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### Buying Time? False Assumptions About Abusive Appeals

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# BUYING TIME? FALSE ASSUMPTIONS ABOUT ABUSIVE APPEALS

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A noncitizen facing deportation from the United States must obtain a stay of removal to avoid being deported while his federal appeal is pending. In its 2009 decision in *Nken v. Holder*, the Supreme Court attempted to clarify the doctrinal standard for obtaining such a stay.<sup>1</sup> However, key parts of the decision now stand on shaky ground because subsequent litigation has revealed that the Solicitor General's Office misled the Court to believe that procedures were in place to bring wrongfully deported individuals back to the United States if they ultimately won their appeals.<sup>2</sup> In addition, the federal circuit courts of appeal are split on how to apply the *Nken* standard.

The government's rush to deport first and resolve appeals later stems from a belief that many noncitizens abuse the appeals process to remain in the United States for a longer period of time. This fear assumes that filing an appeal actually buys a significant amount of time. The opening line of Chief Justice Roberts's majority opinion in *Nken* recognized the critical role of time, but could only vaguely note: "It takes time to decide a case on appeal. Sometimes a little; sometimes a lot."<sup>3</sup> Unpacking fears of abuse therefore requires exploring how long the appellate process actually takes.

In a concurring opinion, Justice Kennedy lamented the lack of available empirical data about how the federal courts of appeals actually handle stays of removal, recognizing that such data would help the Court analyze whether the standard for granting stays is fair and effective.<sup>4</sup> This Article presents new empirical data that shows that common assumptions about the duration of immigration appeals are actually false. The government's arguments to the Supreme Court about the danger that stays of removal pose were founded on these misperceptions. This new data should affect how liberally appellate courts

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1. *Nken v. Holder*, 129 S. Ct. 1749 (2009).

2. Jess Bravin, *Immigration Case Challenges Justice Department's Credibility*, WALL ST. J. (Mar. 13, 2012, 10:58 AM), <http://online.wsj.com/news/articles/SB10001424052970203961204577272053518420934>.

3. *Nken*, 129 S. Ct. at 1754.

4. *Id.* at 1762–63 (Kennedy, J., concurring).

grant stays of removal and assist the Supreme Court in resolving the circuit split over the application of the *Nken* standard.

As immigration cases proceed from immigration courts to the Board of Immigration Appeals (BIA) to the U.S. Courts of Appeals, adjudicators at every level must strike a delicate balance between avoiding undue delay and preventing errant deportations. Federal appellate courts in particular must walk this tightrope with enormous care because effectively they are the last barrier to removal. These courts face the formidable challenge of deciding whether to grant a stay at the very beginning of the appeal, before having an opportunity to thoroughly examine the issues in the case. Moreover, the stakes are often extremely high. For example, if the judge errs in an asylum case, the petitioner could be sent to a country in which she faces a risk of persecution or torture.

The circuit courts deal with these challenges differently. Some grant stays of removal fairly liberally, while others grant them only rarely.<sup>5</sup> These variations are associated with different approaches to applying the standard for stays of removal.<sup>6</sup> In *Nken*, the Supreme Court held that the traditional four-part test for preliminary injunctions applies to stays of removal, rejecting a more stringent standard.<sup>7</sup> Yet the circuit courts remain divided over whether to use a “sliding scale” approach in applying the four-part test, with which a stronger showing on one factor permits a lesser showing on another, or a strict, sequential approach, which involves analyzing each factor independently.<sup>8</sup> We previously found that courts using the “sliding scale” approach produce fewer “false negatives” (cases in which the stay was denied but the appeal was ultimately granted), thereby protecting more people from wrongful deportations.<sup>9</sup> However, the sliding scale approach also correlates to a higher number of “false positives” (cases in which the stay was granted but the appeal was ultimately denied), allowing many noncitizens to delay valid deportations.<sup>10</sup> The Supreme Court must therefore strike a difficult balance to clarify the doctrinal standard for granting stays.

To shed light on the real potential for undue delay that results from granting a stay of removal, we collected information from over 1600 cases in the eleven federal circuit courts that hear immigration petitions.<sup>11</sup> Our data indicate that in most circuits, delay is less of a concern than previously thought. We found that the average processing time for an immigration appeal was under nine months, and cases dismissed for lack of jurisdiction or procedural reasons—as frivolous appeals are more likely to be—were usually resolved in less than six months.

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5. See Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 341 (2014).

6. *Id.*

7. *Nken*, 129 S. Ct. at 1761–62 (2009).

8. See Marouf, Kagan & Gill, *supra* note 5, at 350–51.

9. *Id.* at 341.

10. *Id.*

11. The D.C. Circuit does not contain an immigration court, so the circuit does not have jurisdiction over petitions for review of removal orders and was therefore omitted from our study.

These results suggest that concerns about delay are overblown and that the risk of wrongful deportation is the more urgent issue that courts should consider in setting the standard for granting stays.

Our analysis also demonstrates the importance of court management in understanding how the wheels of justice actually turn. The doctrinal standard for granting a stay of removal is only part of the equation. Courts must also consider the implications of different procedures that can expedite or delay cases. Our examination of the duration of appeals, circuit by circuit, revealed different patterns in the speeds of adjudication. For example, focusing on the two circuits that handle over 70% of all immigration appeals, we found that nearly half of the Ninth Circuit's cases are resolved in less than six months, whereas only about 25% of the Second Circuit's cases are resolved in that time period. These differences appear to result from different case management practices.<sup>12</sup> Although the government argued to the Supreme Court in *Nken* that the Ninth Circuit is opening the door to abuse of the appellate process,<sup>13</sup> this concern actually appears far more valid in the Second Circuit, where cases take much longer to resolve. In the Ninth Circuit, there seems to be little harm in granting stays of removal liberally because the court disposes of frivolous cases fairly quickly.

At the same time, this study demonstrates that strategies designed to increase efficiency in adjudicating motions may compromise the quality of decision-making. These procedures include reducing the size of the panel that decides the stay motion, streamlining the process for voting in ways that may reduce the level of independent scrutiny, lessening the amount of explanation (if any) provided in the decision, and increasing the reliance on staff attorneys to pre-screen cases. As courts strive to strike the correct balance between protecting a noncitizen's right to a meaningful appeal and preventing abuse of the legal process, they should pay attention to available data on the impact of these different procedural practices.

Part I of the Article shows that frivolous immigration filings are a major governmental concern and explores various theories proposed by the government and some judges to explain how and why noncitizens may abuse the appellate process to buy time. It exposes the weaknesses in these theories and proposes alternative explanations for certain behavior of noncitizen litigants. Part II presents the key findings from our empirical study of the duration of immigration appeals and illustrates the implications for courts concerned with the potential for abuse. Finally, Part III offers recommendations to the executive and judicial branches to address these concerns.

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12. The Ninth and Second Circuits are the only two courts that offer temporary protection from removal to any petitioner who requests a temporary stay. See *infra* Part II.F. (discussing the case management procedures of the Second and Ninth Circuits).

13. *Nken v. Holder*, 129 S. Ct. 1749, 1762–63 (2009) (Kennedy, J., concurring).

## I. STAYS OF REMOVAL AND THE FEAR OF DELAY

For decades, the government has expressed concerns about noncitizens filing frivolous or fraudulent immigration applications to stay in the country. Despite numerous efforts to deter such filings, the fear remains. Concerns about abuse are especially acute appeals to the federal circuit courts, in part because frivolousness is particularly difficult to define at that level of adjudication. Consequently, the government has approached stays of removal with great caution. Yet the government's various theories of delay-seeking behavior do not withstand close scrutiny and contradict empirical evidence, suggesting that delay may not be the motivation of noncitizens to pursue federal appeals.

### A. Efforts to Deter Frivolous Appeals

The idea that would-be immigrants might abuse the courts to delay inevitable deportation stems from a general concern about immigration fraud. Asylum fraud became a popular subject in 2011, after the woman who accused Dominique Strauss-Kahn of sexual assault admitted that she lied on her asylum application.<sup>14</sup> The *New York Times* reported that asylum fraud schemes are common, describing the lawyers, *notarios*, and "chop shops" that peddle stock stories to immigrants who are desperately searching for ways to remain in the United States.<sup>15</sup> The next month, the *New Yorker* published an article about asylum-seekers embellishing their experiences to strengthen their claims.<sup>16</sup> Serious investigations into asylum fraud followed, and, in 2012, twenty-six individuals, including six lawyers, were charged in the Southern District of New York for submitting hundreds of fabricated asylum applications on behalf of Chinese immigrants.<sup>17</sup> Such accounts naturally foment fears that countless noncitizens are abusing the legal process.<sup>18</sup>

Fears of frivolous and fraudulent immigration applications are not new. They have plagued the government since asylum offices were first established in the United States in the early 1990s.<sup>19</sup> Numerous regulatory and statutory changes

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14. Sam Dolnick, *Asylum Plays Play Off News to Open Door*, N.Y. TIMES, July 12, 2011, at A1, A19.

15. *Id.*

16. Suketu Mehta, *The Asylum Seeker*, THE NEW YORKER, Aug. 1, 2011, at 32.

17. Press Release, U.S. Att'y's Office for the S. Dist. of N.Y., Twenty-Six Individuals, Including Six Lawyers, Charged in Manhattan Federal Court With Participation in Immigration Fraud Schemes Involving Hundreds of Fraudulent Asylum Applications, (Dec. 18, 2012), available at <http://www.justice.gov/usao/nys/pressreleases/December12/AsylumFraudChargesPR.php>.

18. See, e.g., Diane Uchimiya, *A Blackstone's Ratio for Asylum: Fighting Fraud While Preserving Due Process for Asylum Seekers*, 26 PENN ST. INT'L L. REV. 383, 416 (2007) (discussing how immigration judges rely on general reports about asylum fraud in their decisions in individual cases).

19. See Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunity*, 9 AM. U. J. INT'L L. & POL'Y 43, 51–52 (1994). Far more people than expected began submitting asylum applications, which made the system appear vulnerable to

over the past two decades sought to address these concerns. In 1995, the executive branch introduced regulatory changes aimed at curbing asylum fraud.<sup>20</sup> In 1996, Congress amended the Immigration and Nationality Act (INA) to render noncitizens who file frivolous asylum applications permanently ineligible for immigration benefits.<sup>21</sup> In 2002, the Attorney General issued a regulation that allows a single member of the BIA to summarily dismiss an appeal that is “filed for an improper purpose, such as to cause unnecessary delay” or that “lacks an arguable basis in fact or law.”<sup>22</sup> In 2005, Congress passed the REAL ID Act, which demanded more corroborating evidence from asylum seekers and set a lenient standard for adverse credibility determinations.<sup>23</sup> More recently, the BIA and circuit courts have repeatedly tried to clarify the standard for determining whether an asylum application is frivolous.<sup>24</sup>

Rule of Appellate Procedure 46(c) permits a federal court to “discipline an attorney who practices before it for conduct unbecoming a member of the bar or

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abuse. See *id.* at 50–51 (noting that “the system is ripe for fraud and abuse”); Tim Weiner, *Pleas for Asylum Inundate System for Immigration*, N.Y. TIMES, Apr. 25, 1993, at A1.

20. Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 14,779 (proposed Mar. 30, 1994) (codified at 8 C.F.R. pts. 203, 208, 236, 242, 274a); see also David A. Martin, *The 1995 Asylum Reforms*, CENTER FOR IMMIGR. STUD. (May 2000), [www.cis.org/1995AsylumReforms](http://www.cis.org/1995AsylumReforms). The reforms attempted to address a backlog that made the system appear vulnerable to abuse by making processing of applications more efficient and delaying the availability of a work permit. *Id.*; see also Deborah Anker, *The Mischaracterized Asylum Crisis: Realities Behind Proposed Reforms*, 9 AM. U. J. INT’L L. & POL’Y 29, 30–31 (1994) (discussing an empirical study by Harvard Law School’s immigration and refugee program that challenged public perceptions about abuse).

21. 8 U.S.C. § 1158(d)(4)(A), (d)(6); INA § 208(d)(4)(A), (d)(6). The 1996 amendments also imposed a one-year filing deadline for asylum to discourage fraudulent applications. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 3 (2008), [hereinafter GAO REPORT], available at <http://www.gao.gov/new.items/d08940.pdf>. Congress has since questioned “whether the resources expended on adjudicating the [one-year] rule outweigh its effectiveness in deterring fraud.” *Id.*

22. 8 C.F.R. § 1003.1(d)(2)(i)(D) (2013) (stating that a Board member may dismiss an appeal if he “is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law”). The 2002 regulations also provide that an attorney who files a frivolous appeal may be subject to disciplinary action. *Id.* § 1003.1(d)(2)(iii).

23. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(a), 119 Stat. 302, 302–03 (codified at 8 U.S.C. § 1158(b)(1)(B) (2012)).

24. See, e.g., *Yan Liu v. Holder*, 640 F.3d 918, 922 (9th Cir. 2011); *Khadka v. Holder*, 618 F.3d 996, 1002 (9th Cir. 2010); *Chen v. Mukasey*, 527 F.3d 935, 940 (9th Cir. 2008); *Biao Yang v. Gonzales*, 496 F.3d 268, 279 (2d Cir. 2007) (per curiam) (remanding for clarification by the BIA); *Matter of X-M-C-*, 25 I. & N. Dec. 322, 324 (BIA 2010); *Matter of B-Y-*, 25 I. & N. Dec. 236, 238–39 (BIA 2010); *In re Y-L-*, 24 I. & N. Dec. 151, 157 (BIA 2007).

for failure to comply with any court rule.”<sup>25</sup> Rule 46(c) provides a practical way to respond to abusive patterns of attorney behavior that are easier to identify and assess than the merits of an individual case. Any given appeal may totter on the border between being frivolous or weak, but a pattern of failing to file briefs or respond to court orders is easier to catch.<sup>26</sup> In some cases, such conduct may result from incompetence or an overwhelming caseload, but in other cases, the attorney may be filing meritless appeals simply to buy time for clients.<sup>27</sup> Some courts have supplemented Rule 46(c) with local rules that impose harsh consequences and sanctions for specific types of abuses by both attorneys and *pro se* petitioners.<sup>28</sup>

Flagrant attorney misuse of the appellate process may also result in state bar sanctions. In 2010, the Tennessee Supreme Court affirmed the suspension of a Memphis attorney who had filed eighteen immigration appeals with the Sixth Circuit and, in each case, had failed to pay the filing fees, file required forms, or submit an opening brief, resulting in dismissal of the appeals.<sup>29</sup> Noting that the “filing of frivolous appeals ‘is a recurring problem in immigration practice,’”<sup>30</sup> the Tennessee Supreme Court found that the attorney had “exploited a procedural mechanism” and “abandoned the balance between zealously

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25. FED. R. APP. P. 46(c). The Supreme Court held that conduct “unbecoming a member of the bar” may include any conduct that is “contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice.” *In re Snyder*, 472 U.S. 634, 645 (1985).

26. The Second Circuit has publicly reprimanded attorneys who have filed abusive immigration appeals. In one case in which the court issued a reprimand in a published decision, the attorney defaulted on scheduling orders in fourteen cases, withdrew a number of appeals after the briefing deadlines had passed, and filed a deficient brief that waived a dispositive argument. *In re Payne*, 707 F.3d 195, 198–99 (2d Cir. 2013). In another case, the attorney had a history of missing deadlines and submitted a deficient brief in at least one case in which the motive to appeal was admittedly to gain time until another form of relief became available. *In re Guttlein*, 378 F. App’x 24, 25 (2d Cir. 2010).

27. Concerns about attorneys’ dilatory behavior are not new. An 1893 article published in the *Yale Law Journal* noted:

There are two classes of lawyers who are always demanding delay. First, those whose natural indolence resents any demand for action as a personal injury; second, the excessively busy ones who have managed to get under their control more cases than their time and strength will enable them to dispose of, and who remind one continually of a hen trying to hatch out more eggs than she can cover.

Talcott H. Russel, *The Law’s Delay*, 2 YALE L.J. 95, 102 (1893). The author appears to have overlooked the category of lawyers seeking delay on behalf of their clients.

28. See, e.g., SECOND CIR. LOCAL R. 31.2(d) (granting the court the power to “dismiss an appeal or take other appropriate action for failure to timely file a brief or to meet a deadline”); SECOND CIR. LOCAL R. 38.1 (“The court may, after affording notice and an opportunity to be heard, impose sanctions on a party that: (a) fails to file a brief, the appendix, or any required form within the time specified by FRAP or a rule or order of this court, or (b) takes or fails to take any other action for the purpose of causing unnecessary delay.”).

29. *Flowers v. Bd. Of Prof’l Responsibility*, 314 S.W.3d 882, 887 (Tenn. 2010).

30. *Id.* at 897 (quoting Robert G. Heiserman & Linda K. Pacun, *Professional Responsibility in Immigration Practice and Government Services*, 22 SAN DIEGO L. REV. 971, 980–81 (1985)).



representing his clients and the rules for the professional performance of his vocation.”<sup>31</sup>

Although the Tennessee case is a fairly extreme example, federal courts still struggle to define frivolousness. Although Federal Rule of Appellate Procedure 38 grants the courts of appeals the authority to sanction appellants and attorneys who pursue “frivolous” appeals, but there is no clear test to for frivolity.<sup>32</sup> Courts remain divided over whether frivolousness can be defined simply by the objective “reasonably prudent attorney” test, or whether the attorney must also demonstrate bad faith.<sup>33</sup>

One common approach is the actuarial approach, which defines frivolousness as a low likelihood of success, or by combining the likelihood of success with an estimate of the cost of litigation.<sup>34</sup> This framework is best applied to civil suits for money damages. The question is often whether the costs of litigation outweigh what is at stake in the case, and whether the transaction costs of litigation distort outcomes by leading to settlement of meritless cases.<sup>35</sup> This quantitative approach to frivolousness does not represent how humans actually think about probabilities or how they make decisions.<sup>36</sup> People will often pursue low probability cases if there is a remote prospect of a big reward.<sup>37</sup> Moreover, in cases in which the stakes are extremely high—such as immigration cases, which risk the “loss of both property and life; or of all that makes life worth living”<sup>38</sup>—applying a traditional cost-benefit analysis is not possible.

The general difficulty in defining, identifying, and responding to frivolous appeals explains why the government has approached stays of removal with such great caution. In *Nken*, the government argued that noncitizens seek to

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31. *Id.* at 898; see also Bill Dries, *Suspension Highlights Immigration Advocacy Issues*, MEMPHIS DAILY NEWS, June 10, 2010, <http://www.memphisdailynews.com/news/2010/jun/10/suspension-highlights-immigration-advocacy-issues/print> (discussing the court’s opinion).

32. FED. R. APP. P. 38; CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & JOAN E. STEINMAN, *FEDERAL PRACTICE AND PROCEDURE* § 3984.1 (4th ed. 2008) (noting the lack of clear test for frivolity).

33. See Scott A. Martin, *Keeping Courts Afloat in a Rising Sea of Litigation: An Objective Approach to Imposing Rule 38 Sanctions for Frivolous Appeals*, 100 MICH. L. REV. 1156, 1159–61 (2002) (discussing the “reasonably prudent attorney” standard); Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845, 850 (1984) (elaborating on the requirement of bad faith).

34. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529–31 (1997).

35. See, e.g., Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 465 (2004) (describing the impact of attorney fees on the disposition of a case).

36. See Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 188–89 (2000).

37. Guthrie explains that if a plaintiff has a 1% chance of winning \$5000, the actuarial approach would suggest that the case should be worth fifty dollars. *Id.* But the vast majority of test subjects refuse a fifty-dollar settlement offer in this scenario, preferring to pursue the remote chance of winning a much larger prize. *Id.*

38. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

manipulate the courts to delay removal in many different ways.<sup>39</sup> In an amicus brief, the Washington Legal Foundation more bluntly stated that “a court-imposed delay in removal is a victory for the alien.”<sup>40</sup> In other words, from the government’s perspective, deportation delayed is justice denied. Based in large part on its fear of delay-seeking behavior, the government argued for a stringent stay standard, adopted only by the Fourth and Eleventh Circuits, that required “clear and convincing evidence that the entry or execution of such [removal] order is prohibited as a matter of law.”<sup>41</sup> This standard reflected the government’s view that a stay should be an “extraordinary remedy.”<sup>42</sup>

Although the Court rejected the clear and convincing standard and held that the traditional four-part test for preliminary injunctions applies to stays of removal,<sup>43</sup> Chief Justice Roberts’s majority opinion acknowledged the tension between efficient execution of removal orders and the time required for quality decision-making.<sup>44</sup> Yet the opening lines of the opinion suggest that quality adjudication comes first. The Court stressed that holding a ruling in abeyance provides adequate time for an appellate court to decide a case on the merits.<sup>45</sup> It also cautioned that “[t]he choice for a reviewing court should not be between justice on the fly or participation in what may be an idle ceremony.”<sup>46</sup>

#### *B. Theories of Maximum and Specific Delay*

Although *Nken* generally discussed the critical role of time, the Court never explicitly addressed the government’s argument that noncitizens abuse the appellate process to delay deportation. This may have been a tactical choice to avoid highlighting concerns about abusive appeals in a decision that adopted the more lenient of two proposed standards for stays. The Court also lacked the empirical data to effectively evaluate this argument.<sup>47</sup>

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39. Brief for the Respondent at 10, *Nken v. Holder*, 129 S. Ct. 1749 (2009) (No. 08-681), 2009 WL 45980 at \*10.

40. Brief of the Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of the Respondent at 7, *Nken*, 129 S. Ct. 1749 (No. 08-681), 2009 WL 75556 at \*7.

41. *Nken*, 129 S. Ct. at 1756.

42. Brief for the Respondent, *supra* note 39, at 46 (quoting *Winter v. Nat’l Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008)).

43. *Nken*, 129 S. Ct. at 1756 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)) (“[A] court considers four factors: ‘(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.’”).

44. *Id.* at 1756–57 (“The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final.”).

45. *Id.* at 1754.

46. *Id.* at 1757 (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942)).

47. *Id.* at 1762–63 (Kennedy, J., concurring).

In the *Nken* briefs, the government vaguely discussed the issue of delay without explaining why and how motivation to delay leads certain immigrants to file frivolous appeals in federal court.<sup>48</sup> One argument is that immigrants simply wish to remain in the United States for as long as possible, and therefore attempt to lengthen the adjudication process in any way possible. However, this was not actually the theory that the executive branch promoted in the years leading up to *Nken*.

By 2009, the courts were concerned with the number immigration cases on the federal appellate docket. Petitions to the federal courts surged after the Attorney General initiated reforms of the BIA in 2002 that streamlined its decision-making, allowing single-member panels to affirm the decisions of immigration judges.<sup>49</sup> Critics claim that the surge in appeals to the court was the consequence of lower-quality decisions by the BIA after streamlining.<sup>50</sup> In response, the government argued that the increase in appeals resulted from a desire by noncitizens to delay deportation.<sup>51</sup> However, the simple desire to delay deportation for as long as possible does not explain the post-2002 surge in appeals because noncitizens could delay deportation by appealing to the federal courts even before streamlining. The theory that noncitizens seek maximum delay thus cannot explain the increase in immigration appeals after BIA streamlining.

As a result, the government developed a more nuanced theory of delay, suggesting that immigrants seek to stay in the United States for a specific period of time to earn a certain amount of money before returning home.<sup>52</sup> According

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48. Brief for the Respondent, *supra* note 39, at 35–36 (quoting *Teshhome-Gebreegziabher v. Mukasey*, 528 F.3d 330, 335 (4th Cir. 2008, *abrogated by Nken*, 129 S. Ct. 1749).

49. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

50. Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1008 (2006) (citing E-Mail from Larry Levine, Counsel for Legislative and Public Affairs, U.S. Dep't of Justice, to Stuart Drown, City Editor, *The Sacramento Bee* (Sept. 21, 2004), available at <http://www.justice.gov/eoir/press/LtrtoEditorSacBee.pdf>).

51. *Id.* (citing Exec. Office of Immigration Review, U.S. Dep't of Justice, Fact Sheet: BIA Restructuring and Streamlining Procedures (Mar. 9 2006), available at <http://www.justice.gov/eoir/press/06/BIAStreamliningFactSheet030906.htm>).

52. See Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases*, 74 BROOK. L. REV. 429, 431–32 (2009). Second Circuit Judge Jon O. Newman explained that [o]ne theory for the increased rate of appeal holds that the BIA's streamlined procedures were largely responsible because they drastically reduced the time an alien could expect to remain in this country while his or her case languished in the administrative process. Many aliens, this theory maintains, hope to remain here for about five years in order to earn money for themselves and relatives back home. With their cases moving through the administrative process in less than one year, a petition for review in a court of appeals, with the likely prospect of a stay of removal while the petition was pending, afforded hope of maintaining a five year residence in this country with the petition remaining in the judicial process for four years.

*Id.*

to the theory of specific delay, if the BIA process took longer, more noncitizens were able to achieve their specific desired period of delay without resort to the federal courts; once the BIA became faster, they had to appeal to the next level to achieve the same period of delay.<sup>53</sup> This specific delay theory built on the unquestioned fact that the 2002 reforms did make the BIA faster. In 2000, it took the BIA an average of 1,100 days (roughly three years) to decide appeals.<sup>54</sup> By 2006, an appeal to the BIA took an average of only 400 days (just over one year).<sup>55</sup>

Nevertheless, the specific delay hypothesis has several flaws. First, it predicts that the longer the BIA takes to decide a case, the less likely the noncitizen is to appeal to the federal courts, and, the faster the BIA decides, the more likely the noncitizen is to file a petition for review. Yet previous research has shown that the opposite is true. In cases in which the BIA takes longer to decide a case, the noncitizen is *more likely* to appeal to the circuit court.<sup>56</sup>

Second, the specific delay theory does not explain why noncitizens appeal from detention, as they often cannot gain anything by appealing except more time in confinement.<sup>57</sup> If immigration detainees consented to removal from the country, they could escape detention much sooner. However, appeals from detainees to the BIA increased by 28% from 2007 to 2011, suggesting that a genuine desire to avoid deportation, rather than prolonging the case for a certain period of time to earn money in the United States, may in fact be the primary motivation for appeals.<sup>58</sup>

Third, the specific delay theory does not explain why most noncitizens never pursue any type of appeal at all. In 2011, noncitizens appealed only 8% of

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53. See 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, 5 (2005).

54. GAO REPORT, *supra* note 21, at 50 & fig.8. Detained cases, in particular, have been processed more quickly since streamlining. In 2009, the BIA Chairman reported that detained cases must be completed within 150 days, but they are usually completed within ninety-five days. Maria Baldini-Potermine, *Practice Before the Board of Immigration Appeals: Recent Roundtable and Additional Practice Tips*, 86 INTERPRETER RELEASES 2009, 2011 (2009).

55. GAO REPORT, *supra* note 21, at 50.

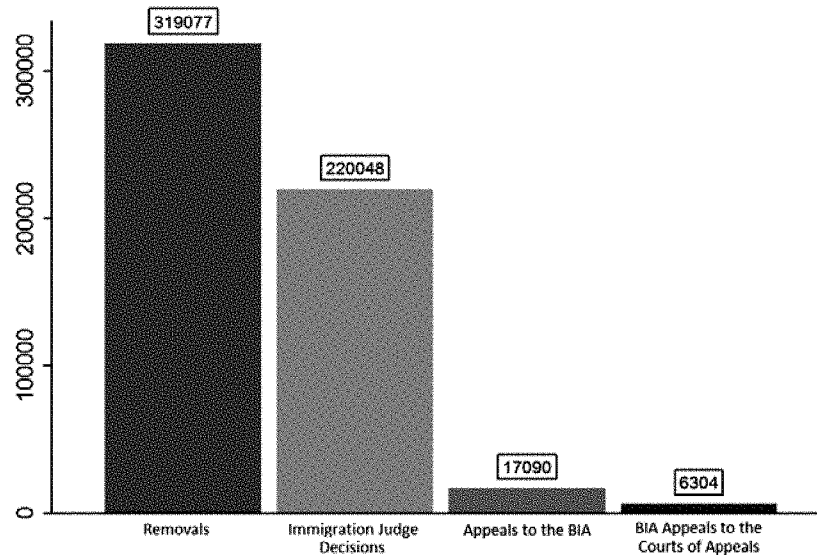
56. Palmer et al., *supra* note 53, at 54–55, 65 (“We found that the pool of sampled BIA decisions that were challenged in petitions for review were, on average, older than the pool of sampled BIA decisions that were not challenged. The mean age of the pool of decisions that were challenged in petitions for review was 1276 days (3.5 years), while the mean age of the BIA decision that were not challenged was 1051 days (2.9 years).”).

57. The Ninth Circuit permits a detained petitioner who is granted a stay of removal by the court to seek a bond hearing before the immigration judges and be released. See *Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942, 948 (2008). Most other circuits have not followed this approach.

58. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2011 STATISTICAL YEARBOOK W1 (2012) [hereinafter FY 2011 STATISTICAL YEARBOOK], available at <http://www.justice.gov/eoir/statspub/fy11syb.pdf>.

immigration court decisions to the BIA<sup>59</sup> and filed only 6,300 petitions for review with the federal appellate courts.<sup>60</sup> That same year, Immigration and Customs Enforcement (ICE) removed 396,906 people from the United States.<sup>61</sup> Even if many appeals are frivolous, they do not frustrate the government's general ability to enforce immigration laws. In fact, the appellate process is marginal to the overall scale of immigration enforcement in the United States. Figure 1 below demonstrates the paucity of appeals.<sup>62</sup>

FIGURE 1: IMMIGRATION APPEALS COMPARED TO REMOVALS IN 2011



59. *Id.* at X1. Both the Department of Homeland Security and the respondent noncitizen may appeal to the BIA in removal cases. *Id.* In 2011, the BIA received a total of 27,237. *Id.* at S2. Noncitizens filed 17,090 of those appeals. *Id.* at X1.

60. See U.S. COURTS FOR THE NINTH CIRCUIT, 2011 ANNUAL REPORT 58 (2011) [hereinafter NINTH CIRCUIT ANNUAL REPORT], available at <http://www.ce9.uscourts.gov/publications/AnnualReport2011.pdf> (noting that the Ninth Circuit handled 2,963 BIA appeals, close to 47% of BIA appeals filed nationwide in 2011).

61. Press Release, U.S. Immigration & Customs Enforcement, U.S. Dep't of Homeland Security, FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities Including Threats to Public Safety and National Security (Oct. 18, 2011), available at <http://www.ice.gov/news/releases/1110/111018washingtondc.htm>.

62. *Id.*; FY 2011 STATISTICAL YEARBOOK, *supra* note 58, at S2, X1; NINTH CIRCUIT ANNUAL REPORT, *supra* note 60, at 58.

Finally, only about half of the noncitizens who appeal to the circuit courts actually request a stay of removal.<sup>63</sup> This is true for both *pro se* and represented petitioners.<sup>64</sup> In three circuits, more than 60% of petitioners never request a stay, and in five circuits only around half do so.<sup>65</sup> This data contradicts the theory that the desire to delay deportation drives noncitizens to go to court because half never even ask the court to stay their removal.

There are alternative explanations for the increase in federal appeals. First, as the BIA became more efficient at deciding cases, it also grew less likely to rule in favor of noncitizens. According to a Government Accountability Office report, “BIA decisions favoring the alien were almost 50 percent lower (declining from 21 percent to 10 percent) in the 4 ½ years following the 2002 streamlining compared with the 4 ½ years preceding it.”<sup>66</sup> Consequently, there were simply more BIA decisions to appeal after 2002, and immigrants and their advocates had more reason to doubt that the BIA provided them a fair opportunity. These factors naturally led to more petitions for review in the federal courts.

Another possible explanation for the increase in appeals is that the BIA’s new “affirmance without opinion” procedure left noncitizens feeling as though the Agency did not properly review their cases, which may have led them to seek review from the federal courts more often. The BIA used its authority to affirm without opinion 44% of the asylum cases it reviewed between March 2002 and October 2006, and entered final orders of removal in 77% of those cases.<sup>67</sup> Thus, more cases were ripe for appeal after 2002, more BIA decisions ended unfavorably for noncitizens, and petitioners had concrete procedural reasons to believe that they had been denied a fair and meaningful review of their cases.<sup>68</sup>

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63. Marouf, Kagan & Gill, *supra* note 5, at 368.

64. *Id.* at 370 (noting that *pro se* petitioners request stays at a rate comparable to represented petitioners).

65. *Id.* at 370–71.

66. GAO REPORT, *supra* note 21, at 10.

67. *Id.*

68. In addition, the 2002 procedural reforms led to numerous federal court challenges about the process itself, raising novel legal issues about the validity of the rulemaking and the legality of affirmances without opinion. See Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 46–47 (2007); see also Dorsey & Whitney, LLP, Study Conducted for: The American Bar Association Commission on Immigration Policy, Practice and Pro Bono Re: Board of Immigration Appeals: Procedural Reforms to Improve Case Management 31–37 (July 22, 2003), available at [http://www.dorsey.com/files/Publication/e649960f-30c0-408f-8965-0df604f69523/Presentation/PublicationAttachment/690ec02a-94b9-4115-a1a0-5d14cf0d7a6d/Dorsey StudyABA\\_8mgPDF.pdf](http://www.dorsey.com/files/Publication/e649960f-30c0-408f-8965-0df604f69523/Presentation/PublicationAttachment/690ec02a-94b9-4115-a1a0-5d14cf0d7a6d/Dorsey%20StudyABA_8mgPDF.pdf).

*C. Stays as an Incentive to Appeal*

In *Nken*, the government argued that both the Ninth and Seventh Circuits granted stays too leniently.<sup>69</sup> In his concurring opinion, Justice Kennedy—joined by Justice Scalia—sympathized with the government’s concerns that the Ninth Circuit may be too lenient.<sup>70</sup> Although the government did not offer any data to support its allegation about the Seventh Circuit, it claimed that noncitizens in the Ninth Circuit appeal BIA decisions 42% of the time, while noncitizens in the Eleventh Circuit appeal in only 9% of cases.<sup>71</sup> The government hypothesized that the availability of a temporary automatic stay in the Ninth Circuit incentivized appeals in that jurisdiction, whereas the Eleventh Circuit’s comparatively restrictive approach to granting stays discouraged abusive appeals.<sup>72</sup>

The government’s theory is difficult to test because only limited data is available about the actual *rates* of immigration appeals in various circuits. The most recent study that examined rates of immigration appeals, performed by John R. B. Palmer, Stephen W. Yale-Loehr, and Elizabeth Cronin, used data from 2004.<sup>73</sup> This study showed that the appeal rates ranged from 9% in the Eleventh Circuit to 60% in the Eighth Circuit, with an average rate of 34% across all circuits.<sup>74</sup>

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69. Brief for the Respondent, *supra* note 39, at 36, 47–48. Our data, which only included cases decided after *Nken*, showed that the Seventh Circuit actually granted a modest 31% of stay requests. Marouf, Kagan & Gill, *supra* note 5, at 364–65. While it is possible that the Seventh Circuit changed its practice substantially after the decision, we think this is unlikely because the court retained its sliding scale approach and a “low” threshold for the likelihood of success. *Id.*

70. See *Nken v. Holder*, 129 S. Ct. 1749, 1763 (2009) (Kennedy, J., concurring).

71. Brief for the Respondent, *supra* note 39, at 36.

72. *Id.* at 36. Under the Ninth Circuit’s General Order 6.4(c), which was issued in 2002, the petitioner receives a temporary automatic stay upon filing the motion for stay. If the government fails to respond to the motion or files a notice of non-opposition, then the temporary stay continues during the pendency of the appeal. If the government opposes the stay, then the court rules on the motion. The Court does not set a briefing schedule in the case until the motion for stay is resolved, thereby delaying the litigation. 9TH CIR. GEN. ORDER 6.4(c).

73. Palmer et al., *supra* note 53.

74. *Id.* at 54. Because our study reports averages of all of the circuits but not the national total average, we have computed the same figure based on the Palmer et al. study’s data.

FIGURE 2: RATES OF APPEAL OF BIA DECISIONS TO THE FEDERAL COURTS IN 2004 (PALMER, YALE-LOEHR & CRONIN)<sup>75</sup>

CIRCUIT	APPEAL RATE
Average of all circuits	34%
1st Cir.	23%
2d Cir.	42%
3d Cir.	34%
4th Cir.	27%
5th Cir.	24%
6th Cir.	36%
7th Cir.	28%
8th Cir.	60%
9th Cir.	45%
10th Cir.	28%
11th Cir.	9%

Our dataset, which begins with cases decided in 2009, did not allow us to calculate *rates* of appeal because we examined only appellate courts' dockets and therefore could not calculate what percentage of BIA orders were appealed.<sup>76</sup> However, we compared the rates of appeal calculated by Palmer and his colleagues with the rates of stay grants in a previous study, and there does not appear to be a connection. While the Eleventh Circuit is a low extreme for both variables, the Eighth Circuit had a high rate of appeal but a lower rate of stay requests and stay grants. The Seventh Circuit grants stays at a high rate, but has a low rate of appeal and a relatively low rate of stay requests. In the Second and Ninth Circuits, which offer some type of temporary automatic stay, we found that nearly all petitioners requested stays, but the rates of appeal Palmer and his colleagues reported were only moderately higher than in most other circuits.<sup>77</sup> These disparities suggest a need for further research and indicate that noncitizens file federal court appeals in immigration cases for different and complicated reasons.<sup>78</sup>

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75. *Id.*

76. The Executive Office of Immigration Review reports the number of appeals received by the BIA, but does not report the number of removal orders issued. *See* FY 2011 STATISTICAL YEARBOOK, *supra* note 58, at S1. Because a noncitizen would only appeal an order of removal, without this data it is difficult to determine if current figures are similar with those in 2004.

77. Palmer, Yale-Loehr & Cronin, *supra* note 74, at 54 (reporting that the Second and Ninth Circuits were among five circuits with appeal rates over 30% but under 50%).

78. Previous research that explored the reasons for the variations among the circuits in the rates of immigration appeals has been inconclusive. *Id.* at 71–80.



There are many possible reasons why the Ninth Circuit has an especially high appeal rate. The Ninth Circuit's body of immigration case law may be perceived as more favorable to noncitizens than the case law of other circuits, which may encourage noncitizens to file appeals in the Ninth Circuit rather than in other courts. Another possible explanation relates to localized differences in the immigration bar in different metropolitan areas. Immigration lawyers may not behave the same way in all regions, and differences among a relatively small number of practitioners can have a substantial impact on the number of cases filed.<sup>79</sup> Furthermore, some lawyers change their behavior in response to particular events, such as BIA streamlining.<sup>80</sup> The Ninth Circuit has seventeen immigration courts, but the courts in Los Angeles and San Francisco handled approximately 38% of the removal proceedings in the Circuit in 2011.<sup>81</sup> This means that if the immigration lawyers in these two cities are especially aggressive in filing appeals, the appeal rate for the Circuit could appear significantly higher, even if cases in the other fifteen courts followed the national average.<sup>82</sup>

Until now, the theory that immigrants file appeals just to buy time has been fertile ground for speculation because it was easy to assume that the federal court process takes a long time. However, our empirical data show that an appeal to a federal court may be the fastest part of the immigration adjudication system, and that federal courts often resolve weak cases quickly. Our findings belie concerns that federal courts are vulnerable to systemic abuse, or at least indicate that if frivolous appeals are being filed, they are likely delaying deportation by only a few months.

## II. EMPIRICAL STUDY OF THE DURATION OF APPEALS

### A. Methodology

Our study analyzed 1646 immigration cases throughout the eleven circuits that handle immigration appeals. We found these cases through the Public Access to Court Electronic Records (PACER) service, which provides on-line access to federal court records. Because orders on stays are interim decisions, we could only access them by looking into individual case dockets in PACER; such interim decisions generally are not available through Westlaw or Lexis. PACER also helped us create a superior sample because it includes *all* immigration cases, whereas Westlaw and Lexis select which cases to include in their databases.

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79. *Id.* at 89 (noting that a small group of lawyers can account for the majority of immigration petitions in a single circuit).

80. *Id.* at 88.

81. FY 2011 STATISTICAL YEARBOOK, *supra* note 58, at B6.

82. *Id.*

Importantly, our datasets<sup>83</sup> included not only cases decided on the merits, but also cases dismissed for lack of jurisdiction or for procedural reasons, such as failure to file a brief or pay the required fees, or cases voluntarily dismissed by the petitioner. We included data of such dismissals so that we could compare the duration of cases decided on the merits with the duration of cases dismissed for other reasons. This data is critical to calculating the amount of delay that results from the filing of potentially frivolous or abusive appeals. Our data thus provide a more complete picture of the circuit courts' immigration dockets than other studies that examine only cases decided on the merits.<sup>84</sup>

We calculated the duration of an appeal by using the date that the case was opened ("docketed") in PACER (the date that the petition for review was filed), and the date that the case was closed ("termed") in PACER (the date that the judgment was entered or the petition dismissed).<sup>85</sup> In addition to recording the dates necessary to measure duration, we recorded other variables visible on the

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83. We used two overlapping datasets for the analyses in this Article. The first dataset is a random sample of 100 immigration appeals in each circuit that were filed after April 22, 2009, when the Supreme Court decided *Nken*, and that have been resolved by the courts. We also collected a supplemental dataset of cases in which the petitioner requested a stay of removal. We collected enough additional cases such that we ended up with approximately one hundred cases per circuit in which a stay was requested. In some circuits with relatively small numbers of immigration appeals, we could not find one hundred cases in which stays had been requested and where a final decision had been made on the petition for review between the date that *Nken* was issued and the present. We used the first random sample of one hundred cases to analyze stay request rates, or other empirical questions that required us to distinguish between cases with and without stay requests. We used the supplemental sample of one hundred cases per circuit with stay requests to analyze whether stays are granted.

84. Cf. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip J. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 405 (2007) (choosing to include only cases decided on the merits).

85. The closing dates recorded in PACER do not include the additional period of time for a mandate to issue, although the date that the mandate issued is apparent from the docket. The mandate provides official notice of the court's decision to the BIA; it is not a judgment. Because the court retains control of the case until the mandate is issued, it may not be clear why we did not go by the date that the mandate was issued to measure the duration of an appeal. The reason is that the date of the mandate depends on whether post-judgment filings are made.

Under the Federal Rules of Appellate Procedure, if one of the parties is a United States officer sued in an official capacity—which is the case in immigration appeals since the respondent is always the Attorney General—a petition for rehearing may be filed within forty-five days after entry of the judgment. FED. R. APP. P. 40(a)(1). This time can be shortened or extended by local court rules. *Id.* If neither party seeks rehearing, then the mandate must issue seven days after the period for seeking rehearing expires. FED. R. APP. P. 41(b). A party may also move to stay the mandate for ninety days pending the filing of a petition for writ of certiorari in the Supreme Court. If the petition for the writ is actually filed, then the stay continues until the Supreme Court's final disposition. Using the date that the mandate is issued as the "end" date of the appeal would therefore greatly distort the amount of time that it actually takes the court to resolve the appeal. Moreover, local rules governing the time period for requesting rehearing would affect our comparison of how long it takes different circuit courts to decide immigration appeals. We therefore used the date that the judgment was entered, which is consistent with how PACER records the end of an appeal.

PACER dockets that we suspected could have an impact on duration. These included: whether a stay was requested; whether the government opposed the stay; whether the court granted the stay; whether the petitioner was represented or *pro se*; whether the petitioner filed a request to proceed *in forma pauperis*; the type of case; whether the case was scheduled for oral argument; the political composition and size of the panels that ruled on the stay and the petition for review; and how the case was resolved—whether it was decided on the merits or dismissed for other reasons, namely lack of jurisdiction, procedural flaws, or voluntarily. We used these variables to develop a linear regression model for the duration of immigration appeals, which shows the change in duration predicted by a given factor.

### *B. Average Duration of Immigration Appeals*

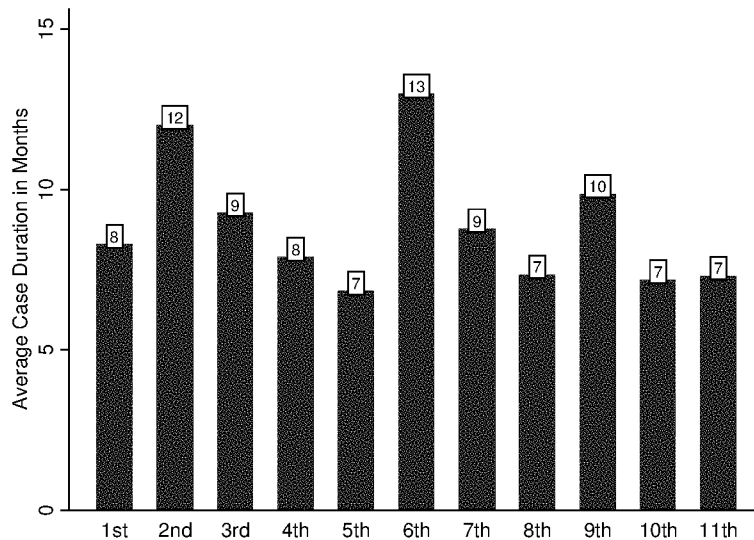
Across the circuits, we found that immigration appeals took an average of 8.8 months.<sup>86</sup> Previous studies suggested an average duration of one year for immigration petitions in the circuit courts.<sup>87</sup> One explanation for this discrepancy is the omission of non-merits dismissals in studies that relied on databases like Westlaw and Lexis; we were able to capture such dismissals by using the PACER dockets. Our findings show that only the Second and Sixth Circuits took an average one year or longer to adjudicate immigration appeals. Several circuits took only seven months. These results demonstrate that, for most circuits, common perceptions of the duration of immigration appeals are wrong. The average duration of immigration appeals in each circuit is presented in Figure 3 below.

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86. This number is the average of all the circuits. It is not a national average because far more immigration appeals are concentrated in some circuits (for example, the Ninth and Second) than in others.

87. Palmer et al., *supra* note 53, at 82–85 (reporting data for the Second, Ninth, and Eleventh circuits).

FIGURE 3: AVERAGE DURATION OF IMMIGRATION APPEALS BY CIRCUIT



### C. Factors That Affect the Duration of an Appeal

Although averages provide useful information, they mask huge variations in the duration of individual appeals. Some of the appeals in our sample lasted as little as a few weeks while others took two years. Various factors affect the length of an appeal.<sup>88</sup> Not surprisingly, we found that if an appeal is scheduled for oral argument, it takes approximately three months longer.<sup>89</sup> These cases are the least likely to be frivolous because courts usually schedule oral argument only for particularly challenging cases and those that raise important legal issues. Asylum cases take an average of one month longer, perhaps because they tend to involve legally and factually complex issues.<sup>90</sup> *Pro se* cases are resolved

88. See Appendix A, *infra*, for the linear regression model predicting the duration of cases, in months.

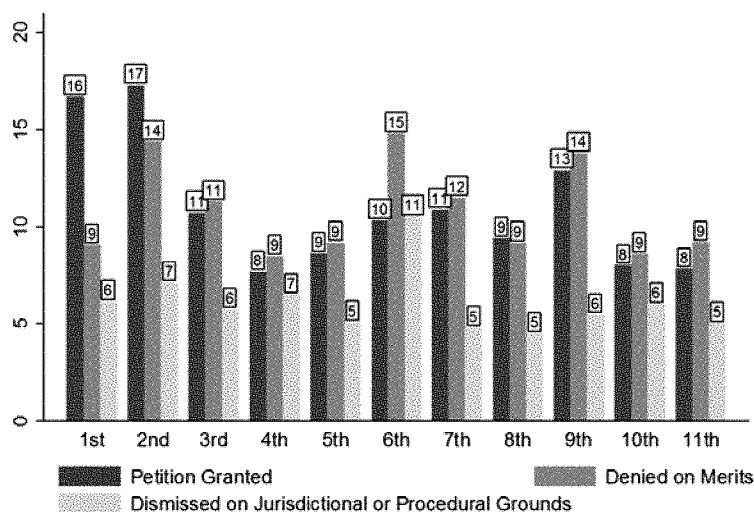
89. See *infra* Appendix A. While the delay caused by oral argument is relatively long, only a small percentage of the cases in our sample (9%) actually included oral argument, indicating that this factor does not affect the vast majority of appeals. Courts also exert significant control over whether to schedule cases for oral argument. For example, the Second Circuit does not schedule *any* immigration appeals for oral argument in order to process them more quickly. See Erick Rivero, Note, *Asylum and Oral Argument: The Judiciary in Immigration and the Second Circuit Non-Argument Calendar*, 34 HOFSTRA L. REV. 1497, 1521 (2006) (arguing that the non-argument calendar violates due process). Despite these efforts, the Second Circuit remains the slowest circuit.

90. See *infra* Appendix A.

almost two months faster than those with attorneys, possibly due to the difficulties *pro se* petitioners face in articulating a substantive appeal.<sup>91</sup>

Most relevant to concerns about frivolousness is our finding that *how* the appeal is resolved—whether it is decided on the merits or dismissed for jurisdictional or procedural grounds—significantly affects duration. Non-merits dismissals take almost three months less. As shown in Figure 4 below, in most circuits, non-merits dismissals occur within just five to six months.

FIGURE 4: DURATION OF PETITIONS (IN MONTHS) BASED ON HOW THEY ARE RESOLVED



Generally the weakest cases—those with jurisdictional or procedural flaws that appear most frivolous on their face—are resolved much more quickly than the average appeal. We also note that some circuits act more quickly to *deny* petitions on the merits than to *grant* them. The First Circuit takes an average of sixteen months to grant petitions, but just nine months to deny them on the merits. Similarly, the Second Circuit takes seventeen months to grant and fourteen months to deny a petition on the merits. These differences are consistent with the theory that it is easier—and therefore faster—for a court to affirm an agency decision than to vacate it.<sup>92</sup> Interestingly, we did not observe

91. See *infra* Appendix A.

92. See Thomas J. Miles, *The Law's Delay: A Test of the Mechanisms of Judicial Peer Effects*, 4 J. LEGAL ANALYSIS 301, 318 (2012) (indicating that courts tend to resolve cases faster when validating an agency decision than when reversing it). The theory is that “[w]hen a court defers and validates an agency decision . . . its task is a less searching and demanding inquiry than when it declines to defer and fully engages in the substance of the agency’s decision.” *Id.* at 317.

this pattern in most circuits, in which grants and denials on the merits took roughly the same amount of time. In fact, when we combined the data from all circuits, we found no statistically significant difference in the duration of appeals granted and denied on the merits.<sup>93</sup> These results suggest that all courts may actually defer to the BIA's decisions, or that giving deference simply does not consistently speed up the adjudication for immigration cases.<sup>94</sup> The Sixth Circuit actually took longer to *deny* a case on the merits than to grant it, which may reflect an emphasis on avoiding errant deportations.

We found no evidence to validate the government's concern that filing or adjudicating a stay drags out an appeal.<sup>95</sup> Neither filing a motion for a stay, nor government opposition to the motion, nor the granting of a stay is associated with a significant increase in the duration of the case. However, if we limit our sample only to appeals decided on the merits, our analysis shows that cases where stays were requested took an average of 1.65 months longer, which is statistically significant.<sup>96</sup> Government opposition to the motion or the granting of a stay did not increase the duration of appeals decided on the merits. Thus, for the subset of appeals decided on the merits, which already eliminates those most likely to be frivolous, the request for a stay is associated with only a small increase in the duration of the appeal. Requesting a stay in a case that satisfies jurisdictional and procedural requirements may heighten the care that judges take in resolving the case. However, have no basis for determining with certainty the explanation for these phenomena.

#### *D. Disparities Among the Circuits in Closing Appeals Quickly*

Analyzing only averages obscures the fact that many circuit courts are adept at closing significant numbers of immigration cases in a very short amount of time. Most circuits close at least 30% of immigration appeals in less than six months. We also found that it is common for courts to be able to close 10% to 20% of their immigration cases in less than three months.

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93. See *infra* Appendix B.

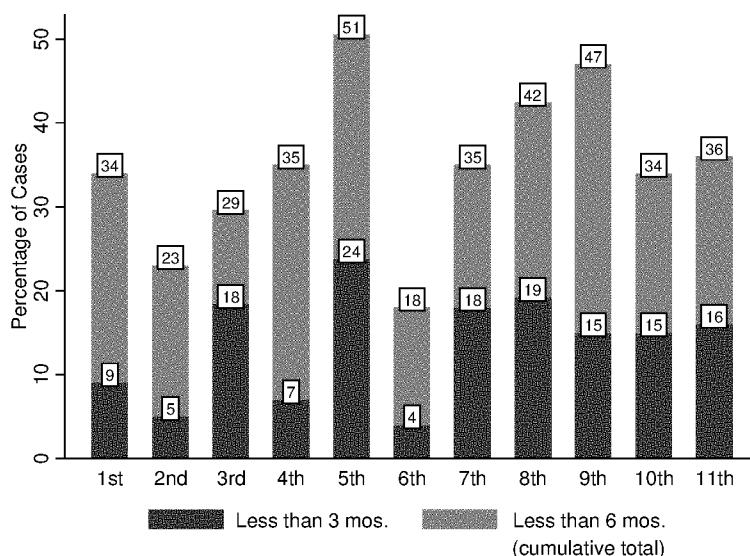
94. Our results are consistent with other empirical research that casts doubt on whether deferential standards of review actually have an impact on the results of administrative law cases. As one recent review of the research summarized, "[t]here is no empirical support for the widespread belief that choice of doctrine plays a major role in judicial review of agency actions." Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 93 (2011). In immigration cases specifically, some courts have expressed open objections to deferring to the BIA because of doubts about its decision-making. See Adam B. Cox, *Deference, Delegation and Immigration Law*, 74. U. CHI. L. REV. 1671, 1683–84 (2007) (noting that Seventh Circuit Judge Posner does not defer to immigration courts); Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 121–23 (2012) (discussing the empirical literature that casts doubt on the impact of deference on adjudication in the immigration context).

95. See *infra* Appendix A.

96. See Appendix B, *infra*, for the linear regression model of the duration of cases decided on the merits, in months.

Categorizing cases into six-month bands (cases decided in less than six months, cases decided in six to twelve months, and so on) reveals that the circuits resolve immigration appeals in very different patterns. For example, the Ninth Circuit closes immigration appeals in an average of ten months, while the Eleventh Circuit's average is just 7.3 months. However, in our sample of one hundred cases per circuit, the Ninth Circuit closed forty-seven cases in less than six months, compared to Eleventh Circuit's thirty-six. The Third Circuit was also slower than the Eleventh Circuit, with a mean duration of 9.3 months for immigration appeals. Nevertheless, the Third Circuit closed twenty-one out of one hundred cases in less than three months, compared to the Eleventh Circuit's five cases. Figure 5 below shows the percentage of cases closed in zero to three months and in three to six months in each circuit. The Ninth Circuit's ability to close nearly half of its cases so quickly is remarkable because it receives more immigration petitions than any other circuit.

FIGURE 5: PERCENTAGE OF IMMIGRATION APPEALS CLOSED IN 0–3 MONTHS AND 3–6 MONTHS



#### *E. The Impact of Duration on Application Rates for Stays of Removal*

If immigrant petitioners are motivated by a desire for delay, and if the potential for delay varies from circuit to circuit, it is plausible that petitioners are more likely to request a stay of removal in the slower circuits. Our data weakly supports this hypothesis, although it is admittedly a difficult theory to test.

Overall, across all circuits, as the stay request rate increases, the average duration of cases increases.<sup>97</sup> For each additional month of average duration, the stay request rate increases by 8%.<sup>98</sup>

The cause of this relationship is difficult to determine. The Second and Ninth Circuits account for much of the relationship because nearly every petitioner in those circuits requests a stay. We reported in a separate study that the temporary stay of removal offered in these circuits is the most plausible explanation for the nearly 100% stay request rate.<sup>99</sup> We also identified many other factors that correlate to an increased stay request rate, such as detention rates. It is probable that stay requests lead to a longer duration rather than vice versa because stay requests are associated with an increase in the duration of merits-based decisions.

#### F. The Impact of Court Procedures on Delay

Part of the reason that the circuits show such different patterns in processing time for immigration appeals is the different internal procedures that the courts use to screen out certain types of cases, especially on jurisdictional and procedural grounds, such as a petitioner's failure to prosecute the appeal. We were able to document this because the docket reports that we analyzed generally indicated whether a petition was denied for lack of jurisdiction or for procedural reasons, which allowed us to separate cases denied for a non-merits reason from those decided on the merits.

Although all of the circuits tend to issue non-merits denials faster than other decisions, some circuits take longer to do so than others. In the Eighth Circuit, fifteen of nineteen cases decided in less than three months were non-merits dismissals. In the Fifth Circuit, twenty of twenty-three petitions finished in less than three months were non-merits dismissals. By contrast, in the Sixth Circuit, twenty-one of twenty-six cases decided in less than *eight* months were non-merits dismissals. However, the Sixth Circuit decided just two cases out of our sample of one hundred in less than three months. Thus, although the circuits may follow a similar pattern of issuing non-merits dismissals faster than merits-based decisions, some circuits are particularly fast and may issue a dismissal in a matter of weeks in some cases and just a few months in many others.

The way in which courts sort cases varies from circuit to circuit. In many circuits, including the First, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits, staff attorneys process cases recommended for screening and special panels decide those cases.<sup>100</sup> However, there are some notable differences and

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97. See Appendix C, *infra*, for the bivariate relationship between the stay grant rate and the average duration of appeals.

98. The bivariate correlation is  $\rho = 0.6845$  ( $p = 0.0202$ ,  $n=11$ ) when we include all circuits.

99. See Marouf, Kagan & Gill, *supra* note 5, at 392.

100. See John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 866–67 (1991).



exceptions. For example, the Third Circuit is unique in sending all cases to argument panels without any staff input on screening cases for oral argument or for complexity.<sup>101</sup> Similarly, standing immigration panels review all of the immigration cases in the Third Circuit.<sup>102</sup> The Sixth Circuit uses staff attorneys to screen cases, but then routes screening recommendations to regular arguments panels that must the cases into their daily calendars.<sup>103</sup> Moreover the Second and Ninth Circuits manage their immigration dockets differently, which influences the duration of their cases. Because these two circuits hear most of the country's immigration appeals, we believe their procedures warrant greater scrutiny.

*1. Efficiency Though Screening: The Ninth Circuit*

It is logical to expect courts with relatively small immigration dockets to complete cases faster than those with large dockets. However, there is a stark contrast between the Second and Ninth Circuits, which together handle nearly 75% of the immigration appeals nationwide. The Ninth Circuit alone handled 47% of all the BIA appeals filed nationally in 2011.<sup>104</sup> While the Ninth Circuit closes nearly half of its immigration petitions in less than six months, the Second Circuit closes relatively few cases so quickly. Figure 6 below portrays the different patterns of adjudication in these two courts.

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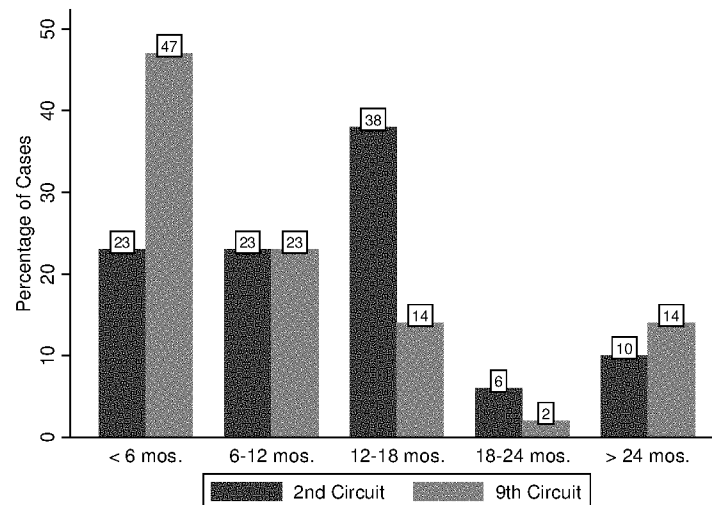
101. See *id.* at 867; Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 337 (2011).

102. See Levy, *supra* note 101, at 338.

103. See Oakley, *supra* note 100, at 867.

104. NINTH CIRCUIT ANNUAL REPORT, *supra* note 60, at 58.

FIGURE 6: PATTERNS OF ADJUDICATION IN THE SECOND AND NINTH CIRCUITS



If we define speed by the percentage of cases closed in less than six months, the Ninth Circuit is the second fastest in the country and the Second Circuit is the second slowest. The Ninth Circuit closes some cases in less than three months, while the Second Circuit almost never closes a case that quickly. Similarly, while the plurality of immigration appeals in the Second Circuit drag on for more than a year, the Ninth Circuit typically closes comparable cases in less than half of a year, and, in a significant number of cases, in just a few weeks.

When a noncitizen files a motion for stay of removal in the Ninth Circuit—usually at the same time as the petition for review—the court promptly sets dates by which the government must file the certified administrative record and respond to the motion.<sup>105</sup> Any dispositive motions, such as motions to dismiss, are due at the same time as the response to the motion for stay, which is eighty-four days from the filing of the original motion.<sup>106</sup> These deadlines are strictly enforced.<sup>107</sup> We observed that the Ninth Circuit also uses Orders to Show Cause (OSCs) fairly aggressively to weed out appeals for which jurisdiction is questionable, or for procedural reasons such as failure to pay the

105. 9TH CIR. GEN. ORDER 6.4(c)(3).

106. *Id.*

107. *Id.* (stating that the court will not entertain any motions for an extension of time to respond to the motion if the certified administrative record is filed in accordance with the schedule).

filing fee.<sup>108</sup> If the petitioner fails to provide a satisfactory response, the staff attorney can set the case for consideration by a “motions and screening panel” of judges, which usually results in expeditious dismissal of the case, sometimes even before the government’s deadline for responding to the stay motion.<sup>109</sup>

The Ninth Circuit also increases its efficiency through a case weighting system. Staff attorneys designate certain cases to be resolved under well-settled law as “screening cases.”<sup>110</sup> The court assigns a “case weight” to each appeal based on its perceived degree of difficulty to more evenly allocate the time-consuming cases so that the most complex cases are not all assigned to the same judges.<sup>111</sup> As Professor Anna O. Law explained:

This weighting system also dictates how the cases are calendared and whether the cases are placed on an oral argument track or on a screening track. The former, which may not literally mean that counsel will engage in oral argument before the judges, nevertheless means that the appeal will receive more attention from judges rather than staff. The latter means that an appeal will receive less judicial scrutiny and is characterized by heavy staff involvement. . . . The screening track . . . is meant for appeals that are regarded as straightforward and therefore easy, or appeals that are perceived as frivolous or hopeless.<sup>112</sup>

Although the Ninth Circuit began developing this system in the late 1970s and early 1980s and did not design it specifically for immigration cases, it is helpful in this area because of the large volume of appeals.<sup>113</sup> The Ninth Circuit’s “Pro Se Unit” is another factor in its efficient disposition of immigration cases. Created in 1992 as a response to a dramatic increase in *pro se* cases, this unit, comprised of one staff attorney and several paralegals, processes all *pro se* appeals in civil and habeas corpus cases.<sup>114</sup> If the unit believes that an appeal is frivolous or has a flaw that requires dismissal, it immediately prepares an order for the Motions and Screening Panel to review.<sup>115</sup>

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108. See *id.* 6.4(c)(5) (discussing Orders to Show Cause); see also Honorable J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT’L L. 187, 192–93 (2005) (explaining that staff attorneys in the Ninth Circuit’s “Motions Unit” are responsible for reviewing every appeal filed and issue Orders to Show Cause directing the party to explain how the court has jurisdiction).

109. See Wallace, *supra* note 108, at 193. The motions and screening panel dedicates one week each month to decide all pending motions and screening cases to determine which require oral argument. *Id.* at 198–99.

110. *Id.*

111. *Id.* at 196–97.

112. ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* 160 (2010).

113. *Id.* at 158–59.

114. Cathy A. Catterson, *The Role of the Staff in the Operation of the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 389, 391 (2000); Wallace, *supra* note 108, at 194.

115. Wallace, *supra* note 108, at 194. The Pro Se Unit also monitors cases for inactivity to determine whether dismissal is required based on failure to prosecute. *Id.* at 195. In addition, the

The Ninth Circuit's system has clear efficiency benefits, but it also generates significant concerns. After 2002, the majority of immigration appeals were routed for screening panels, including all *pro se* cases.<sup>116</sup> As a consequence, these cases are far more likely to eventually be rejected. In 2001, 31% of *pro se* applications for asylum were successful in the Ninth Circuit.<sup>117</sup> By 2005, the success rate had dropped to 5%.<sup>118</sup>

A critical but somewhat invisible part of the case screening system is the courts' heavy reliance on staff attorneys rather than judges to direct the flow of cases and to determine what kind of judicial attention each case receives. Professor Law concluded that in the Ninth Circuit the staff suffered the ultimate burden of the heavy caseload, not the judges.<sup>119</sup> In anonymous interviews with Ninth Circuit judges, she found considerable ambivalence about the system and reported complaints that judges have inadequate time to evaluate cases and a sense of resignation that the court has no alternative.<sup>120</sup>

## 2. *An Alternative Perspective: The Second Circuit*

The Second Circuit, which has the second-largest immigration docket, took the longest to adjudicate immigration appeals. In many ways, this Circuit is an innovator in the handling of its immigration docket, but its procedures result in a very long timeline for resolution of petitions. This longer timeline, coupled with an informal provision for temporary automatic stays, leaves the Second Circuit the most vulnerable to abuse of the appellate process. At the same time, the Circuit has developed an alternative perspective on immigration appeals that merits serious consideration.

The Second Circuit was forced to radically reform its traditional practice of holding oral arguments in the majority of cases because of the surge of immigration appeals after the BIA reforms of 2002.<sup>121</sup> In 2005, the Second Circuit implemented a new local rule that created a Non-Argument Calendar (NAC) for appeals challenging the denial of asylum and related relief, provided

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unit tracks "frequent flyers" who may be abusing the system, such as a petitioner appealing the denial of a third or fourth motion to reopen. *Id.* at 194–95. Lastly, the unit identifies cases that would merit from the appointment of pro bono attorneys. *Id.* at 195.

116. LAW, *supra* note 112, at 165.

117. Ramji-Nogales et al., *supra* note 84, at 360.

118. *Id.* at 360.

119. LAW, *supra* note 112, at 157.

120. *Id.* at 167–68.

121. Oakley, *supra* note 100, at 863–64 (describing how, at the time, the Second Circuit "limit[ed] dispositions without oral argument to the bare minimum required by circumstances independent of court control," such as cases involving *pro se* incarcerated litigants in which both parties waive appeal and the presiding judge on the panel agrees); see also Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J. L. & SOC. POL'Y 1, 9 (2012); Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 307 (1986) (noting that "every circuit but the Second utilizes some sort of screening procedure to identify appeals on which argument will not be heard").

that the cases are not scheduled for oral argument unless specifically ordered by the court.<sup>122</sup> The court also created an Immigration Unit in the Staff Attorney's Office with approximately twelve staff attorneys who prepare bench memoranda on petitions for review to assist the NAC.<sup>123</sup> When it is time to vote on immigration cases, the judges use a "round robin" method with no deliberation.<sup>124</sup> Due largely to these new procedures in immigration cases, the number of unpublished summary orders the court issued doubled between 2002 and 2008.<sup>125</sup> Nonetheless, these changes do not seem to have increased the speed at which the circuit closes its immigration cases relative to other courts.

In October 2012, the Second Circuit implemented a completely new procedure for handling immigration cases.<sup>126</sup> The court based its new system on the Obama administration's policy of granting prosecutors the discretion to prioritize removal cases. The new executive branch policy instructs ICE to not use its limited resources to deport "low-priority" individuals and provides a list of factors to use in deciding who is and is not a high priority.<sup>127</sup> Consequently, the Second Circuit now tolls all immigration petitions for ninety days, holding off on the usual briefing schedule to give the parties time to try to reach an agreement about whether the case should be remanded for administrative closure under the prosecutorial discretion policy.<sup>128</sup> Either party may end the tolling early.<sup>129</sup> Absent a request to end the tolling, the court will presume that the informal stay of removal will continue.<sup>130</sup>

The Second Circuit's new process is striking because it indicates that the court sees little harm in extending the timeline of an appeal and significantly delaying deportation in the process. Already slow in comparison to other circuits, the Second Circuit has now added up to three months to its average resolution time

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122. 2D CIR. R. 34.2(c); see Caplow, *supra* note 121, at 9; Elizabeth Cronin, *When the Deluge Hits and You Never Saw the Storm: Asylum Overload and the Second Circuit*, 59 ADMIN. L. REV. 547, 554 (2007); John R.B. Palmer, *The Second Circuit's "New Asylum Seekers": Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 975 (2006); Rivero, *supra* note 89, at 1521.

123. See Caplow, *supra* note 121, at 10.

124. See Levy, *supra* note 101, at 350.

125. See Caplow, *supra* note 121, at 10–11. The Second Circuit issued summary orders in 147 of the 150 immigration-related cases decided in June 2009 (99.1%), and all but five of these summary orders denied or dismissed the petition for review, an affirmance rate of 96.6%. This is nearly identical to the affirmance rate of 97% in our sample.

126. This procedure was not in place for the cases sampled in our research.

127. *Matter of Immigration Petitions for Review Pending in the United States Court of Appeals for the Second Circuit*, 702 F.3d 160, 161 (2d Cir. 2012); see also Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel 4 (June 17, 2011) [hereinafter Morton Memorandum], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

128. *Matter of Immigration Petitions*, 702 F.3d at 161.

129. *Id.* at 162.

130. *Id.*

of immigration cases, while at the same time expecting the forbearance against removal to continue during that time.

The Second Circuit has effectively turned the tables on the government in the debate over frivolous appeals. The court's order fails to acknowledge the government's concern about frustrating immigration enforcement or the possibility that immigrants abuse the appellate process. Instead, the Second Circuit faults the government for pursuing too many removal orders, and complains that in many cases in which it upholds a removal order, the government fails to execute the deportation.<sup>131</sup> The court explained that "it is wasteful to commit judicial resources to immigration cases when circumstances suggest that, if the Government prevails, it is unlikely to promptly effect the petitioner's removal."<sup>132</sup> The Second Circuit thus has a very different understanding of the problem than the *Nken* Court, which expressed worry about noncitizens' abuse of the appellate process. The Second Circuit's insight that both sides may have a tendency to over-litigate is an essential piece of context to consider.

#### *G. Efficiency Versus Accuracy*

One of our clearest findings is that courts' sorting and decision procedures can have a significant impact on the duration of their cases. However, changing these procedures may also affect the quality of decision-making, especially if speed depends on limiting the ability of the parties to develop arguments and curtailing the time for judges to deliberate. Appellate courts should have a clear understanding of these potential tradeoffs. As the Supreme Court stated in *Nken*, the goal of having a stay system is to avoid the need to administer "justice on the fly."<sup>133</sup> Several procedures designed to promote efficiency may affect a court's accuracy in identifying the cases that deserve a stay. Because our prior research reveals high rates of false negative and false positive decisions on stays and the government's main objection to stays centers on delay, we are especially interested in how particular procedures may involve tradeoffs between speed and accuracy.

We focus on four procedural factors that may influence both the duration and accuracy of rulings on stay motions: (1) the number of judges that decide the motion for stay (ranging from zero—a decision rendered by a clerk—to three); (2) the amount of explanation provided in the decision; (3) the level of reliance on staff attorneys; and (4) the manner of voting. There is good reason to believe that reducing the number of decision-makers and dispensing with explanations increases the speed of adjudication. After all, the BIA adopted these very procedures after streamlining and began processing appeals in one third of the

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131. *See id.* at 160.

132. *See id.*

133. *Nken v. Holder*, 129 S. Ct. 1749, 1757 (2009).

amount of time that it previously needed.<sup>134</sup> The number of decision-makers who rule on the stay and the amount of explanation in the decision are both variables that we could observe from PACER cases, so we are able to include some quantitative information in our discussion of these factors. The analysis of the third and fourth factors is more qualitative in nature.

### 1. Panel Size

The three-judge panel system for adjudicating appeals is designed to reduce error and promote better decisions; the interaction among judges forces them to justify their reasoning, helps reduce the influence of ideology and individual subjectivity, draws attention to important issues that individual judges may have initially overlooked, and leads judges to refine or even change their views.<sup>135</sup> Indeed, through the process of deliberation, judges “often come to see things they did not at first see and to be convinced of views they did not at first espouse.”<sup>136</sup> A single judge acting alone does not have the benefit of these “checks” on his or her reasoning.<sup>137</sup> At the same time, involving multiple judges in the decision-making process may increase the amount of time necessary to reach a decision on the stay or lengthen the overall duration of the appeal, especially if other steps, such as issuing a briefing schedule, are put on hold until

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134. GAO REPORT, *supra* note 21, at 50 & fig.8.

135. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 42 (1994) (explaining that if each judge has a 50% chance of arriving at the “correct” answer, then the larger the panel, the more likely it will collectively arrive at the right result); Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 924 (1989) (“Assigning several judges to a problem reduces the risk that important lines of analysis will escape attention.”); Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 462–63 (2011) (“[U]sing multiple judges decreases the possibility that ideology will drive the decision because multiple judges temper the ideological bent a single judge may bring to a case, assuming the panel includes judges of varied viewpoints”); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1660 (2003) (describing “the give and take of collegial deliberation, during which a judge’s approach to a case must withstand careful scrutiny and criticism from his or her colleagues” and observing that this interaction often leads judges to shift their initial views on the case); Feinberg, *supra* note 121, at 300 (exploring how a persuasive memo by one member of a panel often has the power to change the votes of one or both of the other judges on the panel); Joy Milligan, Note, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1234 (2006) (discussing research demonstrating that “judges within panels may learn from one another’s ideas and worldviews”).

136. Edwards, *supra* note 135, at 1660–61.

137. For example, after the streamlining of the BIA’s procedures, single members of the BIA made many decisions that three-member panels previously made. Three-member panel decisions made during fiscal years 2004 through 2006 favored the noncitizen in 52% of cases, whereas single-member decisions made during the same time period favored the noncitizen in only 7% of cases. See GAO REPORT, *supra* note 21, at 10. As of 2009, over 90% of BIA decisions were single-member decisions. See Maria Baldini-Potermin, *Practice Before the Board of Immigration Appeals: Recent Roundtable and Additional Practice Tips*, 86 INTERPRETER RELEASES 2009, 2010 (2009).

the court makes a decision on the stay. Thus, the size of the panel that rules on the stay may involve a tradeoff between speed and accuracy.

Under Federal Rule of Appellate Procedure 18(a)(2)(D), a motion for a stay pending review of an agency's decision "normally will be considered by a panel of the court," but may be considered by a single judge "in an exceptional case in which time requirements make that procedure impracticable."<sup>138</sup> The local rules and internal operating procedures of several circuits stress the presumption that a panel of judges will adjudicate the motion.<sup>139</sup> In our sample, three-judge panels decided the majority of stay motions (58.6%).<sup>140</sup> Two-judge panels decided an additional 15.7% of cases, while decisions by a single judge were extremely uncommon, comprising only 1% of cases.<sup>141</sup> Surprisingly, *clerks* decided nearly one quarter of the motions (24.7%), without any judge's name on the decision. Figure 7 below shows the percentage of cases in each circuit decided by clerks, one judge, two judges, and three judges.

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138. FED. R. APP. P. 18(a)(2)(D).

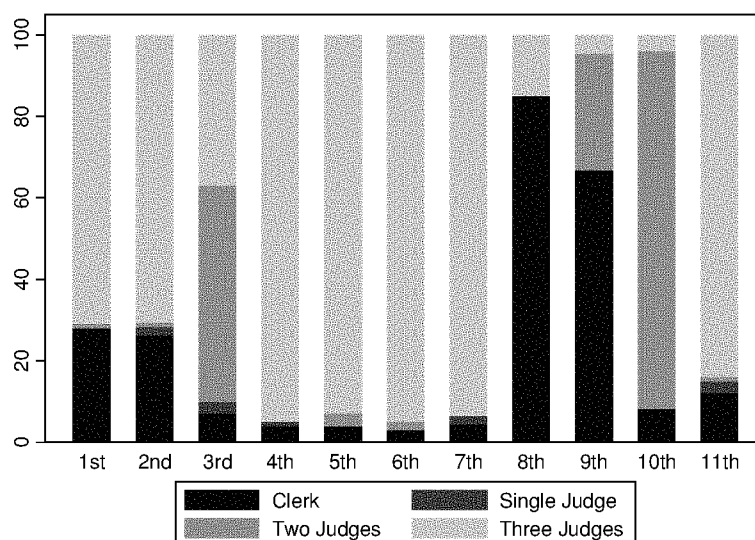
139. See, e.g., 4TH CIR. R. 27(e) ("There is a strong presumption that the Court will act, in all but routine procedural matters, through panels or en banc. . . . Application to a single judge should be made only in exceptional circumstances where action by a panel would be impractical due to the requirements of time."); 6TH CIR. INTERNAL OPERATING P. 27(a)(1) ("In cases not yet assigned to a merits panel, substantive motions are assigned to randomly assembled panels."); 10TH CIR. R. 8.3(A) (stating that "Application[s] to a single judge . . . [are] disfavored except in an emergency."); 10TH CIR. R. 18 ("Applications for stay[s] must comply with Rule 8.").

140. Three-judge panels decided 638 out of 1085 stay motions.

141. Two-judge panels decided 170 out of 1085 stay motions. Eleven were decided by a single judge.



FIGURE 7: PANEL SIZE DECIDING MOTIONS FOR STAYS BY CIRCUIT



Three-judge panels decided over 90% of the stay motions in the Fourth, Fifth, Sixth, and Seventh Circuits. They also decided the vast majority of stay motions in the First Circuit (71%), Second Circuit (77%), and Eighth Circuit (84%). In the remaining circuits, the percentage of three-judge decisions was significantly lower: 37% of decisions in the Third Circuit, 15% of decisions in the Eighth Circuit, 4% of decisions in the Ninth Circuit, and 4% of decisions in the Tenth Circuit. Two-judge panels issued a significant percentage of the decisions on stays in Ninth (29%), Third (53%), and Tenth (88%) circuits.<sup>142</sup> In the remaining circuits, two-judge panels issued decisions in between 0% and 3% of cases. The circuits with the highest percentages of decisions by clerks are the First (28%), Ninth (67%), and Eighth (85%) Circuits. In the Ninth Circuit, 41% of the decisions by clerks involved cases in which the government did not file an opposition to the stay motion, which automatically results in a grant under the court's General Order 6.4(c).<sup>143</sup> In the Eighth Circuit, in which clerks decide

142. The Ninth Circuit rules provide that substantive motions that do not dispose of the appeal, such as motions for stays, are presented to *two* judges. If the two judges are in agreement, they ordinarily decide the motion. A third judge participates only if the other two judges disagree or request the participation of the third judge, or if one of them is disqualified or unavailable. *See* 9th Cir. Advisory Committee Note to R. 27-1(3)(c); *see also* 9TH CIR. GEN. ORDER 6.3(g)(1)(iii). Three-judge panels did not decide any of the Ninth Circuit stay motions in our sample.

143. 9TH CIR. GEN. ORDER 6.4(c)(6).

most stay motions, the local rules actually suggest that three-judge panels should make these decisions.<sup>144</sup>

There does not appear to be any statistically significant relationship between the size of the panel that rules on the stay motion and the duration of the appeal.<sup>145</sup> The Tenth Circuit, which relies heavily on two-judge panels, and the Eighth Circuit, which relies heavily on clerks, did not process appeals more quickly than the Fifth and Eleventh Circuits, which rely primarily on three judge panels. Moreover, the Ninth Circuit, which relies on both clerks and two-judge panels, took an average of one to two months longer to render a decision than several circuits that only use three-judge panels. This suggests that reducing the size of the panel that rules on the stay does not increase efficiency in adjudicating the appeal.

Our results also do not suggest a clear relationship between panel size and accuracy. In the Third Circuit, which relies heavily on two-judge panels for stay motions, we found a statistically significant association between a granted stay motion and an ultimately successful appeal.<sup>146</sup> In fact, the Third Circuit was our most “accurate” circuit, with no false negatives and a low rate of false positives.<sup>147</sup> Yet, in the Tenth Circuit, which also relies primarily on two-judge panels, we found a statistically significant association between a denied stay and an ultimately successful appeal, making it one of the least “accurate” circuits.<sup>148</sup> The Ninth Circuit, which also frequently uses two-judge panels, falls somewhere in the middle in terms of accuracy, granting stays to about half of the petitioners who ultimately prevailed.<sup>149</sup> Thus, use of a two-judge panel itself does not seem to have a significant impact on accuracy.

Given the constraints on the judiciary’s time and resources and the need to make decisions on stay requests relatively quickly, it is understandable that courts sometimes—or typically—permit two rather than three judges to make these decisions.<sup>150</sup> However, we recognize that allowing *clerks* to rule on stay motions can be problematic. In the absence of a procedural rule that dictates a particular result, the use of clerks is inconsistent with Rule 18(a)(2)(D).

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144. 8TH CIR. INTERNAL OPERATING P. (I)(D)(3). The fact that the vast majority of stay motions in the Eighth Circuit are decided by clerks is particularly odd because the court’s local rules provide that administrative panels consisting of three judges are supposed to rule on stays pending appeal. *See id.*

145. We calculated a correlation of .06. If we removed the decisions by clerks from the analysis, the correlation is -.05, which also is not significant.

146. *See* Marouf, Kagan & Gill, *supra* note 5, at 381–83.

147. *See id.*

148. *See id.* at 384.

149. *See id.*

150. Other countries, such as England and Australia, which traditionally allowed only three-judge panels, now also permit fewer judges to make decisions in certain types of cases to conserve judicial resources. *See* Access to Justice Act, 1999, c. 22, § 59(2) (Eng.); Australian Law Reform Comm’n, Report No. 89, Managing Justice: A Review of the Federal Civil Justice System § 7.41 (2000).

Although it is possible that judges may be involved “behind the scenes” in these decisions, the lack of individual accountability is worrisome. If judges cannot be held accountable for their decisions, then the incentive to make well-reasoned decisions decreases. Noting that the Eighth Circuit denied a stay to *every* person in our sample who ultimately prevailed in his appeal, we question whether the lack of individual accountability—or the frequency of decision-making by non-judges in that circuit—may be actively contributing to erroneous decisions without even the benefit of reducing delay.<sup>151</sup>

## 2. *Explanation of Reasoning*

Writing a decision that explains the court’s reasoning takes time. In drafting published decisions, which carry the weight of precedent and affect the reputations of their authors, judges generally strive to provide a coherent and persuasive explanation of how they arrived at a particular result.<sup>152</sup> This is especially likely to be true if they think that the issue may be reheard *en banc* or reviewed by the Supreme Court, although such occurrences are quite rare. On the other hand, the stakes are much lower in drafting unpublished decisions, as well as the level of written explanation.<sup>153</sup> Unpublished decisions are criticized as “potentially plagued by cursory reasoning, imprecise wording, and incomplete fact descriptions.”<sup>154</sup> Although writing is time consuming, it also helps to avoid making rushed decisions under pressure, which changes cognitive processes in profound ways.<sup>155</sup> Being in a hurry leads judges to use less information, give more weight to negative information, and ultimately make less accurate judgments.<sup>156</sup>

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151. The Eighth Circuit was also among the courts that offered no explanation whatsoever for its decisions, which may exacerbate the risk of making poor decisions.

152. See Ahmed E. Taha, *Publish or Perish? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 4 (2004).

153. See RICHARD A. POSNER, *THE FEDERAL COURTS* 165 (1996) (noting the criticism that unpublished opinions encourage sloppy judicial decision-making); Brian T. Damman, *Guess My Weight: What Degree of Disparity is Currently Recognized Between Published and Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority for All?*, 59 DRAKE L. REV. 887, 912–13 (2011).

154. Niketh Velamoor, *Proposed Federal Rule of Appellate Procedure 32.1 to Require that Circuits Allow Citation to Unpublished Opinions*, 41 HARV. J. ON LEGIS. 561, 573–74 (2004).

155. Anne Edland & Ola Svenson, *Judgment and Decision Making Under Time Pressure: Studies and Findings*, in *TIME PRESSURE AND STRESS IN HUMAN JUDGMENT AND DECISION MAKING* 27, 36–37 (Ola Svenson & A. John Maule eds., 1993); see also Dan Zakay, *The Impact of Time Perception Processes on Decision Making under Time Stress*, in *TIME PRESSURE*, *supra*, at 59, 67 (“[D]ecision making under time stress is actually decision making with limited resources. The noxious impact of limited resources on cognitive performance in various domains is well documented . . .”).

156. Edland & Svenson, *supra* note 155, at 28–29, 36; see also Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 431–32 (2011) (discussing how time, pressure, and stress can have a negative impact on the decisions of immigration judges).

Of course, many “unpublished” opinions are now publicly accessible on databases such as Westlaw and Lexis, so judges may have more of an interest in presenting a cogent explanation for their decisions. But the types of decisions that we focus on here—interim decisions on stays of removal—are genuinely unpublished and are available only through the cases’ dockets in PACER. Most of the orders on motions for stays that we looked analyzed little to no reasoning. In fact, the Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits almost exclusively issued single sentence denials or grants of motions for stays. Although these courts sometimes stated that the petitioner had failed to satisfy the standard in *Nken* or a relevant circuit court case, they generally failed to provide any explanation whatsoever. Similarly, the First, Third, and Tenth Circuits frequently did not explain their rulings on motions for stay, although in some cases the judges did provide a specific reason, such as failure to demonstrate a likelihood of success on the merits.

The Sixth Circuit was unique in routinely explaining its decisions on stays. Its orders generally explained the type of relief that the petitioner was seeking, summarized the arguments that the petitioner made in support of the stay, and provided a brief analysis of those arguments. None of the other circuits that we examined came close to this level of detail. The reasoned decisions that the Sixth Circuit issues may contribute to the longer duration of appeals in that court (an average of thirteen months, longer than any of the other circuits). At the same time, the practice of issuing reasoned orders on stays likely contributes to the Sixth Circuit’s striking success in granting stays to *all* of the petitioners in our sample who ultimately prevailed in their appeals. As Professor and law school Dean Chris Guthrie and his colleagues explained, “the discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions” because judges generally will be more careful, logical, and deductive in their decisions if they must write them.<sup>157</sup>

Recognizing practical limitations, we do not suggest that courts should always provide detailed decisions on stays, but we do recommend that they provide at least *some* explanation. At a minimum, courts should explain which part(s) of the four-factor test dictates the result. This minimal amount of reasoning would clarify how the legal standard is being applied in circuits in which the standard is currently ambiguous, increase accountability for these high stakes decisions, and give practitioners an opportunity to learn how the court applies the doctrine. In addition, requiring some explanation would help to prevent judges from making decisions based on implicit bias or extraneous factors, such as perceptions about high rates of asylum fraud among certain nationalities, instead of engaging in an individualized analysis of the case at hand.<sup>158</sup> Writing a few

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157. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 37 (2007) (citations omitted).

158. To what extent judges should consider the low base rate of success in immigration appeals (around 10%) in assessing an individual appeal’s likelihood of success is an interesting question. Cases suggest that judges sometimes improperly rely on general information, such as reports about

sentences or a short paragraph explaining the judge's reasoning should not be a very time-consuming task, and it may lead to better-quality decision-making.

### 3. *Reliance on Staff Attorneys*

Deliberation takes time, but it has the power to change the outcome of a decision. The nature and quality of deliberation often depends on the decision-making procedures. In dealing with motions, including motions for stays of removal, many courts rely heavily on staff attorneys to research and assess the arguments and have adopted a case management, rather than deliberative, approach.<sup>159</sup> Reliance on staff attorneys may improve efficiency, but it also has the potential to compromise quality.

The role that staff attorneys play in briefing judges about the merits of motions varies from circuit to circuit. In the Ninth Circuit, in which the correlation between stays and petitions granted was weaker than in the Third and Sixth Circuits, staff attorneys *orally* present the motions and proposed dispositions to the judges.<sup>160</sup> Judges may request supporting documents before the screening sessions, but very few do so.<sup>161</sup> Moreover, only in "complex matters" do the motions attorneys prepare "legal memoranda" in advance of the oral presentation.<sup>162</sup> Judges usually receive such materials at the screening panel meeting, not in advance.<sup>163</sup> Staff attorneys in the Fourth, Seventh, and Tenth Circuits also make oral presentations in some cases.<sup>164</sup>

Oral presentations may compromise the accuracy of decision-making because the judges are more likely to rely on intuition when listening than when reading,

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the high incidence of fraud among Chinese asylum seekers, when assessing the merits of an individual case. See Uchimiya, *supra* note 18, at 404–10. Yet the general cognitive tendency is to neglect statistical base rates in predicting the likelihood of an event. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 810 (2001) (citing Amos Tversky & Daniel Kahneman, *Evidential Impact of Base Rates*, in JUDGMENT UNDER UNCERTAINTY 153, 156–58 (Daniel Kahneman et al. eds., 1982)) (arguing that "the representativeness heuristic might account for judges' apparent preference for individuating evidence (e.g., eyewitness testimony) over statistical evidence (e.g., base rates)").

159. Brett G. Scharffs, *Law As Craft*, 54 VAND. L. REV. 2245, 2320 (2001); see also ANTHONY T. KRONMAN, *THE LOST LAWYER* 342 (1993) (criticizing this way of thinking as transforming judging from "statesmanship [to something] requiring only administrative skill").

160. 9TH CIR. GEN. ORDER 6.2(d); 9th Cir. Advisory Committee Note to R. 27-1(3). The General Order indicates that "[f]or *some* motions, the moving papers will be sent to the panel in advance of presentation," suggesting that, in most cases, the judges do not see the written briefs submitted by the parties. 9TH CIR. GEN. ORDER 6.2(d) (emphasis added).

161. Anna O. Law, *The Ninth Circuit's Internal Adjudicative Procedures and Their Effect on Pro Se and Asylum Appeals*, 25 GEO. IMMIGR. L.J. 647, 674 (2011).

162. 9TH CIR. GEN. ORDER 6.2(d).

163. Law, *supra* note 161, at 674–75. If judges request more time to review a case, it is put over only briefly (for a few hours or for a day). *Id.* at 675. Such requests are rare. *Id.*

164. Oakley, *supra* note 100, at 905–07. In the Fourth Circuit, as in the Ninth Circuit, staff attorneys do not prepare explanatory memoranda, but instead orally present key facts and issues and respond to questions from the judges. *Id.* at 906, 909. On the other hand, in the Tenth Circuit, oral presentations supplement rather than supersede traditional bench memoranda. *Id.* at 906, 913.

which can lead to errors in judgment. Judges may miss important points that they would recognize if they had written documents that they could read carefully and review later. As the Ninth Circuit's Chief Judge Alex Kozinski acknowledged, "[a]fter you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible."<sup>165</sup> Other Ninth Circuit judges have likewise expressed concerns about cases "'slipping through the cracks'" because they do not receive sufficient attention.<sup>166</sup> These statements suggest that overreliance on the oral presentations of staff attorneys may compromise the quality of decision-making.

Unfortunately, we could not measure how much time courts save by using procedures such as oral presentation of motions by staff attorneys. Future research is necessary in this area. However, even if these procedures substantially increase efficiency, such gains do not justify allowing judges to abdicate their role in evaluating motions that may result in the deportation—or death—of the petitioner.<sup>167</sup> The high rate of false negatives and false positives that we documented in stay adjudications underscores the need for greater accountability in decision-making. Delegating these decisions to staff attorneys whose work remains "silent, unseen, and unknown" undermines such accountability.<sup>168</sup> Part of the solution may be to add more judges to the courts of appeals rather than continue the long-time trend of adding more staff attorneys and clerks, whose qualifications, experiences, and responsibilities differ significantly from those of judges.<sup>169</sup>

#### 4. *Consecutive Voting*

The "round robin" style of voting may save time, but it also undercuts deliberation. The internal operating procedures of both the Fifth and Eleventh Circuits specifically require such consecutive voting by the judges, rather than collective deliberation.<sup>170</sup> The clerk prepares a single set of motions papers and gives them to the initiating judge, who then transmits the file to the next judge with a recommendation.<sup>171</sup> The second judge then makes a recommendation and sends the file to the third judge, who returns the file with a final order to the

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165. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 12–13 (2007).

166. Law, *supra* note 161, at 664.

167. Cf. Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 246 (1998) ("Having a pre-hearing law clerk or staff attorney recast the facts, recast the questions presented, recast the arguments of counsel, recommend a disposition, and draft an opinion is an inappropriate filtering of advocacy and an inappropriate delegation of judicial responsibility.").

168. *Id.* at 237–38.

169. *Id.* at 237.

170. 5TH CIR. INTERNAL OPERATING P. 27.5; 11TH CIR. INTERNAL OPERATING P. 1.

171. *Id.*

clerk.<sup>172</sup> The Fourth Circuit has also standardized this “round robin” approach.<sup>173</sup> In fact, we observed that the Fourth Circuit’s orders on motions for stay routinely stated that one judge issued the order, supported by other judges. This suggests that one judge was really responsible for making the decision while the other two simply signed on after the fact.

Some circuits use the “round robin” approach to decide the actual petitions for review in immigration cases, as well as motions.<sup>174</sup> In the First and Second Circuits—and possibly other circuits—the non-argument panels do not meet; they simply receive the written materials, such as bench memoranda and proposed summary orders prepared by staff attorneys, and then vote sequentially on a piece of paper.<sup>175</sup> As Second Circuit Judge Jon Newman explained, the judges circulate a voting sheet with slots for “Judge 1,” “Judge 2,” and “Judge 3” and select an option to “refer the petition to the [regular argument calendar], deny, grant, remand, or other.”<sup>176</sup> The judges on the panel rotate who fills each slot, with each judge filling a different slot for one third of the week’s cases.<sup>177</sup>

Although the “round robin” approach is meant to increase efficiency, it undermines the benefit of having a panel decide the case because the second and third judges may be unduly influenced by the recommendations of the first judge.<sup>178</sup> Concern for collegiality makes judges “highly vulnerable to the influence of one another.”<sup>179</sup> In addition, judges may be especially susceptible to a pervasive cognitive bias known as “anchoring,” which describes how initial starting points disproportionately influence subsequent decisions.<sup>180</sup> Studies show that presenting people with some initial value (the “anchor”) unconsciously leads them to make judgments closer to the anchor, even if that anchor is completely irrelevant or extreme.<sup>181</sup> Such studies have demonstrated that anchoring affects judicial determinations of guilt and imposition of

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172. See 5TH CIR. INTERNAL OPERATING P. 27.5; 11TH CIR. INTERNAL OPERATING P. 1. The Ninth Circuit specifically rejected this serial screening model, and insisted on operating in “parallel.” See Oakley, *supra* note 100, at 876.

173. See Oakley, *supra* note 100, at 906.

174. Levy, *supra* note 101, at 350–52.

175. *Id.* at 351.

176. *Id.* at 350.

177. *Id.*

178. See Oakley, *supra* note 100, at 876 (“This system saves judicial time when the first judge rejects the case from the screening docket without investment of time by the other judges, but once the initiating judge has invested time in reviewing the case and preparing a proposed disposition, the successive judges may feel less free to moot this effort by rejecting the case from the screening docket.”).

179. Edwards, *supra* note 135, at 1661; see also CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 166 (2003).

180. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128–29 (1974).

181. *Id.*

sentences in criminal cases,<sup>182</sup> judicial bail determinations,<sup>183</sup> awards of damages,<sup>184</sup> and negotiation outcomes.<sup>185</sup>

Anchoring occurs by priming the memory and selectively increasing the accessibility of information consistent with the anchor.<sup>186</sup> Thus, a judge may decide whether to agree with a recommendation to deny a motion for stay of removal by mentally testing the possibility that the recommendation is appropriate, which would involve selectively retrieving knowledge consistent with that recommendation (for example, recalling the weaknesses of the case).<sup>187</sup> Because the judge relies primarily on easily accessible knowledge when it is time to make a final decision, previous anchor-consistent knowledge greatly influences his judgment.<sup>188</sup> Empirical testing would be valuable to determine whether the recommendations of fellow judges actually have this type of anchoring effect. The process of sequential decision-making that the Fourth, Fifth and Eleventh Circuits utilize may explain why these circuits failed to grant stays in the vast majority of cases where the petitioner prevailed.<sup>189</sup>

By contrast, the Third Circuit, is the most “accurate” in terms of granting stays to the petitioners who subsequently prevail on appeal while denying them to most of the petitioners who ultimately lose, explicitly *rejected* the “round robin” style of voting.<sup>190</sup> Although the Third Circuit judges do not necessarily meet as a group to decide a motion, their court procedures provide more opportunity for

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182. See Francisca Fariña et al., *Anchoring in Judicial Decision-Making*, 7 PSYCHOL. IN SPAIN 56, 57, 60–61 (2003) (finding anchoring effects in judicial determinations of guilt and imposition of sentences); see also Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1540–41, 1544, 1546–47 (2001) (reporting that even highly experienced German criminal trial judges anchor sentences to the demands of the prosecutor).

183. See Ebbe B. Ebbesen & Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOL. 805, 817–18 (1975) (finding that judges anchor heavily on prosecutors’ bail recommendations, even after controlling for defendants’ criminal records, local ties, and the severity of the crimes).

184. See Guthrie et al., *supra* note 158, at 792 (finding that “the judges in [the] study relied on an anchor—the \$75,000 jurisdictional minimum raised by the motion to dismiss—to estimate damage awards in a hypothetical personal-injury case”); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberate Disregarding*, 153 U. PA. L. REV. 1251, 1285–91 (2005) (finding anchoring effects in the compensatory damages awarded by trial judges, based on the demands made by the plaintiff’s lawyer in the pre-trial settlement conference).

185. Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights From Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 621 (2006) (using a meta-analysis to demonstrate that “anchoring has a powerful influence on negotiation outcomes”).

186. Englich & Mussweiler, *supra* note 182, at 1548.

187. *Id.* (providing an analogous example of judges and criminal sentencing).

188. *Id.*

189. We note that the Eighth Circuit also had a high rate of false negatives; it failed to grant a stay in any of the cases in which it granted a petition in our sample. It is not clear if the Eighth Circuit also uses sequential voting.

190. Levy, *supra* note 101, at 351. The Third Circuit rejected “round robin” voting because of concerns of undue influence. *Id.*



original and independent analysis by each judge on the panel, both because they do not vote consecutively and because they rely less on staff attorneys.<sup>191</sup> This may contribute to the court's high level of accuracy in adjudicating stays.

Our data also raises questions about whether the "round robin" approach actually speeds up the adjudication of appeals. If we set aside the Second Circuit, which takes a particularly long time, the average duration of appeals in the other circuits that we know use consecutive voting (the First, Fourth, Fifth, and Eleventh) is about 7.5 months. This is faster than the Third Circuit, which has rejected consecutive voting and takes an average of nine months to resolve immigration appeals. If we include the Second Circuit, the average duration of appeals in circuits that use consecutive voting increases to 8.4 months, which is closer to the average duration in the Third Circuit. A better understanding of the procedures used in the remaining circuits is necessary to assess whether the "round robin" approach is really associated with faster decisions. However, even assuming that consecutive voting helps process cases more quickly, a brief reduction in delay may not justify an increased risk of error.

### III. RECOMMENDATIONS

Based on our results, we make recommendations to the judiciary (the Supreme Court and the U.S. Courts of Appeals) and the executive (the Department of Justice and the Department of Homeland Security) branches.

#### A. *Combining a Temporary Automatic Stay with an Effective Case Management System*

Relatively simple procedural reforms can go a long way to increase the efficiency of the appeals process and improve the quality and consistency of decisions on stays of removal. One crucial area for reform is the procedures that courts use to identify frivolous or flawed appeals soon after they are filed. The effective screening processes that some courts have developed can serve as models for other courts. Promoting early identification of clearly flawed appeals is the best way to prevent abuse of the legal process and preserve judicial resources for evaluating meritorious cases. For example, courts should promptly issue Orders to Show Cause in cases in which the court appears to lack jurisdiction over the appeal, the petitioner has not paid the filing fee, or the case has some other fatal flaw.

We recommend combining procedures for early screening of appeals with a temporary automatic stay of removal to give the court the time necessary to make a reasoned decision on a motion for stay. Although the two courts that currently offer temporary automatic stays—the Second and Ninth Circuits—do receive far more stay motions than other circuits, we found that stay motions, by themselves, do not prolong the duration of an appeal. Given the overall high

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191. *Id.* Immigration panels review all of the immigration cases in the Third Circuit; they are not "screened" by staff attorneys.

rates of false negatives and false positives that we have reported in our previous study,<sup>192</sup> a temporary automatic stay would offer an important safety measure against rushed decision-making.

This temporary stay can be implemented by adopting a rule similar to Ninth Circuit General Order 6.4(c), which directs the court to rule on the merits of the stay if the government opposes it.<sup>193</sup> To facilitate prompt decision-making, the rule should include strict deadlines for filing a response and mandate that failure to respond will be construed as non-opposition. Temporary automatic stays both preserve judicial resources and protect petitioners by giving judges time to search for the “needles in the haystack.” If coupled with a mechanism to speed the dismissal of flawed appeals, automatic temporary stays would not unreasonably open the door to abusive appeals.

#### *B. Using Prosecutorial Discretion Policies to Conserve Judicial Resources*

The Second Circuit has challenged the government by recognizing that a relatively small percentage of noncitizens with outstanding orders of removal are actually deported from the United States. The court has raised compelling questions about why the judiciary should spend precious resources adjudicating immigration appeals filed by petitioners who are not a high priority for removal under the Obama administration’s prosecutorial discretion policies.<sup>194</sup> The Second Circuit’s approach of providing a ninety-day period for the government and petitioner to attempt to agree on administrative closure should serve as a good experiment to test whether the court’s assertive stance by the court will motivate the Department of Homeland Security to implement its own policies. So far, only about 2% of removal cases nationwide have been administratively closed under the prosecutorial discretion policies.<sup>195</sup>

If the Department of Homeland Security refuses to administratively close cases, an alternative (or complementary) approach would be for the Department of Justice’s Office of Immigration Litigation (OIL) to decline to oppose stay motions filed by “low priority” petitioners. Because these individuals should not be targeted for deportation in the first place, staying their removal should be uncontroversial. This would test whether OIL is willing to change its practice of actively opposing the vast majority of stay motions based on the Obama administration’s priorities. For example, OIL could establish a practice of filing

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192. Marouf, Kagan & Gill, *supra* note 5, at 392.

193. 9TH CIR. GEN. ORDER 6.4(c).

194. See Morton Memorandum, *supra* note 127, at 1–2; see also Memorandum from John Morton, Director, U.S. Immigration and Customs, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel 1–2 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

195. See *ICE Prosecutorial Discretion Programs*, TRAC IMMIGRATION, <http://trac.syr.edu/immigration/reports/287/> (last updated June 28, 2012) (finding that the number of prosecutorial discretion cases amounted to only 1.9% of the 298,173 cases that were pending before immigration courts as of the end of September 2012).

prompt notices of non-opposition to stay motions in cases in which the petitioner has no criminal record, does not represent a threat to public safety, or otherwise does not fall into any of the “high priority” categories.<sup>196</sup>

As Justice Kennedy observed in *Nken*, empirical data is essential for courts to find a balanced approach to adjudicating immigration appeals.<sup>197</sup> We have attempted to fill this need by analyzing PACER data. However, the government can assist the courts by publishing the percentage of removal orders issued by immigration judges that are actually executed each year. If, as the Second Circuit suggests, the number is quite small, concerns about the appeals process resulting in undue delay of deportations would be greatly undermined.

*C. Adopting a Flexible Stay Standard that Minimizes Errant Deportations*

Our study has shown that immigration appeals usually take well under one year and that the appeals that seem most likely to be abusive—those dismissed for jurisdictional and procedural reasons—have especially short lives. We have also observed that many flawed appeals are dismissed in less than three months. This suggests that courts should prioritize preventing false negatives over preventing false positives because deportations in weak appeals are likely to be delayed by only a matter of months. The sliding scale approach, which correlates to a reduction in the rate of false negatives from 57% to 28%, achieves this result.<sup>198</sup>

*D. Deterring Abusive Appeals by Detecting Problematic Patterns of Behavior Rather than Trying to Scrutinize Individual Cases*

Courts have a hard time defining, much less identifying, “frivolous” appeals. Looking for problematic patterns of behavior by repeat players is a more effective way to weed out abusive appeals than engaging in the impossible task of assessing the merits of an individual case at the onset of litigation to determine whether the arguments are genuinely frivolous or just weak. Issuing local rules aimed at discouraging and sanctioning behavior, such as failing to file timely briefs or respond to Orders to Show Cause, is an effective first step. Those local rules can then be combined with Federal Rules of Appellate Procedure 46 and 38, as the Second Circuit has done, to discipline and sanction attorneys who engage in a pattern of abusive behavior.<sup>199</sup> The goal is to ensure that the court’s case management procedures keep track of each missed deadline or withdrawn appeal in a meaningful way. Courts could consider publishing periodic reports with the names of attorneys who have three or more incidents of problematic

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196. In *Justice on the Fly*, we not only found high rates of opposition in most circuits, but also that the government had opposed the motion for stay in the majority of cases in which it subsequently filed a motion to remand, acknowledging that the appeal had merit. See Marouf, Kagan & Gill, *supra* note 5, at 378.

197. *Nken v. Holder*, 129 S. Ct. 1749, 1762–63 (2009) (Kennedy, J., concurring).

198. Marouf, Kagan & Gill, *supra* note 5, at 389.

199. See 2D CIR. R. 38.1.

behavior (for example, three missed deadlines for filing briefs) in order to ensure that abusive behavior is promptly detected.

#### *E. Reexamining the Procedures Used to Rule on Motions*

Although different courts have different procedures for ruling on motions, there has been little empirical research on how these various procedures actually affect the efficiency and the quality of decision-making. Courts must give these issues serious consideration. For instance, courts should write a minimum of a few sentences of specific reasoning for decisions on motions.<sup>200</sup> Additionally, courts that use the “round robin” method of voting should assess how much time is really saved by this practice and to evaluate the potential risks associated with it. Courts should also examine their level of reliance on staff attorneys, including reliance on oral presentations by staff to rule on motions. Finally, courts should not allow clerks to sign decisions on motions for stays of removal. This practice not only contradicts the Federal Rules of Appellate Procedure but also undermines judicial accountability.

### IV. CONCLUSION

Commentators have expressed concerns about dilatory, delay-seeking behavior by litigants for over a hundred years.<sup>201</sup> Yet few scholars have empirically explored the actual speed of judicial decision-making.<sup>202</sup> Consequently, perceptions about the duration of appeals are often based on false assumptions rather than facts and may be clouded by explicit or implicit biases related to the nature of the appeal. There is a particular risk of distortion with cases that reach the Supreme Court because such cases take a particularly long period of time to resolve. By contrast, the far larger number of cases dismissed on non-merits grounds early in the process are typically invisible. It is a well-known maxim that the wheels of justice turn slowly. But as it turns out, justice is often administered with a fair degree of efficiency.

Immigration appeals seem particularly susceptible to misperceptions about delay due to popular notions about noncitizens filing fraudulent applications. However, our study shows that noncitizens cannot routinely buy a significant amount of time in the United States simply by filing a federal court appeal. We have shown that immigration appeals in the federal courts generally take well under a year, and that those appeals most likely to be frivolous are usually

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200. See Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 421 (2011) (“Slow, careful, deliberative processes are the key to sound judgment, not snap intuition.”).

201. See *supra* note 27.

202. See Miles, *supra* note 92, at 324 (“The speed of court decision-making deserves more study. . . . Basic facts about how the speed of decision-making varies across circuits, areas of law, and their intersection with judicial experience await exploration.”). Miles’s article is one of the few empirical pieces addressing this topic.

dismissed in less than six months. Many are even dismissed in less than three months.

To be clear, immigration adjudication in the United States does take considerable time, but most of that time is taken by the first instance adjudication within the Department of Justice's Immigration Courts. Cases pend in immigration courts nationwide for an average 550 days.<sup>203</sup> In California alone, the average immigration court delay is 700 days.<sup>204</sup> This data suggests that the federal appeals stage may actually be the *fastest* part of the removal process. Those concerned with delay should focus their attention on how long cases are taking in immigration courts, in which judges regularly continue cases for years. Both the government and immigrants with meritorious cases have a shared interest in making this process more efficient.<sup>205</sup>

Our conclusion has implications for how aggressively the Department of Justice should fight motions for stays of removal, how liberally courts should grant them, and what doctrinal approach they should adopt. If appeals do not take very long and judges cannot predict cases will succeed, courts should set a flexible standard for stays and only allow the government to oppose stays in cases that clearly abusive.<sup>206</sup>

Instead of focusing on stays as an obstacle to immigration enforcement, the government should direct its energy toward ensuring that courts have the resources and procedures in place to process cases efficiently. Our results demonstrate that courts with effective case management systems are able to quickly identify and dismiss cases with fatal flaws, thereby resolving the government's concern about undue delay. Our study suggests that both case management and traditional doctrine must play a role in adjudication. Unfortunately, the critical role of case management in the administration of justice is not a traditional subject of legal scholarship and appellate judges are often unaware of how other courts manage cases.<sup>207</sup>

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203. *Latest Immigration Court Numbers, As Of January 2013*, TRAC IMMIGRATION (February 13, 2013), <http://trac.syr.edu/immigration/reports/308/>. TRAC reports that "[u]nclosed cases now in the Court's backlog have already been waiting on average about a year and a half (550 days) and typically will need to wait considerably longer before they are resolved." *Id.*; see also *Immigration Court Backlog Tool*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last visited May 22, 2014) (tracking the average length of immigration cases across the country).

204. *Immigration Court Backlog Tool*, *supra* note 203.

205. Figures from November 2013 show that cases in which relief was granted in the immigration court took on average 869 days, cases that were closed due to prosecutorial discretion took 875 days, and those that were terminated took 561 days, whereas those in which a removal order was issued took only 261 days. *Id.*

206. See Marouf, Kagan & Gill, *supra* note 5, 398–99.

207. See Levy, *supra* note 101, at 317–18 (discussing the void in knowledge about federal appellate courts' case management systems and analyzing the practice of five circuits using qualitative research from a series of interviews).

Recognizing the importance of proper court staffing and procedures is particularly important. The federal courts' budgets were slashed by 8% during federal sequestration.<sup>208</sup> Such cuts mean that the judiciary must eliminate roughly one quarter of its workforce, which will delay court proceedings and compromise the justice system.<sup>209</sup> These changes do not bode well for either noncitizens or the Justice Department. Reduced staff coupled with an ever-increasing caseload could result in lower-quality decision-making, which may in turn lead to more stay denials in cases that ultimately prevail on appeal.

Our results call out for more research on court administration as an integral part of our system of law, and suggest that mundane matters such as how courts sort their dockets can and should have a significant impact on legal doctrine. If concerns about delay are exaggerated, then it follows that procedural standards designed to prevent abuse of the process may be calibrated too strictly. On the specific matter of immigration appeals, this new data suggests that the government's arguments to the Supreme Court in *Nken* were founded on fundamentally false assumptions.

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208. See Bruce Moyer, *January-February 2013: Federal Courts Brace for Budget Cuts*, FED. B. ASS'N, <http://www.fedbar.org/Advocacy/Washington-Watch/WW-Archives/2013/January-February-2013-Federal-Courts-Brace-for-Budget-Cuts.aspx> (last visited May 22, 2014).

209. *Id.*; see also Chad Bray, *Federal Judges Express 'Grave Concern' Over Budget Cuts*, WALL ST. J. (Aug. 15, 2013, 6:51 PM), <http://blogs.wsj.com/law/2013/08/15/federal-judges-express-grave-concern-over-budget-cuts/>; *Justice Sequestered*, N.Y. TIMES, July 21, 2013, at 10.

## APPENDIX A

The linear regression model below helps to analyze various factors that play a role in predicting the duration of appeals. In this model, the coefficient indicates the deviation that can be attributed to a single factor if all of the other factors are held equal (for example, -2.5 means that the presence of the factor will reduce the duration of the case by two and a half months, all other things being equal). The variables marked with stars are those for which there is a statistically significant correlation, with three stars indicating a stronger correlation.

FIGURE 8: LINEAR REGRESSION MODEL PREDICTING DURATION OF CASE IN MONTHS

	Coef.	Robust Std. Err.	t Score	P >  t
Stay Requested	0.3442	0.4215	0.82	.414
Stay Granted	-0.2556	0.6159	-0.41	.678
Government Opposed Stay	-0.6768	0.4707	-1.44	.151
Procedural or Jurisdictional (Non-Merits) Dismissal	-2.8126	0.4041	-6.96	.000 ***
Voluntary Dismissal	-3.2817	0.5419	-6.06	.000 ***
Petition Granted	0.0390	0.5826	0.07	.947
IFP Filed	-1.6798	0.6354	-2.64	.008 **
IFP Granted	0.7423	0.4650	1.60	.111
Pro Se Litigant	-1.8479	0.4107	-4.50	.000 ***
Asylum Case	1.3226	0.3755	3.52	.000 ***
Oral Arguments	3.1444	0.6171	5.10	.000 ***
Panel Party Unanimity	-0.5503	0.3764	-1.46	.144
Female on Panel	1.0130	0.3609	2.81	.005 **

Constant	8.3448	0.6333	13.83	.000 ***
N= 1098; F(23,1074) = 27.55, p=.000; R <sup>2</sup> = .37; Adj. R <sup>2</sup> = .36; Root MSE = 4.49 †Unreported fixed effects circuit variation available upon request (Wald F(10,1074) = 11.39 ***)				



## APPENDIX B

This model analyzes only those cases that the court decided on the merits, excluding those dismissed on procedural or jurisdictional grounds.

FIGURE 9: LINEAR REGRESSION MODEL OF DURATION OF CASES DECIDED ON THE MERITS (IN MONTHS)

	Coef.	Robust Std. Err.	t Score	P >  t
Stay Requested	1.6509	0.6449	2.56	.011 *
Stay Granted	-0.1043	0.7689	-0.14	.892
Government Opposed Stay	-1.3588	0.7187	-1.89	.059
Petition Granted	-0.3518	0.5994	-0.59	.558
IFP Filed	-2.2180	1.4485	-1.53	.126
IFP Granted	0.6853	0.5648	1.21	.225
Pro Se Litigant	-2.5405	0.5704	-4.45	.000 ***
Asylum Case	0.9993	0.4044	2.47	.014 **
Oral Arguments	3.7063	0.6710	5.52	.000 ***
Panel Party Unanimity	-0.1134	0.4714	-0.24	.810
Female on Panel	1.2418	0.4164	2.98	.003 **
Constant	7.2967	0.7165	10.18	.000 ***
N= 610; F(21,618) = 11.12, p=.000; R <sup>2</sup> = .29; Adj. R <sup>2</sup> = .27; Root MSE = 4.70				
†Unreported fixed effects circuit variation available upon request (Wald F(10,618) = 13.11 ***)				

APPENDIX C

FIGURE 10: BIVARIATE RELATIONSHIP BETWEEN STAY GRANT RATE AND AVERAGE DURATION

