court of Appeals for the Second Circuit. This essay draws on a large empirical study that benefited immensely from the advice and efforts of Pragati Patrick, Tom Zelenock, John Yu, Anthony Maycock, Sue Siler, Lisa Greenberg, Amanda Flug, Lory Rosenberg, Kathleen Moccio, Nancy Morawetz, Nadine Wettstein, Stephen Legomsky, Philip Schrag, Charles Roth, and Mireia Artigot-Golobardes. The author wishes to thank Lenni Benson, Stephen Yale-Loehr, and Elizabeth Cronin, for all of their guidance on both the study and this essay. The views expressed herein are those of the author and do not necessarily represent the views or policies of the Second Circuit or any other entity.

## 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.<sup>1</sup> 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.<sup>2</sup> Similar increases have been felt in courts of appeals around the country, with the heaviest volume in the Second and Ninth Circuits.<sup>3</sup> 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.<sup>4</sup> The study focuses specifically on one type of appeal: the petition for review of an expulsion order under the Hobbs Act.<sup>5</sup> 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.
  4. John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005).
  5. Pub. L. No. 81-901, 64 Stat. 1129 (1950) (current version at 28 U.S.C. §§ 2341-2351 (2000)); see 8 U.S.C. § 1252(a)(1) (2000).

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.<sup>6</sup> 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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6. See EOIR, Fact Sheet: BIA Streamlining (Sept. 15, 2004), at <http://www.usdoj.gov/eoir/press/04/BIAStreamlining2004.htm> (last visited Dec. 3, 2004) [hereinafter EOIR Streamlining Fact Sheet]; *ABA Comm'n on Immigration Policy, Practice & Pro Bono, Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms* (2003), <http://www.abanet.org/immigration/bia.pdf> (last visited May 25, 2004) [hereinafter ABA Report]; Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management* (2003), [http://www.dorsey.com/files/upload/DorseyStudyABA\\_8mgPDF.pdf](http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf) (last visited May 25, 2004).

One of the primary sources of data on which the study relies is the Administrative Office of the U.S. Courts (“AO”).<sup>7</sup> Among other things, the AO gathers and assembles data on every case filed and every case terminated in the U.S. Courts of Appeals.<sup>8</sup> 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.<sup>9</sup>

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  $m$ .<sup>10</sup>

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,<sup>11</sup> and the Public Access to Court Electronic

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7. The AO is an administrative arm of the Federal Judiciary that generally provides administrative support, program management and policy development to the courts, and implements the policies of the Judicial Conference of the United States. See 28 U.S.C. §§ 601–613 (2000); Administrative Office of the United States Courts, <http://www.uscourts.gov/adminoff.html> (last visited May 28, 2005).

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.”

9. For more on the AO data, see generally Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003); Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 585–87 (1998).

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/oil/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<sup>12</sup> was used to determine which of these decisions had been challenged in the courts of appeals.<sup>13</sup> In addition, a sample of Second Circuit cases was taken from that court's docket database and records room.<sup>14</sup>

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.<sup>15</sup>

### 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.<sup>16</sup> Like most tribunals, the BIA has long been concerned with backlogs in its caseload,<sup>17</sup> 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.<sup>18</sup>

12. See <http://pacer.psc.uscourts.gov> (last visited May 27, 2005).

13. To determine whether a petition for review was filed, we searched the docket of the court of appeals that would have had jurisdiction, based on the location in which the IJ completed proceedings. See Palmer, Yale-Loehr & Cronin, *supra* note 4, at 40 nn.210-11 and accompanying text.

14. See Palmer, Yale-Loehr & Cronin, *supra* note 4, at 35 nn.188-91 and accompanying text.

15. Cf. Eisenberg & Schlanger, *supra* note 9; Stephen R. Couch, *Quantitative Immigration Data, Scientific Knowledge, and Public Policy: Possibilities, Limitations, and Interrelationships*, in QUANTITATIVE DATA AND IMMIGRATION RESEARCH 259, 266-67 (Stephen R. Couch & Roy Simün Bryce-Laporte eds. 1979) (noting the problems associated with using governmental data that has not been collected for research purposes, particularly in the immigration context).

16. The BIA also reviews a host of other decisions, by both IJs and District Directors, on issues ranging from administrative fines to visa petitions to detention. See 8 C.F.R. § 1003.1(b) (2005); CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 3.05[3] (rev. ed. 2005) [hereinafter ILP]; Stephen H. Legomsky, *Forum Choices for the Review of Agency Decisions: A Study of the Immigration Process*, 71 IOWA L. REV. 1298, 1307-10 (1986). In addition, the BIA must decide motions to reopen or reconsider its own decisions. See 8 C.F.R. § 1003.2 (2005); ILP, *supra*, § 3.05[7]. Finally, not all expulsion proceedings are subject to review by the BIA. See 8 C.F.R. § 235.8(b), (c) (2005); INA § 238(b), 8 U.S.C. § 1228(b) (2000); 8 C.F.R. § 238.1 (2005); INA §§ 235(b)(1)(B)(iii)(III), (C), 8 U.S.C. §§ 1225(b)(1)(B)(iii)(III), (C) (2000); 8 C.F.R. §§ 235.3(b)(5)(iv), 235.6(a)(2)(ii), § 1003.42, 1235.3(b)(5)(iv), 1235.6(a)(2)(ii) (2005).

17. See, e.g., David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1324-25 (1990); Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 39-41 (1977).

18. See, e.g., *Operations of the Executive Office for Immigration Review (EOIR): Hearing Before the House Comm. on the Judiciary, Subcomm. on Immigration and Claims*, 107th Cong., at 27 (2002) [hereinafter *EOIR Hearing*] (prepared statement of Stephen Yale-Loehr) (noting a ten-fold increase between fiscal year 1984, when the BIA received less than 3000 cases and fiscal year 2000, when the BIA

## NATURE AND CAUSES OF THE IMMIGRATION SURGE

In October 1999, the Department of Justice responded with a regulation that attempted to streamline the BIA's appellate review procedures.<sup>19</sup> 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.<sup>20</sup> The BIA first began issuing these so-called affirmances without opinion (AWOs) in September 2000,<sup>21</sup> but only in limited categories of cases.<sup>22</sup>

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-

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received almost 30,000). The increase in challenges to IJ rulings stemmed from both an increase in the number of appealable IJ decisions and an increase in the rate at which those decisions were appealed. *See id.* at 22 (prepared statement of EOIR Director Kevin D. Rooney) (noting that 10.9% of Immigration Court decisions were appealed to the BIA in fiscal year 1996, as compared with 15.7% in fiscal year 2001). The increase in appealable IJ decisions appears to have resulted from the combination of record migration and a huge increase in expulsion (from 30,039 expulsion proceedings in 1990 to 185,731 in 2000). *See Dorsey & Whitney LLP, supra* note 6, at 12–13; Lory Diana Rosenberg, *Lacking Appeal: Mandatory Affirmance by the BIA*, 9 BENDER'S IMMIGR. BULL. 93–94 (2004). To keep up with the expanded caseload, the number of IJs was increased from seventy-five in 1987 to over 225 in 2002. *See EOIR Hearing, supra*, at 9 (prepared statement of former Board Member Lauren R. Mathon). The increase may have also been caused by the rise in asylum claims at the end of the 1980's and early 1990's, which has been linked to the enforcement of sanctions against employers who hire undocumented aliens, and the fact that employment authorization could be quickly obtained by filing an asylum application. *See Martin, supra* note 17, at 1326–27; PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 32 (2000); THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, & HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 842 (5th ed. 2003); Peter H. Schuck & Theodore Hsien Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979–1990*, 45 STAN. L. REV. 115, 165–66 nn.232–33 (1992).

Another cause of the BIA's backlog may have been Congress's frequent amendments to the INA, particularly the complex changes brought about by the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA). *See EOIR Hearing, supra*, at 9 (prepared statement of former Board Member Lauren R. Mathon); *id.* at 22–23; Dorsey & Whitney LLP, *supra* note 6, at 14. The number of Board members has also been suggested as a possible cause, although there is disagreement over this point. Former Board member Lory Rosenberg attributes the backlog in part to the fact that in the early 1990s, only three of the five permanent Board member positions were filled, requiring IJs to intermittently sit on the Board. *See Rosenberg, supra*, at 93. Former Board member Lauren R. Mathon notes that four of the Board members appointed between 2000 and 2001 had no background in immigration law, and therefore needed time to become proficient in their work. *See EOIR Hearing, supra*, at 22. On the other hand, EOIR Director Kevin Rooney argues that the increase in authorized Board members during the 1990s from five to twenty-three had "no appreciable impact" on the annual completion of cases. *See id.* at 20; *see also* Dorsey & Whitney LLP, *supra* note 6, at 14–15 nn.37–38 (citing comments by the Federation for American Immigration Reform and from congressional staffers who argued that the increase in Board members actually added to the backlog). Another asserted cause for the backlog is management problems within the BIA from 1995 to 2000. *See EOIR Hearing, supra*, at 9 (prepared statement of Lauren R. Mathon).

19. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999).

20. *See id.* at 56,141.

21. *See Palmer, Yale-Loehr & Cronin, supra* note 4, at app. tbl.20.

nounced a proposed regulation to expand streamlining and clear the backlog.<sup>23</sup> 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:<sup>24</sup> (1) cases involving claims for asylum, withholding,<sup>25</sup> 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.<sup>26</sup> The Attorney General's new regulation was published in August 2002, effectively codifying and further expanding the streamlining that had already occurred.<sup>27</sup>

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*,<sup>28</sup> it is now required to defer to them unless they are clearly erroneous,<sup>29</sup> and it may no longer engage in its own fact finding.<sup>30</sup> Finally, the regulation reduces the number of authorized board members from twenty-three to eleven, with the stated rationale of improving "cohesiveness and collegiality."<sup>31</sup>

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-

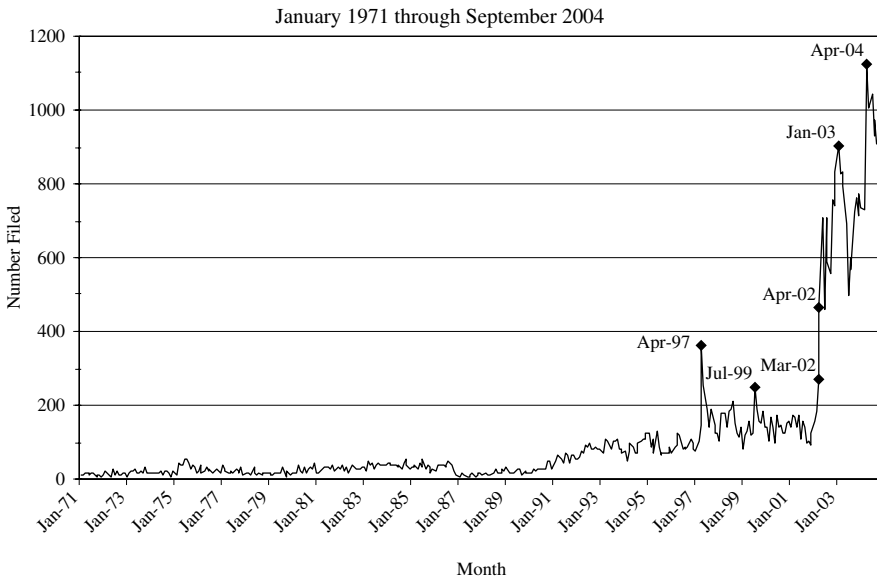
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22. See Memorandum from Paul W. Schmidt to all BIA Members (Aug. 28, 2000), *reprinted in* Dorsey & Whitney LLP, *supra* note 6, at app. 3; Memorandum from Paul W. Schmidt to all BIA Members (Nov. 1, 2000), *reprinted in* Dorsey & Whitney LLP, *supra* note 6, at app. 17.
  23. See Attorney General John Ashcroft, News Conference — Administrative Change to Board of Immigration Appeals (Feb. 6, 2002), <http://www.usdoj.gov/archive/ag/speeches/2002/020602transcriptadministrativechangeetobia.htm> (last visited May 28, 2006).
  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].
  29. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,902, 54,905 (August 28, 2002) (codified at 8 C.F.R. § 1003.1(d)(3)(i)).
  30. *Id.* at 54,902, 54,905 (codified at 8 C.F.R. § 1003.1(d)(3)(iv)).
  31. *Id.* at 54,894.



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.”<sup>32</sup>

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%.<sup>33</sup>

**FIGURE 1: MONTHLY PETITIONS FOR REVIEW OF BIA DECISIONS NATIONWIDE**



Source: AO data. Reprinted from Palmer, Yale-Loehr & Cronin, *supra* note 4.

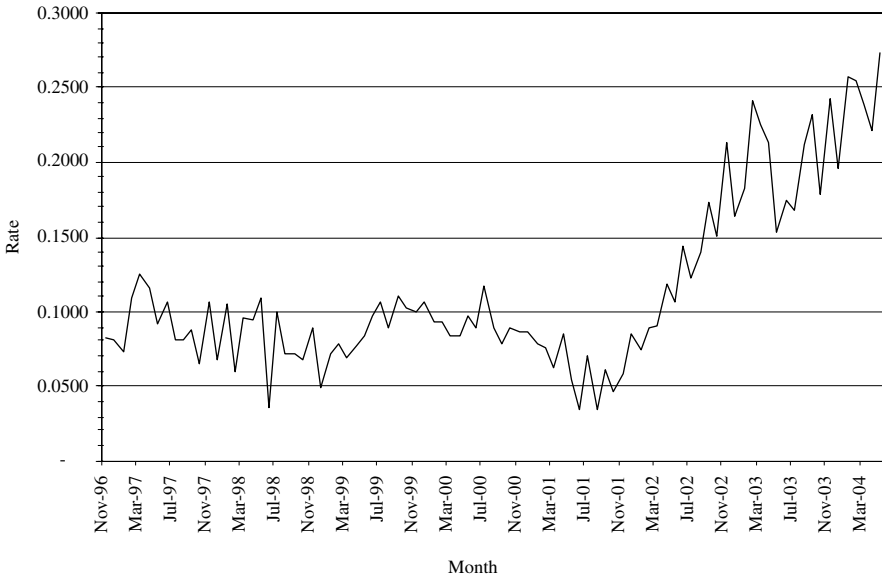
**IV. EXPLAINING CHANGES IN OVERALL APPEAL RATE**

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

32. *All Things Considered: Appeals Courts Flooded With Immigration Cases* (NPR radio broadcast, Nov. 19, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4179087> (last visited May 26, 2005) [hereinafter *All Things Considered*].

33. See Palmer, Yale-Loehr & Cronin, *supra* note 4, at 54 tbl.1.

**FIGURE 2: ESTIMATED APPEAL RATE FOR BIA DECISIONS ARISING FROM IJ PROCEEDINGS**



Source: AO data on petitions for review and EOIR data on BIA decisions arising from IJ proceedings. Rate is calculated by dividing the number of petitions for review filed in month  $m+1$  by the number of BIA decisions issued in month  $m$ . The dates on the x-axis represent month  $m$ . Reprinted from Palmer, Yale-Loehr & Cronin, *supra* note 4.

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.<sup>34</sup> Similarly, an alien with no resources and no access to counsel will generally have a hard time filing a petition for review,<sup>35</sup> 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.

35. See Ruth Ellen Wasem, *U.S. Immigration Policy on Haitian Migrants* 6 (Congressional Research Service Jan. 21, 2005), [http://ndu.edu/library/docs/crs/crs\\_rs21349\\_21jan05.pdf](http://ndu.edu/library/docs/crs/crs_rs21349_21jan05.pdf) (last visited May 15, 2005); *The Detention and Treatment of Haitian Asylum Seekers: Hearing Before the Senate Comm. on the Judiciary, Subcomm. on Immigration*, 107th Cong. 11 (2002) (statement of Cheryl Little, Executive Director, Florida Immigrant Advocacy Center) [hereinafter Little Testimony].

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.<sup>36</sup> 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.

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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,<sup>37</sup> 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.<sup>38</sup> Although the BIA disputes the accuracy of these figures,<sup>39</sup> 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.<sup>40</sup> The USCIRF study looks only at

37. See Susan Kyle, Cory Fleming & Fritz Scheuren, *Statistical Report on Immigration Court Proceedings: FY 2000–2004*, in I UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 20, 413 (Feb. 2005).

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.

On May 2, 2005, the Los Angeles Times reported that “[f]ive years ago, the BIA ruled in favor of immigrant appeals 9% of the time. By 2003, immigrants won their appeals 6% of the time.” Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts: As Caseloads Skyrocket, Judges Blame the Work Done by the Board of Immigration Appeals*, L.A. TIMES, May 2, 2005, at 1. It is not clear where these figures come from.

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.

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.<sup>41</sup> 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.<sup>42</sup> 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.”<sup>43</sup> 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.”<sup>44</sup> 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.

42. See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006); Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. 1154 (2004).

43. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,894 (August 26, 2002) (codified at 8 C.F.R. part 3).

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*.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.

The EOIR reports that the proportion of BIA decisions involving non-detained aliens increased in 2002. Looking just at the BIA's adjudication of appeals taken directly from IJs, the proportion of BIA decisions involving non-detained aliens ranged from 62% to 81%, with a yearly average of 74% between fiscal years 1996 and 2001.<sup>48</sup> Between fiscal years 2002 and 2004, that number

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45. 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).

46. See 8 U.S.C. § 1252(a)(2)(C) (2000).

47. 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).

48. The data for fiscal years 2000 through 2004 are taken from EOIR, OFFICE OF PLANNING AND ANALYSIS, FY 2004 STATISTICAL YEAR BOOK X1 (Mar. 2005) [hereinafter EOIR YB 2004], available at <http://www.usdoj.gov/eoir/statspub/fy04syb.pdf> (last visited Jun. 5, 2005). The data for fiscal year 1999 are taken from EOIR, OFFICE OF PLANNING AND ANALYSIS, FY 2003 STATISTICAL YEAR BOOK X1 (Apr. 2004) [hereinafter EOIR YB 2003], available at <http://www.usdoj.gov/eoir/statspub/fy03syb.pdf> (last visited Apr. 7, 2005). The data for fiscal year 1998 are taken from EOIR, OFFICE OF PLANNING AND ANALYSIS, STATISTICAL YEAR BOOK 2002 W1 (Apr. 2003), available at <http://www.usdoj.gov/eoir/statspub/fy02syb.pdf> (last visited June 5, 2005). The data for fiscal year 1997 are taken from EOIR, OFFICE OF PLANNING AND ANALYSIS, FY STATISTICAL YEAR BOOK 2001 V1 (Mar. 2002) [hereinafter EOIR YB 2001], available at <http://www.usdoj.gov/eoir/statspub/FY01syb.pdf> (last visited June 5, 2005). The

ranged from 86% to 88%, with the yearly average at 88%.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

*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.<sup>52</sup> As an academic field, immigration law has only recently begun to flourish,<sup>53</sup> and there has been a huge growth in the prac-

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data for fiscal year 1996 are taken from EOIR, OFFICE OF PLANNING AND ANALYSIS, STATISTICAL YEAR BOOK 2000 V1 (Jan. 2001) [hereinafter EOIR YB 2000], available at <http://www.usdoj.gov/eoir/stats/pub/SYB2000Final.pdf> (last visited June 5, 2005).

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 X1.

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”).

ting bar since the 1980s.<sup>54</sup> 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.<sup>55</sup> 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”)<sup>56</sup> 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.<sup>57</sup> She notes, for instance, that many attorneys would previously advise their clients to concede grounds of deportability and focus only on obtaining discretionary relief.<sup>58</sup> 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.<sup>59</sup>

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

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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).
55. See EOIR YB 2004, *supra* note 48, at W1; EOIR YB 2001, *supra* note 48, at K1; EOIR YB 2000, *supra* note 48, at K1, E2 tbl.6.
56. The 1996 amendments to the INA were contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, 3009-346 (effective Apr. 1, 1997). Among other things, these amendments expanded the grounds on which people may be expelled and lengthened the bars to re-entry following periods of unlawful presence. At the same time, they cut back on the grounds of relief from expulsion and limited judicial review. See generally Lenni B. Benson, *The New World of Judicial Review of Removal Orders*, 12 GEO. IMMIGR. L.J. 233 (1998); Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); Hiroshi Motomura, *Judicial Review in Immigration Cases After AADC: Lessons From Civil Procedure*, 14 GEO. IMMIGR. L.J. 385 (2000); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963 (2000).
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.*



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,<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> Handling large numbers

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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); *Albathani 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.

62. See, e.g., Michael Maggio, Larry S. Rifkin & Sheila T. Starkey, *Immigration Fundamentals For International Lawyers*, 13 AM. U. INT'L L. REV. 857, 913 (1998); cf. Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1531 (2005) (discussing how high-volume bankruptcy practices have used “cookie cutter” pleadings to drive down costs).

of similar cases with similar procedural postures may be the only way to make ends meet.<sup>63</sup> 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.<sup>64</sup>

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.

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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).

64. While the study does not present empirical evidence to support this theory, there is, at least, anecdotal evidence that certain communities of non-citizens pay close attention to developments in immigration law. Within New York City's Chinese community, for instance, news appears to travel fast regarding Second Circuit decisions in immigration cases. Lawyers sometimes joke that their clients hear about new case law before they do, and court decisions are reported in Chinese language newspapers. *E.g.*, David Hsieh, *Interpretation of China's One Child Policy Varies—Political Asylum a Game of Lottery*, WORLD JOURNAL, Feb. 15, 2005 (reporting on *Hao Jiang v. INS.*, No. 03-4519, 118 Fed. App'x 565, 2004 WL 2980414 (2d Cir. Dec. 23, 2004)), *translated from Chinese and reprinted in* Voices That Must Be Heard: The Best of New York's Ethnic and Immigrant Press, at <http://www.indypressny.org/article.php3?ArticleID=1928> (last visited May 15, 2005).

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.<sup>65</sup> 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  $m$ .<sup>66</sup>

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.<sup>67</sup>

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65. *E.g.*, *In Re C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997); *In Re Antonio Esposito*, 21 I. & N. Dec. 1 (BIA 1995).

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.

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

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

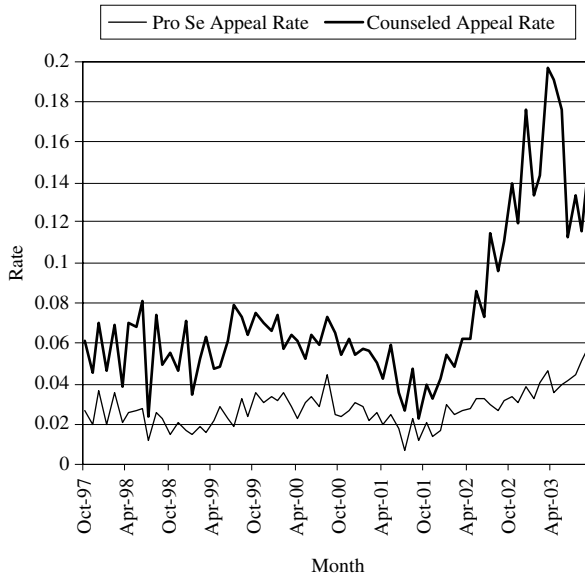
*Source: Second Circuit internal docket database. Reprinted from Palmer, Yale-Loehr & Cronin, supra note 4.*

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.<sup>68</sup>

68. See *supra* note 64.

**FIGURE 3: ESTIMATED APPEAL RATES FOR BIA DECISIONS NATIONWIDE BY REPRESENTATIONAL STATUS**



Source: AO and EOIR data. Reprinted from Palmer, Yale-Loehr & Cronin, *supra* note 4.

*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.<sup>69</sup> 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.<sup>70</sup>

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,<sup>71</sup> 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.<sup>72</sup> 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-

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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.

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.<sup>73</sup>

## 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

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73. *E.g.*, *INS v. St. Cyr*, 533 U.S. 289 (2001).

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.