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**JUDICIAL SPECIALIZATION AND THE  
ADJUDICATION OF IMMIGRATION CASES**

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ABSTRACT

*When scholars and policymakers consider proposals for specialized courts, they are usually—and appropriately—mindful of the potential effects of specialization on the adjudication of cases. Focusing on the immigration field, this Article considers these potential effects in relation to other attributes of adjudication: the difficulty of cases, the severe caseload pressures, and the strong hierarchical controls that are each important attributes at some or all levels of the adjudication system. Specifically, this Article discusses the effects of those attributes, the effects of judicial specialization, and the intertwining of the two. It applies that analysis to proposals to substitute some type of specialized court for the federal courts of appeals in the adjudication of immigration cases. The Article concludes that the impact of adopting such a proposal could be substantial but that it is also quite uncertain. To a considerable degree, the impact depends on the form of specialization adopted and on other provisions of the legislation that creates a specialized court.*

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## INTRODUCTION

The adjudication<sup>1</sup> of immigration cases has been the subject of serious concerns. Heavy caseload pressures and evidence of other problems in the adjudication process have generated doubts about the quality of decisionmaking in the administrative tribunals that handle immigration cases.<sup>2</sup> Great disparities in decisional tendencies among the immigration judges who handle asylum cases in the first

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1. Among immigration practitioners, the term “adjudication” is often used to refer to administrative review of applications and petitions. In this Article, I use the term in its more conventional sense to refer to decisionmaking in a judicial setting, both within the Justice Department (immigration courts and the Board of Immigration Appeals) and in the federal courts.

2. See, e.g., Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 18–21 (2006) (describing working conditions in the courts that jeopardize the immigration adjudication system).

instance have led to uncertainty about the fairness of the adjudication system.<sup>3</sup> Evidence of an effort to manipulate the policies of the Board of Immigration Appeals (BIA) through selective removals of judges has raised questions about the independence of adjudicators.<sup>4</sup> Finally, substantial growth in the numbers of immigration cases brought to the federal courts of appeals has put pressure on judges in some circuits.<sup>5</sup>

Inevitably, policymakers and commentators have responded to these concerns with an array of proposals for changes in the adjudication system. Indeed, substantial changes in the administrative tribunals have already been made. In turn, some of those changes have been criticized on the ground that they create new problems.<sup>6</sup>

One category of proposals involves the assignment of cases from one or more levels of the adjudication structure to a specialized court.<sup>7</sup> Not only are these proposals important in themselves, but they also highlight the importance of specialization in the adjudication of immigration cases. In this Article, I consider the issue of court specialization in the field of immigration. To do so, I place specialization in the context of other attributes of adjudication in this field.

The central theme of this Article is that the impact of judicial specialization is complex and contingent on other conditions. Specialization potentially has major consequences for legal decisionmaking, but these consequences are not uniform and straightforward. In analyzing the desirability of judicial specialization, it is necessary to take complexity and contingency into account.

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3. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 325–49 (2007) (presenting data illustrating the disparities); *see also id.* at 305 (“[T]he outcome of a refugee’s quest for safety in America should be influenced more by law and less by a spin of the wheel of fate that assigns her case to a particular government official.”).

4. *See, e.g.*, Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 375–79 (2006) (expressing concern over former Attorney General Ashcroft’s reassignment of judges).

5. John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14 (2006).

6. For a discussion of the changes made in BIA procedures in 1999 and 2002 to deal with backlogs of cases and criticisms of the 2002 changes, *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, 23–32 (2005).

7. For a more detailed discussion, *see infra* Part III.C.

Part I of this Article sets specialization aside and examines three other dimensions of adjudication in the immigration field, which I label attributes: the difficulty of cases, the extent of caseload pressures on adjudicators, and the degree of control by higher authorities. These attributes of adjudication are important in shaping the behavior of decisionmakers and the outcomes of the cases they decide. Thus, it is worthwhile to probe their effects in light of what is known about judicial decisionmaking more generally. For purposes of this Article, however, the primary significance of these attributes is their relationship with specialization.

Part II turns to judicial specialization as a general phenomenon. It begins by surveying potential effects of specialization on the process of adjudication and the outputs of legal decisionmakers. It then turns to the attributes of case difficulty, caseload pressure, and control of judges, and raises two issues: how specialization might affect these attributes, and how these attributes might condition the effects of specialization.

Part III brings together specialization and the attributes of adjudication in the immigration field. It begins by examining the specialization of immigration courts<sup>8</sup> and the BIA, and the impact of that specialization. It then examines the courts of appeals, generalist bodies that have developed a degree of specialization in immigration through the increased flow of immigration cases to them. Finally, it considers proposals to replace court of appeals review of executive-branch decisions in the immigration field with review by a more specialized body. Taking into account the other attributes of adjudication in the immigration field and the effects of specialization, this Part analyzes the potential impact of these proposals. It concludes that a wide range of effects is possible, depending on the form of the proposal adopted and the conditions under which a specialized court operates.

Before turning to this Article's central concerns, it is useful to sketch out the basic structure of adjudication in immigration law. Three sets of legal decisionmakers play the most important roles in immigration adjudication: immigration judges, members of the BIA who hear appeals from decisions of immigration judges, and judges on the federal courts of appeals who hear petitions for review of BIA decisions. This Article focuses on these three sets of judges. Other

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8. In this Article, the term "immigration courts" refers specifically to the trial-level bodies in which immigration judges serve.

decisionmakers participating in immigration cases include asylum officers, who make preliminary judgments about certain asylum applications;<sup>9</sup> the attorney general, who can intervene in cases within the Department of Justice (DOJ);<sup>10</sup> federal district court judges, who hear criminal immigration cases;<sup>11</sup> and the Supreme Court, which can accept petitions for certiorari after court of appeals decisions.<sup>12</sup>

Immigration judges are located in the Executive Office for Immigration Review (EOIR) in the DOJ.<sup>13</sup> The attorney general officially appoints immigration judges, but EOIR effectively makes the selection during most periods.<sup>14</sup> As of December 2009, there were about 240 immigration judges sitting in fifty-four immigration courts across the country.<sup>15</sup> Immigration judges act as trial-level decisionmakers in several types of immigration cases. The overwhelming majority of these cases—about 98 percent in recent

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9. Asylum officers hear applications for asylum that are made outside the context of proceedings to remove individuals from the United States. *See infra* notes 23–24 and accompanying text.

10. Immigration judges and BIA members act on behalf of the attorney general, who can override their decisions. In practice, the attorney general intervenes only after BIA review of an immigration judge's decision. It was reported in 2006 that the attorney general had reviewed only twenty-five BIA decisions in fifteen years. *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 67 (2006) (statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, U.S. Department of Justice).

11. Federal district court judges hear cases arising from criminal prosecutions of individuals for violation of immigration laws. In 2008, immigration offenses accounted for 34 percent of all criminal cases commenced in the district courts, and they constituted a majority of criminal cases in some districts. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 227–32 (2010), available at <http://www.uscourts.gov/judbus2009/JudicialBusinesspdfversion.pdf>.

12. The Supreme Court hears a fairly small number of cases that directly involve interpretation of the immigration laws—by one count, about one case per term on average during the 1953–2008 terms—although many other cases involve or affect immigrants. The count is based on analysis of the issue codings in The Supreme Court Database, compiled primarily by Harold Spaeth. *See* The Supreme Court Database, <http://scdb.wustl.edu/> (last visited Mar. 28, 2010).

13. For a summary of the history that led to the current status and role of immigration judges (and of the BIA) in the adjudication of cases, see Dory Mitros Durham, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 661–80 (2006).

14. OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 71–72, 114–15 (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>; Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 473 (2008).

15. This figure was calculated from lists of judges at the EOIR website. EOIR, U.S. Dep't of Justice, EOIR Immigration Court Listing, <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last visited Mar. 28, 2010).

years—are proceedings to remove noncitizens from the United States.<sup>16</sup>

The BIA is also located in EOIR.<sup>17</sup> The attorney general appoints members of the BIA.<sup>18</sup> The BIA hears appeals from decisions of immigration judges and from certain types of decisions by the Department of Homeland Security (DHS); in fiscal year 2009, 89 percent of BIA cases came from immigration courts.<sup>19</sup>

Judges on the federal courts of appeals hear petitions for review of BIA decisions that were unfavorable to individuals, as well as a smaller number of appeals from district court decisions that involve immigration.<sup>20</sup> The courts of appeals cannot reach final decisions in favor of individuals who have brought petitions for review; rather, they are limited to remanding cases to the BIA for reconsideration.<sup>21</sup>

A range of issues arises in the cases that these adjudicators address, but the issue that receives the greatest attention is asylum. Noncitizens may apply for asylum to remain in the United States; to be successful, they must establish that they are refugees as defined by federal law.<sup>22</sup> Applications may be either defensive—that is, made as a defense in proceedings to remove a noncitizen from the United States—or affirmative—that is, made by a noncitizen in a separate

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16. See EOIR, U.S. DEP'T OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK, at C3 tbl.3, C4 tbl.4 (2010) (showing the number of proceedings of each type received and completed by immigration courts in fiscal year 2009). For a description of the steps involved in removal proceedings, see U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 10 (2006).

17. 8 C.F.R. § 1003.1(a)(1) (2009).

18. *Id.*

19. See EOIR, *supra* note 16, at T2 tbl.17 (showing the number of cases completed by the BIA that came from immigration courts). The government makes a small percentage of the appeals to the BIA, about 6 percent in fiscal year 2005. *Immigration Litigation Reduction*, *supra* note 10, at 43 (prepared response of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, U.S. Department of Justice, to questions submitted by Sen. Leahy, Member, S. Comm. on the Judiciary) (providing a chart of BIA outcomes).

20. Formally, the courts of appeals review orders to remove individuals from the U.S., rather than BIA decisions. See 8 U.S.C. § 1252(a)(1) (2006) (providing for judicial review of removal orders). Of the 57,740 cases commenced in the courts of appeals across all fields in fiscal year 2009, 7,518 were petitions for review of decisions by the BIA and 1,690 were appeals from the district courts in criminal cases involving immigration offenses. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 11, at 90, 94.

21. 8 U.S.C. § 1252(e)(4)(B).

22. See *id.* § 1101(a)(42) (establishing refugee qualifications).

proceeding before an asylum officer in the DHS.<sup>23</sup> If an affirmative application is not granted and the applicant “appears to be inadmissible or deportable,” the asylum officer refers the case to an immigration judge for a removal proceeding in which the asylum application is considered.<sup>24</sup> EOIR data indicate that in fiscal year 2009, about one in eight cases received by immigration courts involved asylum issues, a decline from one in five in 2007.<sup>25</sup> The great majority of cases that reach the courts of appeals involve asylum claims because, in 1996, Congress eliminated the right to petition the courts of appeals to review BIA decisions in most other types of cases.<sup>26</sup>

### I. ATTRIBUTES OF ADJUDICATION IN THE IMMIGRATION FIELD

The attributes of adjudication affect the choices of legal decisionmakers. These attributes structure and shape judges’ choices in powerful ways, and they differ across fields of legal policy and among adjudicative bodies within those fields. There are several attributes of adjudication, but the three dimensions considered in this Part are especially important, and each has a substantial effect on the decisions made by judges in the immigration field.

The first dimension is the degree of difficulty of the cases presented to decisionmakers. Immigration cases are unusually difficult, primarily because of the ambiguity of relevant facts. This difficulty is particularly great for immigration judges, and it has fundamental effects on the adjudication of individual cases.

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23. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, THE ASYLUM PROCESS (2006), <http://trac.syr.edu/immigration/reports/159/> (explaining affirmative and defensive asylum applications).

24. 8 C.F.R. § 208.14(c)(1) (2009). For a summary of the procedures, see Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 418 (2007).

25. See EOIR, *supra* note 16, at C3 tbl.3, I1 fig.13 (finding that 39,279 of 327,735 cases received in 2009 involved asylum issues, compared with 57,139 of 279,436 in 2007).

26. The chief judge of the Court of Appeals for the Second Circuit reported in 2006 that more than 90 percent of the petitions for review of BIA decisions in his court raised asylum issues. *Immigration Litigation Reduction*, *supra* note 10, at 5 (testimony of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit); see also Lenni B. Benson, *You Can’t Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405, 425 (reporting similar estimates for the Second Circuit). For a discussion of congressional efforts to limit review in 1996, see generally Donald S. Dobkin, *Court Stripping and Limitations on Judicial Review of Immigration Cases*, 28 JUST. SYS. J. 104 (2007).

The second dimension is the extent of time pressures on decisionmakers. Judges within the DOJ, who undertake the first two stages of decisionmaking in immigration cases, are under very heavy time pressure. Judges on the federal courts of appeals, responsible for the third stage, feel more limited pressure. But the sharp increase in the number of immigration cases that appellate judges receive has heightened that pressure in some circuits.

The third dimension is control of decisionmakers by others, primarily officials who stand above them in the formal hierarchy. Even judges on the courts of appeals are under some hierarchical control from the Supreme Court. The degree of hierarchical control is far greater for adjudicators within administrative agencies, however, and in some respects, controls on immigration judges and members of the BIA have become tighter over time.

#### A. *The Difficulty of Cases*

Whatever their mix of motives may be, one goal of judges is to make decisions that are legally accurate; that is, decisions that apply the relevant legal rules properly to the facts.<sup>27</sup> The difficulty that judges face in making accurate decisions varies across cases, and that variation is sometimes summarized (and, of course, oversimplified) in terms of a distinction between easy and hard cases.<sup>28</sup>

In turn, the distinction between easy and hard cases links to the differences between appellate courts with primarily mandatory jurisdiction and those with primarily discretionary jurisdiction. In courts that must decide essentially all appeals they receive, judges consider a high proportion of their cases to be easy to decide because there is one obvious outcome under the law.<sup>29</sup> In contrast, case

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27. In this Article, I do not directly address the debate among legal scholars and political scientists about the relative importance of legal and policy considerations in judicial decisionmaking. For a discussion of the differing positions, see LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 5–9 (2006). I think that these two types of considerations are intertwined in judges' choices, in that judges typically seek to make what they consider good law, but their judgments often are influenced heavily by their policy preferences. For further elaboration, see *infra* note 30. However, this Article's conclusions about judicial specialization and its relationship with other attributes of adjudication do not rest on a particular position on the roles of legal and policy considerations in judicial decisions.

28. *E.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058–60 (1975); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805–07 (1982).

29. Ruggero J. Aldisert, *Philosophy, Jurisprudence, and Jurisprudential Temperament of Federal Judges*, 20 IND. L. REV. 453, 462, 466 (1987) (discussing the federal courts of appeals); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*,



selection on courts with discretionary jurisdiction tends to weed out the easy cases, so that judges make a high proportion of decisions, perhaps the great majority, in cases they perceive to be hard.<sup>30</sup>

Decisionmaking differs in important ways between the trial and appellate levels, and conceptions of judicial behavior cannot necessarily be imported from one to the other.<sup>31</sup> But cases at the trial level also differ in the degree of difficulty they pose for judges. At the trial level, a case may be difficult because legal standards are imprecise, the facts are uncertain, or both.

In the form that they take before immigration judges, immigration cases are often difficult. For one thing, some applicable legal standards in immigration law are quite imprecise. One example is the rule that a deportable individual may avoid removal from the United States if “removal would result in exceptional and extremely unusual hardship” to a family member who is a lawful resident of the United States.<sup>32</sup> Of course, imprecise statutory language is not unusual. More importantly, the facts to which judges must apply these imprecise standards may be impossible to ascertain with any confidence.<sup>33</sup> Thus, immigration judges frequently face daunting tasks.

Decisions whether to grant asylum are particularly difficult. Deportable individuals may avoid removal if they establish that they

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1991 WISC. L. REV. 837, 856–58 (same); John T. Wold, *Going Through the Motions: The Monotony of Appellate Court Decisionmaking*, 62 JUDICATURE 58, 62–63 (1978) (discussing the California Courts of Appeal).

30. Easterbrook, *supra* note 28, at 805–07. Commentators tend to share judges’ perceptions of differences between appellate courts with mostly mandatory jurisdiction and those with mostly discretionary jurisdiction. It is primarily because of this shared perception that some scholars conclude that legal considerations play little or no role in Supreme Court decisionmaking. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 44–85 (2002) (describing the futility of using legal considerations to fully explain decisionmaking); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 35–60 (2005).

31. See C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 136 (1996) (“[T]he legal paradigm includes a set of implicit assumptions about the relationship between trial and appellate judges that is equally unable to accommodate evidence of political jurisprudence.”); see also *id.* at 136–51 (elaborating on the differences between trial and appellate courts).

32. More precisely, the hardship is “to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1229b(b)(1)(D) (2006). For an illustration of the imprecision of this standard when subjected to close analysis, see *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 58–63 (B.I.A. 2001).

33. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1280–82 (1990).

are refugees.<sup>34</sup> Under the law, winning refugee status requires individuals to show that they have suffered “persecution” or have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>35</sup>

The “well-founded fear” language requires judges to take into account both past and potential future events.<sup>36</sup> This task is not unique to immigration law. Judges face similar tasks when making sentencing decisions, especially when asked to take into account a defendant’s prospects for rehabilitation, and when awarding child custody. In each instance, they are required to apply broadly worded standards to factual situations that are often complicated and disputed.

Arguably, however, asylum decisions are more difficult than sentencing and child custody decisions. Language problems, inexperience with the legal process, and pro se status<sup>37</sup> frequently limit aliens’ ability to communicate their cases effectively to a court.<sup>38</sup> The facts of what happened in another country are often impossible to ascertain, and there may be little basis for predictions about what would happen if an individual were returned to that country.<sup>39</sup> The usual absence of written evidence relevant to an asylum decision

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34. 8 U.S.C. § 1158(b)(1)(A).

35. *Id.* § 1101(a)(42)(A).

36. *See, e.g.,* Ramirez-Felipe v. Mukasey, 292 F. App’x 482, 483–84 (6th Cir. 2008); Zulbeari v. INS, 963 F.2d 999, 1000–01 (7th Cir. 1992).

37. In fiscal year 2009, 39 percent of individuals with cases before immigration judges were represented by attorneys. EOIR, *supra* note 16, at G1 fig.9. On the lack of legal representation for most individuals and the difficulties it creates, see Nina Bernstein, *In City of Lawyers, Many Immigrants Fight Deportation Alone*, N.Y. TIMES, Mar. 13, 2009, at A21.

Of course, individuals represented by attorneys do not necessarily receive high-quality services. *See* Aris v. Mukasey, 517 F.3d 595, 598–99, 601 (2d Cir. 2008) (describing how an attorney “failed spectacularly” in an immigration proceeding); Richard L. Abel, *Practicing Immigration Law in Filene’s Basement*, 84 N.C. L. REV. 1449, 1452–77 (2006) (describing an egregious example of neglect in the representation of Chinese immigrants); John T. Noonan, Jr., *Immigration Law 2006*, 55 CATH. U. L. REV. 905, 907–12 (2006) (referring to an attorney as a “scarecrow”). Both the high proportion of unrepresented individuals and the deficiencies of some representation are discussed in Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 5–10 (2008). The legal rules for adequacy of counsel in immigration proceedings have shifted in recent years. *See In re Compean*, 25 I. & N. Dec. 1 (Att’y Gen. 2009) (vacating several prior decisions instituting a new standard); John Schwartz, *A Bush Rule Bolstering Deportations Is Withdrawn*, N.Y. TIMES, June 4, 2009, at A13 (describing a change from a Bush administration ruling).

38. *See* Alexander, *supra* note 2, at 18–19.

39. *See* Martin, *supra* note 33, at 1271–72, 1282–85.

makes judges especially dependent on their assessment of an alien's testimony.<sup>40</sup>

Two other characteristics add to the difficulty of removal decisions for judges. First, these decisions are dichotomous: adjudicators must "make a binary yes-or-no decision on a claim that could fall anywhere along a continuum."<sup>41</sup> Although a judge's decision whether or not to sentence an individual to jail or prison time is also binary, that binary choice lies within a wide range of options.<sup>42</sup> Similarly, judges have a wide range of choices in child custody decisions because of the availability of joint custody and various options concerning visitation and other aspects of parental roles.<sup>43</sup>

Second, there is particular finality to decisions about removal of individuals from the United States. In systems that allow for parole, a judge who sentences a defendant to prison knows that the length of the defendant's stay depends in large part on someone else's decisions. Child custody decisions are subject to reconsideration if one parent comes back to court with the claim that circumstances have changed. In contrast, there ordinarily is no opportunity to reconsider decisions whether to remove individuals from the United States.

High levels of case difficulty can have multiple effects on decisionmaking. One effect is to foster inconsistency in a particular judge's decisions.<sup>44</sup> If legal standards and case facts are uncertain, a judge who seeks accuracy under the law may end up making idiosyncratic decisions due to the enormous leeway for choice that the law and facts allow.

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40. Legomsky, *supra* note 24, at 443.

41. Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 489 (2007) (referring to asylum cases). In proceedings before an immigration judge, however, there is a third option of allowing an immigrant to leave the United States voluntarily. 8 U.S.C. § 1229c(b)(1) (2006).

42. If a judge sentences a defendant to prison, the judge can determine the length of the sentence within statutory constraints. If a judge does not impose a prison sentence, the judge can determine whether to impose probation, the length of the probation term, and the conditions of probation. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5A–5C1.2 (2009). The Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), has (at least) weakened the force of the federal sentencing guidelines, but the options that the guidelines lay out are typical of those available to judges.

43. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.05–.12 (2002).

44. *See, e.g.*, Leon Dash, *Sentences Tied to "Gut Reaction,"* WASH. POST, June 26, 1975, at D5 (describing the highly disparate sentences given to similar defendants on the basis of a judge's "gut reaction" to them).

Another effect can be understood in terms of the social-psychological theory of motivated reasoning.<sup>45</sup> According to this theory, the more difficult it is to ascertain the accurate conclusion about a matter, the more that people's preferences for one conclusion over another—directional goals, in contrast with accuracy goals—come into play. Directional goals can influence judgments either consciously or unconsciously. The preferences that underlie directional goals for legal decisionmakers may be attitudes toward the policy issues that a case raises, often labeled “policy preferences,” or attitudes toward the litigants themselves. One result is increased variation among judges in their patterns of decisions, based on differences in attitudes.

The effects of case difficulty on sentencing decisions are well documented. The adoption of sentencing guideline systems was largely a response to evidence of bias<sup>46</sup> and idiosyncrasy<sup>47</sup> in individual judges' choices, as well as disparities in sentencing patterns among judges.<sup>48</sup> But guideline systems did not eliminate these problems.<sup>49</sup> In

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45. See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990) (discussing how motivation affects reasoning through “reliance on a biased set of cognitive processes”). See generally Roy F. Baumeister & Leonard S. Newman, *Self-Regulation of Cognitive Inference and Decision Processes*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 3 (1994) (discussing “motivated cognition in the context of self-regulation theory”); Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, 20 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 297 (1987) (analyzing cognitive and motivational bases for biased cognitions); Carolin Showers & Nancy Cantor, *Social Cognition: A Look at Motivated Strategies*, 36 ANN. REV. PSYCHOL. 275 (1985) (analyzing the role of motivation in social cognition). For a discussion of the application of the motivated reasoning concept to judicial decisionmaking, see EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 13–79 (2009).

46. The evidence on racial discrimination in sentencing is complex and disputed. See Steven Klepper, Daniel Nagin & Luke-Jon Tierney, *Discrimination in the Criminal Justice System—A Critical Appraisal of the Literature*, in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 55, 55–128 (Alfred Blumstein et al. eds., 1983) (critiquing studies of discrimination in case disposition); Martha A. Myers & Susette M. Talarico, *The Social Contexts of Racial Discrimination in Sentencing*, 33 SOC. PROBS. 236, 236 (1986) (analyzing “whether race differences in treatment vary as a function of who is being sentenced and where sentencing occurs”).

47. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 12–25 (1972); see also JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?”: THE MAKING OF A CRIMINAL LAWYER 37 (1983) (reporting a judge's description of the impact of time of day and day of week on sentencing).

48. See generally Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentencing Disparity and Its Reduction*, 43 U. CHI. L. REV. 109 (1975) (studying sentencing disparity and discussing early attempts to study the phenomenon).

light of the great uncertainty involved in applying vague standards to the facts of individual cases, such problems are inevitable. Although there is not as much systematic information available on judges' child custody decisions as there is on sentencing decisions, the looseness of the "best interests of the child" standard and the frequency of disputed facts seem to produce similar patterns.<sup>50</sup>

Whether or not immigration cases present greater difficulties than sentencing and child custody cases, their difficulty affects decisionmaking. The theory of motivated reasoning suggests that this difficulty increases the weight of judges' preferences. This suggestion is consistent with the striking disparity among immigration judges in their patterns of decisions in asylum cases.<sup>51</sup> It is not surprising that there is a relationship between rates of granting asylum and two characteristics of immigration judges that are probably correlated with their policy preferences: gender<sup>52</sup> and experience in enforcement of immigration laws.<sup>53</sup> The difficulty of deciding immigration cases can shape immigration judges' choices in other ways as well, expanding the room for bias and idiosyncrasy.

Because the BIA and courts of appeals address cases under different rules from those that apply to immigration courts, judges in these two forums do not necessarily face the same level of case difficulty as immigration judges. In immigration cases, the tasks of the BIA and the courts of appeals differ from those of immigration courts because they review preexisting decisions and their review is circumscribed.<sup>54</sup> The BIA is not to "engage in de novo review of

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49. See Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733, 748–62 (2001); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 785 n.8 (1998); Jeffery T. Ulmer & John H. Kramer, *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383, 389 (1996).

50. See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 249–62 (1975).

51. See U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-08-940, SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 22–29 (2008); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LATEST DATA FROM IMMIGRATION COURTS SHOW DECLINE IN ASYLUM DISPARITY (2009), <http://trac.syr.edu/immigration/reports/209/>; Ramji-Nogales et al., *supra* note 3, at 325–49.

52. Ramji-Nogales et al., *supra* note 3, at 342–46.

53. *Id.* at 347–49.

54. For a discussion of circumscribed immigration review in the courts of appeals, see Katzmann, *supra* note 37, at 7.

findings of fact determined by an immigration judge.”<sup>55</sup> It may review those facts “only to determine whether the findings of the immigration judge are clearly erroneous,”<sup>56</sup> although it can review other issues de novo.<sup>57</sup> Courts of appeals ruling on petitions for review of BIA decisions must decide “only on the administrative record.”<sup>58</sup> “[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,”<sup>59</sup> and “a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law.”<sup>60</sup>

These limits reduce the difficulty of judges’ tasks as decisionmakers in some respects, and that is especially true of the courts of appeals. The language of the governing rules for review, however, still requires judges to make difficult judgments about the facts in some cases. The Second Circuit, for instance, regularly wrestles with the credibility of applicants as witnesses on issues relating to asylum.<sup>61</sup>

In part because of the high stakes involved, immigration cases can be difficult at all levels of the system. The task of immigration judges in at least a substantial proportion of cases is unusually difficult. The limited scope of decisionmaking in the BIA and (even more) the courts of appeals eases the difficulty of decisionmaking in some ways. In the field of immigration, however, the courts of appeals hear primarily asylum cases, and these cases present decisionmakers at any level with special challenges.

### B. *Time Pressures*

With relatively few cases to decide on the merits, and with a staff of four well-qualified law clerks, Supreme Court Justices may not feel heavy time pressures in their work as decisionmakers. If so, they are unusual. Most judges have to cope with more cases than they can

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55. 8 C.F.R. § 1003.1(d)(3)(i) (2009).

56. *Id.*

57. *Id.* § 1003.1(d)(3)(ii).

58. 8 U.S.C. § 1252(b)(4)(A) (2006).

59. *Id.* § 1252(b)(4)(B).

60. *Id.* § 1252(b)(4)(C).

61. See John R.B. Palmer, *The Second Circuit’s “New Asylum Seekers”*: Responses to an Expanded Immigration Docket, 55 CATH. U. L. REV. 965, 977–97, 982–88 (2006).

handle comfortably in the time available.<sup>62</sup> The greater the time pressures that they feel, the more likely that these pressures will affect the quality of decisionmaking.

Students of judicial behavior have not given sufficient weight to the existence of time pressures in most courts. As federal court of appeals Judge Frank Easterbrook put it, “[m]uch of the judge-centered scholarship in contemporary law schools assumes that judges have the leisure to examine subjects deeply and resolve debates wisely. Professors believe they have this capacity and attribute it to judges. Pfah!”<sup>63</sup> Judge Easterbrook might have directed his comment at political scientists as well, because they too often operate under the implicit assumption that judges can analyze carefully each case that they are called upon to decide.

Immigration judges face extraordinarily severe caseload pressures. With a large volume of cases to resolve, they need to decide cases quickly, and they receive considerable pressure from their superiors to do so.<sup>64</sup> In the period from 2000 to 2005, the total immigration caseload grew substantially with little increase in the number of immigration judges.<sup>65</sup> In 2005, according to one calculation, immigration judges averaged “more than six cases per judge per workday.”<sup>66</sup> The total caseload in 2009, measured by the number of proceedings received by the immigration courts, was about the same as it was in 2005.<sup>67</sup> Judges have little staff support; even with an increase in the number of law clerks, there is still an average of only one clerk for every four judges.<sup>68</sup> Immigration judges and others have attested to the difficulties created by this workload, and some have used an analogy to traffic court to highlight the need for speed in

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62. Of course, judges themselves help determine how much time is available. For a discussion of the judicial preference for leisure, see RICHARD A. POSNER, *OVERCOMING LAW* 123–26 (1995).

63. Frank H. Easterbrook, *What’s So Special About Judges?*, 61 U. COLO. L. REV. 773, 778 (1990).

64. See Stuart L. Lustig et al., *Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 64–65 (2008) (quoting immigration judges on pressures to complete cases).

65. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 51, at 11–14.

66. Alexander, *supra* note 2, at 19.

67. See EOIR, *supra* note 16, at C3 tbl.3 (noting a 1.1 percent caseload decline between 2005 and 2009).

68. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1652 (2010).

decisionmaking despite the gravity of the cases before immigration courts.<sup>69</sup>

A president of the National Association of Immigration Law Judges reported in 2005 that in an earlier period immigration judges had been “encouraged to do things in a short-and-dirty manner,” because the BIA was a backstop to catch errors.<sup>70</sup> But when BIA procedures were changed so that large proportions of cases were decided summarily by a single judge rather than receiving more extensive consideration by a three-judge panel, that backstop was no longer available.<sup>71</sup> A perceived need to analyze cases more carefully, however, does not mean that judges actually can engage in that careful analysis. As one court of appeals judge said, “I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances.”<sup>72</sup>

Members of the BIA are also under heavy caseload pressures. In the 1990s, a combination of forces brought about an enormous increase in the number of cases appealed to the BIA, creating a substantial backlog.<sup>73</sup> Streamlining rules adopted in 1999<sup>74</sup> and

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69. According to one immigration judge, “[t]hese are death penalty cases being handled with the resources of traffic court.” APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA’S IMMIGRATION COURTS 1 (2009), available at <http://www.appleseeds.net/Portals/0/Documents/Publications/Assembly%20Line%20Injustice.pdf>; see also Juan P. Osuna, Chairman, BIA, Panel Discussion at the Brookings Institution: Immigration and the Courts 12 (Feb. 20, 2009) (transcript available at [http://www.brookings.edu/~media/Files/events/2009/0220\\_immigration/20080220\\_immigration.pdf](http://www.brookings.edu/~media/Files/events/2009/0220_immigration/20080220_immigration.pdf)) (noting that a former chief immigration judge called the immigration court system “a traffic court volume with Supreme Court consequences”).

70. Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, at A1.

71. *Id.*; see also *Immigration Litigation Reduction*, *supra* note 10, at 187 (statement of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit); Benedetto, *supra* note 14, at 477–80 (noting that BIA reform precludes the BIA from “cleaning up” the improper decisions of immigration judges). The proportion of summary BIA decisions was later reduced. See *infra* note 78.

72. *Immigration Litigation Reduction*, *supra* note 10, at 186–87 (statement of John M. Walker, Jr.). Chief Judge Walker also said at the hearing that “[w]e don’t have confidence, frankly, that the BIA has really looked at the case.” *Id.* at 22 (testimony of John M. Walker, Jr.).

73. 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 12–16 (2003), available at [http://www.dorsey.com/files/upload/DorseyStudyABA\\_8mgPDF.pdf](http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf).

74. Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,135 (Oct. 18, 1999) (codified as amended at 8 C.F.R. pt. 1003).



procedural reforms adopted in 2002<sup>75</sup> were designed to cope with the backlog. The 1999 rules allowed single BIA members to hear certain cases in place of three-judge panels. These rules also allowed for affirmance without opinion of certain kinds of decisions by immigration judges.<sup>76</sup> The 2002 rules made single-member decisions the general rule,<sup>77</sup> expanded the use of affirmances without opinion,<sup>78</sup> and substituted a clearly erroneous standard of review of factual judgments in the place of de novo review.<sup>79</sup> Even with these expedients, the work of BIA members remains daunting. According to one calculation, they averaged “more than sixteen appeals per member per workday” in 2006.<sup>80</sup>

Judges on the federal courts of appeals face their own caseload pressures, but these pressures are not nearly as severe as they are for administrative decisionmakers in immigration law. The courts of appeals, however, *have* had to confront rapid growth in the numbers of petitions for review of BIA decisions. This rapid growth reflects primarily a higher rate of petitions from BIA decisions and secondarily an increase in the volume of those decisions.<sup>81</sup> The growth

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75. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003).

76. Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,141–42.

77. In each of the fiscal years from 2003 through 2008, the percentage of BIA cases decided by single members was between 93 percent and 94 percent. Legomsky, *supra* note 68, at 1657 n.104.

78. The expansion was enormous, but it has since been reversed. Of the BIA decisions in fiscal year 2001, 6 percent were affirmances without opinion. *Id.* at 1662. In fiscal years 2002 through 2004, about one-third were affirmances without opinion. *See id.* In fiscal year 2009, the proportion was 5 percent. *Id.* Attorney General Alberto Gonzales indicated in 2007 that the BIA would be “drastically decreasing its reliance on summary one-line decisions.” *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Alberto Gonzales, Att’y Gen. of the United States). As yet, there appear to be no analyses indicating whether the decline in the use of affirmances without opinion has been accompanied by an increase in decisions favorable to individuals.

79. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,902–03.

80. Alexander, *supra* note 2, at 21.

81. STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 758 (5th ed. 2009) (“In 2002, just before the BIA reforms, only 5% of the BIA decisions were being appealed to the federal courts. By November 2004 that figure was 25% and by 2006 it had risen to 30%.” (citation omitted)); Palmer, *supra* note 5, at 15 (“Observers generally agree that the surge is closely linked to recent procedural changes at the BIA, which substantially increased the volume of decisions reached by that tribunal, and led litigants to appeal those decisions at a higher rate.”); Palmer et al., *supra* note 6, at 3 (“More people than ever before are petitioning the courts to review decisions of the Board of

has been most substantial for the Ninth Circuit, which receives the largest number of petitions to review BIA decisions, and the Second Circuit, for which those petitions constitute a larger share of the caseload than in any other circuit.<sup>82</sup> In fiscal year 2008, 41 percent of new Second Circuit cases and 34 percent of new Ninth Circuit cases were petitions to review BIA decisions.<sup>83</sup> The biggest surge came in 2002, as a result of changes in BIA procedures that increased both the number of BIA decisions and the propensity of individuals to petition for review of those decisions. The number of petitions to the Second Circuit increased by 781 percent between February 2002 and February 2003.<sup>84</sup>

The most fundamental impact of heavy caseloads is to put judges in a position in which they have to balance their goal of making the best possible decision—whatever their criteria for “best” may be—against the goal of simply getting through the cases. Judges cannot take all of the time needed to fully consider the alternatives in a case.<sup>85</sup> And when caseload pressures are greatest, simply processing cases may become the dominant goal in decisionmaking. Although judges can reduce their burdens by delegating work to other people,<sup>86</sup> such expedients are often inadequate or unavailable.

Judges, then, must adopt cognitive strategies that speed up the process of decisionmaking. One strategy available to them is the adoption of heuristics, such as formal or informal presumptions, to guide decisions.<sup>87</sup> An appellate court, for instance, might establish a

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Immigration Appeals (BIA), and these petitions now account for a substantial proportion of the caseload in the courts of appeals . . .”).

82. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 11, at tbl.B-3.

83. *Id.* In fiscal year 2009, the proportions were considerably lower—28 percent in the Second Circuit and 27 percent in the Ninth Circuit. *Id.* It is uncertain whether the decline in 2009 and the overall decline in petitions to review BIA decisions represent the beginning of a longer-term trend. If so, the perceived need to relieve the courts of appeals of their immigration caseloads may weaken.

84. Comm. on Fed. Courts, *The Surge of Immigration Appeals and Its Impact on the Second Circuit Court of Appeals*, 60 REC. ASS’N B. CITY N.Y. 243, 244 (2005).

85. See Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 82 (1998) (“[G]iven the work load of judges, they often make their decisions before developing the models to their fullest.”).

86. One example is the central staff that does much of the work of reaching decisions in a subset of cases in some appellate courts. See JOY A. CHAPPER & ROGER A. HANSON, NAT’L CTR. FOR STATE COURTS, INTERMEDIATE APPELLATE COURTS: IMPROVING CASE PROCESSING 15–22 (1990).

87. For background on the use of heuristics in decisionmaking, see generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos

heavy presumption in favor of affirmance that appellants cannot easily overcome.<sup>88</sup> And directional goals may take precedence over accuracy goals,<sup>89</sup> because less time generally is required to ascertain how a case relates to one's preferences than to closely analyze its legal merits. In this respect, time pressures could reinforce the effects of case difficulty.

For immigration judges, caseload pressures contribute to the high levels of stress reported by judges.<sup>90</sup> These pressures might also help account for some immigration judges' abusive treatment of asylum applicants.<sup>91</sup> The wide disparities in the rates at which immigration judges rule in favor of asylum claims may be a product of these pressures as well as the difficulty of ascertaining the right answer in these cases. With little time to decide difficult cases, judges may respond largely in terms of their general attitudes toward asylum and asylum claimants.

In contrast to immigration judges, members of the BIA have incentives to rule in a particular way to reduce the pressures on themselves. Specifically, they can summarily affirm rulings of immigration courts against individuals without writing an opinion, whereas reversals require opinions.<sup>92</sup> The 2002 rule changes that expanded the circumstances under which summary affirmances could be used and that encouraged their use<sup>93</sup> help account for the decline in the proportion of decisions by immigration judges that BIA members reverse.<sup>94</sup>

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Tversky eds., 1982); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 17–42 (1980).

88. Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 602–03.

89. On the meaning of directional and accuracy goals, see *supra* text accompanying note 45.

90. Lustig et al., *supra* note 64, at 59; Marcia Coyle, *Burnout, Stress Plague Immigration Judges*, NAT'L L.J., July 13, 2009, at 4.

91. See, e.g., *Ba v. Gonzales*, 228 F. App'x 7, 11 (2d Cir. 2007); Nina Bernstein, *Judge Who Chastised Weeping Asylum Seeker Is Taken off Case*, N.Y. TIMES, Sept. 20, 2007, at B1.

92. 8 C.F.R. § 1003.1(e)(4) (2009).

93. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,885–87 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003).

94. For a depiction of the increased use of summary decisions and the increased proportion of denied appeals, see DORSEY & WHITNEY LLP, *supra* note 73, at apps. 24–25. For a discussion of affirmances without opinion, see *supra* note 78. It is uncertain whether the decline in the use of summary decisions since 2004 has been accompanied by a reduced proportion of denied appeals.

For court of appeals judges, there is some evidence about the effects of growing immigration caseloads. One analysis found that the impact of judges' ideological positions on their decisions on petitions for review of BIA decisions was far greater from 2003 to 2008, after the big increase in the number of petitions, than it had been from 1998 to 2002.<sup>95</sup> The study's author suggested that increased time pressures may have led judges to fall back on their policy preferences as relatively efficient guides to decision.<sup>96</sup>

The outlier among the circuits in decisions made from 2004 to 2005 was the Seventh Circuit, in which the remand rate (that is, nonaffirmances) was 36 percent, about twice as high as the circuits that ranked second and third (19.5 percent in the Ninth Circuit, 17 percent in the Second Circuit).<sup>97</sup> In a 2005 opinion, Judge Richard Posner called attention to the Seventh Circuit's high reversal rate in immigration cases.<sup>98</sup> Four years later, he speculated that caseloads had something to do with that high rate: "The 7th Circuit doesn't have one of the heaviest workloads. Maybe that's why we reverse so many of the appeals."<sup>99</sup> Yet some other circuits with relatively small absolute numbers of immigration petitions and small proportions of immigration petitions among their cases had low reversal rates.<sup>100</sup>

As the 2002 rule changes for the BIA indicate, courts (or those who make rules for courts) can cope with caseload pressures by adopting procedural changes that skew decisions in one direction. The Second Circuit, which is subject to the greatest caseload pressures in immigration, has adopted procedural changes that ease these pressures but that may not affect the court's decisional

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95. Chad Westerland, *The Consequences of Immigration Reform for the U.S. Courts of Appeals* 38 (Aug. 3, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1443381>.

96. *Id.* at 28–29.

97. Ramji-Nogales et al., *supra* note 3, at 362 tbl.2. The overall remand rate for all circuits was 15.4 percent. *Id.* In 2006, a DOJ official reported (for an unspecified period) that individuals won in 14 percent of the decisions by courts of appeals; if procedural decisions were taken into account, the success rate was less than 10 percent. *Immigration Litigation Reduction*, *supra* note 10, at 33 (testimony of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, U.S. Department of Justice).

98. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

99. Abdon M. Pallasch, *Political Refugees Better Off Right Here*, CHI. SUN-TIMES, Apr. 27, 2009, at 14 (quoting Richard Posner, J., U.S. Court of Appeals for the Seventh Circuit).

100. Total numbers of appeals for 2004–05 were obtained from the OFFICE OF PUBLIC AFFAIRS, ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 101 tbl.B (2006), available at <http://www.uscourts.gov/judbus2005/appendices/b0.pdf>.

tendencies.<sup>101</sup> The Ninth Circuit engages in heavy screening of immigration cases. One member of the court reported in 2006 that only 9 percent of the immigration cases terminated in 2005 “actually reached three-judge panels,”<sup>102</sup> and another reported that “well over 80% of the immigration petitions for review are resolved through centralized staff review.”<sup>103</sup> It is uncertain to what extent, if at all, this screening affects the aggregate outcomes of cases.

Caseload pressures are a key attribute of adjudication in the field of immigration. The Second and Ninth Circuits have adapted to those pressures through procedural changes, and major procedural changes were mandated for the BIA. For immigration judges, who hear cases in the first instance, summary review of prior decisions is unavailable. Large caseloads, reinforced by the difficulty of deciding cases, create enormous time pressures in the immigration courts.

### C. Control

Judicial independence and accountability are longstanding concerns for scholars, public policymakers, and judges themselves.<sup>104</sup> The relationship between the federal courts and the larger political system has been a matter of particular interest. This interest has grown in recent years due to a perceived increase in attacks on the courts from the other branches.<sup>105</sup>

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101. Comm. on Fed. Courts, *supra* note 84, at 249–52; Palmer, *supra* note 61, at 971–76; Osuna, *supra* note 69, at 51–56.

102. *Immigration Litigation Reduction*, *supra* note 10, at 9 (testimony of Carlos T. Bea, J., U.S. Court of Appeals for the Ninth Circuit).

103. *Id.* at 182 (letter from Sidney R. Thomas, J., U.S. Court of Appeals for the Ninth Circuit).

104. See, e.g., Stephen B. Burbank, Barry Friedman & Deborah Goldberg, *Introduction to JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 3 (Stephen B. Burbank & Barry Friedman eds., 2002). Independence and accountability usually refer to the content of judges’ decisions, and I follow that usage in this and subsequent discussions of control over judges. This kind of control should be distinguished from control over the quantity of decisions—that is, efforts to increase production by judges to deal with case backlogs. Efforts by superiors to increase production in the immigration courts and the BIA were discussed previously. See *supra* Part I.C.

105. See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* (2006); MARK C. MILLER, *THE VIEW OF THE COURTS FROM THE HILL: INTERACTIONS BETWEEN CONGRESS AND THE FEDERAL JUDICIARY* (2009).

Such attacks notwithstanding, judges on the federal courts of appeals enjoy considerable freedom from their political environment. Because of their intermediate position in the judicial hierarchy, their decisions lack the visibility of Supreme Court decisions, and it is relatively rare for court of appeals decisions to arouse political controversy.<sup>106</sup> Of course, court of appeals judges are insulated by life tenure.

The most significant source of control over the courts of appeals is Supreme Court review. If judges seek to avoid reversal, either for practical or symbolic reasons, the prospect of review may affect the choices of circuit court judges.<sup>107</sup> But the infrequency with which the Supreme Court reviews court of appeals decisions works against hierarchical control. As noted earlier,<sup>108</sup> the Court hears relatively few immigration cases.

Court of appeals judges also are subject to a degree of congressional control, in that Congress could respond negatively to decisions with which its members disagree. Indeed, Congress has acted to remove the jurisdiction of the courts of appeals over certain immigration matters.<sup>109</sup> Taken together, these congressional actions are quite consequential, eliminating judicial review of most issues relating to removal, other than asylum claims.<sup>110</sup> These actions may

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106. Perhaps the most controversial court of appeals decision in recent years was the Ninth Circuit decision holding that inclusion of “under God” in the Pledge of Allegiance recited at a public school was unconstitutional. *Newdow v. U.S. Congress*, 328 F.3d 466, 488 (9th Cir. 2002), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). The level of interest in that decision highlighted the infrequency with which court of appeals decisions receive much attention. *See, e.g.*, Alexander K. Hooper, Recent Development, *Jurisdiction-Stripping: The Pledge Protection Act of 2004*, 42 HARV. J. ON LEGIS. 511, 511 & n.3 (2005) (discussing public and congressional reaction to the Ninth Circuit decision and the introduction in the House of Representatives of a jurisdiction-stripping bill intended to “protect” the Pledge of Allegiance).

107. *See* Donald R. Songer, Jeffrey A. Segal & Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 673–74 (1994).

108. *See supra* note 12.

109. Dobkin, *supra* note 26, at 104–07; Legomsky, *supra* note 4, at 380–84. The statutes that limited jurisdiction were the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.), the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 U.S.C. and 18 U.S.C.), and the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified in scattered sections of 8 U.S.C.).

110. Provisions of the 1996 statutes “bar judicial review of entire classes of removal orders, preclude judicial review of most discretionary decisions, specifically prohibit the use of particular judicial remedies and forms of action, and otherwise inhibit judicial review.” Legomsky, *supra* note 4, at 380.

have resulted in part from dissatisfaction with the courts' perceived decisional tendencies in such matters.

Whatever may be the extent of external control over Article III federal judges such as those on the courts of appeals, judges who work within the executive branch are generally thought to have considerably less independence.<sup>111</sup> Administrative law judges (ALJs) have the highest degree of independence, but that independence is still limited. The most important limit is the power of agency heads to review ALJ decisions.<sup>112</sup> The battles between the Social Security Administration and its ALJs in the 1980s indicate that ALJs have some ability to fight off efforts at control; however, these battles also underline the extent of control that does exist.<sup>113</sup>

Immigration judges and members of the BIA are not ALJs, and their independence is more limited.<sup>114</sup> Serving in the EOIR in the DOJ,<sup>115</sup> both sets of judges are thereby free from control by the DHS, which is the government litigant in administrative cases. But the DOJ is an interested party in litigation issues. Among other things, it houses the Office of Immigration Litigation, whose attorneys represent the DHS in immigration cases in federal court.<sup>116</sup> DOJ officials can and have used their powers to influence or preempt the decisions of immigration judges, and they have asserted broad powers

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111. See, e.g., James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1209–34 (2006).

112. For background on this review and its exercise, see generally Christina L. Boyd & Amanda Driscoll, *Empirical Insights into Agency Adjudications: Agency Head Reversals of Administrative Law Judges* (Aug. 18, 2008) (unpublished manuscript, presented at the 2008 Annual Meeting of the American Political Science Association, on file with the *Duke Law Journal*); Cole Taratoot, *Accountability and Independence: Administrative Law Judges and NLRB Rulings* (July 1, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1428518>.

113. See DONNA PRICE COFER, *JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING PROCESS* 75–156 (1985); Taylor, *supra* note 41, at 177–82; Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1354–55 (1992).

114. Legomsky, *supra* note 4, at 372–79. For background on executive-branch adjudicators who are not ALJs, see generally John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992).

115. EOIR, U.S. Dep't of Justice, EOIR Background Information, <http://www.justice.gov/eoir/background.htm> (last visited Mar. 28, 2010).

116. U.S. Dep't of Justice, Office of Immigration Litigation: District Court Section, [http://www.justice.gov/civil/oil/District\\_Court\\_Section.htm](http://www.justice.gov/civil/oil/District_Court_Section.htm) (last visited Mar. 28, 2010); see also Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 293 & n.122 (2002) (noting that the DOJ's Office of Immigration Litigation handles immigration cases).

to relieve immigration judges of their assignments.<sup>117</sup> Because the BIA was created by the DOJ and has no statutory basis,<sup>118</sup> it is subject to even greater control by DOJ officials.

Attorney General John Ashcroft's actions in 2002 and 2003 demonstrated the DOJ's capacity to control the BIA.<sup>119</sup> The BIA procedural changes discussed earlier<sup>120</sup> represented efforts to address the backlog of cases, but they also created incentives to rule against individuals who appealed from decisions by immigration judges. More importantly, Ashcroft announced that the number of positions on the BIA would be reduced from twenty-three to eleven,<sup>121</sup> a decision that was striking in light of the backlog. Because of vacancies, only five BIA members were reassigned to other positions in 2003 to reach the goal of a membership of eleven.<sup>122</sup> Based on these members' decisional tendencies, it appears that they were reassigned largely due to their tendency to favor appellants more than their colleagues did.<sup>123</sup>

The existence of significant controls over judges might affect their behavior in multiple ways. Broadly speaking, if these controls do affect judges' choices, the effects could take two forms. First, judges

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117. Legomsky, *supra* note 4, at 372–75. Provisions of a 2007 Code of Conduct for immigration judges and members of the BIA exempted communications with DOJ employees from the prohibition on ex parte communications while a case was pending. Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510, 35,511–12 (June 28, 2007). In the view of one commentator, each of these provisions “further erodes . . . decisional independence.” Legomsky, *supra* note 24, at 420–21. Another change adopted under Attorney General Gonzales allowed government attorneys, but not those representing the other side, to file complaints about decisions by immigration judges and the BIA. *Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 40 (2009) (testimony of Stephen H. Legomsky, Professor, Washington University School of Law).

118. See Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (codified as amended at 8 C.F.R. pt. 1003) (establishing the BIA); see also Legomsky, *supra* note 24, at 417 (noting that the BIA was created by the attorney general rather than by statute).

119. See Legomsky, *supra* note 4, at 375–77 (describing the structural and procedural changes in the BIA instituted by Attorney General Ashcroft, and their influence on BIA decisions).

120. See *supra* text accompanying note 93.

121. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003).

122. Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1155 (2004).

123. See *id.* at 1156–61 (analyzing BIA members' votes in closely divided en banc decisions and concluding that those who tended to favor noncitizens were more likely than their colleagues to be reassigned).



might respond selectively, avoiding specific decisions that could arouse negative reactions from those who hold controls over them. Alternatively, judges might adjust their decisions regularly, moving policy in the direction preferred by those with control.

This dichotomy is illustrated by the relationship between the Supreme Court and Congress.<sup>124</sup> The powers of Congress to override or limit the effects of the Court's decisions and congressional powers over the Court as an institution arguably give the Justices reason to take Congress into account in their decisionmaking. One possible result is that the Justices generally act without regard to Congress, but draw back from decisions that seem likely to produce deep and widespread dismay among members of Congress. Another possible result is that the Justices routinely adjust their decisions so that the ideological content of those decisions does not diverge too far from the collective view of Congress.<sup>125</sup>

In all likelihood, Supreme Court review and congressional power over jurisdiction have little effect on the decisions of the courts of appeals in immigration law. It is not clear that concern about potential reversal has a great deal of impact on court of appeals judges in general,<sup>126</sup> and the infrequency of Supreme Court review of immigration law decisions further limits the likely impact of that review. Judges might avoid decisions that run counter to the perceived preferences of Congress, especially decisions that expand the rights of noncitizens under the immigration laws. But there are so many immigration cases and so many circuit court judges that a judge who must decide a specific case has little reason to think that the decision in that case will have much impact on the prospect of congressional action.<sup>127</sup>

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124. See BAUM, *supra* note 27, at 73–81 (assessing these two models' power to explain Supreme Court behavior).

125. For arguments that the Justices respond to Congress in this way in statutory cases, see generally Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247 (2003); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991). For a skeptical view of this argument, see Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Law and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

126. David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 580 (2003).

127. In other words, even if judges would prefer that Congress not limit their jurisdiction in immigration cases or change the law to limit immigrants' legal rights, they face a collective action problem: because a single judge's choices seldom have much effect on the likelihood that Congress will take negative action, judges have little incentive to take positions that depart from their reading of the law or their policy preferences to avoid displeasing Congress. For

The record of the courts of appeals in asylum cases strongly suggests that court of appeals judges feel free to follow their own paths in immigration law. The substantial proportion of decisions in which panels remand BIA decisions and the substantial variation in that proportion across circuits<sup>128</sup> provide evidence that judges respond to asylum cases primarily on the basis of their own legal and policy considerations rather than external control.

Because immigration judges and members of the BIA lack the job security of Article III judges, it is far more plausible that hierarchical controls affect their behavior. Within the judiciary, it is widely assumed that life tenure or its absence has considerable effect on judges' independence. The empirical evidence on this effect for Article I and Article III judges is quite limited, but it suggests that Article I judges are more responsive to the preferences of the other branches.<sup>129</sup> There is more substantial evidence to show that the need to win a new term from the electorate affects the choices of state judges.<sup>130</sup> For their part, state judges whose continued tenure depends on the governor or state legislature may be inclined to favor state

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background on collective action problems, see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

In light of the difficulty of many immigration cases and the growth in the volume of these cases despite congressional action, it is not certain that all judges are unhappy about limitations on their jurisdiction in the immigration field.

128. See Ramji-Nogales et al., *supra* note 3, at 362 tbl.2 (showing the percentage of asylum cases remanded by each circuit in 2004 and 2005).

129. See, e.g., Scott Andrew Hendrickson, *Examining Judicial Independence: Article I v. Article III Courts 94–192* (Aug. 2006) (unpublished Ph.D. dissertation, Washington University in St. Louis) (on file with Olin Library, Washington University in St. Louis) (studying tax and international trade litigation in federal courts).

130. See Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 108 (2007) (“[J]udges in partisan competitive systems sentence significantly more punitively than those in retention systems.”); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1122–23 (1987) (finding that electoral pressures made a Louisiana Supreme Court justice less likely to cast unpopular votes in highly visible death penalty cases); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 442 (1992) (“District-based elections, close margins of victory, approaching the end of a term, conditioning from previous representational service, and experience in seeking reelection influence liberal justices to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky.”); Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) (finding that judges become more punitive as elections approach); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 660–62, 669–72 (2009) (finding that both campaign contributions and the political preferences of the electorate influence judges' votes).

government positions in litigation.<sup>131</sup> Because they are subject to additional control from their superiors, judges who work within the DOJ could be expected to show even greater responsiveness to the preferences of these superiors.

Direct evidence on the impact of this control is incomplete, and the evidence that does exist is ambiguous. When Attorney General Ashcroft announced that he intended to reduce the size of the BIA from twenty-three members to eleven,<sup>132</sup> he created a quasi-experiment. Members of the BIA had good reason to suspect that those who took positions perceived as unduly favorable to noncitizens would be vulnerable to removal; as noted earlier, such suspicions proved well founded.<sup>133</sup> The question was whether this situation would induce BIA members to shift their positions in cases to align them more closely with those of the attorney general. An analysis of en banc decisions suggested that some BIA members did so, but this response was not universal; four of the nineteen sitting members “supported outcomes in closely divided cases that could be viewed unfavorably from a conservative perspective.”<sup>134</sup>

After the procedural changes of 2002, the proportion of cases resolved with summary decisions increased enormously, and the proportion of rulings in favor of appellants declined quite substantially.<sup>135</sup> Both changes came quickly.<sup>136</sup> These changes might reflect concern by BIA members about their positions, or they could simply represent an effort to follow the letter and spirit of the new rules for review. The relative importance of those two motivations is uncertain. But the attorney general’s effort to change the pattern of decisions by BIA members was successful.

The picture for the immigration courts is more complicated. The insecure tenure of immigration judges, the removal of BIA members in 2003, and the rules that give government lawyers opportunities to put pressure on immigration judges<sup>137</sup> all create incentives to favor the

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131. Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1617 (2009).

132. *See supra* text accompanying note 121.

133. *See supra* text accompanying note 123.

134. Levinson, *supra* note 122, at 1159.

135. DORSEY & WHITNEY LLP, *supra* note 73, at app. 24.

136. *Id.* At least in asylum cases, the proportions of BIA decisions favorable to individuals remained at the new, lower level through fiscal year 2005. *See* Ramji-Nogales et al., *supra* note 3, at 359 fig.42 (showing asylum grant and remand rates for fiscal years 1998 through 2005).

137. *See supra* note 117.

government.<sup>138</sup> On the other hand, reports by immigration judges about the control exerted by DOJ superiors suggest that this control has considerably more to do with simply disposing of cases than with the content of the decisions the judges reach.<sup>139</sup> Indeed, in one study, most comments by immigration judges about pressures relating to decision content referred to pressures from the courts of appeals rather than from DOJ officials.<sup>140</sup> If immigration judges do feel these pressures, the effect favors individuals rather than the government—because it is rulings against individuals that the courts of appeals can review and then remand for reconsideration.<sup>141</sup>

In this context, the substantial variation among immigration judges' decisional records in asylum cases is intriguing. This variation seems to suggest that judges reach decisions with considerable independence despite the controls to which they are subject. In 2006, the DOJ initiated a program to address problems in the adjudication of immigration cases, including disparities among immigration judges in the rates at which they granted asylum.<sup>142</sup> Pressures toward convergence in decisional records might not be successful, however, because judges can be expected to respond to these pressures in different ways.<sup>143</sup> For the same reason, the continued existence of disparities does not mean that judges are generally unresponsive to efforts by their superiors to influence the content of their decisions, especially if these efforts at control affect subsets of cases or judges differentially.

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138. See Legomsky, *supra* note 4, at 372–75 (describing factors that pressure immigration judges to rule in favor of the government); Marcia Coyle, *Immigration Judges Seek Article I Status*, NAT'L L.J., Aug. 10, 2009, at 13 (describing pressures that have led immigration judges to seek Article I status to increase their independence).

139. See Lustig et al., *supra* note 64, at 64–65 (quoting survey responses from immigration judges complaining of the pressure to dispose of cases quickly).

140. *Id.* at 71–72 (quoting immigration judges' expressions of frustration about criticism from the courts of appeals).

141. In 2008, Chief Judge Dennis Jacobs of the Second Circuit reported his understanding that a court of appeals decision favorable to an individual “can sometimes lead to the opening of a disciplinary inquiry against the immigration judge who issued the ruling.” *Executive Office for Immigration Review*, *supra* note 117, at 57 (letter from Dennis Jacobs, C.J., United States Court of Appeals for the Second Circuit). If this is true, as Chief Judge Jacobs pointed out, then immigration judges might feel considerable pressure to rule in favor of individuals.

142. EOIR, U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS: DIRECTIVE #8: ANALYSIS AND RECOMMENDATIONS REGARDING DISPARITIES IN ASYLUM GRANT RATES 1 (2006), available at [http://trac.syr.edu/immigration/reports/210/include/08-EOIR\\_asylum\\_disparity\\_report.pdf](http://trac.syr.edu/immigration/reports/210/include/08-EOIR_asylum_disparity_report.pdf).

143. Legomsky, *supra* note 24, at 435–36.

Perhaps the most important lesson about the relationship between judges and their political environment in the United States is that the *ex ante* mechanism of choosing judges is considerably more powerful than the *ex post* mechanism of influencing them once they are on the bench. Substantial differences in the behavior of liberal and conservative appointees to the Supreme Court<sup>144</sup> and of Democratic and Republican appointees to the lower federal courts<sup>145</sup> demonstrate that officials who select judges can exert strong influence on the courts even when those judges enjoy high levels of independence. Even state judges who have more limited independence from *ex post* control respond to cases largely on the basis of their own ideological positions.<sup>146</sup>

These findings point to the significance of any efforts to choose judges for immigration cases on the basis of their perceived positions on immigration issues. One reason that the primary source of immigration judges is trial attorneys in the DHS<sup>147</sup> may be a perception that these attorneys will be relatively favorable to the government's position when they sit as immigration judges. Indeed, the simple relationship between the length of time that an immigration judge spent in the former Immigration and Naturalization Service (INS) or the DHS and the proportion of decisions favorable to asylum rates is fairly strong.<sup>148</sup>

The backgrounds of BIA members are illustrated by the court's membership in late 2009. Those judges came from a variety of

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144. See Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 817 tbl.3 (1995) (showing a correlation between Justices' ideology, as determined by editorials published before their confirmation, and their votes).

145. See, e.g., Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *Right On: The Decision-Making Behavior of George W. Bush's Judicial Appointees*, 92 JUDICATURE 312, 316–18 (2009) (showing that district judges appointed by Democratic presidents cast higher proportions of liberal votes than Republican appointees).

146. See LAURA LANGER, JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY 123 (2002) (suggesting that within some limits, state supreme court justices are largely free to follow their own ideological preferences). For further statistical analysis, see *id.* at 89–122.

147. According to one report, “55 percent of Immigration Judges worked in positions that were adversarial to immigrants (the vast majority of whom were Trial Attorneys [in Homeland Security]).” APPLESEED, *supra* note 69, at 9. This finding led to the conclusion that trial attorneys in the DHS “serve[] as the farm team for the Immigration Judge corps.” *Id.*

148. See Ramji-Nogales et al., *supra* note 3, at 347 (explaining that past work experience with the Immigration and Naturalization Service (INS) or the DHS is correlated with fewer decisions granting asylum).

backgrounds,<sup>149</sup> though nearly all had prior experience in the immigration field. About half had served as immigration judges or in nonjudicial positions with the BIA, and some had held academic or congressional positions related to immigration law.<sup>150</sup> Among the 2009 members, prior experience in an agency enforcing the immigration laws appears to have been considerably more common than experience in the private immigration bar,<sup>151</sup> and some additional BIA members had come directly from DOJ positions outside the immigration field.<sup>152</sup> If the 2009 membership is typical, then, the prior experience of BIA members (like that of immigration judges) leans toward the government side.

Whether or not Attorney General Ashcroft influenced sitting members of the BIA by announcing his plan to cut the BIA's size, his apparent use of judges' decisional records as a criterion for removing some of them produced a body that was more sympathetic to his own views. Efforts in the George W. Bush administration to hire immigration judges on the basis of political affiliation were motivated largely by patronage considerations, not solely by ideology,<sup>153</sup> but judges chosen on the basis of political considerations by a Republican administration might be expected to take progovernment positions in their decisionmaking.

Judges on the federal courts of appeals enjoy a high level of independence as decisionmakers, and that is true of their work in immigration law. In contrast, immigration judges and BIA members within the DOJ are subject to significant *ex ante* and *ex post* controls. The extent to which these controls affect judges' decisional records is uncertain, but the limited independence of DOJ judges in the immigration field distinguishes them sharply from Article III judges.

The difficulty of reaching decisions, the severity of time pressures, and the extent of control all affect the process of judging

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149. See EOIR, U.S. DEP'T OF JUSTICE, FACT SHEET: BOARD OF IMMIGRATION APPEALS 1-5 (2009), available at <http://www.justice.gov/eoir/fs/biabios.pdf> (describing the backgrounds of the members of the BIA).

150. *Id.* (describing the prior experience of BIA members).

151. Only two of the fourteen BIA members indicated that they had experience in the private immigration bar. *Id.* at 1-2. It is possible that a few other members had such experience that their biographical information did not list.

152. *Id.* at 2, 4-5 (describing the BIA members' DOJ experience).

153. See generally OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., *supra* note 14, at 69-124 (describing the hiring of immigration judges and BIA members under the Bush administration and examining allegations of politically motivated hiring).

and the decisions that judges reach. Taken together, these attributes differ across the three major sets of adjudicators in immigration law. Powerful as these attributes are in themselves, they also create a context for specialization by judges. Part II examines specialization and its relationship with the other attributes of adjudication.

## II. JUDICIAL SPECIALIZATION

All full-time adjudicators are specialized in judging.<sup>154</sup> But judges vary considerably in the extent of their subject-matter specialization, from those who hear very wide ranges of cases to those who hear cases involving a single field of law. Scholars and participants in the policymaking process have argued persuasively that subject-matter specialization can affect courts' outputs.<sup>155</sup> Thus, it may be consequential that administrative adjudicators who decide immigration cases are specialized in immigration. It may also be consequential that court of appeals judges are basically generalists and that the growing number of immigration cases has given some circuit judges a degree of specialization in immigration law.

This Part considers the possible effects of judicial specialization in broad terms and looks more closely at the relationship between specialization and the attributes of adjudication discussed in Part I. The central point of this Part is that the impact of judicial specialization is intertwined with the impact of other attributes of adjudication. Attention to their interrelationship allows a better sense of the effects of specialization and ultimately its desirability.

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154. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 248 (1996).

155. See STEPHEN H. LEGOMSKY, *SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION* 7–20 (1990); ISAAC UNAH, *THE COURTS OF INTERNATIONAL TRADE: JUDICIAL SPECIALIZATION, EXPERTISE, AND BUREAUCRATIC POLICY MAKING* 171–79 (1998); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 331 (1991); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 62–74 (1975); Sarang Vijay Damle, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1268–70 (2005); Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377, 377–82; Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 784–85 (1981); Nathaniel L. Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996, 998–1001 (1971); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1143–47 (1990); Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 88–109 (1995).

### A. *Specialization as an Attribute of Courts*

Judges who serve in the federal executive branch are primarily specialists who hear cases in a single field of law.<sup>156</sup> In the federal judicial branch, in contrast, adjudication in most fields of law is done by the district courts, courts of appeals, and the Supreme Court, and the members of all those courts clearly are generalists.<sup>157</sup> The generalist quality of federal court judges distinguishes them sharply from the specialized administrative judges in the federal executive branch.

But this difference between the federal judicial branch and the executive branch in the extent of specialization by judges is not inevitable. Judges in the executive branch could be given the power to hear a wide range of cases rather than cases involving a single topic such as immigration. Indeed, executive-branch judges in some states serve on central panels; they hear cases arising in multiple agencies and thus are not narrowly specialized.<sup>158</sup> At least one commentator has proposed that the federal government adopt a similar practice.<sup>159</sup>

Further, there is a good deal of specialization within the judicial branch as well, more than most observers of the courts recognize.<sup>160</sup>

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156. For more information on executive branch judges and adjudication in the federal government, see Frye, *supra* note 114, at 261–63; Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 ADMIN. L. REV. 1, 52–59 (1997).

157. This is not to say that there are no elements of specialization in these courts. For instance, judges on the courts of appeals have a degree of specialization in opinion writing, and in two circuits, immigration cases constitute a large minority of the agenda. See *infra* Part III.B.

158. See Thomas E. Ewing, *Oregon's Hearing Officer Panel*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 57, 80 (2003) (discussing the utility of cross-training for ALJs in Oregon's central panel system); Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 78–81 (1994) (examining the jurisdiction and structure of central administrative panels in various states); Marvin F. Kittrell, *ALJs in South Carolina*, S.C. LAW., May–June 1996, at 42, 42 (discussing South Carolina's central panel system); Ann Wise, *Louisiana's Division of Administrative Law: An Independent Administrative Hearings Tribunal*, 68 LA. L. REV. 1169, 1191 (2008) (discussing Louisiana's central panel judges).

159. Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 267–68 (1981).

160. In addition to the federal courts discussed in the text, many specialized courts exist in the states. For a list of state courts that are considered to be specialized and that are listed as separate bodies on organization charts, see COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2007, at 16–67 (2008), available at [http://www.ncsconline.org/D\\_Research/csp/2007\\_files/State%20Court%20Caseload%20Statistics%202007.pdf](http://www.ncsconline.org/D_Research/csp/2007_files/State%20Court%20Caseload%20Statistics%202007.pdf). There is also a great deal of unofficial specialization in state trial courts, based on temporary or permanent assignments of judges to hear specific categories of cases. MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 119–240 (2003).



The federal court system includes several courts with judges who permanently hear only a limited range of cases: the Court of Federal Claims, the Tax Court, the Court of International Trade, the Court of Appeals for Veterans Claims, the Court of Appeals for the Armed Forces, bankruptcy courts, and the Federal Circuit. Judges are also borrowed from the district courts and courts of appeals for part-time service on the Foreign Intelligence Surveillance Court, and a similar arrangement was used for courts such as the Emergency Court of Appeals and the Temporary Emergency Court of Appeals.<sup>161</sup>

Thus, adjudicators in the executive branch can be generalists, and adjudicators in the judicial branch can be specialists. In practice, however, adjudication in the executive branch is far more specialized than in the judicial branch. Why does this difference exist? The best answer probably lies in the existence of different traditions in the two branches.

The executive branch follows the general pattern in modern society, in that it features high levels of specialization. Individual administrative agencies deal with a relatively narrow range of policy issues, and units within those agencies deal with even narrower subsets of policy matters. Integrated into the agencies in which they adjudicate cases,<sup>162</sup> administrative judges naturally incorporate the specializations of these agencies.

In contrast, a strong expectation has developed in the federal judicial branch that judges are, and should be, generalists. Judges themselves frequently express this expectation.<sup>163</sup> The power of this expectation is reflected in the efforts of judges on the Federal Circuit

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The overall extent of specialization in the judiciary is difficult to characterize, not only because so much of the state-level specialization is unofficial but also because specialization has multiple dimensions and forms. For a discussion of that variation in specialization, see Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1671–75 (2009).

161. See Fed. Judicial Ctr., Courts of the Federal Judiciary, <http://www.fjc.gov/history/courts.html> (last visited Mar. 28, 2010) (discussing several of the current specialized courts, along with some specialized courts of the past). For a broad survey of current and past specialized federal courts, see Lawrence Baum, *Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?*, 74 JUDICATURE 217, 220–22 (1991).

162. See Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157, 161–64 (2000) (discussing the historical development of ALJs and agency integration).

163. See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 521 n.2 (2008) (providing several judges' explanations of the benefits of having generalist judges).

to depict themselves as generalists rather than specialists.<sup>164</sup> Thus, although the extent of specialization in the federal judiciary has grown over time,<sup>165</sup> the heart of the federal judicial system remains a set of generalist courts.

Judicial specialization is a continuum rather than a dichotomy. The ends of the continuum can be described in a fairly straightforward way. At one end, a judge hears cases in a wide range of legal fields, and no field accounts for a substantial proportion of the judge's work.<sup>166</sup> At the other end, a judge hears cases in a single field of law.<sup>167</sup>

Judges on the specialized federal courts differ in where they stand on this continuum. Judges serving on the Foreign Intelligence Surveillance Court are generalists with a part-time specialization. The Court of Federal Claims hears a moderately wide range of cases involving monetary claims against the federal government,<sup>168</sup> and the Federal Circuit hears cases in several different fields.<sup>169</sup> The other courts hear narrower ranges of cases. For example, the Court of

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164. See, e.g., *Immigration Litigation Reduction*, *supra* note 10, at 141, 143 (letters from Paul R. Michel, C.J., U.S. Court of Appeals for the Federal Circuit). In subsequent references, this court will be referred to simply as the Federal Circuit.

165. Through 1900, the Court of Claims was the only permanent specialized federal court. See Baum, *supra* note 161, at 219. The number of permanent specialized courts grew over the twentieth century, gradually increasing the proportion of federal jurisdiction that was allocated to specialized bodies. *Id.* (tracing the increase in congressional decisions adding jurisdiction to specialized federal courts).

166. The term "field" has a degree of ambiguity, in that legal fields might be defined in different ways. For the most part, that ambiguity can be ignored in this Article, because it is reasonable to treat immigration as a distinct field.

167. This description is framed in terms of judges rather than courts because it is primarily the individual judge whose degree of specialization is consequential. If a court has broad jurisdiction but a judge on that court hears only a narrow range of cases, that judge should be treated as a specialist. The distinction between judges and courts is most important at the state trial level, where judges on courts that have broad jurisdiction often are assigned specific types of cases, either temporarily or permanently. For instance, a 1977 survey of judges in general jurisdiction courts found that 12 percent of the judges on those courts were hearing only criminal cases. JOHN PAUL RYAN ET AL., *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE* 23 (1980). Trial courts in large cities are typically divided into specialized divisions to which judges are assigned for some period of time. See, e.g., Circuit Court of Cook County, State of Ill., Organizational Chart, <http://www.cookcountycourt.org/about/flowchart.html> (last visited Mar. 28, 2010) (mapping Chicago's specialized divisions).

168. Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 719–36 (2003) (discussing the jurisdiction of the Court of Federal Claims).

169. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, *APPEALS FILED AND ADJUDICATED, BY CATEGORY, FY 2009* (2009), <http://www.cafc.uscourts.gov/pdf/TableAppealsFiledTerminated09.pdf> (showing the distribution of Federal Circuit cases).

Appeals for Veterans Claims hears the same type of case as the Board of Veterans' Appeals, an administrative court within the Department of Veterans Affairs.<sup>170</sup> Analyses of specialization as an attribute of adjudication need to take gradations of specialization into account.<sup>171</sup>

Greater subject-matter specialization for judges is usually accompanied by reductions in the number of judges who hear cases in the field or fields in which a court specializes. If a specialized court replaced the federal district courts in the social security field, one result would be to concentrate social security cases among the specialized court judges rather than to spread them among the hundreds of district judges. That result is consequential. To take the most obvious example, a reduction in the number of "decisional units"<sup>172</sup> that hear cases in a particular field is likely to increase the uniformity of legal interpretation in the field.<sup>173</sup> More subtly, such a reduction may subject judges to greater influence from external sources that care about courts' work in a field of law, because those sources can concentrate their influence on a smaller number of judges. In the analysis of judicial specialization, the concentration of

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170. See 38 U.S.C. § 7252(a) (2006) (describing the jurisdiction of the Court of Appeals for Veterans Claims).

171. For example, Stephen Legomsky argues that courts specializing in a single field are undesirable but those with multiple specialties can provide important benefits. LEGOMSKY, *supra* note 155, at 38–42.

If legal fields could be defined with precision, *see supra* note 156, the degree of specialization for any single judge could be ascertained with a measure such as the Herfindahl-Hirschmann Index, a standard measure of concentration among firms in an industry, *see* Amos Golan, George Judge & Jeffrey M. Perloff, *Estimating the Size Distribution of Firms Using Government Summary Statistics*, 44 J. INDUS. ECON. 69, 70–71 (1996) (describing the Herfindahl-Hirschmann Index).

172. Legomsky, *supra* note 24, at 428.

173. This effect is easy to exaggerate; so long as there are multiple decisional units, considerable variation in standards for decision may exist. Thus, concentrating cases in a single court is less likely to produce uniformity if cases are decided by single-judge or three-judge units within the court. *Id.* at 429.

An example is the patent jurisprudence of the Federal Circuit, which decides the great majority of cases in three-judge panels. Judges on the Federal Circuit have adopted different approaches to the construction of claims in patents, resulting in divergent standards in the court's decisions. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1330–35 (Fed. Cir. 2005) (Mayer, J., dissenting) (criticizing the lack of a standard method for deciding patent claims); JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATION AT RISK* 58–61 (2008) (discussing the problem of a climate of uncertain claim construction in patent courts); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1176 (2004).

cases in a field among a smaller number of decisional units should be taken into account.<sup>174</sup>

### B. *The Effects of Judicial Specialization*

Scholars have devoted considerable thought to the effects of specialization on adjudication, especially in the federal courts.<sup>175</sup> Those effects might be categorized in several ways. This Article will consider three categories: changes in the identities of the judges who decide cases in a field, experience deciding large numbers of cases in a field, and outside influence on judges. To simplify the discussion, this Section will compare judges who stand at the opposite ends of the continuum of specialization.

1. *Identities of Judges.* Giving jurisdiction over a field to a specialized court rather than dividing it among generalist courts automatically changes the identities of the judges who decide cases in a field. If the two sets of judges are exactly alike in their relevant traits, this change will have no impact in itself.<sup>176</sup> But even if judges are selected randomly, that is unlikely to occur. Moreover, the existence of a specialized court can be expected to change the characteristics of the judges who decide cases in a field.

One source of this change is self-selection. The subset of lawyers who are interested in serving on the Tax Court likely differs from the

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174. The relationship between the level of judicial specialization and the number of decisional units is imperfect. Judges on a particular court may hear cases in multiple fields of law but have exclusive jurisdiction over one or more of those fields. Thus, advocates of the Federal Circuit's creation emphasized the potential advantage of enhanced uniformity in the standard of patentability, even though patent law was only one of the fields in which the court would work. Donald W. Banner, *Witness at the Creation*, 14 GEO. MASON L. REV. 557, 560 (1992). Indeed, a court with very broad jurisdiction may have exclusive jurisdiction over a particular class of cases. For example, appeals from certain administrative agencies go solely to the federal court of appeals for the District of Columbia. 28 U.S.C. §§ 1291 historical and revision notes, 1294 orders reviewable (2006). Conversely, if judges are specialized but cases are divided among a large number of them, uniformity is unlikely. This is true of the bankruptcy courts, which currently have more than three hundred judges. *Id.* § 152.

The concentration of cases in a field among a small number of judges might be considered a second dimension of specialization. See Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823, 826-27 (1977); Revesz, *supra* note 155, at 1121-30.

175. See sources cited *supra* note 155. This discussion of the effects of specialization draws in part from Baum, *supra* note 160, at 1675-80.

176. Of course, the same judge could behave quite differently on a specialized court than on a generalist court. For a discussion of the effects of specialization that are separate from the identities of judges, see *infra* Part II.B.2-3.

subset who are interested in serving on federal district courts. Many lawyers would rule out the Tax Court because they lack interest and expertise in the tax field, and many lawyers would consider the district courts more attractive simply because they are generalist courts. On the other hand, specialists in tax law might find the Tax Court more attractive because they could focus on the field in which they have the most interest and expertise.

The other source of change is the criteria used to select judges. In choosing members of the Tax Court, officials in the executive branch might limit themselves to candidates who have demonstrated expertise in tax law. If they seek to protect the interests of the federal government in tax litigation, they might choose judges whose backgrounds and expressions of policy preferences suggest that they are sympathetic to the government's position. Alternatively, they might respond to lobbying by the private tax bar and choose judges who are sympathetic to individual taxpayers or to some subset of taxpayers (such as businesses).

Because of these mechanisms, judges who serve on specialized courts sometimes bring to their judicial service greater expertise in the subject matter they confront than generalist judges. Indeed, expertise in tax law is treated as a prerequisite for service on the Tax Court.<sup>177</sup> In turn, this expertise could foster greater efficiency in deciding cases and greater effectiveness in reaching high-quality decisions.<sup>178</sup> These are the two benefits that are regularly ascribed to

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177. Of the thirty-two active, senior, and special trial judges on the court as of January 2010, all had substantial experience in tax law prior to their appointments. See U.S. Tax Court, Judges, <http://www.ustaxcourt.gov/judges.htm> (last visited Mar. 28, 2010) (describing the biographies of the judges); see also *Nominations of David L. Aaron, Mary Ann Cohen, Margaret Ann Hamburg, M.D., Stanford G. Ross, Ph.D., and David W. Wilcox, Ph.D.: Hearing Before the S. Comm. on Finance*, 105th Cong. 48, 52–54 (1997) (biographical information of Mary Ann Cohen, J., U.S. Tax Court) (recounting the extensive tax law background of Judge Mary Ann Cohen, the only judge whose prior tax experience is not disclosed on the U.S. Tax Court's website).

178. Effectiveness is an imprecise term that requires some discussion. Advocates of and commentators on judicial specialization often refer to expertise rather than effectiveness. *E.g.*, Currie & Goodman, *supra* note 155, at 67–68; Damle, *supra* note 155, at 1277. What they mean, however, is that expertise can produce more effective decisionmaking. In conventional legal terms, effectiveness means interpreting the law more accurately. However, effectiveness can be understood more generally in terms of what judges are trying to accomplish. For judges who seek to advance their conceptions of good policy, effectiveness refers to success in identifying the choices that are consistent with those conceptions. For more information on the meaning of effectiveness and related concepts in the context of judicial specialization, see LEGOMSKY, *supra* note 155, at 7–16; Baum, *supra* note 160, at 1676.

specialization in any sector of government or society<sup>179</sup> and the major benefits (along with uniformity) that are frequently ascribed to judicial specialization.<sup>180</sup>

Specialists in a particular legal field bring with them not only expertise but also points of view about the issues in the field. If there is a dominant point of view among lawyers in a field, such as patent lawyers' preference for a relatively lenient standard of patentability, the interpretations of law in a specialized court in that field may reflect that point of view.<sup>181</sup> Even if there is no dominant point of view, judges may be selected to reflect a particular position within the field.

2. *Experience on the Court.* Whether or not judges on a specialized court have prior experience in the field of their court's work, they become specialists once they begin their judicial service. Thus, they gain expertise in their field more quickly than judges on a generalist court. By doing so, they likely increase the efficiency and effectiveness with which cases are decided.<sup>182</sup>

Specialization in a particular field of law can affect judges' perceptions and perspectives in other ways. To take one example, judges' self-confidence in their expertise in a field can lead them to

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179. See, e.g., HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION 10, 20 (1947) (noting expertise, responsibility, and efficiency as the expected benefits of specialized administration).

180. Efficiency and effectiveness in themselves are policy neutral, and they are usually treated as such. However, they may affect the interests of the two sides in litigation. For instance, judges who develop expertise in a field might tend toward one side. Indeed, advocates of judicial specialization often assume that their side will benefit from judicial expertise. See, e.g., Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717, 774–84 (1999) (asserting that a specialized copyright court would produce more correct and consistent results, which would favor copyright holders). Similarly, efficiency could speed the completion of cases, which might favor the interests of one side.

181. For more information on the preferences of patent lawyers, see Baum, *supra* note 174, at 835; Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1075 (2003). Indeed, once presidents began to appoint patent lawyers to the Court of Customs and Patent Appeals in the 1950s, this court adopted a more lenient standard of patentability. Baum, *supra* note 174, at 842–44.

182. The positive effects of judges' specialized experience on their effectiveness might be countered by negative effects, because specialized judges may lack knowledge about developments in other fields of law. Similarly, the effects of specialization in bringing judges with expertise to a court might be countered by the relative unattractiveness of a specialized court to some of the most qualified candidates for judgeships. For a discussion of these possible negative effects of specialization on effectiveness, see Currie & Goodman, *supra* note 155, at 70; Damle, *supra* note 155, at 1281, 1285–86; Revesz, *supra* note 155, at 1161–65.

take more assertive positions in policymaking. That assertiveness might take the form of a readiness to overturn administrative decisions on review<sup>183</sup> or to depart from prior interpretations of the law that were made by generalist courts.

Another example is insularity; that is, a narrow perspective based on the field in which a judge works. In the bureaucracy, insularity has been captured by Miles' Law: "[W]here you stand depends on where you sit."<sup>184</sup> In other words, officials tend to see issues in terms of the values and interests of the field in which they work, and they may be unfamiliar with competing values and interests. This narrow perspective can lead specialized judges to decide cases in their field with little attention to relevant developments in other fields of law. Another effect can be a sense of responsibility for the success of a government program whose decisions a court reviews.

3. *External Influences on Judges.* Every court exists in an environment of litigants, lawyers, and others who care about its decisions. These people may influence court decisions by affecting judges' ability to achieve important goals, such as continued tenure in office, or by shaping the views of judges through interaction with them. The potential for such influence in a field increases if the judges are specialized. Individuals and groups have a greater incentive to seek influence over a specialized court in their field, which has a greater impact on their interests, than over a generalist court.<sup>185</sup>

Those involved in a field also have a better opportunity to succeed in their efforts to exert influence, because they are more important to a specialized court and its judges than to courts that hear cases in a wide array of fields.<sup>186</sup> Regular participation in a court enhances the ability of a set of lawyers to shape judges' views and to develop cooperative relationships with them. Put differently, judicial specialization makes it easier for litigants to gain the benefits of

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183. UNAH, *supra* note 155, at 131–70; Bruff, *supra* note 155, at 332; Currie & Goodman, *supra* note 155, at 71.

184. Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38 PUB. ADMIN. REV. 399, 399–400 (1978).

185. The number of decisional units is also relevant. The division of bankruptcy cases among more than three hundred judges, each of whom decides cases as an individual, means that any specific bankruptcy judge has less impact on the interests of a group that cares about bankruptcy law than a member of the Court of International Trade or the Federal Circuit has for groups that care about the fields in which these courts work.

186. Bruff, *supra* note 155, at 331–32; Currie & Goodman, *supra* note 155, at 70–71; Dreyfuss, *supra* note 155, at 379–80.

repeat player status in a court.<sup>187</sup> To the extent that judges are susceptible to external pressure, groups that are capable of exerting such pressure are in a better position to do so when a court deals only with a single field.

In any field of law, there are competing litigants and lawyers on the two sides. Their gross influence on a court is less important than their net influence (that is, the influence of people and groups on one side relative to the other side). In some specialized courts, the two sides' capacities to shape judges' perspectives and exert external pressure may be approximately equal, so that they have little net effect. But in some fields, one side may have a substantial advantage over its rival.

This is especially true when one side is a government. In both the state and federal judicial systems, governments are regular participants in most specialized courts.<sup>188</sup> Governments are in a uniquely strong position as litigants,<sup>189</sup> and their unique advantages enhance their opportunities for influence over specialized courts.

Generalizations about external influence on sitting judges also apply to the process of selecting judges, and here the government's advantage is clearest. The selection of judges for those courts reflects this advantage. Except for the Foreign Intelligence Surveillance Court, whose members are chosen by the Chief Justice from judges on the federal district courts and courts of appeals,<sup>190</sup> judges on the current specialized federal courts<sup>191</sup> are all nominated by the

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187. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-123 (1974).

188. At the state level, judicial specialization is greatest in criminal law. Of the current specialized federal courts, most hear solely litigation in which the government is a party. (The bankruptcy courts hear primarily cases involving private parties, and the Federal Circuit hears a mix of government and private litigation.)

189. Herbert M. Kritzer, *The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?*, in IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? 342, 342-70 (Herbert M. Kritzer & Susan Silbey eds., 2003).

190. The Foreign Intelligence Surveillance Court rules on applications for warrants for electronic surveillance for national security purposes. For a discussion of the court and the Chief Justice's appointments to its judgeships, see Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239, 252-57 (2006). The Foreign Intelligence Surveillance Court of Review hears government appeals from denials of warrants; because there are few such appeals, the Court of Review seldom meets. See Elec. Privacy Info. Ctr., Foreign Intelligence Surveillance Act Orders 1979-2007, [http://epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://epic.org/privacy/wiretap/stats/fisa_stats.html) (last visited Mar. 28, 2010) (compiling the record of the Foreign Intelligence Surveillance Court, based on the court's annual reports).

191. See *supra* note 161 and accompanying text.



president.<sup>192</sup> When the president has the power to select the members of specialized courts, the executive branch agencies that litigate in those courts are in a better position to shape the president's choices than their private sector opponents.<sup>193</sup>

The potential effects of judicial specialization subsumed within the three categories discussed in this Section are all plausible, but by no means are they guaranteed. Systematic evidence on the performance of specialized courts is fairly slim; there is only fragmentary information about the actual effects of specialization.<sup>194</sup> The evidence that does exist, however, shows that those effects are not straightforward. Indeed, effects that seem nearly certain to follow from specialization do not necessarily occur in practice. To take one example,<sup>195</sup> many of the past and present federal specialized courts

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192. Baum, *supra* note 160, at 1679; Currie & Goodman, *supra* note 155, at 14; Revesz, *supra* note 155, at 1146–47.

193. For this reason, the government's opponents sometimes suspect that the government is building a favorable bias in the courts through selection of judges. This was true of the Tax Court's early days. See HAROLD DUBROFF, *THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS* 85–86 (1979) (discussing a fear of bias in selections made by the Treasury Department in 1924).

194. See Baum, *supra* note 160, at 1680–84 (cautioning against sweeping conclusions given the dearth of data on the effects of specialized courts). There does exist an array of research that provides insights into the effects of judicial specialization. See, e.g., Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1230 (2006) (using bankruptcy judges as a case study to examine the impact of specialization on judicial decisions).

Some of this research takes the form of detailed studies of particular courts or sets of courts. E.g., 2 JONATHAN LURIE, *PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951–1980*, at 71–106 (1998); ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 3–16* (1978); WILLRICH, *supra* note 160, at 119–277 (2003) (studying several Chicago courts); James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 120–53.

Other research makes direct comparisons between generalist and specialized courts. E.g., MICHELE SVIRIDOFF ET AL., *DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT* 109–38 (2000) (comparing the Manhattan Midtown Community Court and Downtown Manhattan Court); UNAH, *supra* note 155, at 132–36, 154–57 (comparing the Court of International Trade, the Federal Circuit, and generalist federal courts); Michael Morley, *The Case Against a Specialized Court for Federal Benefits Appeals*, 17 FED. CIR. B.J. 379, 383–84 (2008) (comparing reversal rates between generalist and specialist courts subject to Federal Circuit review); Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1803–07 (2008) (comparing the rates at which the courts of appeals reversed specialist bankruptcy appellate panels and generalist federal district courts in bankruptcy cases).

195. A second example is the lack of full uniformity of legal standards in patent law despite the consolidation of patent appeals in the Federal Circuit. See *supra* note 173.

were created primarily to protect the government's interests in litigation.<sup>196</sup> Executive branch officials could use their power to choose judges to staff these specialized courts with judges who seem sympathetic to the government's interests. But in practice, they have made only limited use of that opportunity. The primary reason for this limited use seems to be that the officials who help to select judges often see these courts as relatively unimportant, so they emphasize patronage considerations over policy considerations in appointments.<sup>197</sup>

This gap between likely and actual effects should not be surprising. Inevitably, the impact of judicial specialization depends on the conditions under which generalist and specialized courts operate. The actual effects of giving jurisdiction over a field to a specialized court will depend on variables such as the mechanisms for selection of judges, the technicality of their work, the substantive and procedural legal rules that govern the court, and the configuration of interest groups in the field. As a result, the relationship between specialization and the outputs that courts produce is highly complex.

### *C. Interactions between Specialization and Other Attributes of Adjudication*

The discussion thus far has considered the possible effects of specialization on adjudication in broad terms. The discussion can be applied to the relationship between specialization and the other attributes of adjudication considered in Part I. That relationship has two sides. On the one hand, specialization can shape these other attributes. On the other hand, these attributes help determine the impact of specialization. These interrelationships are quite relevant to the three attributes discussed in this Article.

1. *The Difficulty of Cases.* If specialization can improve judges' efficiency and effectiveness in deciding cases, these effects would likely increase with the difficulty of the cases. Thus, it is not surprising

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196. For a discussion of the motivations for the establishment of federal specialized courts, see Baum, *supra* note 161, at 217.

197. HAROLD W. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 45-46 (1972). In at least one instance, an appointment strategy actually worked against the government's interest as a litigant. The Reagan and George H.W. Bush administrations chose judges for the Claims Court (now the Court of Federal Claims) whose conservative views inclined them to favor claims against the government under the Takings Clause. See W. John Moore, 'Just Compensation,' NAT'L J., June 13, 1992, at 1404, 1405-06.

that there have been long-standing efforts to secure greater specialization of judges in the adjudication of federal tax and patent cases, given that the Internal Revenue Code is unusually complex and the facts of many patent cases are unusually technical.<sup>198</sup>

But some difficulties are more amenable to expertise than others. A specialist in tax law may fully understand provisions of the federal tax code that are unintelligible to a generalist lawyer or judge. A judge who is familiar with computer software may readily comprehend the issues involving a software patent. In contrast, some issues that arise in court cases are inherently difficult, regardless of a judge's experience or expertise. Judges who have presided over hundreds of trials may never gain any great aptitude in assessing the credibility of witnesses, simply because assessment of credibility is so difficult.<sup>199</sup> If judges *think* they have gained such aptitude, they are likely wrong.

Thus, there may be a curvilinear relationship between case difficulty and the potential benefits of specialization. Some types of cases are so easy that specialists can gain little over generalists in efficiency or effectiveness. Patent and tax law fall in an intermediate category, in which specialization produces substantial benefits in efficiency and effectiveness. But in a third category, the difficulties run so deep that specialization is of little use in dealing with them. Even if a curvilinear relationship exists, this tripartite categorization is an oversimplification, but it underlines the complexity of the relationship between judges' specialization and their efficiency and effectiveness.

2. *Time Pressures.* Judicial specialization might ease the pressure of heavy caseloads on judges simply by enhancing efficiency. Because the gains in efficiency from judicial specialization are assumed rather than measured, however, it is uncertain how substantial those gains actually are. In any field, there are limits to how much the speed of

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198. See, e.g., HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 153–67 (1973) (noting the complexity of patent and tax laws as historical factors motivating specialization).

199. See Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 *LAW & CONTEMP. PROBS.* 243, 262–65 (1988) (concluding that demeanor evidence is often no more reliable than flipping a coin to determine truth or falsity and that people identify the wrong behavior as indicating the truth or falsity of a speaker's statement).

case processing can be increased before it has an impact on a court's effectiveness or other qualities of its outputs.<sup>200</sup>

Specialization may have an indirect effect on time pressures as well. Depending on the circumstances under which it is created, a specialized court may increase the ratio of judges to cases and thereby reduce time pressures in a particular field. To take one example, transferring cases in a field from overburdened generalist judges to underburdened specialists will produce this effect; this was the case when the Court of Customs Appeals was given jurisdiction over appeals from Patent Office decisions in 1929.<sup>201</sup>

If specialization can affect caseload pressures, these pressures also help determine the effects of specialization. Under most conditions, heavy time pressures seem likely to reduce the differences between generalist and specialized courts. When judges must give precedence to case disposition, the imperative of processing cases quickly will narrow the effects of judges' own attributes—including their specialization in a particular field of law. The expertise that judges develop through specialization might produce only limited benefits when they have little time to apply that expertise to individual cases. Further, regardless of their degree of specialization, judges will be heavily dependent on the inputs they receive from litigants and lawyers when there is little time to dig deeply into a case. On the other hand, it is possible that caseload pressures enhance the effects of expertise, in that judges who are highly familiar with the issues in a field can overcome the difficulties of making decisions quickly in a way that is simply impossible for a judge who lacks that familiarity.

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200. After an influx of drug prosecutions in the 1970s and 1980s, New York City and Chicago created special drug courts to process these cases more efficiently. (These drug courts were different from the "problem-solving" drug courts that were later established in many cities.) One result was that patterns of case outcomes changed. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, ASSESSMENT OF THE FEASIBILITY OF DRUG NIGHT COURTS 10–16 (1993); Steven Belenko, Jeffrey A. Fagan & Tamar Dumanovsky, *The Effects of Legal Sanctions on Recidivism in Special Drug Courts*, 17 JUST. SYS. J. 53, 56–58 (1994); Barbara E. Smith et al., *Burning the Midnight Oil: An Examination of Cook County's Night Drug Court*, 17 JUST. SYS. J. 41, 46–47 (1994).

201. See P.J. Federico, *Evolution of Patent Office Appeals*, 22 J. PAT. OFF. SOC'Y 838, 853–56 (1940) (noting an increased caseload and time pressures, which required greater delegation to achieve more individualized attention for patent-related issues).

3. *Control.* For the reasons discussed earlier in this Part,<sup>202</sup> judicial specialization can facilitate ex ante and ex post control of judicial decisionmaking.<sup>203</sup> When judges hear cases in only one field, selectors of those judges who seek to use their selection power to shape court policies can focus on that field. Moreover, “[i]t is easier to predict how judges will decide cases in their specialty than how they will decide cases across the board.”<sup>204</sup> By the same token, policymakers who have power over a court—bureaucratic or judicial superiors, legislatures, chief executives—can observe and respond to a court’s work more easily when that work is concentrated in one area.<sup>205</sup> As already discussed in regard to the selection of judges,<sup>206</sup> those in a position to exert control over a court through either ex ante or ex post mechanisms do not necessarily make use of their powers. If they do so, however, specialization facilitates their efforts.

Substantive and procedural rules that accompany judicial specialization may be considered a second form of ex ante control. When Congress gives a new specialized court jurisdiction that previously did not exist, as it has done for some federal courts,<sup>207</sup> Congress also needs to establish rules for the exercise of that jurisdiction. But even when Congress transfers jurisdiction from generalist to specialized courts, it can accompany that transfer with new legal rules that affect the work of the specialized court. Indeed, that has been a common practice. And if administration officials or members of Congress want to move the new court’s decisions in one

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202. For a discussion of “Identities of Judges” and “Influences on Judges,” see *supra* Part II.B.1, 3.

203. POSNER, *supra* note 154, at 254.

204. *Id.*; see also Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 138, 141 (Ronald Kahn & Ken I. Kersch eds., 2006) (“[I]t is comparatively more difficult to find decision makers who will be reliable on a wide range of issues than it is to find appointees who will act reliably over a narrowly defined set of policies . . .”).

205. For federal courts, one relevant factor is that much of the congressional oversight of generalist courts occurs in the Judiciary Committees, whereas oversight of some specialized courts occurs in the committees whose jurisdiction is in the court’s field (such as the Veterans’ Affairs committees for the Court of Appeals for Veterans Claims). Members and staff on these specialized committees have relatively strong incentives and capabilities for monitoring the court in their field.

206. See *supra* note 197 and accompanying text.

207. Among current courts, this was true of the Court of Military Appeals (now the Court of Appeals for the Armed Forces), the Foreign Intelligence Surveillance Court, and the Court of Veterans Appeals (now the Court of Appeals for Veterans Claims).

direction or another, they can write rules that are highly favorable to one side.<sup>208</sup>

Ex post control reduces the range of discretion available to a decisionmaker. In the process, it limits the impact of any differences among judges. If elected judges feel strong pressure to issue stricter sentences as elections approach, for instance, then this pressure may reduce differences in sentencing practices between liberal and conservative judges.<sup>209</sup> Similarly, any effects of specialization on courts' outputs can be expected to diminish with increases in the level of control over judges.

It is in regard to ex post control that judges in the executive branch differ most from those in the judiciary.<sup>210</sup> To the extent that the discretion of administrative judges is limited by hierarchical control, the specialization that characterizes most of them makes less difference than it otherwise would. This relationship underlines the most important lesson of this Part—that the effects of judicial specialization are contingent on other attributes of adjudication.

### III. SPECIALIZATION IN THE ADJUDICATION OF IMMIGRATION CASES

A great deal of specialization exists in the adjudication of immigration cases. Immigration judges and members of the BIA are specialists in the field of immigration. In contrast, judges on the federal courts of appeals are fundamentally generalists. There is a degree of specialization in immigration in the courts of appeals, however, because of the large numbers of petitions for review in two of the federal circuits. Some legislators and scholars have proposed enhancing the degree of specialization in the adjudication of

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208. Legislation of this type was enacted for the Foreign Intelligence Surveillance Court. *See* 50 U.S.C. § 1803(a) (2006) (establishing that judges need to write opinions only if they deny an application for surveillance); *id.* § 1805(a)(3) (requiring a limited scope of probable cause inquiry for warrant applications). Another example was the Emergency Court of Appeals, which was created to hear challenges to the validity of price control policies during World War II. *See* Emergency Price Control Act of 1942, Pub. L. No. 77-421, ch. 26, § 204(b), 56 Stat. 23, 32 (expired 1947) (limiting the grounds on which the court could hold a regulation or order illegal); *id.* § 204(c) (prohibiting a stay of enforcement of a regulation or order while a case was pending). For a discussion of these and other provisions intended to protect the price control program from judicial interference, see William Jerome Wilson, *The Price Control Act of 1942*, in *THE BEGINNINGS OF OPA* 1, 99–103 (Office of Temporary Controls ed., 1947).

209. For evidence supporting this hypothesis, see Huber & Gordon, *supra* note 130, at 248.

210. *See supra* Part I.C.

immigration cases by substituting a more specialized body for the courts of appeals in this field.

Both the effects of current specialization and the prospective effects of enhanced specialization in the judiciary are best understood in relation to the other attributes of adjudication in the immigration field. The prospective effects are of several types, some of which are quite difficult to gauge. Despite this difficulty, these effects merit close examination in order to assess the impact and desirability of enhanced specialization in the adjudication of immigration cases.

This Part begins by examining current specialization among the immigration adjudicators within the DOJ. It then discusses the degree of specialization in the immigration field among the federal courts of appeals. Finally, it turns to proposals that would move immigration cases from the courts of appeals to a more specialized body.

#### A. *Immigration Courts and the Board of Immigration Appeals*

Specialization in the bureaucracy is generally taken for granted. But it is not inevitable that the administrative adjudicators who decide immigration cases are specialists in that field. The existence of central panels of administrative judges in some states is a reminder that adjudication might be structured so that immigration is only one of many fields in which certain judges work.<sup>211</sup> What difference does it make that the judges who adjudicate immigration cases in the executive branch are specialists?

At the most basic level, specialization ensures that immigration judges and members of the BIA have great familiarity with their field. The recruitment of many judges with immigration experience means that a considerable portion of administrative adjudicators come to their jobs with a head start in the field. Even judges without prior immigration experience can become knowledgeable in a relatively short time when they hear nothing but immigration cases.<sup>212</sup> Thus, immigration judges and BIA members undoubtedly have considerable expertise, which carries potential benefits for the efficiency and effectiveness with which they decide cases. The extent

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211. For a discussion of central panels of administrative judges in the states, see Hoberg, *supra* note 158, at 78–81.

212. This is especially true if the specialized court has a supporting staff with expertise in immigration issues. To the extent that law clerks and other staff members in a specialized court are themselves specialists in the relevant field, they extend the benefits of the expertise that judges bring to a court or gain through their experience on the court.

of those benefits and other effects of specialization, however, depend heavily on other attributes of immigration adjudication within the DOJ.

Of those other attributes, the difficulty of immigration cases looms the largest, especially for immigration judges. In the categorization of case difficulty discussed earlier,<sup>213</sup> at least a substantial proportion of immigration cases falls into the most difficult category. In this category, even the high levels of expertise that flow from specialization may not be sufficient to overcome the inherent difficulty of reaching decisions. As a result, specialization might provide only limited benefits in enhancing the efficiency and effectiveness with which cases are decided.

The time pressures on both immigration judges and members of the BIA compound the difficulties of immigration cases. As I have explained,<sup>214</sup> it is plausible either that the experience and expertise gained from specialization are of little help when judges operate under severe caseload pressure or that specialization is of particular benefit under those conditions. In light of the difficulty of cases, however, the former possibility seems more likely.<sup>215</sup>

If immigration cases were decided by administrative judges who worked in several other fields as well, the cumulative effects of case difficulty and time pressure likely would be reduced. Moving back and forth between immigration and other fields, members of central panels would get relief from the special problems that arise in immigration cases. If burnout weakens the quality of decisionmaking in immigration cases,<sup>216</sup> administrative judges who are not specialists might be at an advantage in that respect.

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213. *See supra* Part II.C.1.

214. *See supra* Part II.C.2.

215. Complaints by court of appeals judges and others about the quality of decisions by immigration judges should not be given too much weight, because these complaints are largely based on the most egregious judges and decisions. Still, the frequency and severity of these complaints strongly suggest that any positive effects of specialization on the quality of decisions are outweighed by the negative effects of case difficulty and caseload pressure. *See* Alexander, *supra* note 2, at 15–18 (discussing readily identifiable patterns of repeated errors in immigration cases); Benedetto, *supra* note 14, at 471–74 (noting criticism for a lack of transparency in the appointment process for immigration judges). The BIA has also been subject to strong criticism. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829–31 (7th Cir. 2005) (noting a history of criticism of immigration judges and the BIA on the Seventh Circuit); Westerland, *supra* note 95, at 14–15 (same).

216. *See supra* Part I.B.



The relationship between specialization and control over administrative judges in the immigration field depends in part on the arrangements that would exist in the absence of specialization. If the DOJ hired and supervised a central panel of administrative judges, then judges would still be under the control of a party with a stake in immigration cases. The situation would be quite different if an agency with no direct interest in case outcomes were responsible for the hiring and supervision of judges. With that complication, the relationship between specialization and control can be probed.

Specialization facilitates *ex ante* control through the selection of judges on the basis of their perceived points of view on immigration issues. If the tendency to choose immigration judges and BIA members from government lawyers in the field<sup>217</sup> reflects an effort to staff positions with judges favorable to the government's position, that strategy would be far less likely to occur if immigration cases were just one part of a judge's portfolio. If the DOJ held the power to appoint members of a central panel, its officials could choose government lawyers in the hope that they would be sympathetic to the government across the various fields of law addressed by the central panel. But that use of the selection power is a relatively blunt instrument.

Similarly, the BIA's specialization facilitated the *ex post* control that Attorney General Ashcroft exerted over the BIA.<sup>218</sup> A generalist court under Justice Department supervision could instead carry out the functions of the BIA. Under that condition, it is unlikely that the attorney general would have removed members on the basis of their decisional record in immigration cases.

The wide variation among immigration judges in the proportion of asylum claims they accept suggests that they possess a considerable degree of decisional independence, though recent efforts to reduce these disparities may achieve some success.<sup>219</sup> To the extent that immigration judges have been independent, that independence leaves more room for specialization to shape their behavior. But the difficulty of the cases they decide and the strong pressure they feel to dispose of cases work in the other direction. The effects of these two

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217. *See supra* Part I.C.

218. *See supra* Part I.C.

219. *See supra* Part I.C. The high rates with which some immigration judges accept asylum applications might reflect an assertiveness based on the self-confidence that specialization fosters.

attributes of adjudication within the DOJ likely outweigh any impact of specialization.

*B. The Federal Courts of Appeals*

As noted earlier, judges on the federal courts of appeals are fundamentally generalists, in that they hear a wide range of cases. Certainly, they see themselves as generalists.<sup>220</sup> There are some elements of specialization in the courts of appeals, including a degree of specialization among judges in opinion writing.<sup>221</sup> The agenda of each circuit and of its individual judges, however, is highly diverse.<sup>222</sup>

In this context, the increased number of petitions to the courts of appeals for review of BIA decisions has had a striking effect. Today, a large percentage of the cases filed in two circuits come from the BIA. To make one comparison, those percentages in 2008—41 percent in the Second Circuit and 34 percent in the Ninth Circuit<sup>223</sup>—were both higher than the percentage of Federal Circuit filings that concerned patent law.<sup>224</sup> At least those two circuits, then, could be regarded as quasi specialized in immigration cases.<sup>225</sup>

If specialization enhances judges' expertise and thus improves efficiency and effectiveness, judges on the Second and Ninth Circuits likely have secured that benefit. Because the preponderance of petitions for review of BIA decisions today involve asylum, judges in

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220. *E.g.*, Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1756 (1997). For other references by court of appeals judges to their status as generalists, see Cheng, *supra* note 163, at 521 n.2.

221. *Id.* at 533–45.

222. *E.g.*, *id.* at 540–46. The diversity of the cases heard by the courts of appeals as a whole is shown in ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 11, at 86–90. Analysis of case data compiled by the Federal Judicial Center indicates that circuits vary in their mixes of cases, but each circuit hears a wide range of cases. This analysis is based on data from the Inter-University Consortium of Political and Social Research, Federal Court Cases: Integrated Database, 2008, which may be downloaded at <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/25002;jsessionid=398D0E4929DD4BC31892EC0C98263ABF?q=federal+judicial+center>. Most or all of the circuits require random assignment of cases to judges, and there is a general norm of random assignment. Cheng, *supra* note 163, at 523.

223. *See* ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 11, at 97, 100.

224. This percentage was 31 percent. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, APPEALS FILED, BY CATEGORY, FY 2008 (2008), <http://www.cafc.uscourts.gov/pdf/ChartFilings08.pdf>. However, the 2009 proportion was higher, at 36 percent. U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, *supra* note 169. In the same year, the proportion of Second and Ninth Circuit filings that came from the BIA dropped below 30 percent. *See supra* note 83 and accompanying text.

225. Westerland, *supra* note 95, at 17.

these two circuits have an especially good opportunity to develop expertise on that issue.

As discussed,<sup>226</sup> the influx of immigration cases into the Second and Ninth Circuits has exacerbated caseload pressures on these courts, spurring judges to adjust their procedures to cope with the problem. Serious as these pressures are, they seem considerably more limited than the very strong pressures on adjudicators within the DOJ. But these time pressures may limit the benefits of quasi specialization to some degree by giving court of appeals judges less opportunity to make effective use of the expertise they develop in the immigration field.<sup>227</sup>

Both the prominence of immigration cases on the dockets of the Second and Ninth Circuits and the concentration of immigration cases in those circuits<sup>228</sup> might lead to efforts to exert ex ante control over decisions in the two circuits through judicial appointments based on prospective positions on immigration issues. There is no evidence that this is the case; to the extent that appointments to the courts of appeals are driven by policy issues, immigration does not appear to be among these issues.<sup>229</sup> Nor, it seems, are there many judges on the Second and Ninth Circuits, or any circuit, who have experience in the immigration field.<sup>230</sup>

In most respects, then, judges on the Second and Ninth Circuits are in positions more similar to their colleagues on other circuits than to members of the two adjudicative bodies within the DOJ. Indeed, they may be similar to their colleagues in the extent of expertise they have gained from the increase in petitions for review of BIA

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226. See *supra* Part I.B.

227. See *supra* Part II.C.2.

228. In fiscal year 2008, nearly three-quarters of all petitions for review of BIA decisions came to the Second and Ninth Circuits—45 percent in the Ninth and 28 percent in the Second. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 11, at tbl.B-3 (listing the types and number of appeals by Circuit). In fiscal year 2009, the proportion was nearly two-thirds. *Id.*

229. See NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 50–74 (2005) (identifying criminal defendants' rights, abortion, states' rights, and civil rights as issues that affect the judicial appointment process).

230. One exception is Judge Carlos Bea of the Ninth Circuit, who not only handled some immigration cases as an attorney but was himself a successful litigant at the BIA. *Immigration Litigation Reduction*, *supra* note 10, at 8 (testimony of Carlos T. Bea, J., U.S. Court of Appeals for the Ninth Circuit). Judge Bea was nominated by President George W. Bush in 2003. If officials in the Bush administration had wanted to shape immigration policy on the courts of appeals through judicial appointments, they probably would not have chosen a judge who contested a government immigration decision in the BIA.

decisions.<sup>231</sup> There were three other circuits—the Third, the Fifth, and the Eleventh—that received more than four hundred BIA cases in 2009.<sup>232</sup> The numbers of BIA cases were much lower in some circuits, but in most of these circuits, the numbers were large enough to give judges considerable familiarity with immigration law and adjudication.<sup>233</sup> The volume of BIA-related litigation in the Seventh Circuit, for instance,<sup>234</sup> was sufficient for Judge Posner to offer his well-publicized judgment about the failings of the immigration adjudication system in the DOJ.<sup>235</sup>

Overall, the degree of specialization in immigration cases that has developed in the courts of appeals probably has not had much impact on judges' decisions. The large volume of cases with which some circuits must cope may well affect the disposition of cases, but that is a different matter from specialization in itself. Caseload pressures aside, judges on the courts of appeals seem to treat appeals from the BIA in the same way that they treat other cases; that is, responding on the basis of their readings of the law and their policy preferences.<sup>236</sup>

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231. The extent of this increase across the courts of appeals is striking. In 1984, the courts of appeals received only 490 cases that had been decided by the INS. (This total may have included only direct appeals from the INS, or it may have included cases that came up through the district courts.) The Ninth Circuit received more than 60 percent of these cases, leaving only 183 to be divided among panels and judges in the other circuits. See Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1339 n.261 (1986).

232. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 11, at tbl.B-3.

233. *See id.*

234. *Id.* at 97 tbl. B-3.

235. *Benslimane v. Gonzales*, 430 F.3d 827, 829–30 (7th Cir. 2005).

236. To a considerable degree, these preferences seem to follow ideological lines. Two related studies found strong evidence that Democratic appointees in the Ninth Circuit were more favorable to asylum claims than Republican appointees. Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 192–203 (2009); David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 843–63 (2005). A less systematic analysis found suggestive evidence that Democratic and Republican appointees responded differently to asylum cases in the Sixth Circuit, but not in the Third Circuit. Ramji-Nogales et al., *supra* note 3, at 369–71. The same study found that differences in decisional tendencies across the circuits in 2004–2005 correlated fairly well with the ideological reputations of the circuits. *Id.* at 361–67. An analysis across all of the courts of appeals, using a measure of judges' ideological positions that is more complicated than partisan affiliation, found a statistically significant relationship between those positions and asylum decisions in the 2003–2008 period but not in the 1998–2002 period. Westerland, *supra* note 95, at 38.

### C. Replacing the Courts of Appeals with a Specialized Body

Since at least the early 1980s, scholars and public policymakers have offered proposals for changes in the structure of adjudication for immigration cases that involve judicial specialization in some way.<sup>237</sup> These proposals vary considerably.<sup>238</sup> Some, such as converting the BIA into an Article I court and otherwise leaving the adjudication structure unchanged,<sup>239</sup> would not change the system's level of specialization.<sup>240</sup> But others would increase the level of specialization

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237. See, e.g., SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 248–50 (1981) (suggesting the creation of an Article I immigration court); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644, 651–55 (1981) (advocating a specialized judicial model for immigration courts); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 18–24 (1980) (suggesting the formation of a new Article I immigration court); see also *Immigration Litigation Reduction*, *supra* note 10, at 12–13 (testimony of John McCarthy Roll, J., U.S. District Court for the District of Arizona) (advocating for a consolidated immigration court); COMM'N ON IMMIGRATION, ABA, REFORMING THE IMMIGRATION SYSTEM: EXECUTIVE SUMMARY 43–48 (2010), available at <http://new.abanet.org/Immigration/Documents/ReformingtheImmigrationSystemExecutiveSummary.pdf> (considering the possibilities for restructuring immigration adjudication and proposing the creation of an Article I immigration court). Levinson's proposal was a model for Roberts's proposal. See Roberts, *supra*, at 19 n.63.

238. Legomsky, *supra* note 24, at 464–68. See generally *Immigration Litigation Reduction*, *supra* note 10 (discussing various reform proposals). In 2006, the Senate passed a bill that would have asked the Government Accountability Office to study three possible changes:

(1) consolidating all such appeals into an existing circuit court, such as the United States Court of Appeals for the Federal Circuit; (2) consolidating all such appeals into a centralized appellate court consisting of active circuit court judges temporarily assigned from the various circuits, in a manner similar to the Foreign Intelligence Surveillance Court or the Temporary Emergency Court of Appeals; or (3) implementing a mechanism by which a panel of active circuit court judges shall have the authority to reassign such appeals from circuits with relatively high caseloads to circuits with relatively low caseloads.

S. 2611, 109th Cong. § 707 (2006). The House did not consider the bill.

239. *Immigration Litigation Reduction*, *supra* note 10, at 129–31 (statement of Doris Meissner, Senior Fellow; Muzaffar A. Chishti, Director; & Michael J. Wishnie, Fellow, Migration Policy Institute). Another proposal would move the adjudication of immigration cases from the DOJ to an independent agency in the executive branch. U.S. COMM'N ON IMMIGRATION REFORM, 1997 REPORT TO CONGRESS: BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 175–83 (1997), available at <http://www.utexas.edu/lbj/uscir/becoming/goals.pdf>.

240. The adoption of such proposals could be consequential in other respects, however, by providing greater insulation of judges from ex post control. That is especially true of Article I status. Among specialized federal courts, the Tax Court and the Court of International Trade (formerly the Customs Court) began as executive branch bodies and later moved to the judicial branch. DUBROFF, *supra* note 193, at 165–215 (describing the evolution of the Tax Court); JOSEPH E. LOMBARDI, THE UNITED STATES CUSTOMS COURT: A HISTORY OF ITS ORIGIN AND EVOLUTION 52–62 (1976). There is no systematic evidence on the consequences of these shifts.

by shifting jurisdiction over applications for review of decisions by Justice Department adjudicators from the federal courts of appeals to a new body.

This Section focuses on the latter set of proposals, which relate to this Article's concern with the effects of judicial specialization. In light of the other attributes of adjudication in the immigration field, what might result from shifting cases from the courts of appeals to a more specialized body? Some significant effects are possible, including effects on the overall tenor of decisions in immigration cases. But these effects are not easily predicted. One reason is that they are contingent on other conditions, some of which are themselves unpredictable, such as the content of substantive and procedural rules that would accompany the creation of a new court. Another reason is that the impact of enhanced specialization would depend in large part on the form of specialization adopted by Congress.

The proposals considered in this Section take three forms.<sup>241</sup> In the first, immigration courts and the BIA would be converted into a new Article I immigration court with trial and appellate divisions, and the courts of appeals would no longer have a role in reviewing administrative decisions in immigration.<sup>242</sup> There has been considerable change in the adjudication of immigration cases since the early 1980s, when proposals of this type were made.<sup>243</sup> These proposals, however, could be applied to the current situation.

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241. Other forms could be (and may have been) suggested. The discussion in this Part focuses on the three forms described here.

242. Levinson, *supra* note 237, at 651–55; Roberts, *supra* note 237, at 18–24. It is uncertain whether a structure in which immigration cases did not go to any Article III courts prior to Supreme Court review on certiorari would run into constitutional problems. One commentary on the Roberts proposal concluded that the question was open. Robert E. Juceam & Stephen Jacobs, *Constitutional and Policy Considerations of an Article I Immigration Court*, 18 SAN DIEGO L. REV. 29, 35–43 (1980). A leading commentary on the question of when Article III courts are required pointed to the unclear state of Supreme Court doctrine but argued for an interpretation under which appellate review by an Article III court is required. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 943–49 (1988). Under that interpretation, the author argued, the use of administrative courts to decide immigration cases was acceptable because of the role of the courts of appeals. *Id.* at 967–70. For a more recent analysis that reflects the continued uncertainty about when Article III courts are required, see David A. Case, *Article I Courts, Substantive Rights, and Remedies for Government Misconduct*, 26 N. ILL. U. L. REV. 101, 191–211 (2005).

243. See *Executive Office for Immigration Review*, *supra* note 117, at 41–44 (statement of Stephen H. Legomsky, Professor, Washington University School of Law) (discussing the changes in immigration adjudication over time).

In the second form, the Federal Circuit would take the place of the courts of appeals. Senator Arlen Specter offered this proposal, which was considered at a 2006 hearing of the Senate Judiciary Committee.<sup>244</sup> Some number of judges would be added to the Federal Circuit to help the court handle the new caseload.

In the third form, cases would go to a court composed of Article III federal judges who serve temporarily, and perhaps part-time, on that court. The Chief Justice would designate the judges for this court. Senior Judge Jon Newman of the Second Circuit suggested this type of court at the 2006 Senate hearing,<sup>245</sup> and Professor Stephen Legomsky presents a detailed proposal of this type in his article for this Symposium.<sup>246</sup> Such a court would be similar to the Foreign Intelligence Surveillance Court, which draws judges from the district courts, and the Foreign Intelligence Surveillance Court of Review, which draws judges from the district courts and courts of appeals.<sup>247</sup> In the past, there were other federal courts that borrowed their judges from the district courts and courts of appeals, including the Emergency Court of Appeals (1942–61) and the Temporary Emergency Court of Appeals (1971–93).<sup>248</sup>

The primary rationales for proposals taking any of these three forms have been achieving greater uniformity in immigration law through the elimination of rulings by multiple courts of appeals<sup>249</sup> and (in the current period) providing relief to overburdened courts of

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244. *Immigration Litigation Reduction*, *supra* note 10, at 2 (statement of Sen. Specter, Chairman, S. Comm. on the Judiciary).

245. *Id.* at 10–11 (testimony of Jon O. Newman, J., U.S. Court of Appeals for the Second Circuit).

246. Legomsky, *supra* note 68, at 1710–20. The Legomsky proposal would replace the BIA and the courts of appeals with a new Court of Appeals for Immigration. *Id.* at 1686, 1714. The court would be staffed by judges from the district courts and courts of appeals. *Id.* at 1686–87, 1714. Judges would serve full-time on the immigration court during their period of service on this court for a fixed term, perhaps of two years. *Id.* at 1686, 1714.

247. 50 U.S.C. § 1803(a) (2006) (setting forth procedures for selecting judges for the Foreign Intelligence Surveillance Court); *id.* § 1803(b) (setting forth procedures for selecting judges for the Foreign Intelligence Surveillance Review Court).

248. Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 359–67 (2004) (discussing the Emergency Court of Appeals and the Temporary Emergency Court of Appeals, along with other courts that borrowed their judges).

249. *Immigration Litigation Reduction*, *supra* note 10, at 8 (testimony of Carlos T. Bea, J., U.S. Court of Appeals for the Ninth Circuit); Levinson, *supra* note 237, at 653; Roberts, *supra* note 237, at 20.

appeals.<sup>250</sup> Additional rationales are that consolidation of cases in a single court would eliminate forum shopping by individuals who challenge BIA rulings<sup>251</sup> and enhance the expertise with which cases are decided.<sup>252</sup> These issues are important, but the potential impact of judicial specialization is not limited to them. Thus, consideration of the effects of adopting any of these proposals should be framed more broadly.

Because the body of empirical data about the effects of judicial specialization is slim,<sup>253</sup> and because these effects are complex and contingent, any effort to estimate the effects of adopting these proposals is highly imperfect. But an analysis that takes into account both what we know about judicial specialization and the attributes of adjudication in immigration law can offer some ways of thinking about the impact of moving cases from the courts of appeals to a more specialized body.<sup>254</sup>

First, it is unlikely that specialization would provide substantial benefits through enhanced judicial expertise. Whatever advantages expertise provides, a shift in jurisdiction would not greatly enhance these advantages. The courts of appeals already hear a large number of immigration cases, three-quarters of which are heard in the two circuits in which immigration constitutes a large share of the agenda.<sup>255</sup> Even if immigration cases were transferred to a new court whose judges hear only immigration cases, it is not clear that its judges would become any more expert in the field than the judges of the Second and Ninth Circuits are today.

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250. *Immigration Litigation Reduction*, *supra* note 10, at 12 (testimony of John McCarthy Roll, J., U.S. District Court for the District of Arizona).

251. *Id.* at 29 (testimony of David A. Martin, Professor, University of Virginia School of Law).

252. *Id.* at 12 (testimony of John McCarthy Roll).

253. *See supra* note 127 and accompanying text.

254. The set of suggestions that follows is my own. For an insightful analysis of the effects of establishing a specialized immigration court, see Legomsky, *supra* note 24, at 464–68. Professor Legomsky concludes that, on balance, substituting a specialized court for the courts of appeals would be undesirable. “The advantages of generalist review, especially in an area in which fundamental liberty interests are at stake, are in my view enough to outweigh any marginal consistency gains from specialization.” *Id.* at 468; *see also* Legomsky, *supra* note 231, at 1386–96 (analyzing the specialized immigration court proposals of the 1980s). Professor Legomsky’s own proposal for a Court of Appeals for Immigration was designed to avoid the negative effects of specialization by giving jurisdiction over appeals to judges who have substantial experience in the generalist federal courts. Legomsky, *supra* note 68, at 1694–96.

255. *See supra* note 228 and accompanying text.



Second, the effects of specialization on time pressures would depend primarily on the judicial personnel provided to the new court. If immigration cases were reallocated to a set of judges borrowed from all the circuits, without any increase in the number of court of appeals judges, the reallocation would decrease pressures on the circuits that have received the largest numbers of immigration cases. By the same token, however, it would increase pressures on circuits that lose more judicial person-hours than immigration cases currently cost them.

If instead cases went to the Federal Circuit or to a new court, Congress would decide on the number of judges to allocate to the court in question. Senator Specter's 2006 proposal would have given immigration cases to the Federal Circuit but would have added only three judges to that court, which would have overwhelmed the Federal Circuit and its judges.<sup>256</sup> If Congress were generous in providing judges to the Federal Circuit or to a specialized immigration court, it could substantially ease caseload pressures on the Second and Ninth Circuits and allow immigration cases to be decided under less severe time constraints. Such generosity, of course, is not guaranteed.

Third, a reduction in the number of judges deciding asylum cases would probably produce greater homogeneity of judicial standards on asylum issues and thus greater uniformity in judicial policy. This effect is hardly certain, because the number of judges in the field would still be large enough to allow for considerable variation in standards. Probably a stronger force for homogeneity would be mechanisms that can operate within a single court—en banc hearings and judges' acceptance of precedents established by prior panels. The experience of the Federal Circuit in patent law, however, cautions against assuming that concentration of cases in a single court will produce a high level of uniformity in the law.<sup>257</sup>

Fourth, it is quite difficult to predict how judges' experience on a specialized immigration court would affect their perceptions and perspectives. The self-confidence they develop could make them more willing to overturn administrative rulings against individuals. Alternatively, their central role in shaping asylum policy might make them more reluctant to interfere with executive branch policy. The

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256. See *Immigration Litigation Reduction*, *supra* note 10, at 3–5 (testimony of Paul R. Michel, C.J., U.S. Court of Appeals for the Federal Circuit).

257. See *supra* note 173.

potential for either of these effects should not be exaggerated, given the large number of immigration cases already decided by judges in some circuits. In this respect, only a court in which judges hear nothing but immigration cases throughout their judicial careers would be very different from the status quo. Another possible effect is that fully specialized judges would come to see immigration issues from an insular perspective, losing the broader perspective of generalist judges.<sup>258</sup>

Fifth, the collective views of the judges who decide immigration appeals almost surely would change if jurisdiction is transferred to a single court, simply because one set of judges would replace another. No matter which form of specialization is adopted, only by chance would the distribution among the judges deciding immigration cases match the distribution of views among the judges who currently decide them. The smaller the group of judges deciding cases in a particular field, the more likely that they will collectively lean in a particular direction.

The impact of having a different set of judges decide immigration cases would be considerably greater if judges were selected on the basis of their perceived views about immigration issues. The incentives of officials selecting these judges to seek ex ante control of the court through appointments would depend on the form of specialization adopted. If jurisdiction over immigration cases were transferred to the Federal Circuit, these cases would constitute only one of several fields in which that court works. To the extent that appointments to the Federal Circuit are made on the basis of policy considerations, executive branch officials who choose judges would have to weigh immigration against other fields such as patents.<sup>259</sup>

In contrast, a stand-alone court that decided only immigration cases would require no such weighing. If selecting officials wanted to use appointments to shape court policy, they could focus on

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258. See Timothy S. Barker, *A Critique of the Establishment of a Specialized Immigration Court*, 18 SAN DIEGO L. REV. 25, 27 (1980). Another type of effect that might occur is a negative reaction to the repetition of cases in a single field. In light of concerns about burnout among immigration judges, it is interesting that Senator John Cornyn used the same term to refer to this potential effect for appellate judges who heard only immigration cases. *Immigration Litigation Reduction*, *supra* note 10, at 15 (statement of Sen. Cornyn, Member, S. Comm. on the Judiciary).

259. Still, there has been some concern that immigration politics would come into play in the selection of federal circuit judges. See, e.g., Editorial, *Don't Tamper with the Courts*, N.Y. TIMES, Apr. 7, 2006, at A24.

ascertaining the views of prospective appointees on immigration issues. Leaving aside the difficulties that can arise in that effort, the question is whether policy considerations would dominate other considerations such as patronage. The history of appointments to federal specialized courts indicates that patronage is sometimes the primary consideration.<sup>260</sup> The history of appointments of immigration judges and members of the BIA does not lead to any clear predictions about how executive branch officials would use the power of appointment to a specialized immigration court.<sup>261</sup>

If White House legal staff members and DOJ officials did select judges on the basis of policy considerations, it seems likely that they would favor nominees who seemed inclined to favor the government's position. An administration sympathetic to immigrants, however, might take a different approach.

If the Chief Justice designated judges to serve temporarily on a specialized immigration court, the Chief might use this power to staff the court primarily with judges who reflect the Chief's own point of view. Although this possibility may seem highly speculative, Professor Theodore Ruger has presented evidence indicating that Chief Justices Burger and Rehnquist favored Republican appointees in choosing judges for specialized courts.<sup>262</sup> Thus, any evaluation of this form of specialization should take into account the record of the sitting Chief Justice on immigration issues.<sup>263</sup>

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260. See *supra* note 197 and accompanying text.

261. See *supra* Part I.C.

262. Ruger, *supra* note 248, at 390–95, 397–401. In the case of the Special Division of the Court of Appeals for the D.C. Circuit, which chose special counsel for investigations of criminal allegations against high-level officials of the executive branch, Chief Justice Rehnquist's appointments to the Special Division arguably led to the impeachment of President Clinton. See JEFFREY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT* 70–73 (1999).

263. Chief Justice Roberts's record on these issues thus far is too slim to provide a basis for firm conclusions about his views. See *Kucana v. Holder*, 130 S. Ct. 827 (2010) (joining a unanimous decision favorable to the individual); *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009) (joining a unanimous decision favorable to the government); *Nken v. Holder*, 129 S. Ct. 1749 (2009) (writing a majority opinion favorable to the individual); *Negusie v. Holder*, 129 S. Ct. 1159 (2009) (joining a majority opinion somewhat favorable to the individual); *Dada v. Mukasey*, 128 S. Ct. 2307 (2008) (joining a dissenting opinion favorable to the government); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (joining a majority opinion favorable to the government); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (joining a majority opinion favorable to the individual); *Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006) (joining a majority opinion favorable to the government).

Sixth, specialization might increase control of court policy through ex post mechanisms. Any such effect would probably be slight, however, so long as the court was staffed by Article III judges. Federal Circuit judges and judges designated for temporary duty on a specialized court would retain Article III protections. Because of the continuing diversity of cases they would hear,<sup>264</sup> they would not be subject to the more subtle pressures that judges who decide cases in a single field might feel.

Supplanting the courts of appeals with a court of Article I judges could have a more substantial effect, because judges on that court might be concerned about reappointment. But there is little evidence about this effect in other fields.<sup>265</sup> Regardless of the effect on sitting judges, executive branch officials could make reappointment decisions on the basis of judges' decisional records. The efficacy of that approach would depend heavily on the length of judges' terms and their interest in reappointment.

Finally, the decisions of a new specialized court in immigration law would depend to a considerable degree on the substantive and procedural rules that Congress adopted when it established the court. Legislation that shifts immigration cases from the courts of appeals to a specialized court would give members of Congress an opportunity to adopt new rules for court review of decisions by adjudicators in the executive branch. As it has done in other instances,<sup>266</sup> Congress might adopt rules that are intended to favor one side or the other—to make review of BIA decisions either more or less favorable to the individuals who petition for review. To take one possibility, if Congress were collectively unsympathetic to asylum seekers, its lack of sympathy likely would result in rules that favored the government's legal position. The effects of such changes might be far greater than the effect of transferring jurisdiction from the courts of appeals to another court.

## CONCLUSION

Part III's discussion of current and potential judicial specialization in immigration law emphasized the complexity and

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264. In a court of designated judges from the various circuits, immigration might constitute full-time work for a certain period, but that period would still constitute only a portion of the judges' work in the long term.

265. *But see* Hendrickson, *supra* note 129, at 94–192.

266. *See supra* note 208 and accompanying text.

contingency of the effects of specialization. It is difficult to ascertain what difference it makes that administrative adjudicators in the immigration field are fully specialized or that a degree of specialization in the field has developed in the courts of appeals. It is even more difficult to predict how, and how much, decisions on petitions for review of decisions by adjudicators in the executive branch would change if jurisdiction were transferred from the courts of appeals to another body. For the same reason, assessments of the desirability of such a transfer should be made with considerable caution.<sup>267</sup>

One lesson of this Article's analysis is that policymakers who consider proposals for change in the structure of adjudication of immigration cases should recognize the complex relationship between specialization and other attributes of adjudication. In other fields of law, the potential effects of specialization sometimes have been exaggerated or overlooked because of inadequate attention to other attributes that shape the work of courts. Decisions about judicial specialization in any field should be made with careful consideration of the potential effects, including the uncertainties that exist in predicting those effects.

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267. The relative benefits and drawbacks of specialization will vary among fields of law. For a discussion of characteristics of fields that should be taken into account, see LEGOMSKY, *supra* note 155, at 20–32.