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The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals

The Committee on Federal Courts

INTRODUCTION

In February 2002, the Department of Justice implemented certain "procedural reforms" concerning its Board of Immigration Appeals ("BIA"), which reviews decisions of immigration judges in exclusion, deportation, and removal cases. These reforms, ostensibly designed to increase the efficiency of immigration appeals and to reduce the backlog of pending immigration cases, expanded the use of affirmances without opinion by single BIA members in nearly all types of cases within the BIA's jurisdiction. The result has been a surge in immigration appeals filed in the circuit courts of appeals from decisions of the BIA.[1] The purpose of this Report is to analyze the impact of this surge on the Second Circuit.[2]

1. This problem was highlighted by a study conducted pro bono by the firm of Dorsey & Whitney LLP for the American Bar Association. Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management* (July 22, 2003) [hereinafter "Dorsey & Whitney Report"]. This report is recommended for its thorough discussion of the BIA procedural reforms and their impact. The two Dorsey & Whitney attorneys primarily responsible for its report, Steven Carlson and Kathleen Moccio, addressed our Committee at its October 2003 meeting.

2. We conducted our study by analyzing data prepared by the federal courts and by interviewing personnel at the Second Circuit, including Judge Jon Newman, Elizabeth Cronin (Chief of Legal Affairs), and several staff attorneys. These persons were extraordinarily helpful to us in our investigation. We also consulted with the U.S. Attorney's Office, and received valuable

The surge has been dramatic by almost any measure. For example, in the twelve-month period from February 2002 to February 2003, monthly appeals from the BIA filed in the Second Circuit increased by 781%.[3] As we show below, this surge in BIA appeals, particularly in the Second Circuit, has continued unabated.

In this report we (1) describe the BIA procedural reforms; (2) quantify the resulting increase in appeals from the BIA to the circuit courts of appeals with particular emphasis on the Second Circuit; (3) review the constitutional challenges to the BIA reforms, which have been uniformly rejected; (4) describe the administrative response of the Second Circuit to the BIA appeal surge; (5) assess the impact of the surge on the Second Circuit, and its other ramifications; and (6) offer our recommendations on how to deal with the surge going forward.

I. THE IMMIGRATION APPEALS PROCESS AND THE BIA PROCEDURAL REFORMS

An appeal from the decision of an immigration judge in an exclusion, deportation, or removal case is filed with the Board of Immigration Appeals, a federal administrative body which is part of the Department of Justice.[4] The Attorney General has authority to modify the BIA's structure and procedures.[5] The BIA may grant oral argument, award discretionary relief, and issue written decisions.[6] Before the recent procedural changes, three-member panels of the BIA heard individual appeals.[7]

In 1999, the BIA promulgated "Streamlining Rules" to administer its rapidly increasing caseload.[8] Single BIA members were empowered to de-

information and assistance from James Cott, Chief of the Civil Division for the Southern District of New York and a member of this Committee. We consulted as well with immigration lawyers and the Committee on Immigration & Nationality Law of the Association. We also sought the views of the BIA through its General Counsel, but as of the date of this report we have not received a reply to our questions.

We offer special thanks to Rosann B. MacKechnie, Clerk of the Court for the Second Circuit and an adjunct member of this Committee, for her invaluable assistance in providing information concerning the Second Circuit's caseload.

3. Admin. Office of U.S. Courts, *The Third Branch*, Sept. 2003, p 2.

4. *See* 8 C.F.R. § 1003.1 (2004).

5. *Id.*; Dep't of Justice Order No. 174-59, § 19, 25 Fed. Reg. 2460 (Mar. 28, 1960).

6. 8 C.F.R. § 1003.1 (2004).

7. 1 CHARLES GORDON, STANLEY MAILMAN, STEVEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 3.05 (2004).

8. 8 C.F.R. § 1003.1(a)(1)(2004). Dorsey & Whitney estimates that between 1992 and 2000, appeals to the BIA increased from 12,823 to 29,972 and the BIA's backlog of pending appeals

cide certain categories of cases without opinion.[9] In 2002, noting the BIA's continuing backlog, Attorney General John Ashcroft announced additional "procedural reforms."[10] These 2002 reforms are most responsible for the surge in appeals from the BIA to the circuit courts of appeals. Among other changes, these new rules expanded the number of cases referred to single-member summary review,[11] eliminated *de novo* review of factual issues, and expanded the grounds for mandatory dismissal. At the same time, the number of BIA members was reduced from 23 to 11.[12]

As intended, the reforms had a noticeable impact on the dispositions of appeals by the BIA. Summary affirmances increased from between 2 to 3% of all cases decided to close to 60% by October 2002.[13] At the same time, dispositions in favor of aliens declined. Before the reforms, aliens obtained relief in approximately 25% of the BIA's cases; by October 2002, after the procedural reforms had been implemented, that percentage fell to 10%.[14]

The procedural reforms provoked criticism and concern. Advocates for aliens seeking asylum contended that aliens were being deported without being accorded meaningful administrative review.[15] Feeling aggrieved by these changes, asylum-seekers began to appeal their cases to the circuit courts of appeals in record numbers. Before the procedural reforms only

increased from 18,054 to 63,763. *See* Dorsey & Whitney Report at Appendix 12. It appears that the largest component of the BIA's caseload increase consisted of asylum cases, especially from Chinese nationals. See p. 253, below. *See also*, Dorsey & Whitney Report at 17-20 (discussing other causes of the BIA backlog).

9. 8 C.F.R. § 1003.1(a)(7) (2004).

10. Press Release, Department of Justice, DOJ Unveils Administrative Rule Change to Board of Immigration Appeals in Order to Eliminate Massive Backlog of More than 56,000 Cases (Feb. 6, 2002), *at* http://www.usdoj.gov/opa/pr/2002/February/02_ag_063.htm.

11. *See* generally Dorsey & Whitney Report at 25-31. The rules allowed the Chair of the BIA to designate certain classes of cases for issuance of affirmances without opinion ("AWO"). Pursuant to this authority, the BIA designated "all cases" as appropriate for AWOs. *Id.* at 24-25.

12. *Id.* at 29-30. Some have suggested the reduction was done on a political basis and that BIA judges who were perceived to be "liberal" were those who lost their positions. *See* Steve H. Legomsky, IMMIGRATION AND REFUGE LAW AND POLICY 79-82 (2003 Supp.) (describing this change as the "purge of the liberals.").

13. Dorsey & Whitney Report at Appendix 25.

14. *Id.* at Appendix 24.

15. *See, e.g.*, American Immigration Lawyers Association, Final Comment on the Proposed BIA Reform Rule (March 20, 2002) *at* http://www.immigrationlinks.com/news/news1306hot (expressing a "fear that the Administration's proposal would tilt the balance in favor of expeditiousness, instead of fostering careful and just adjudications, thereby impairing the due process rights of individuals while undermining the Board's capacity to provide meaningful appellate review.").

6% of BIA cases were appealed. By the end of 2003, 20% were being appealed.[16] Thus, the surge.

II. THE SURGE IN BIA APPEALS IN THE CIRCUIT COURTS OF APPEALS, AND IN THE SECOND CIRCUIT IN PARTICULAR

A. The Surge in the U.S. Circuit Courts of Appeals

The change in processing BIA cases had an immediate impact. In 2002, the year the procedural reforms were put in place, the total number of immigration appeals filed in the circuit courts of appeals around the country rose by 294% (from 1,642 cases in 2001 to 6,465 in 2002). The surge continued and grew in 2003, with appeals filed from the BIA increasing an additional 35% (from 6,465 to 8,750).[17]

Another way to look at this phenomenon is to examine the percentage of all appeals to the circuit courts that are appeals from the BIA. In 1999 through 2001, before the procedural reforms of 2002, BIA appeals constituted but 3% of all of federal appeals filed. In 2002, BIA appeals constituted 10.9% of all appeals filed, and in 2003 this percentage increased to 14.4%.[18]

B. The Surge in the Second Circuit

The surge had even more dramatic consequences in the Second Circuit, which, similar to the Ninth Circuit, has drawn far more BIA appeals than any other Circuit. Administrative agency appeals (most from the BIA) have increased as follows in the Second Circuit from 2001 to 2003.[19]

YEAR	TOTAL OF APPEALS FILED	ADMIN. AGENCY APPEALS FILED	ADMIN. AGENCY APPEALS AS % OF TOTAL APPEALS FILED
2001	4,460	175	4%
2002	5,356	1,025	19%
2003	6,534	2,224	34%

16. Second Circuit Clerk's Office, INS APPEALS & BIA CASES: CALENDAR YEARS 2001-2003 (on file with Association).

17. Admin. Office of U.S. Courts, U.S. Courts of Appeals, Sources of Appeals and Original Proceedings Commenced by Circuit for the Twelve Month Periods Ending Dec. 31, 1999, 2000, 2001, 2002 and 2003 Table B3 (Feb. 6, 2004) (on file with Association).

18. *Id.* The individual circuit statistics do not break out BIA appeals from other administrative agency appeals. For all circuits combined (excluding the Federal Circuit), BIA appeals comprised 87% of all administrative agency appeals in 2003.

19. *Id.*

Administrative agency appeals pending in the Second Circuit increased from 1,151 at year end 2002 (22% of the 5,277 total appeals pending), to 2,992 at year end 2003 (40% of the 7,514 total appeals pending).[20] We discuss below the practical impact of this surge, which shows no signs of abating, on the operations of the Second Circuit (see pp. 252-254, below).

III. LEGAL CHALLENGES TO THE CURRENT BIA PROCEDURES

In a number of circuits, including the Second Circuit, the BIA practice of affirmance without opinion ("AWO") has been challenged as a violation of the Due Process Clause of the Fifth Amendment. Courts to date have rejected these challenges.

"It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). It is not, however, "a due process violation for the BIA to affirm the [immigration judge's] decision without issuing an opinion." *Denko v. INS*, 351 F.3d 717, 730 (6th Cir. 2003) (citations omitted). This is so because "the summary-affirmance-without-opinion rule renders the [immigration judge's] . . . decision the final agency order, and we review that decision." *Id.* Accordingly, if the BIA does not independently state a correct ground for affirmance and merely endorses the decision of the immigration judge, the "BIA risks reversal on appeal" if the immigration judge's decision is found to be erroneous. *Id.* But so long as the petitioner had a "full and fair hearing" before the immigration judge, and the immigration judge correctly applied the relevant legal standards in deciding the case, the petitioner is deemed to have had a meaningful "opportunity to be heard," and thus the AWO practice in the BIA does not run afoul of the Fifth Amendment. *Id.* at 730 n.10.

In a recent decision, *Zhang v. DOJ*, 362 F.3d 155 (2d Cir. 2004), the Second Circuit likewise held that the BIA's AWO procedure does not violate due process. In *Zhang*, the petitioner's asylum application was denied following a full hearing before an immigration judge, who found petitioner's claim that he would be persecuted in China not credible and therefore ordered his deportation. A single BIA judge affirmed that decision without opin-

20. Admin. Office of U.S. Courts, Statistical Tables for the Federal Judiciary, Table B-1 (Dec. 31, 2003), *at* http://www.uscourts.gov/judiciary2003/deccontents.html) [hereinafter 2003 Tables].

The total number of appeals pending in the Second Circuit increased by 42.4% from year end 2002 to year end 2003: from 5,277 appeals pending to 7,514 appeals pending. This dramatic increase, largely a result of the increase in BIA appeals, far exceeds the modest 4.35% increase in pending appeals over this same time period in all other circuits combined. *Id.*, Table B.

ion. Petitioner then appealed the BIA's ruling to the Second Circuit, arguing that the AWO by a single judge—in contrast to the three-judge BIA panels prior to the 2002 procedural reforms—violated his right to due process.

The Second Circuit disagreed. "Preliminarily, we observe that an alien's right to an administrative appeal from an adverse asylum decision derives from statute rather than from the Constitution." *Zhang*, 362 F.3d at 157. Here, the statute that provides an alien with a right to an appeal—the Immigration and Nationality Act—is silent as to the manner and extent of any administrative appeal, leaving that determination to the Attorney General. *See* 8 U.S.C. § 1101(a)(47). "Where legislation is silent as to implementation, the Supreme Court has stated that 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Zhang*, 362 F.3d at 157 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council Inc.*, 435 U.S. 519, 543 (1978)). Thus, because nothing in the immigration laws requires that administrative appeals be resolved by three-member panels of the BIA through formal opinions that address the record, "the BIA was free to adopt regulations permitting summary affirmance by a single Board member without depriving an alien of due process." *Id.*

This is the conclusion of all circuit courts of appeals that have addressed the due process issue. *See also Yuk v. Ashcroft*, 355 F.3d 1222, 1229-32 (10th Cir. 2004); *Albathani v. INS*, 318 F.3d 365, 375-79 (1st Cir. 2003); *Soadjede v. Ashcroft*, 324 F.3d 830, 831-33 (5th Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003); *Loulou v. Ashcroft*, 354 F.3d 706, 708-09 (8th Cir. 2003); *Falcon Carriche v. Ashcroft*, 350 F.2d 845, 848 (9th Cir. 2003); *Mendoza v. U.S. Attorney General*, 327 F.3d 1283, 1288-89 (11th Cir. 2003).

Although the new procedures have survived constitutional challenge, the way in which the BIA has implemented them has drawn judicial disapproval. The BIA, for example, came in for harsh criticism by the First Circuit in *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003). While the court there did not reverse the BIA's decision, it credited "[t]he . . . serious argument . . . that the very nature of the one-line summary affirmance may mean that BIA members are not in fact engaged in the review required by regulation and courts will not be able to tell." *Albathani*, 318 F.3d at 378-79. The First Circuit went on to observe that " [f]or example, the Board member who denied Albathani's appeal is recorded as having decided over 50 cases on October 31, 2002, a rate of one every ten minutes over the course of a nine-hour day." *Id.*

Despite these and other harsh disparagements of the new BIA proce-

dures,[21] there is no indication that the 2002 procedural reforms will be judicially or legislatively reversed or significantly altered in the near future. Thus, the surge of appeals to the circuit courts of appeals is likely to continue. If this is so, then the critical question becomes: what docket management measures, if any, have the courts formulated to cope with the surge of cases? We turn now to that topic.

IV. THE SECOND CIRCUIT'S RESPONSE

The Second Circuit quickly recognized the challenges posed by the BIA appeal surge. A senior judge, the Honorable Judge Jon Newman, led the effort to develop a response to it that would not compromise the important rights at stake.[22] In May 2003 Judge Newman convened a meet-

21. Another example of the judicial disapproval of the BIA is found in several decisions authored by Judge Richard Posner, of the Seventh Circuit. In one case, Judge Posner, writing for a panel of the Seventh Circuit in *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004), remanded the cases of several aliens denied asylum by BIA judges, finding "a pattern of serious misapplications by the board and the immigration judges of elementary principles of adjudication." Quoting from earlier Seventh Circuit criticism of the BIA, Posner reiterated, "the Board's analysis was woefully inadequate, indicating that it has not taken to heart previous judicial criticisms of its performance in asylum cases [citing cases]. The elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases." *Id.* at 654.

Judge Posner's criticisms dwell on the failure of the BIA to analyze factual records supporting claims of persecution. Agencies have long been required to provide reasoned bases for their decisions. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Faulting the BIA for not meeting its constitutional obligations in this regard, Judge Posner stated, in *Guchshenkov v. Ashcroft*, 366 F.3d 554 (7th Cir. 2004), that the BIA must dispense reasoned judgments and that its heavy docket is no excuse for not doing so:

> We are mindful that immigration judges, and the members of the Board of Immigration Appeals, have heavy caseloads. The same is true, however, of federal district judges, and we have never heard it argued that busy judges should be excused from having to deliver reasoned judgments because they are too busy to think. The two cases under review, like the other cases in which we have reversed the board of late, are not so difficult that it is unreasonable for a reviewing court to expect and require reasoned judgments at the administrative level. The errors that have compelled us to reverse in these cases despite the deferential standard of judicial review of agency action are not subtle. Asylum seekers should not bear the entire burden of adjudicative inadequacy at the administrative level.

Id. at 560.

22. In a March 31, 2004, teleconference with this Committee's subcommittee focusing on this issue, Judge Newman discussed his efforts to develop tools to manage the increased volume of BIA appeals. Telephone interview with Judge Jon Newman, Senior Circuit Judge Second Circuit Court of Appeals (March 31, 2004) [hereinafter Judge Newman Interview] (notes of interview on file with the Association).

ing at the Courthouse with Second Circuit staff attorneys, the United States Attorney's Office, and private immigration attorneys with the most BIA appeals pending in the Second Circuit. The objective of the meeting was to explore how the Court could best handle the increase in BIA appeals. As a result of suggestions made at this meeting, the Second Circuit took the following steps:

- The U.S. Attorney's Office was told that since the Justice Department was responsible for the surge, it would have to ensure that there were sufficient Assistant U.S. Attorneys designated to handle the cases.
- The BIA was urged to designate sufficient staff to ensure that the records on appeal from the BIA were submitted more promptly, since lengthy delays had resulted when the BIA changed its procedures without adding staff to process records for appeals.[23]
- Status conferences with Second Circuit staff attorneys were ordered for all of the cases in which records were ready.
- In instances in which the petitioner was in detention—a small minority of the BIA appeals pending in the Second Circuit[24]—the case was to be given priority and scheduled for conference on an expedited basis.[25]

23. Despite this request obtaining records remains a significant problem, according to Elizabeth Cronin, Director of Legal Affairs of the Second Circuit: " . . . it still can take months to receive the administrative record and a case is not ready to be conferenced (unless there is a glaring jurisdictional defect) until the record comes in. That, in and of itself is a cause for delay." Response to Committee Questionnaire, Elizabeth Cronin, Director of Legal Affairs for the Second Circuit Question 4 (April 20, 2004) (on file with Association) [hereinafter Legal Affairs questionnaire response]. However, the U.S. Attorney's Office does not consider the delays in obtaining administrative records to be the reason for the backlog in the Circuit. E-mail from James Cott, Chief of the Civil Division of the U.S. Attorney's Office for the Southern District of New York, to Michael B. Mushlin, Subcommittee Chair Comment 9 (May 27, 2004) (on file with Association) [hereinafter USAO Email] ("It is the sheer number of appeals that is driving the process, not any delay in providing records").

24. *See* Response to Committee Questionnaire, United States Attorney's Office for the Southern District of New York Question 3 (June 17, 2004) (on File with Association) [hereinafter USAO questionnaire response] (" . . . in the vast majority of immigration cases pending before the Circuit, the Petitioner is *not* detained") (emphasis original).

This situation may not be typical of other circuits, and in any event may be about to change. In April 2004, a pilot program was launched in Atlanta and Denver, "Operation Compliance," pursuant to which immigrants who lose their cases in the BIA are arrested and "held in immigration detention sites until they exhaust their appeals or post bond." Ricardo Alonso-Zaldivar, *U.S. Testing Plan to Jail Immigration Case Losers*, Chicago Tribune, April 26, 2004, at 1.

25. *See* Legal Affairs questionnaire response, Question 2.

- Additional part-time attorneys were assigned to help process the cases. The staff attorneys began to conference together multiple cases being handled for the petitioners by the same attorney, a more efficient process for the Court and for the relatively small number of attorneys who handle the BIA appeals.
- The Chief Judge was asked to authorize three extra panels of judges for Spring 2004 that would be able to hear cases if it turned out that the flow of ready cases exceeded the ability of the regular panels to hear them. To date these panels have not been needed.

To comply with the needs of the Court, the United States Attorney's Office implemented a major shift in its resources. What was a "small"[26] unit within its Civil Division has now grown to nine attorneys and seven support staff, all working full time on immigration matters. Further, the BIA appeal surge has been so pervasive that, since June 2003, it has become necessary to assign "all 40+ other Assistant United States Attorneys [who] are in the Civil Division [to] handle immigration cases as part of their docket."[27]

The U.S. Attorney's Office also has taken steps to avoid unnecessary motion practice in these appeals. For example, in order to avoid a need for a litigated motion to stay deportation pending the appeal, the U.S. Attorney's Office has a procedure under which, in most but not all cases, the government will defer action to deport until the appeal is decided.[28]

The conferencing system implemented by the Second Circuit, which applies to the 80% of BIA appeals in which petitioner is represented by counsel,[29] attempts to resolve cases at the staff attorney level. Among the possible outcomes of a conference with a staff attorney are that (i) the alien withdraws and dismisses the case; (ii) the parties agree to remand

26. *See* USAO questionnaire response, Question 8 (the size of the unit before the surge is not specified).

27. *Id.*

28. In cases where the U.S. Attorney's Office believes that a stay is not warranted the policy does not apply and the motion for a stay is litigated. *See* Legal Affairs questionnaire response, Question 3.

29. *See* Legal Affairs questionnaire response, Question 9 ("approximately 80 percent of the cases are counseled cases . . ."). The approximately 20 percent of the appeals in which petitioners appear pro se are not conferenced. *See* E-mail from Elizabeth Cronin, Director of Legal Affairs for the Second Circuit, to Michael B. Mushlin, Subcommittee Chair (Sept. 2, 2004) (on file with Association) [hereinafter Legal Affairs E-mail].

the case;[30] (iii) the parties agree to suspend the case pending either pursuit of other administrative relief or the resolution of another matter raising substantially similar issues; or (iv) the parties conclude a stipulated resolution is not appropriate and the appeal is scheduled for briefing and argument to the Court.[31]

Some 60% of the BIA appeals conferenced are in fact resolved, and thus do not require further attention from the Court.[32] However, only 30 to 60 BIA appeals can be conferenced each month, given the limited number of staff attorneys available. With 900 appeals waiting to be conferenced, and new filings regularly being added to the conference queue, the backlog will inevitably grow at the current conference rate, even if 100% of the conferenced appeals were settled.

V. IMPACT OF THE SURGE ON THE SECOND CIRCUIT

Because of the magnitude of the surge of BIA appeals in the Second Circuit, we expected to discover that it had caused a substantial backlog in the processing of the entire appellate docket in the Circuit. But that has not yet happened, largely because of the Court's timely and innovative response to the surge (see pp. 249-252 above).

30. *See* Legal Affairs questionnaire response, Question 5. Cases are remanded by consent of the U.S. Attorney "because the government is concerned about the decision or there is a change in country conditions or an adjustment to a petitioner's status occurs while the petition is pending (i.e. marriage)." Cases are resolved in favor of the government when the alien agrees that the appeal is futile and agrees to voluntary deportment." *Id.*

The head of the Civil Division of the U.S. Attorney's Office states that "[a]s a practical matter the government would never set out the reasons why it consents to remands in any broad way. Each case is considered individually." *See* USAO Email, Comment 12.

31. It does not appear that the BIA procedural reforms have led to an increased rate of reversal or remand by the Court, for those cases not resolved at conference. In the 12-month period ended December 31, 2003, for example, the Second Circuit resolved on the merits 146 administrative appeals (most from the BIA). Of those 146 cases, one was reversed and 9 were remanded, for a 6.85% remand/reversal rate. 2003 Tables, Table B-5. By comparison, about 12.4% of all 1,982 cases resolved by the Second Circuit on the merits in 2003 were reversed or remanded. *Id.*

This data may be misleading, however, since it does not take into account the many administrative appeals that were terminated at conference—262 in 2003 (*id.*, Table B-1)—some on terms that remanded the case to the BIA or provided other relief to the petitioner.

We note that the Dorsey & Whitney Report, at 48-55, highlights five appeals, all from other circuits, in which the courts found serious errors in decisions by immigration judges that the BIA had summarily affirmed.

32. The average rate of disposition at conference during the first three months of 2004 was 61%. *See* Legal Affairs questionnaire response, Question 4.

Statistics, at first blush, might suggest that the Circuit's non-BIA docket has in fact suffered from the BIA surge: the number of non-administrative agency appeals pending for more than 12 months increased from 323 at year end 2002 to 1,170 at year end 2003.[33] However, Court personnel are clear that this increase is not attributable to the surge in BIA appeals.[34] Thus, the real consequence of the high number of BIA appeals to date has been simply the growing backlog of such appeals.

Nonetheless, if the tide of BIA appeals continues, at some point, unless additional resources are brought to bear, the processing of non-BIA appeals surely will be negatively impacted. And the tide of BIA appeals is indeed still growing.[35] Over the first six months of 2004, new appeals from the BIA filed in the Second Circuit totaled 1,435, as compared with 1,150 such appeals filed during the comparable period in 2003, a 25% increase.[36] Thus the need for further action to respond to this ever increasing BIA caseload is apparent.

The Second Circuit, in fact, is in the process of implementing a new

33. Here are the statistics provided by the Second Circuit Clerk's Office:

34. The conferencing of BIA appeals and other appeals is handled on separate tracks so the backlog in BIA appeals awaiting conference does not delay the conferencing of other appeals.

	DEC. 31, 2002		DEC.31, 2003		% INCREASE	
TOTAL APPEALS PENDING	4,444		6,587		48%	
APPEALS PENDING OVER 12 MONTHS	917		3,133		242%	
ADMIN. AGENCY APPEALS (MOST FROM BIA)		594		1,963		230%
ALL OTHER APPEALS		323		1,170		262%
APPEALS PENDING OVER 12 MONTHS AS % OF TOTAL APPEALS PENDING	20.6%		47.6%			

See Legal Affairs questionnaire response, Question 2 (reporting that in non-immigration cases the normal processing of cases is continuing according to established time lines: a conference within six weeks of the filing of the notice of appeal and if not resolved at conference, the appeal heard within 14 weeks thereafter, absent requested extensions in the briefing schedule).

35. *Id.* at Question 10 ("We are still seeing a significant number of new cases every day."). *See* USAO questionnaire response, Question 10 ("Based on our figures, it does not appear that the surge in immigration cases is abating. In 2003 we received more than 2,200 petitions for review, and we are on a similar pace in 2004.").

36. Information provided to Committee by Second Circuit Clerk's Office.

program to address the backlog of BIA appeals. This program will draw on the services of volunteer pro bono mediators to conference the older BIA cases, thus supplementing the conferencing performed by the Court's own staff attorneys.[37] The success of this program, of course, cannot be forecasted with any confidence.

VI. OTHER RAMIFICATIONS OF THE SURGE

The surge has had "real world" consequences beyond those indicated by the numerical data. In this section we briefly touch on those consequences as they relate to aliens seeking relief, the U.S. Attorney's Office, and the administration of law generally.

A. Aliens Seeking Relief

For many aliens, perhaps surprisingly, the procedural reforms have had a positive result: appellate review at a favored venue, the circuit courts of appeals. This may be the reason why, contrary to our expectations, the response of the immigration bar to the surge in immigration appeals and the truncated procedures at the BIA has been subdued.[38] We have talked to several attorneys representing immigrants who have said that they appreciate the care that the Second Circuit is giving these appeals and believe that their clients are more likely to receive a fair consideration of their position from the circuit courts than from the BIA.[39] In part because the Second Circuit has focused additional resources to deal with immigra-

37. Letter from John M. Walker, Chief Judge of the Second Circuit, to Thomas H. Moreland, Committee Chair, (July 2, 2004) (on file with Association). Judge Walker's letter outlines the Court's voluntary mediator plan, under which it would schedule the oldest 300 BIA appeals for briefing and argument without conference, but schedule a conference—without altering the briefing schedule—on request of a party. The letter requests the assistance of the private bar to serve as pro bono mediators at these conferences. The Association has provided Judge Walker with a list of attorneys interested on serving as pro bono mediators.

38. The Committee on Immigration & Nationality Law of this Association did object in 2002 to the BIA "procedural reforms." Letter from Cyrus D. Mehta to Charles K. Adkins, General Counsel, Executive Office for Immigration Review (March 20, 2002) [on file with Association]. More recently, that Committee chose not to take a position on the topic of this report, *i.e.*, the impact of the surge in BIA appeals on the Second Circuit's docket.

39. Not all immigration attorneys are as sanguine. One pointed out to us that many aliens cannot afford to pay for an appeal to the Second Circuit, and thus simply must accept the BIA's (usually) AWO and be deported. Others commented to us that the change in BIA procedures severely compromised the rights of all aliens, not just those who lack funds to appeal.

tion appeals, these cases are being dealt with more attentively than they might have been otherwise. The conferencing system developed by the Second Circuit is particularly valuable, though not for pro se appellants, whose appeals are not conferenced.[40]

Another reason why we did not hear more complaints about the present system from the immigration bar may be that the most of the petitioners in the Second Circuit are not in detention while awaiting their appeals, and those who are receive expedited consideration. In addition, most are not in jeopardy of being deported because the United States Attorney's Office's policy results in temporary stays. (see p. 251, above).

However, a delay in the appellate process, even with a stay of deportation, is not an entirely satisfactory state of affairs for petitioners. The delay puts them in limbo, and under the stress of not knowing their future. Moreover, asylum seekers cannot work until six months after legal entry into the United States, so delay renders these petitioners unable to work until their appeal is decided. The appellate delays, inherently, also postpone permanently reuniting petitioners with their families, and they cannot travel abroad to see family members while their appeal is pending.[41]

B. The U.S. Attorney's Office

Because of the increased number of immigration cases, the U.S. Attorney's Office has altered staffing and processing of immigration cases. Despite the fact that the surge has necessitated increased and revised staffing, the U.S. Attorney's Office has not suggested that, to this point, its resources are being diverted from other pressing matters. But were the surge to continue unabated, the ability of the U.S. Attorney's Office to provide the same level of high quality legal representation to the government on other matters might be diminished.

C. The Proper Administration of the Law

One way to look at procedural reforms is to view them as a wholesale transfer of administrative appellate decision-making responsibility from the BIA to the U.S. Attorney's Office at the conferencing stage and to the judges of the circuit courts of appeals at the argument and decision stage. The important issue raised by this is one of propriety: was it proper for the Department of Justice, in order to alleviate its own backlog of immigration appeals, to create rules that shifted the backlog to the circuit courts?

40. See footnote 29, above.

41. Email from Kathleen Moccio, Esq. to Michael B. Mushlin, Subcommittee Chair, (July 6, 2004) [on file with Association].

As evident from some of the criticism we have heard, at least some federal judges are asking why the circuit courts should be forced to endure the BIA's "dumping" of immigration cases. Our review of this issue prompts us to ask the same question.

VII. CONCLUSIONS AND RECOMMENDATIONS

We commend the Second Circuit and its judges and staff for their innovative work to address the surge. We also commend the United States Attorney's Office for shifting its resources to assign attorneys to handle the onslaught of cases and for its humane stay policy.

While much is being done to mitigate the problems caused by the surge, however, no assurance can be given that all is well and that matters are in hand. In fact, as we have documented above, despite the great efforts of many the surge continues to be serious and threatens to metastasize into a significant problem for the administration of justice in the Second Circuit. While the surge in BIA appeals has not yet caused other appeals to be delayed, if the surge continues—as it has to date—at some point disposition times for all litigants in the Second Circuit will likely be adversely affected.

Thus, at a minimum we recommend that the Second Circuit receive additional resources to continue and to expand its innovative conferencing program. In particular, more conference attorneys and support staff will be needed to address what appears to be a permanent increase in BIA appeals. The Second Circuit's new program using volunteer pro bono attorneys to conference cases may be a partial answer to the problem, but for this program to succeed the volunteers will need costly training and supervision on an ongoing basis. Further, even the optimum use of pro bono attorneys will not avoid the need for more full time staff attorneys, given the volume of BIA appeals.

We also believe that the inequality in the treatment of pro se appellants should be ended. Those litigants are not given the benefit of the conferencing system because they lack counsel. We therefore support the provision of counsel, paid or pro bono, to them. We recognize that it may be neither feasible nor efficient to assign counsel to every pro se appellant, especially if, as the Court's Office of Legal Affairs advises, many of the pro se appeals are clearly frivolous.[42] But, as that Office also advises, efforts are made to identify potentially meritorious pro se appeals. At minimum, counsel should be appointed in such cases at the earliest practicable time so that they can be conferenced.

42. Legal Affairs email, Sept. 2, 2004.

Contrary to its need for increased resources, the Court's budget is effectively being cut. In our interview with Judge Newman he indicated that the present "maintenance budget" for the federal court system is a cause for real concern, for in practice such a budget will result in cuts in staff "at a time when we need additional people." This will make it even more difficult for the Court to stay current with its docket.[43] The U.S. Attorney's Office may also need additional resources to handle the volume of BIA appeals.

Our review leads us to question the wisdom of the BIA procedural reforms and to suggest that these reforms merit broader investigation and study by Congress and others. To the substantial extent, as appears, that the BIA has ceased in practice to play the administrative appellate role which is its reason for existence, some corrective action is in order. The present dysfunctional and inefficient system wastes taxpayer money and unfairly imposes on the circuit courts almost the entire burden of assuring that the statutory rights of aliens, and the interests of all citizens in an effective immigration system, are vindicated.

Finally, attention should be paid to the substantive aspects of the BIA appeals. The "vast majority" of BIA appeals concern denials of asylum applications,[44] and over half, more specifically, concern asylum claims by Chinese nationals based on China's "one couple-one child" policy.[45] *See generally* Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881 (2000). While the law on this subject is beyond the scope of this report, and the intensely factual nature of asylum cases may limit the utility of general legal principles, the Second Circuit may wish to focus on whether a clarification of the law might be among the appropriate responses to the deluge of these BIA appeals.

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43. Judge Newman Interview, March 31, 2004 (*see* n.22 above).

44. *See* USAO questionnaire response, Question 1.

45. *See* Legal Affairs questionnaire response, Question 1. Substantial numbers of these asylum applications are granted by immigration judges or the BIA: approximately 2,500 were granted in each year from 2001 through 2003. Billy Shields, *Chinese Migrants Smuggled Through Caribbean Say They Are Fleeing Forced Sterilization*, Assoc. Press, Jan. 4, 2004.

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+ Abstained from consideration of this report