CHANGES IN APPELLATE CASELOAD AND ITS PROCESSING

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Judicial time is now one of the scarcest items in our society.[1]

In 1971, the Sixth Circuit had 1015 appeals[2] and nine judgeships.[3] The Ninth Circuit had 1936 appeals[4] and thirteen judgeships.[5] Nationally, there were 12,788 appeals filed[6] and ninety-seven permanent judgeships.[7] Today, according to the 2005 statistics from the Administrative Office of the United States Courts, there were 15,236 appeals filed in the Ninth Circuit,[8] and 65,418 appeals filed nationally[9] with 179 judgeships.[10] That's almost a 500% increase in filings, and a 77% increase in judgeships.

This problem is not new. In response to the continuing hue and cry over the crisis of volume in the federal appellate courts during the 1960s and 1970s, Congress established a Commission on the Revision of the Federal Court Appellate System ("Hruska Commission").[11] One of the key results of the

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1. C.J. George Edwards, *The Avoidance of Appellate Delay*, 52 F.R.D. 51, 62 (1970).

2. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR tbl.5 (1971).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR tbl.B-1 (2005).

9. *Id.*

10. *Id.* at tbl.12.

11. Comm'n on the Revision of the Fed. Court Appellate Sys., *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973).

Commission's work was the adoption of section 6 of the Omnibus Judgeship Act of 1978.[12] Section 6 postponed the division of the Fifth Circuit for a few years, while it permitted the Ninth Circuit to experiment to see if it could function as a large appellate court.

Skip forward twenty years to the White Commission—the Commission on Structural Alternatives for the Federal Courts of Appeals—chaired by retired Supreme Court Justice Byron White.[13] The White Commission was created by Congress in response to the continuing controversy over whether the Ninth Circuit Court of Appeals had grown to a point that it could not function effectively and whether, in response, Congress should split the Ninth Circuit to create two or more smaller courts.[14] The statute also directed the Commission to study the present circuit configuration and the structure and alignment of the courts of appeals with particular focus on the Ninth Circuit. The recommendations by the Commission, made in its report issued in December 1998, included suggestions that Congress: (1) reorganize the Ninth Circuit into three regionally based adjudicative divisions; (2) create a Circuit Division for conflict correction to resolve any conflicts that arise from different decisions of the three regional divisions; (3) authorize each circuit to decide, with panels of two rather than three judges, cases that lack precedential value; and (4) authorize circuits to create district court appellate panels for designated categories of appeals, with discretionary review available in the court of appeals.[15] Although the specific recommendations of the White Commission were not fully embraced by the Congress to which the final report was submitted, it provided an extremely valuable service in its thorough study of the present federal appellate structure and in its focus on both the administrative functioning of a circuit and the adjudicative responsibilities of a federal court of appeals, as opposed to the political motivations that drive *some* circuit split proponents.

Almost seven years have elapsed since the White Commission issued its final report, and the debate continues. During the last few years, two federal appellate courts—the Second Circuit and the Ninth Circuit—have witnessed an extraordinary change in the composition of their caseloads because of the unprecedented growth in the number of administrative appeals from the Board of Immigration Appeals ("BIA"). Before discussing today's caseload challenges, a look back may help set the stage.

I have had the honor of having a ringside seat to the administration and operation of the Ninth Circuit Court of Appeals. I have worked at the Ninth Circuit since 1979 and became its clerk in 1985. My purpose is to reflect on what changes I have seen in these twenty-plus years and on what the challenges have been, continue to be, and may be in the foreseeable future. I will focus on the interaction,

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12. Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629.

13. COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT (Dec. 18, 1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf.

14. *See* Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491 (1997).

15. *See* Carl Tobias, *Appellate Study Panel Issues Final Report*, 1 J. APP. PRAC. & PROCESS 409, 412–13 (1999).

or perhaps the interdependencies, among and between the changes in caseload, the role of the court staff, and the use of technology.

Let's start with a brief review of some of the caseload statistics. These charts are provided not as scientific proof or hard statistical data, but more to demonstrate the caseload trends, or fluctuations, over the years.

Table 1: Some Statistical Comparisons, 1945 to 2005

YEAR	Cases Commenced	Cases Terminated	Percentage Reversed	Time for Docketing/ Record to Termination
1945:				
All Circuits	2730	2848	27.9%	7.0 months
9th Circuit	267	324	32.1%	10.2 months
1955:				
All Circuits	3695	3654	26.9%	7.3 months
9th Circuit	385	523	22.5%	15.8 months
1965:				
All Circuits	6766	5771	22.0%	8.0 months
9th Circuit	840	563	23.6%	8.2 months
1975:				
All Circuits	16,658	16,000	17.8%	7.4 months
9th Circuit	2731	2450	21.4%	10.2 months
1985:				
All Circuits	33,360	31,387	15.9%	10.3 months
9th Circuit	5303	4535	18.2%	12.6 months
1995:				
All Circuits	50,072	49,805	9.3%	10.4 months
9th Circuit	8415	8301	9.3%	14.3 months
2005:				
All Circuits	65,418	57,486	9.1%	11.4 months
9th Circuit	15,236	12,572	7.4%	15.4 months

Source: Admin. Office of the U.S. Courts, Annual Reports tbls.B, B1, B4 & B5 (reports for years 1945, 1955, 1965, 1975, 1985, 1995 & 2005).

What is significant about these numbers? Look at the reversal rate, for starters.

Were district judges just more apt to be mistaken in the earlier years, or were the cases just more difficult? Did appellate judges have more time to spend on the cases, hence they found more harmful than harmless errors or many more abuses of discretion?

Table 2 breaks down the Ninth Circuit caseload further by types of cases from 1985 to the present year:

Table 2: Ninth Circuit Filings

YEAR	1985	1990	1995	2000	2005
Criminal	889	1871	1571	1706	2258
Prisoner Petitions	570	1204	2027	2461	2842
U.S. Civil	976	851	806	687	657
Other Civil	1823	2025	2581	2365	2216
Agency	720	451	921	1102	6664
TOTALS:	5303	6787	8415	9147	15,454

Source: Admin. Office of the U.S. Courts, Annual Reports tbl.B-3 (reports for years 1985, 1990, 1995, 2000 & 2005).

Note the growth in criminal appeals from 1985 to 1990, and again from 2000 to 2005. Adoption of the United States Sentencing Guidelines and the right to appeal a sentence account for the rise in the former period; the Supreme Court's changes to sentencing law created by its recent decisions from *Apprendi*[16] to *Booker/Fanfan*[17] account for the latter. Prisoner petitions skyrocketed consistent with the growth of pro se appeals across most federal courts. Civil cases filed by the federal government decreased over the last twenty years. The incredible growth caused by appeals from the BIA is also reflected in the most recent filing year.

Was the pattern similar on a national level? Review Table 3.

Table 3: Filings in All Federal Courts of Appeals

YEAR	1985	1990	1995	2000	2005
Criminal	4989	9493	10,162	10,707	15,831
Prisoner	6532	9942	14,985	17,252	16,972
U.S. Civil	5234	4363	4460	3740	3040
Other Civil	11,805	12,812	14,758	14,788	13,054
Agency	3179	2578	3295	3237	13,117
TOTALS:	33,360	40,898	50,072	54,697	67,999

Source: Admin. Office of the U.S. Courts, Annual Reports (reports for years 1985, 1990, 1995, 2000 & 2005).

The answer is yes, and then some. Look at the significant decline in "U.S. Civil" cases and "Other Civil" cases. The prisoner cases appear to be leveling off.

16. Apprendi v. New Jersey, 530 U.S. 466 (2000); *see also* Blakely v. Washington, 542 U.S. 296 (2004).

17. United States v. Booker, 543 U.S. 220 (2005).

Some say that AEDPA,[18] which imposed some limitations on the number of petitions for writs of habeas corpus, and the PLRA,[19] which created filing limitations for civil rights cases filed by pro se prisoners, are finally having an impact at the appellate level. For example, consider requests for a Certificate of Appealability, which is now required prior to the filing of many habeas corpus petitions. In the Ninth Circuit, only twelve percent are granted, leading to fewer habeas filings by state prisoners. Similarly, many of our prisoners appear to have lost their enthusiasm for filing appeals because of implementation of one aspect of the PLRA: its creation of a "pay as you go" filing system, which requires even indigent prisoners to make partial payments toward the appellate filing fee.[20] As previously noted, BIA appeals are accountable for the growth in agency cases.

There are many reasons why the appellate caseload has continued to grow dramatically over the last thirty or so years. Acts of Congress have certainly contributed to the growth: the Criminal Justice Act of 1964, the civil rights acts, and various environmental laws. In recent years, as noted, we have more sentencing appeals because of the Supreme Court's decisions interpreting the Sentencing Guidelines,[21] the AEDPA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[22] and the PLRA. We also have a lot more lawyers, a lot more prisoners, and generally a more litigious society that often turns to the courts, rather than the political process, for solutions.

Another ingredient that I believe has contributed to the changing composition of the caseload in the courts is the use of alternative dispute resolution ("ADR")—both court-sponsored and private programs. This contributed, in my judgment, to the drop in regular civil cases. ADR has taken many of the more complex civil cases out of the court system entirely, or has taken them out before they are decided by a panel of judges. For cases involving the federal government, the Attorney General has a great deal of prosecutorial discretion, which may shift the volume of the caseload in different directions according to the administration in power at the time.

Before proceeding to the more current and critical caseload issues facing the Ninth Circuit today, some discussion of the changing role and composition of the court staff is merited.[23]

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18. The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at scattered sections of the U.S.C.).

19. Prisoner Litigation Reform Act (PLRA), 28 U.S.C. § 1915(b) (1996).

20. *Id.*

21. UNITED STATES SENTENCING GUIDELINES MANUAL (2004).

22. Pub. L. No. 104-208, 110 Stat. 3009-546 (amending scattered sections of the U.S.C.); *see also* Immigration and Nationality Act, § 240A(d)(2), 66 Stat. 163 (codified as amended 8 U.S.C. § 1229(b)(d)(2) (2000); *id.* § 244(b)(2) (codified at 8 U.S.C. § 1254(b)(2) (1994) (repealed 1996)); Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified at scattered sections of the U.S.C.).

23. For those interested in the role of the Clerk of Court, an excellent history of the position of the clerk dating from 1789 to the present can be found in a Federal Judicial Center publication, ORDER IN THE COURTS: A HISTORY OF THE FEDERAL COURT CLERK'S OFFICE (2002).

I will start with the position of law clerks to judicial officers. In 1882, Supreme Court Justice Horace Gray introduced the practice of hiring an honor law graduate from Harvard at his own expense to serve as his secretary.[24] In 1885, the Attorney General recommended to Congress that each justice be provided by law with a secretary or law clerk.[25] In 1886, Congress provided clerical assistants to each justice.[26] In 1922, a law clerk position was authorized for the justices of the Supreme Court, under the Appropriations Act, at a salary of $3600 per year.[27]

In 1930, the law clerk position was extended below the Supreme Court, when each of the circuit judges was allowed to appoint a law clerk with the approval of the Attorney General.[28] The law clerk position was again extended in 1936, when a law clerk was provided for every district judge who desired one and whose need was certified by the senior circuit judge.[29] In 1959, district judges no longer needed the permission of the chief judge of the circuit to hire a law clerk.[30] In 1979, the Judicial Conference of the United States authorized a third law clerk and a second secretary to circuit judges.[31] By 1991, there were more than 2000 law clerks in the federal courts.[32]

The position of staff attorney to the circuit courts is of more recent vintage. Not until 1982 was each of the courts of appeals authorized to appoint staff attorneys.[33] Prior to that, staff additions were authorized by the Director of the Administrative Office of the Courts at the request of chief circuit judges on an ad hoc basis.[34]

Today, the positions in the clerk's, staff attorney's, library, and circuit executive's offices are all based on staffing formulas approved by the Judicial

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24. *See* Martha Swann, *Clerks of the Justices*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 159 (Kermit L. Hall ed., 1992).

25. FED. JUDICIAL CTR., CHAMBERS HANDBOOK FOR JUDGES' LAW CLERKS AND SECRETARIES 3 (1994).

26. *Id.*

27. Act of June 1, 1922, ch. 204, 42 Stat. 599, 614 (creating the positions of "nine law clerks, one for the Chief Justice and one for each associate justice, at not exceeding $3,600 each").

28. Act of June 17, 1930, Pub. L. No. 71-373, 46 Stat. 774.

29. Act of Feb. 17, 1936, Pub. L. No. 75-449, 49 Stat. 1140.

30. Act of Sept. 1, 1959, Pub. L. No. 86-221, 73 Stat. 452.

31. Two law clerks per judge were authorized in 1969 and a third in 1979. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES: ANNUAL REPORT OF THE DIRECTOR 76–77 (1979).

32. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR tbl.28 (1991) (noting that as of June 30, 1991, there were 1594 law clerks to active judges and 453 clerks to senior judges, totalling 2047 law clerks).

33. Act of April 2, 1982, Pub. L. No. 97-164, § 120, 96 Stat. 34 (codified at 28 U.S.C. §§ 713–15).

34. *See* Donald P. Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253 (1980).

Conference of the United States and based on work measurement studies.[35] Caseload is the driving force behind the clerk's office and staff attorney formulas, while the number of judicial officers accounts for the circuit executive and library formulas. Not surprisingly, the support staff in the federal judiciary has grown dramatically over the last fifty years, in direct correlation with the growth in caseload and also as a result of "decentralization" of duties and responsibilities from the Administrative Office of the U.S. Courts. In the Ninth Circuit, the growth is reflected in Table 4.

Table 4: The Growth in Ninth Circuit Support Staff

YEAR	Clerk's Office	Staff Attorneys	Library Staff	Circuit Executive
1975	30	11	4	3
1980	49	29	5	4
1985	65	33	10	13
1990	93	37	12	18
2005	150	84	21	32

Source: Court Telephone Directories, courtesy of Senior Judge Alfred T. Goodwin.

The growth of clerk's office staff increased by 400% in thirty years while the caseload increased by almost 500%. Judgeships increased in the Ninth Circuit from thirteen judgeships in 1968[36] to its current authorized complement of twenty-eight judgeships in 1984.[37]

Now I will turn to the role of the staff *today* in the Ninth Circuit. The principal role of the staff is to get the cases ready for decision on the merits by a three-judge panel. As Chief Judge Edwards noted, judicial time is our scarcest resource,[38] and the role of the staff is critical in conserving that resource so that the Article III judges can perform their primary and most important function—deciding the merits of a case.

Since I joined the clerk's office staff in 1979, the position of deputy clerk has changed from that of typist and file clerk, to docket clerk, to case manager. With the impending arrival of electronic filing, the position will have the added dimension of quality controller. The role of the staff attorneys has also evolved in the last two decades. When I arrived at the Ninth Circuit, the staff attorneys' position might have been likened to a fourth year of law school where much time and effort was devoted to developing the attorneys' legal writing and research

35. *See, e.g.*, U.S. SENATE JUDICIARY SUBCOMM. ON ADMIN. OVERSIGHT & THE COURTS, 106TH CONG. CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS (1999) (discussing staffing formula).

36. Act of June 18, 1968, Pub. L. No. 90-347, 82 Stat. 184.

37. Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 333.

38. Edwards, *supra* note 1, at 69.

skills, and based on today's standards, at a fairly leisurely pace.[39] Today, those writing and research skills are still critical to the position, but in addition, the staff must also have oral presentation and time management skills.[40] At the symposium, Judge Richard Tallman spoke in more detail about the role of the staff attorneys in our operations, and the statistics he presented demonstrate that this is a high-volume area for the court.

Many new and different staff positions have been created over the years, many of which were caused by the increasing reliance on technology to help manage the courts—and not just for case management. Computers are vital in all facets of court operations and administration, from human resources, to budget and financing, as are the internet, court web pages, electronic filing, and audio-, video-, and teleconferencing.

To put it simply, the biggest difference in court management from the time of the Hruska Commission Report in 1975, to the White Commission Report in 1998, to the current day is *technology*. It has not only changed the world, it has changed how courts operate, and it will continue to do so in the coming years, in an even more dramatic fashion.

Back to the current world of the Ninth Circuit and the caseload challenges it currently faces—two words: "immigration cases." Just look at the numbers in Tables 5 and 6 below.

Table 5

Immigration & Naturalization Service Cases for 12-month Period Ending September 30th		
Year Ending	**National**	**9th Circuit**
1994	983	431
1995	1180	624
1996	1062	579
1997	1921	1018
1998	1936	1102
1999	1731	938
2000	1723	910
2001	1760	954
2002	4449	2670
2003	8833	4206
2004	10,812	5368

39. *See, e.g.*, Ubell, *supra* note 34, at 255–63.

40. *See, e.g.*, J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 VAND. J. TRANSNAT'L L. 187, 192–99 (2005) (describing current staff attorney work).

Immigration & Naturalization Service Cases for 12-month Period Ending September 30th		
Year Ending	**National**	**9th Circuit**
2005	11,741	6390

Source: Admin. Office of the U.S. Courts, Annual Reports tbl.B-3B (reports for years 1994–2005). 2005 figures are through June 30, 2005.

Table 6

						% Change
Yr End 9/30 9th Circuit	**2001**	**2002**	**2003**	**2004**	**6-30-05**	**2001 to 2005**
Immigration BIA Appeals	954	2670	4206	5368	6390	570%
Dist.Ct. / Other Filings	9388	8751	8666	8906	9327	-1%
Total Filings	10,342	11,421	12,872	14,274	15,717	
% of Total	9%	23%	33%	38%	41%	
% Increase of Immigration Cases		**180%**	**58%**	**28%**	**19%**	**570%**
						% Change
Yr End 9/30 2nd Circuit	**2001**	**2002**	**2003**	**2004**	**6-30-05**	**2001 to 2005**
Immigration BIA Appeals	170	533	2081	2632	2401	131%
Dist.Ct. / Other Filings	4349	4337	4278	4376	4414	1%
Total Filings	4519	4870	6359	7008	6815	
% of Total	4%	11%	33%	38%	35%	
% Increase of Immigration Cases		**214%**	**290%**	**26%**	**-9%**	**1312%**
						% Change
Yr End 9/30 All Circuits	**2001**	**2002**	**2003**	**2004**	**6-30-05**	**2001 to 2005**
Immigration BIA Appeals	1760	4449	8833	10,812	11,741	567%
Dist.Ct. / Other Filings	55,704	53,106	52,014	51,950	56,258	1%
Total Filings	57,464	57,555	60,847	62,762	67,999	
% of Total	3%	8%	15%	17%	17%	
% Increase of Immigration Cases		**153%**	**99%**	**22%**	**9%**	**567%**

Source: Admin. Office of the U.S. Courts, Annual Reports, tbls.B & B-3B (reports for years 2001–2005).

The growth in the number of immigration cases pending before the BIA began back in the 1990s. Commentators assume that the rise was caused by a number of factors, including an increased caseload (likely due to a 300% increase in the number of immigration law judges ("ILJs") and a 50% increase in the rate of appeal from their decisions over the relevant time period), frequent changes in the immigration laws (at least nine different statutes relating to immigration were

enacted between 1985 and 2001), and staffing issues at the BIA (including changes in the number and identity of board members, which possibly decreased BIA efficiency).[41] In any event, the BIA had more than 57,000 cases pending in 2001.[42]

The BIA's "streamlining" regulation, which has received much attention in the courts and in the media, was first adopted in October 1999.[43] It authorized the Board Chairman to designate certain categories of cases as suitable for review by single board members. It authorized the single board member to affirm without opinion if he or she determined that:

> [T]he result reached in the decision . . . was correct; that any errors in the decision . . . were harmless or nonmaterial; and that (A) the issue on appeal was squarely controlled by existing BIA or federal court precedent and did not involve the application of precedent to a novel fact situation; or (B) the factual and legal questions raised on appeal are so insubstantial that three-Member review is not warranted.[44]

As an aside, this is not dissimilar to the standard used for our court's screening of cases,[45] except that Title 28, § 46 of the United States Code requires three federal judges to make those merits decisions,[46] albeit with a great deal of assistance from the court's staff attorneys. Thus far, our court has chosen not to employ "judgment orders," although the U.S. Judicial Conference's recent approval of new Federal Rule of Appellate Procedure 32.1 to permit citation to unpublished decisions may change that.[47]

The BIA's streamlining regulation was adopted in phases. The first two phases involved converting certain categories of cases to single-board-member review (for example, appeals from visa petitions, and other fairly straightforward

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41. *See* DORSEY & WHITNEY, LLP, BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 13 (2003), [hereinafter DORSEY & WHITNEY STUDY], *available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf (study conducted for the American Bar Association Commission on Immigration Policy, Practice and Pro Bono); *see also* 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, 22–32 (Fall 2005). Approximately 12,823 appeals to the BIA were filed in 1992, compared to 29,972 filed in 2000.

42. Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3).

43. Procedural Reforms to Improve Case Management, 64 Fed. Reg. 56,135 (Oct. 18, 1999) (to be codified at 8 C.F.R. pt. 3).

44. *See* DORSEY & WHITNEY STUDY, *supra* note 41, at 17 (citing 8 C.F.R. § 1003.1 (1999)).

45. *See* FED. R. APP. P. 34(a)(2) (screening cases if the appeal is frivolous, if the dispositive issues have been authoritatively decided, or if the facts and legal arguments are adequately presented in the briefs and record and do not require oral argument).

46. 28 U.S.C. § 46(b) (2000).

47. *See* Fed. Judiciary News Release, Conference Memorializes Late Chief Justice, Acts on Administrative Legal Matters (Sept. 20, 2005), *available at* http://www.uscourts.gov/ Press_Releases/judconf092005.html.

cases).[48] In November 2000, the list was expanded to include appeals from an ILJ order finding deportability where facts were not in dispute, and certain appeals in which the alien was denied cancellation of removal.[49]

In March 2002, two large categories of cases were added to the list: (1) cases involving claims for asylum, withholding, and relief under the Convention Against Torture; and (2) cases involving claims for suspension of deportation or cancellation of removal.[50] Ultimately in May 2002, the categories-of-cases approach was abandoned, and instead the definition became all cases involving appeals of ILJ decisions, so long as the BIA had jurisdiction and so long as the cases met the regulatory requirement for streamlining (that is, the case had the correct result, had only harmless or nonmaterial errors, and presented issues that were insubstantial or were squarely addressed by precedents).[51]

The 2002 regulation also did three other things. First, it expanded grounds for summary dismissals to include cases brought for purposes of delay or bad faith; second, it changed the standard of review of an ILJ's factual decisions from de novo to clearly erroneous; and third, it reduced the number of board members from twenty-three to eleven.[52] This latter change was made to improve the BIA's cohesiveness and collegiality.

So what has all of this meant to the composition of the Ninth Circuit caseload? Historically, the Ninth Circuit has usually received about half of the immigration cases filed in the country.[53] That proportion really has not changed much. It is just that the pie has gotten a whole lot bigger, and as a result, these cases now comprise roughly forty-five percent of our docket.[54] Our initial hope, or more accurately, wishful thinking, was that these cases would dissipate once the BIA backlog got through our court. This hope has not yet been realized. The number of immigration cases initiated and a substantial increase in the rate of appeal from BIA decisions to the circuit have contributed to this ongoing caseload growth.[55] Adding to that increase was the passage of the REAL ID Act,[56] a provision of which requires all pending habeas petitions in the district court filed by aliens to be transferred to the circuit courts as petitions for review. That Act took effect May 11, 2005. Thus far we have received fewer than 200 cases.

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48. *See* Palmer, Yale-Loehr & Cronin, *supra* note 41, at 24–25.

49. DORSEY & WHITNEY STUDY, *supra* note 41, at 13.

50. *See* Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,878 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3).

51. *See id.*

52. *Id.* at 54,878–81.

53. *See supra* tbl.5.

54. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR tbl.B-1 (2004).

55. DORSEY & WHITNEY STUDY, *supra* note 41, at app. 27. The study notes that appeals to circuit courts have climbed from approximately 300 per month per circuit to more than 800 per month. *Id.* at 42.

56. The REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (codified at 8 U.S.C. § 1778 (Supp. 2005)).

A result of the influx of immigration appeals has been that our court, and particularly our Court Executive Committee, has spent much time over the last few years considering ways to handle these cases in an efficient, effective, and judicious manner. The law does not permit a one-judge merit decision. We have to work within the existing statutory structure.

As a large appellate circuit, over the years we have spent much time and effort in crafting systems that allow the court to handle both a high volume of particular types of cases and cases raising common or related legal issues. Immigration cases lend themselves well to our existing systems because there are, more or less, a finite number of countries in the world from which applicants have sought asylum and a fixed number of country reports prepared by the United States Department of State. And although the issues can be varied and sometimes complex, immigration cases are heavy on facts, and for some number of them, the limited standard of review makes many of them suitable for the court's screening and submission panels.

Technology has also been an immense help in managing these cases. Due to the volume of these cases, we have instituted an electronic noticing and scheduling system. On October 1, 2005, the court began to receive the Certified Administrative Record in these cases in electronic format. This has allowed the court to dispose of these cases more promptly, both in reviewing jurisdictionally deficient cases and in a review of the merits.

In addition, the court's automated legal issue tracking system has been refined over the years and allows us to manage a heavy merits caseload efficiently.[57] Cases arising from the same country and raising similar issues can be presented to a lead oral argument panel. Similar cases that follow can be either held up pending the first panel's decision, or submitted to a screening panel once the legal issue has been resolved.[58]

The other important point to make regarding our current caseload is reflected in Table 6. Somewhat surprisingly, appeals filed from the district courts have actually gone down in the last four years, by about 5% overall. Some districts have seen greater declines than others.[59]

57. Wallace, *supra* note 40, at 202.
58. *Id.* at 198–99.
59. *See* tbl.7.

Table 7: Court Year Filings by District (INS)—September 30, 1995 to 2005

YEAR	AK	AZ	CA	GU	HI	ID	MT	NV	NMI	OR	WA	INS TOT.	DIST. TOT.
1995	210	814	5,126	34	251	165	203	591	18	593	719		8,724
INS	9	48	488	0	16	0	2	16	0	3	33	615	
1996	189	870	5,176	56	199	130	169	520	23	585	875		8,792
INS	1	35	497	1	5	1	0	11	0	1	24	576	
1997	172	856	5,568	68	228	108	188	476	11	630	793		9,098
INS	5	71	829	3	11	1	1	9	0	8	71	1,009	
1998	174	823	6,140	47	205	152	189	471	13	514	819		9,547
INS	4	67	941	1	9	1	0	4	0	8	61	1,096	
1999	184	795	5,822	51	411	146	203	511	20	564	849		9,556
INS	12	61	765	0	6	1	0	16	0	9	73	943	
2000	138	877	5,891	65	197	119	162	537	28	479	848		9,341
INS	4	116	675	21	18	0	1	17	0	10	58	920	
2001	157	1,015	6,491	33	231	137	205	678	19	582	936		10,484
INS	0	113	746	4	7	1	1	24	0	6	54	956	
2002	121	1,046	7,642	34	234	142	262	582	16	587	843		11,509
INS	3	192	2,240	8	28	3	3	49	0	21	118	2,665	
2003	119	1,186	8,439	32	217	168	264	680	22	559	946		12,632
INS	6	260	3,388	13	65	1	18	84	0	51	264	4,150	
2004	116	1,083	9,617	67	228	167	325	829	19	555	1,007		14,013
INS	1	201	4,519	27	50	1	2	147	1	63	219	5,231	
2005	165	1,212	11,207	40	264	151	325	799	10	647	1,237		16,057
INS	4	262	5,717	3	47	4	2	155	0	68	265	6,527	

Source: Admin. Office of the U.S. Courts, Annual Reports (reports for years 1995–2005).

Reasons are varied and, as previously noted, include: the increasing popularity of ADR; further restrictions on prisoner cases; greater prosecutorial discretion; congressional restrictions on the court's jurisdiction; and finally, more aggressive case management techniques.

The introduction of a new case management system, with electronic filing, will further change court operations and the composition of court staff dramatically. This new system should be implemented in the federal appellate courts in mid-to-late 2006. Court administrators are immersed in preparing and planning for its arrival. The experience of the federal bankruptcy and district courts will help lay the groundwork, but the appellate courts have chosen not to just replicate those systems but rather to design one specifically for the appellate court environment and the unique challenges it presents. This new system, once implemented and accepted by the user communities (lawyers, litigants, court staff, and most importantly, the judges) will result in more efficient and effective systems. How long implementation and acceptance will take depends on how well the system is designed and how well the users are trained.

I look forward to the next conference on the Ninth Circuit circa 2020 when my successor can extol the virtues of court management in the twenty-first century.

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