

## RESPONSE TO AN UNWARRANTED ACCUSATION

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A recent article in the *Stanford Law and Policy Review* makes the serious accusation that the U.S. Court of Appeals for the Second Circuit has reduced the quality of its decisions because of an increase in caseload.<sup>1</sup> That accusation is expressed explicitly. “We would expect . . . the court that maintains greater procedural safeguards, the Second Circuit, to reduce its decision quality under workload pressure. The findings [of the Article] reflect this prediction.”<sup>2</sup> “[I]t is plausible to expect that under caseload pressure the Second Circuit, but not the Ninth, would decrease its decision quality. This is exactly what the empirical findings indicate.”<sup>3</sup>

The Article bases its accusation of a decline in the Second Circuit’s quality of decision making on (1) the fact that, during the years studied, the Court experienced an increase in caseload after a surge in immigration cases, (2) an assertion, derived from regression analysis, that the Court’s reversal rate for civil appeals declined by 1.3 percentage points, and (3) an assumption that a decline in the Court’s reversal rate indicates a decline in the quality of the Court’s decision making.

Although making the serious accusation of reduced quality, the Article concedes that it might not be true! “[W]hen we observe, for example, a decline in reversal rates following a workload increase, we cannot know for sure whether to attribute these observable effects to appellate judges’ tendency to cut corners, or simply to the changing composition of their dockets.”<sup>4</sup> There is, of course, another possibility: a decline in reversal rate does not indicate a decline in quality. In any event, the accusation has been made, and it merits this brief response.

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1. Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 STAN. L. & POL'Y REV. 57 (2016). In this response, I refer to the Lavie piece as “the Article.”

2. *Id.* at 61.

3. *Id.* at 82.

4. *Id.* at 75 (citation omitted).

The Article studied all civil cases terminated in the federal courts between 1998 and 2005, with a few exceptions, notably prisoner appeals.<sup>5</sup> The Article focused on *filings* in the Second and Ninth Circuits because, beginning in 2002, those circuits experienced a significant increase in petitions for review of decisions by the Board of Immigration Appeals (BIA) denying application for asylum.<sup>6</sup> “The increase in the number of appeals *filed* in these two circuits . . . was about 50%.”<sup>7</sup> The increase in filings resulted because the BIA rendered thousands of summary denials in 2002 in response to congressional demands to reduce its backlog. The Second and Ninth Circuits received the great majority of the petitions filed in all circuits because a disproportionate number of petitioners lived in New York and California, within the jurisdiction of the Second and Ninth Circuits, respectively.<sup>8</sup>

An increase in filings, however, does not necessarily mean an increase in burdens for the judges. Many filed appeals do not result in cases considered by panels. Moreover, the burdens on judges of a court of appeals can vary from year to year depending on the extent to which visiting judges are used. To determine the extent to which the burdens on judges of the Second Circuit increased from 2001, before the surge of BIA petitions, to 2005, after the surge, I examined the number of cases considered by panels during the Court’s August 2000 and August 2004 terms (ending in the following August of each year) and the average number of cases considered by Second Circuit judges each time they served on panels. The number of cases considered by panels increased by 16% (although this is far less than the 66% increase in filings that occurred in

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5. *Id.* at 78, 91. Because the Article considered only appeals in civil cases, the exception for prisoner appeals must refer to appeals in cases challenging prison conditions, not criminal convictions.

6. Filings of administrative appeals, which are overwhelmingly petitions for review of BIA decisions, increased in the Second Circuit from 237 in 2001 to 1,066 in 2002 and in the Ninth Circuit from 1,054 in 2001 to 3,899 in 2002. U.S. COURTS, *Statistical Tables for the Federal Judiciary*, tbl.B-1 (Dec. 31, 2001), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/b001dec01.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/b001dec01.pdf); *id.* (Dec. 31, 2002), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/b001dec02.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/b001dec02.pdf). By 2005, filings of administrative appeals reached 2,784 in the Second Circuit and 6,870 in the Ninth Circuit. *Id.* (Dec. 31, 2005), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/B01Dec05.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/B01Dec05.pdf).

The Article labels the surge in petitions for review of BIA decisions as “post-9/11 developments,” Lavie, *supra* note 2, at 77, but there is no reason to think that 9/11 had anything to do with the surge. The surge occurred after 9/11, not because of it. See John D. Ashcroft & Kris W. Korbach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L. REV. 1991, 1991 (2009) (noting that reforms were enacted in 2002 after the BIA backlog “had been steadily growing for more than a decade”).

7. Lavie, *supra* note 2, at 76 n.103 (emphasis added).

8. See Judge Jon O. Newman, *The Second Circuit’s Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 431 (2009).

the Second Circuit from 2001 to 2005<sup>9</sup>), and the average number of cases considered by Second Circuit judges each time they served on panels increased by 17%.<sup>10</sup>

So I accept the Article's assertion that the burdens on Second Circuit judges increased somewhat after the surge in immigration cases. However, it should be noted that the surge in immigration filings alone did not result in a major increase in the number of cases heard by or submitted to panels from 2001 to 2005; the Second Circuit did not begin its Non-Argument Calendar (NAC), sending twelve and later nine immigration cases to several panels each week, until September 30, 2005.<sup>11</sup>

Although I did not examine the *outcomes* of all of the appeals decided in the relevant years, I also accept the Article's calculation of a 1.3 percentage point decline in the Second Circuit's civil appeal reversal rate.

The basic flaw in the Article is the assumption that a decline in a court's reversal rate indicates a decline in the quality of decision making. The Article bases this concluding assumption on an initial assumption that a judge takes more time to prepare an opinion reversing a judgment than affirming a judgment, and speculates that an increased caseload reduces the time to consider each appeal, which leads to fewer reversals, and therefore, reduced quality.<sup>12</sup> Quoting Judge Aldisert of the Third Circuit, the Article purports to explain: "Under time pressure judges may be tempted, consciously or subconsciously, to decide cases in a less time-consuming way. A notable example is reversing district court rulings less often—'because a reversal will require a time-consuming, researched opinion.'"<sup>13</sup>

With due respect to that distinguished judge of the Third Circuit, his brief comment that a reversing opinion requires extensive time to prepare is a false premise for the Article's false conclusion that a decline in a court's reversal

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9. The total number of cases commenced in the Second Circuit grew from 4,460 in 2001 to 7,384 in 2005. *See* U.S. COURTS, *supra* note 7.

10. Cases considered by panels in the Second Circuit totaled 1,325 in the August 2000 term and 1,531 in the August 2004 term, an increase of 16%. Judicial manpower remained virtually unchanged. The number of times when Second Circuit judges were assigned to panels that considered these cases was 685 in the 2001 term and 678 in the 2004 term, which means that the average number of cases that Second Circuit judges considered each time they served on panels was 1.93 in the 2001 term and 2.26 in the 2004 term, an increase of 17%. These figures were derived from a hand count of court calendars for both terms. These calendars are available for inspection in the Clerk's Office.

11. Newman, *supra* note 9, at 433-34.

12. The Article also makes the unsupported and unwarranted assumption that an increase in caseload causes an increase in remands to district courts. Appellate courts "may remand more cases (rather than affirm or reverse), shifting some work back to district courts." Lavie, *supra* note 2, at 66. No examples are cited. In thirty-eight years, I have never seen a Second Circuit panel remand a case in order to save time.

13. Lavie, *supra* note 2, at 66 n.48 (citing Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1146 n.110 (2011) (quoting Judge Ruggero J. Aldisert, *Then and Now – Danger in the Courts*, FED. LAW., Jan. 1997, at 43)).

rate indicates a decline in quality. On the contrary, many opinions reversing district court judgments require *less* time for doing research and writing opinions than affirming opinions.<sup>14</sup> The reason: a reversing opinion will often reckon with just one claim of the winning appellant, but an affirming opinion needs to reckon with all the major claims of the losing appellant. I have written many short opinions reversing district court rulings and many long opinions affirming district court rulings.<sup>15</sup>

Even if a decline in a court's reversal rate were probative of anything, the Article's reported decline of just 1.3 percentage points for the Second Circuit is extremely slight and most likely attributable to a slight change in the mix of cases. That mix in any appellate court is highly unlikely to remain constant from year to year. Some slight variation in the reversal rate is to be expected without indicating anything about the quality of decision making. The more likely reason for a change in reversal rate is a slightly higher or lower percentage of appeals meriting reversal.

The Article underscores the basic flaw of assuming that a slight decline in reversal rate indicates a decline in the quality of decision making by failing to identify even a single affirmance by the Second Circuit in the relevant years that the Article's author believes should have been reversed or would have been reversed if the caseload had not increased.

The Article concludes with a negative assessment of the way the Second Circuit has responded to caseload growth compared to the Ninth Circuit. The Article attributes the Second Circuit's allegedly deficient performance to "procedural safeguards," referring to our practice of offering oral argument to most parties in fully briefed appeals—a practice producing the highest oral argument rate of all the circuits.<sup>16</sup> As the Article states, "[C]ourts that enshrine procedur-

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14. The time to read briefs in appeals resulting in affirmances and reversals is not likely to vary.

15. *Compare* *United States v. Clark*, 740 F.3d 808, 810-13 (2d Cir. 2014) (reversing judgment in 4 pages), *Desardouin v. City of Rochester*, 708 F.3d 102, 104-06 (reversing judgment in part in 3 pages), *Swartz v. Insogna*, 704 F.3d 105 (2d Cir. 2013), 107-12 (vacating judgment and remanding in 6 pages), *and* *United States v. Whitley*, 529 F.3d 150, 151-58 (2d Cir. 2008) (same in 7 pages), *with* *United States v. Cromitie*, 727 F.3d 194, 198-227 (2d Cir. 2013) (affirming judgment in 29 pages), *United States v. Biaggi*, 909 F.2d 662, 669-97 (2d Cir. 1990) (same in 29 pages), *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1148-67 (2d Cir. 1988) (same in 20 pages), *and* *United States v. Myers*, 692 F.2d 823, 826-60 (2d Cir. 1982) (affirming convictions of several defendants in 35 pages).

16. Although it is true that the Second Circuit has a tradition of according oral argument to a greater extent than other circuits, the Article's generalization that "every case" is sent to an oral argument calendar is not correct. *See* *Lavie*, *supra* note 2, at 70. There are two categories of exceptions:

(1) One category of cases not receiving argument comprises pro se appeals determined at a preliminary stage to be frivolous. Many of these are appeals from dismissal of a complaint by a prisoner challenging prison conditions. In a high percentage of these appeals, the appellant makes a motion to proceed *in forma pauperis* or for appointed counsel. In order to determine whether the appeal has sufficient merit to meet even the low threshold for granting such a motion, the court must assess the merits. In doing so, the court frequently concludes

al safeguards [like the Second Circuit] would compromise decision quality in the face of workload pressure; whereas resilient, flexible courts [like the Ninth Circuit] will better handle such caseload growth.”<sup>17</sup>

In reply, I offer two comparisons: (1) The total of administrative appeals (almost entirely immigration cases from the BIA) pending in the Second Circuit was 312 on January 1, 2002, soared to 4,924 on December 31, 2004, declined to 1,594 on December 31, 2009, and stood at 732 on June 30, 2016. In the Ninth Circuit, the total started at 1,049 on January 1, 2002, soared to 6,509 on December 31, 2004, increased further to 7,084 on Dec. 31, 2009, and still stood as high as 4,890 on June 30, 2016.<sup>18</sup> In both circuits, immigration cases continued to pour in. (2) The median time from filing a notice of appeal until disposition for all appeals for the fiscal year ending Sept. 30, 2016, was 10.8 months in the Second Circuit and 15.2 months in the Ninth Circuit.<sup>19</sup> Readers can decide for themselves which circuit “better handle[d]” its caseload growth.

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that the motion should be denied because the appeal is frivolous, and simultaneously dismisses the appeal as frivolous. Such cases never reach an oral argument calendar. Newman, *supra* note 9, at 433.

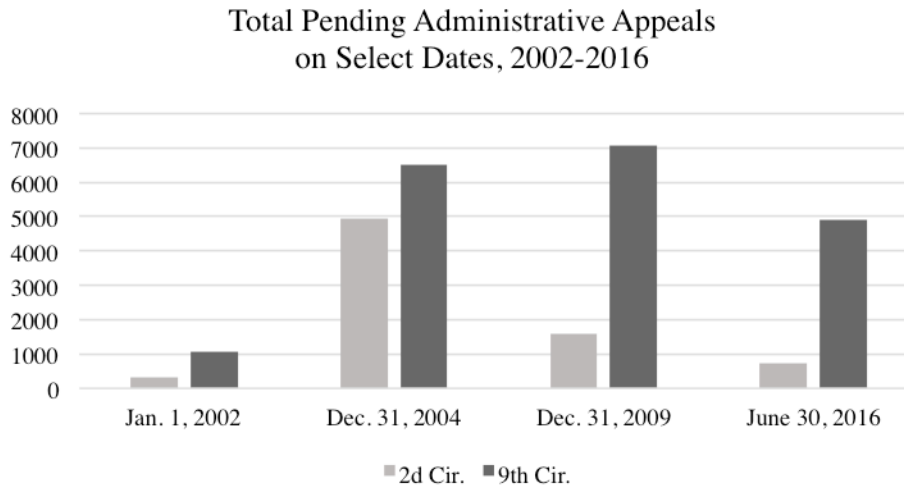
(2) Starting on September 30, 2005, petitions seeking review of decisions of the BIA denying an asylum claim were placed on a special NAC and received oral argument only if one member of the panel so requested. *Id.* at 433-34. The number of such requests declined over time as most of the legal issues were resolved, and most petitions concerned routine challenges to an Immigration Judge’s credibility finding. Statistics available for inspection at the Staff Attorney’s Office of the Second Circuit Court of Appeals reveal that in the years 2006, 2007, and 2008, the numbers of cases originally on a NAC calendar that were transferred to an argument calendar were 109, 94, and 76, respectively. For the years 2014, 2015, and 2016, the numbers were 21, 13, and 13, respectively. *See also* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 418 (2013) (noting that since the NAC was created, most BIA appeals in the Second Circuit have not received oral argument).

17. Lavie, *supra* note 2, at 88-89.

18. U.S. COURTS, *Statistical Tables for the Federal Judiciary*, tbl.B-1 (Dec. 31, 2002), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/b001dec02.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/b001dec02.pdf); *Id.* (Dec 31, 2004), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/B01dec04.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/B01dec04.pdf); *Id.* (Dec. 31, 2009), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/B01Dec09.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/B01Dec09.pdf); *Id.* (June 30, 2016), [http://www.uscourts.gov/sites/default/files/data\\_tables/stfj\\_b1\\_630\\_2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/stfj_b1_630_2016.pdf).

19. U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS 22 (Sept. 30, 2016).

CHART 1:  
Total Pending Administrative Appeals on Select Dates, 2002 – 2016



**Source:** U.S. COURTS, *Statistical Tables for the Federal Judiciary*, tbl.B-1 (Dec. 31, 2002); *Id.* (Dec 31, 2004); *Id.* (Dec. 31, 2009); *Id.* (June 30, 2016).