# WHEN THE DELUGE HITS AND YOU NEVER SAW THE STORM: ASYLUM OVERLOAD AND THE SECOND CIRCUIT

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## INTRODUCTION

In 2002, federal circuit courts began to experience an unprecedented surge of immigration appeals. Within a relatively short period of time, waves of petitions for review from agency decisions in asylum cases were washing ashore. The volume was unexpected, and the circuits where the bulk of the cases were being filed, primarily the Second and Ninth Circuits, had to face the problem and make decisions on how to deal with the increasing caseload. This paper describes what occurred in the Second Circuit (the Court), the options that the Court considered, and the unique and creative way the Court ultimately dealt with the problem. It will not

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discuss in any depth explanations for the deluge.[1] Rather, the focus will be on solutions for handling such a crisis and a short description of general legal issues relevant to asylum cases.

## I. REVIEW OF ASYLUM, WITHHOLDING OF REMOVAL AND CONVENTION AGAINST TORTURE CLAIMS IN FEDERAL COURT

Prior to enactment of the REAL ID Act of 2005,[2] expulsion orders[3] were challenged in the federal courts under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[4] Petitioners challenging a final order of removal within the meaning of 8 U.S.C. § 1252(a)(1) could file a petition for review in the circuit where the immigration judge (IJ) issued the order of expulsion.[5] An order of expulsion by an IJ becomes final either when the time for filing an appeal expires, and no appeal is filed, or when the Board of Immigration Appeals (BIA) affirms the order.[6] The deadline for filing an appeal to the BIA is thirty days from the date on which the IJ decision is orally stated or, if the decision is written, mailed.[7] If the IJ grants relief but the BIA reverses, then the BIA decision is considered the final expulsion order.[8]

The REAL ID Act made significant changes to IIRIRA relating to the jurisdictional bars that purport to strip the courts of the authority to review, among other things: determinations that an asylum application is untimely,[9]

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1. For an in-depth examination of this subject, see John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005) and John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 14 (2007) [hereinafter Palmer, *Immigration Surge*].

2. Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (2005) (to be codified as amended at 8 U.S.C. § 1252 ).

3. "Expulsion" is a general term used to denote three types of proceedings and orders: exclusion, deportation, and removal. Exclusion and deportation were used prior to April 1, 1997 when the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) replaced them with the removal proceeding. Exclusion was used for aliens who had not entered the United States, while deportation was used for those who had. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW & POLICY 380-82 (3d ed. 2002).

4. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (amending the Immigration and Nationality Act (INA) of 1952).

5. *See* 8 U.S.C.A. § 1252(b)(2) (West 2005).

6. *See* 8 U.S.C.A. § 1101(a)(47)(B) (West 2005).

7. *See* Executive Office of Immigration Review, 8 C.F.R. §§ 1003.3(a)(1), 1003.38(b), 1240.15 (2006).

8. *See* Del Pilar v. U.S. Att'y Gen., 326 F.3d 1154, 1156-57 (11th Cir. 2003); *see also* Huang v. INS, 421 F.3d 125, 128 (2d Cir. 2005) (implicitly treating this type of BIA decision as the final order).

9. *See* 8 U.S.C.A. § 1158(a)(3) (West 2005).

denials of certain discretionary relief other than asylum,[10] and removal orders against aliens who have committed certain crimes.[11] Prior to the REAL ID Act, the federal courts had interpreted the IIRIRA's jurisdictional bars as applying to petitions for review under 8 U.S.C. § 1252 or 1105a, but not to habeas corpus petitions filed in the district courts under 28 U.S.C. § 2241.[12] The rationale was, at least in part, that preventing review in any court would raise serious concerns under the Suspension Clause of the U.S. Constitution.[13] Therefore, the Supreme Court interpreted IIRIRA to mean that those barred under the law from requesting review in the circuit courts could still file habeas corpus applications in district courts.[14]

Under the REAL ID Act, Congress explicitly stated that final orders of removal could not be challenged under, among other things, 28 U.S.C. § 2241 or "any other habeas corpus provision."[15] Suddenly, habeas corpus cases pending in the district courts were instead supposed to be in the circuit courts as petitions for review. Consequently, shortly after the date of enactment, May 11, 2005,[16] the district courts began transferring a significant number of § 2241[17] immigration habeas corpus cases to the circuits as petitions for review.[18] This change in the law has been a major factor in the continuing surge of immigration cases into the circuit courts.

The two questions before a circuit court in reviewing a final order of expulsion are: (1) what decision is being reviewed; and (2) what is the standard of review. In the immigration context, the court has two agency decisions: that of the IJ and the BIA. The court must ultimately decide which reasoning the agency intended to rest its decision. However, this reasoning is not always clear. This will be more fully explored in the discussion of the BIA streamlining process.

The circuit court reviews de novo both questions of law and the application of law to undisputed facts.[19] Nevertheless, where the BIA's interpretation of statutory and regulatory language resolves a question of law, the court must defer to that interpretation in certain situations.[20]

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10. *See id.* § 1252(a)(2)(B).
11. *See id.* § 1252(a)(2)(C).
12. *See* Gorsira v. Chertoff, 364 F. Supp. 2d 230, 231-34 (D. Conn. 2005).
13. *See* U.S. CONST. art. I, § 9, cl. 2.
14. *See* INS v. St. Cyr, 533 U.S. 289, 299-314 (2001).
15. *See* Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (2005) (to be codified as amended at 8 U.S.C. § 1252(a)(2)(A)).
16. *See* Pub. L. No. 109-13, 119 Stat. 231 (2005).
17. 28 U.S.C.A. § 2241 (West 2006).
18. As an aside, issues are coming up under the REAL ID Act in the Second Circuit, which possibly implicate the Suspension Clause of the Constitution. For example, because the REAL ID Act precluded habeas corpus review in the district court, dismissing a petition for review as untimely for having been filed beyond the thirty-day deadline creates Suspension Clause issues.
19. *See* Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003).
20. Where the INA is silent or ambiguous as to a particular legal standard, the court gives *Chevron* deference to the Attorney General's and BIA's construction as long as it is

Most denials of asylum, withholding, and Convention Against Torture (CAT) claims are based on evidentiary issues and, therefore, require the circuit court to review administrative findings of fact. Review is under the substantial evidence standard.[21] However, an agency's reliance on an improperly stringent standard constitutes legal, not factual error, and the court reviews de novo whether such a standard has been used.[22] The Second Circuit has held that it "will *reverse* the BIA only if no reasonable fact-finder could have failed to find the past persecution or fear of future persecution necessary to sustain the petitioner's burden"[23] or "will *vacate* BIA conclusions, as to the existence or likelihood of persecution, that a perfectly reasonable fact-finder *could* have settled upon, insofar as the BIA either has not applied the law correctly, or has not supported its findings with record evidence."[24]

## II. THE STORM GATHERS

The Second Circuit encompasses the states of New York, Connecticut and Vermont, with its courthouse residing in lower Manhattan. Following the events of September 11, 2001, it was not unexpected that there could have been an immigration crackdown and that the Court could have seen an increase in filings. As the Court began to see such an increase, many assumed that it was due to a crackdown. In fact, this assumption was erroneous. It became clear that there was another element at work which was more likely responsible for the surge.

As discussed earlier, in order to exhaust administrative remedies, an asylum petitioner whose claim is denied by an IJ must first appeal that decision to the BIA. If the Board issues a decision affirming a denial by the IJ, this decision may be appealed to the circuit court. For reasons that are unclear, the BIA, an agency located within the Department of Justice, began to experience a backlog of appeals from IJ decisions during the 1990s,[25] which grew to over 56,000 cases.[26]

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reasonable. *See* INS v. Aguirre-Aguirre*,* 526 U.S. 415, 424-25 (1999); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*,* 467 U.S. 837 (1984). The court will reject the interpretation of the agency if it is unreasonable or contrary to clear congressional intent. *See* INS v. Cardoza-Fonseca*,* 480 U.S. 421, 447-48 (1987).

21. 8 U.S.C.A. § 1252(b)(4)(B) (West 2005) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

22. *See* Edimo-Doualla v. Gonzales*,* 464 F.3d 276, 281 (2d Cir. 2006).

23. Qiu v. Ashcroft, 329 F.3d 140, 149 (2d Cir. 2003) (emphasis in original) (quoting Diallo v. INS, 232 F.3d 279, 287 (2d Cir. 2000)).

24. *Id.*

25. One commentator has hypothesized that the backlog may have grown as a result of a number of factors: an increase in appealable immigration judge (IJ) decisions resulting from increased migration and expulsion; an increased number of IJ's issuing decisions; an increased enforcement of sanctions against those who hire illegal aliens; frequent

In late 1999, the Department of Justice first began addressing the growing backlog with a regulation meant to streamline procedures within the BIA.[27] The regulation contained two provisions relevant to this discussion. Under the regulation: (1) cases could be assigned to single BIA members rather than panels; and (2) BIA members could affirm IJ decisions without issuing an opinion (AWO) in limited types of cases.

As the number of outstanding cases continued to grow, Attorney General John Ashcroft decided in 2002 to further streamline BIA procedures and eliminate the backlog.[28] As a result, most cases could be AWO, and three member panels would become the exception rather than the rule.[29] This move became especially relevant to circuit courts since such courts began to notice the change. The expanded streamlining procedures included:

(1) allowing AWO's in claims for asylum, withholding, and CAT relief;
(2) allowing AWO's in claims for suspension of deportation and cancellation of removal;
(3) almost all cases would be eligible to be heard by one member;
(4) BIA could no longer engage in fact finding; and
(5) the number of Board members was reduced from twenty-three to eleven.[30]

Thus, cases were being decided more quickly, and many of them ended up at the Court's door. The BIA's rate of decision-making doubled, and the rate of applications to the circuits increased five-fold.[31]

## III. THE DELUGE

Between April 2002 and September 2005, the number of petitions for review rose by more than three times the amount in the previous thirty years combined.[32] To put this into context, in 2001, administrative appeals accounted for just 5.8%, or 262 cases filed in the Second Circuit. In just one year, the number of appeals grew to 603. By 2004, there were 2,747

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amendments to INA by Congress; internal management problems. *See* Palmer, *Immigration Surge*, *supra* note 1, at 17 n.18.

26. *See* Attorney General John Ashcroft, News Conference, Administrative Changes to Board of Immigration Appeals (Feb. 6, 2002), *available at* http://www.yale.edu/lawweb/avalon/sept_11/ashcroft_011.htm; *see also* Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed,* L.A. TIMES, Jan. 5, 2003, at A1.

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

28. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

29. *See id.* at 54,880.

30. *See* Palmer, *Immigration Surge*, *supra* note 1, at 17-19.

31. *See id*. at 19-20. However, the reasons for the discrepancy in the rate of appeals to the circuit courts will not be addressed herein.

32. *See id.* at 14.

such cases or 39.2% of the Court's caseload.[33] The vast majority of those were immigration appeals.[34] By August 2005, the backlog reached almost 5,000.[35]

A large number of the petitions for review have been asylum-related, where petitioners claim refugee status, and as a result, seek to avoid expulsion from the United States. Between April 2002 and March 2006, the Second Circuit received, on average, 171 petitions for review *per month*. This is more than the Court had previously seen in an entire year. Prior to 2002, petitions for review accounted for less than 4% of the Court's docket. By 2006, it was over 36%.[36] According to the Third Branch, between 2002 and 2003 the percentage increase in BIA appeals was 781%.[37]

## IV. HANDLING IMMIGRATION CASES BEFORE AND AFTER THE SURGE

Before the streamlining at the agency level, the Second Circuit had a manageable immigration caseload. Essentially, the Court handled the cases in the ordinary course as with all other appeals. Nevertheless, the Court stood apart from other circuits in addressing immigration cases. Generally, the Second Circuit hears oral argument on all appeals—even those which are pro se—except for most prisoner cases.[38] Unlike other circuits, the Second Circuit sits approximately forty-two weeks per year and hears oral argument every day in which it sits. In addition, the Circuit had a unique arrangement with immigration cases. In every other circuit, the Office of Immigration Litigation (OIL) represented the government in immigration cases.[39] Until May 15, 2005, the U.S. Attorneys' Office for the Southern District of New York (USAO) represented the government in the Second

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33. John M. Walker, Jr., Chief Judge, U.S. Court of Appeals, Second Circuit, Keynote Address at the New York Law School Law Review Symposium: Seeking Review: Immigration Law and Federal Court Jurisdiction (Sept. 26, 2005), *available at* http://www.nyls.edu/pages/3733.asp.

34. *See id.*

35. Press Release, John M. Walker, Jr., Chief Judge, U.S. Court of Appeals, Second Circuit, Non-Argument Calendar in the Second Circuit Court of Appeals (Aug. 4, 2005), *available at* http://www.nywd.uscourts.gov/document/Non-Argument%20Calendar.pdf.

36. These figures are based on data from the Administrative Office of the United States Courts. *See generally* U.S. Courts: Statistical Reports, http://www.uscourts.gov/library/statisticalreports.html.

37. *See Immigration Appeals Surge in Courts*, THE THIRD BRANCH (Fed. Courts, Washington D.C.), Sept. 2003, at 2, *available at* http://www.uscourts.gov/ttb/sep03ttb/immigration/index.html.

38. 2D CIR. LOCAL R. 34.

39. *See* U.S. ATTORNEYS' MANUAL, Title 4, Immigration Litigation, § 4-7.010, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/7mciv.htm (The Office of Immigration Litigation (OIL) litigates in the federal courts on behalf of the Immigration and Naturalization Service). The handling of immigration litigation by the U.S. Attorneys' Office (USAO) for the Southern District of New York pre-dated the establishment of OIL.

Circuit. This long-standing arrangement had another unique component: when a motion for stay of removal[40] was filed, the government, through the USAO, agreed to "forebear" from deporting an individual if the government did not contest the stay or the Court decided the motion.[41] This arrangement reduced the need for extensive and excessive motion practice.

Originally, when the immigration caseload was manageable, the fully counseled immigration cases would go through the Court's Civil Appeals Management Plan (CAMP).[42] CAMP participation is mandatory for all fully counseled civil appeals, and since approximately 80% of the asylum cases were counseled, the staff counsel in CAMP saw most of the immigration cases. At these confidential conferences, petitioner's counsel and the government attorney would meet with staff counsel to discuss the case and attempt to resolve it. Perhaps surprisingly, CAMP was especially effective in removing a significant number of immigration cases from the Court's docket. For example, a petitioner might instead decide to withdraw the petition or accept voluntary departure, the government might agree to remand the case to the agency, or there might have been a change in circumstances that would make the petitioner eligible for adjustment of status. If settlement was unsuccessful, the case would proceed to briefing and oral argument.

To deal with the surge, CAMP set up "immigration days" where eight to twelve immigration cases would be scheduled for conferences on each day. As the number of filings continued to rise, more immigration days were scheduled. CAMP was the only federal circuit court mediation program that routinely handled counseled immigration appeals.

The settlement program was successful. The disposition rate after conference was as high as 64%.[43] However, the numbers of cases continued to rise, making scheduling the consequential additional conferences difficult. One of the largest obstacles in dealing with this volume was the lack of certified administrative records being filed by the

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40. Prior to the enactment of IIRIRA, stays of deportation were automatic. *See* Michael v. INS, 48 F.3d 657, 661 (2d Cir. 1995) (citing 8 U.S.C. § 1105a(a)(3)) ("Upon the timely filing of an alien's petition to review a final deportation order, and absent an aggravated felony conviction, an alien's deportation is automatically stayed pending review of that petition by the court of appeals."). This stay is no longer automatic. *See* IIRIRA, Pub. L. No. 104-208, § 309(c)(4), 110 Stat. 3009-626; 8 U.S.C.A. § 1252(b)(3)(B) (2005).

41. The policy of forbearance began in 1995 whereby the USAO agreed not to deport or return an alien who has filed a motion for stay of deportation until and unless the Court decides the motion for stay. That policy was reaffirmed in 2002. *See* Memorandum For Second Circuit Chambers and Staff, Revised (Sept. 5, 1995) (on file with author).

42. 2D CIR. LOCAL R., Appendix, Part C, Civil Appeals Management Plan, *available at* http://www.ca2.uscourts.gov/Docs/Forms/CAMP.pdf.

43. John R.B. Palmer, *The Second Circuit's 'New Asylum Seekers': Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 972 (2006).

agency. The cases could not be scheduled for conference without this record, and at the agency level, the backlog of record requests was staggering.

As the surge continued, the Court grew more concerned about managing the case volume. The Court hired another staff counsel to handle only conferences in immigration cases. The Court also began a pro bono mediator program to assist staff counsel in grappling with the backlog of cases. In spring 2004, the Court began issuing briefing schedules in large numbers of immigration cases without automatic settlement conferences to speed the process and included strict filing deadlines.

It became more difficult to set up conferences because there were only a limited number of Assistant U.S. Attorneys and petitioners' counsel to handle the cases. Even with extra assistance, the settlement process could not respond because the rate of filing continued to soar. Thus, the Court had to decide, as discussed in the introduction, whether to allow the backlog to accumulate and lay the blame at the feet of the agency, or attempt a new method of attack. Thus was born the non-argument calendar (NAC). Essentially, NAC is a separate, parallel track from the regular argument calendar, along which asylum-related cases proceed.

The Court was committed not only to it administrative goal of reducing, and ultimately eliminating its backlog, but also to providing speedier determinations in these cases. The Court, however, first had to overcome its long-standing commitment to providing oral argument in the majority of cases filed. When compared to other circuits, the Second Circuit has the highest oral argument-to-disposition ratio or, said differently, it has the lowest percentage of cases decided without the benefit of oral argument.[44] Allowing oral arguments is a hallmark of appellate practice in the Court.

The NAC offered a solution that would ensure that cases would not languish in the backlog. While not perfect, it was both a creative and fair way of dealing with an overwhelming problem.

An NAC calendar was developed whereby four panels of three judges sat each week and considered twelve asylum cases a piece. According to the Local Rules implementing NAC, where a party seeks appeal or petition for review concerning a claim for asylum, the proceeding will be placed on the NAC. Proceedings on the NAC will be heard by a three-judge panel, without oral argument, unless the Court transfers it to the Regular Argument Calendar (RAC).[45]

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44. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 22 (1998).

45. 2D CIR. LOCAL R. § 0.29, Non-Argument Calendar (NAC).

To assist in this process, the Staff Attorneys' Office within the Office of Legal Affairs became authorized to hire a supervisor and twelve attorneys to establish an immigration unit. The NAC officially began on October 3, 2005. Cases are sent to panels where judges consider the appeals sequentially and any one of them has the authority to transfer the case to the RAC,[46] where it would be heard by a separate merits panel. In fact, despite concerns that the NAC would somehow violate petitioners' due process rights or result in reduced analyses,[47] the opposite has occurred. First, many cases have been referred by NAC panels to the RAC. From December 2005 through March 2007, with the exception of three weeks, the Court has heard transferred NAC cases every week. In fact, at many sittings the panels have heard numerous NAC transfers. Further, despite not having oral argument automatically available, NAC cases get a full review by panels of this Court.

NAC has proven to be very useful in lowering the number of cases the Court hears. Additionally, the Court recently expanded its use of NAC, enlarging the eligible pool of cases for NAC to include withholding of removal and CAT relief even where there is no underlying asylum claim.[48]

One of the most beneficial results of the NAC is an incredibly rich pool of opinions on immigration issues. While the majority of cases are disposed of by summary order (unpublished decisions), the Court has significantly increased its immigration jurisprudence. The Court is encountering a wealth of issues ranging from adverse credibility determinations and the substantial evidence standard to complicated issues such as whether 8 U.S.C. § 1158(a)(2)(D) permits the filing of successive asylum applications on the basis of changes in personal circumstances, where such applications should be filed, and whether a boyfriend can claim refugee status based on the forced sterilization or abortion performed on his girlfriend in China.

## CONCLUSION

Despite early concerns and misgivings, the development of NAC was a creative, innovative and responsible way of responding to a crisis faced by the Second Circuit. The investment of time and effort by the judges, staff attorneys, staff counsel and Clerk's Office personnel in implementing NAC, while daunting and challenging, has transformed this idea into a successful solution to fending off this deluge.

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46. Palmer, *supra* note 43, at 975.

47. Erick Rivero, Note, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497, 1521-29 (2006) (analyzing NAC cases under the *Mathews v. Eldridge* balancing test).

48. 2D CIR. INTERIM LOCAL R. § 0.29 (amended February 2007).