

# **PRACTICAL IMPEDIMENTS TO STRUCTURAL REFORM AND THE PROMISE OF THIRD BRANCH ANALYTIC METHODS: A REPLY TO PROFESSORS BAUM AND LEGOMSKY**

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## INTRODUCTION

Professors Lawrence Baum and Stephen Legomsky have documented the shortcomings of the nation's immigration adjudication system as revealed in popular and academic articles, government and interest group reports, pleas by immigration judges, exasperated criticisms by federal appellate judges, and their own examination of original data and other sources.

The resource-starved U.S. immigration removal adjudication system's sometimes shabby and uneven treatment of immigrants sends to foreign countries some individuals who are convinced that they received a level of justice that was no better than they would have received from autocratic bureaucracies in their home countries. The system permits others to stay here despite dubious claims to that right.

Removal adjudication is part of the slot machine that is U.S. immigration enforcement, which abides the unauthorized presence of ten to twelve million individuals, while scooping up a fraction of them for criminal prosecution or removal proceedings. Those targeted for removal include some who have committed serious crimes but also plenty who simply had the misfortune of working for employers with a high percentage of illegal workers. Judge Jon Newman of the

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Second Circuit took note of this uneven treatment in recommending that the Department of Homeland Security (DHS) consider permitting a particular immigrant whom an immigration judge had ordered removed “to remain here along with the millions of others who are not removed despite their lack of a lawful status.”<sup>1</sup>

Professor Legomsky proposes a variety of changes to this system, including a more independent first-instance judiciary and a specialized federal appellate court.<sup>2</sup> Professor Baum analyzes how specialization affects judging generally and might affect removal litigation.<sup>3</sup> In so doing, he sheds some valuable light on how the Legomsky specialized appellate court might operate compared to alternative proposals for restructuring removal adjudication appeals. Both articles are admirable for their analysis, and although chances are slim for moving immigration adjudication outside the purview of the Department of Justice (DOJ), it is beneficial to churn ideas and be ready should an opportunity arise. After explaining my pessimism about structural change, I discuss Legomsky’s proposal in Part I, drawing on Baum’s insights on specialized courts. Then, in Part II, I outline a new (and fairly undeveloped) approach to improving immigration court performance without major structural change but with a changed DOJ outlook on immigration court oversight and management.

Effecting major legislative changes—such as a restructured removal adjudication system—would be a hard slog even with substantial legislative majorities in a period of unified government. It would be even harder in a divided government or one with small legislative majorities under pressure to reduce federal spending. In fact, the demand for tougher enforcement of laws on the books could lead to pressure, not to make removal adjudication more accommodating to aliens, but just the opposite—that is, an Ashcroft rather than a Reno mentality. Immigration hard-liners can point to reports of disparate asylum adjudication as proof that the adjudication system grants asylum to those who do not deserve it. Professor Legomsky reasons, correctly I think, that the 2002 changes at the Board of Immigration Appeals (BIA)—a reduction in size and

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1. *Rotimi v. Holder*, 577 F.3d 133, 139 (2d Cir. 2009) (Newman, J., concurring).

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

3. See Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501 (2010).

procedural cuts linked to that reduction—produced more BIA decisions unfavorable to immigrants.<sup>4</sup> Legislators might decide that keeping the immigration courts resource-starved will reduce the number of decisions in which immigrants prevail.

Perhaps the best source of optimism for restructuring and better resourcing the adjudication system is a shared concern that it may be sending bona fide refugees-in-fact to countries with human rights records deplored across the political spectrum. Although most removal proceedings completed in 2008 involved Latin Americans, only two Latin American countries made the top ten list of nationalities receiving asylum in 2008. China heads the list, which included some nationalities that barely made or were not even among the top twenty-five in completed removal proceedings—aliens from Iraq, Albania, Ethiopia, Guinea, and Russia.<sup>5</sup> These facts, though, have not produced much pressure for major change so far.

#### I. THE LEGOMSKY PROPOSAL: UPGRADE THE ADJUDICATORS, TRANSFER AND CONSOLIDATE APPEALS

Professor Legomsky would move the immigration adjudication function from the DOJ to an independent agency within the executive branch and convert the immigration judges (IJs) from DOJ attorneys to Administrative Law Judges (ALJs) or Article I judges. Although I think concern over DOJ manipulation of IJs, although valid, may be overwrought, I endorse this proposal while cautioning that an independent immigration adjudication agency may have more difficulty in securing resources than does the DOJ and its Executive Office of Immigration Review (EOIR).

Professor Legomsky also would replace the BIA and the current two-step appellate review process with a new specialized Article III appellate court for immigration, staffed on two-year rotations by sitting district and circuit judges; Congress would create additional district and circuit judgeships sufficient to compensate for those assigned temporarily to the new court. Conceptually, this idea has some commendable features. Its enactment is highly unlikely, however, both because of the difficulty in estimating its caseload and the number of judges it would need and because of legislative

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4. Legomsky, *supra* note 2, at 1659.

5. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK, at E1 fig.6, E2 tbl.5, J1 fig.15, J2 tbl.7 (2009) [hereinafter EOIR], available at <http://www.justice.gov/eoir/statpub/fy08syb.pdf>.

reluctance to create additional judgeships for any purpose. If enacted, its implementation would quite likely present a logistical nightmare.

A. *A Separate Executive Branch Agency for First-Instance Immigration Removal Adjudication*

Professor Legomsky would convert IJs into Administrative Procedure Act (APA)-protected Administrative Law Judges for Immigration (ALJIs) and place them in an Office of the Chief Administrative Law Judge for Immigration, a separate executive branch agency outside of any department. The president would appoint the chief judge with Senate confirmation.<sup>6</sup> Most sitting IJs would be grandfathered in. A merit selection committee, rather than the chief judge, would appoint new judges. Legomsky's proposal would also correct various procedural problems that bedevil the current system. I see many advantages to this proposal and only one potential downside.

IJs, as Professor Baum explains, have an especially difficult job because of their working conditions, the kind of evidence before them, and because their decisions, some literally involving life or death, are largely dichotomous and final.<sup>7</sup> As Professor Legomsky shows, they also face a serious case of role conflict. On the one hand, they are appointed and subject to removal by a DOJ that describes them as "attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them."<sup>8</sup> The DOJ, through the EOIR, exercises general oversight—including setting case disposition time frames and conducting performance reviews—creating at least the implied threat of retribution or removal for judges whose performance runs contrary to DOJ preferences. IJs have documented instances in which DOJ supervisors have impinged on the independent exercise of their responsibilities, such as the DOJ's failure to implement the authority Congress granted them to impose contempt citations<sup>9</sup> and a proposed Code of Conduct that authorizes BIA members and IJs to discuss cases *ex parte* with government lawyers but not immigrants or their lawyers.<sup>10</sup> The

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6. Legomsky, *supra* note 2, at 1714.

7. Baum, *supra* note 3, at 1510–11.

8. 8 C.F.R. § 1003.1(a)(1) (2009).

9. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 10 (2008).

10. Legomsky, *supra* note 2, at 1674–75.

attorney general proposed a performance evaluation system in 2006 over the objections of IJs, who pointed to the APA's limits on agency evaluations for the judges appointed under its aegis.<sup>11</sup> Housing a corps of judges charged with protecting the rights of an unpopular minority in an executive branch law enforcement agency creates, according to the National Association of Immigration Law Judges, "understandable concerns that the decisions rendered by Immigration Judges are not independent and free from pressure or manipulation."<sup>12</sup>

On the other hand, the possibility of retribution against IJs is apparently much stronger than the reality. The same DOJ that calls IJs the attorney general's delegates also tells them to "exercise their independent judgment and discretion" and "take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case."<sup>13</sup> As Professor Legomsky acknowledges, DOJ efforts to influence specific BIA or IJ decisions are "rare."<sup>14</sup> Moreover, IJs have not been subject to the ideological housecleaning that hit the BIA in 2002.<sup>15</sup> Legomsky is likely correct that the 2002 incident keeps IJs aware that someone may be looking over their shoulders as well, but, as Professor Baum notes,<sup>16</sup> if IJs acted based on pervasive fear of intrusions upon their decisionmaking autonomy, one would expect uniform decisions reflecting agency priorities, not the major disparities in asylum

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11. See, e.g., Marks, *supra* note 9, at 14 ("[I]t is a . . . long-established principle that administrative law judges must be exempt from . . . agency administered performance evaluations . . . to ensure their independence in decision-making. Despite this well-established benchmark in administrative adjudications, the first item on the Attorney General's 22-point plan is to subject Immigration Judges to . . . performance evaluations." (footnote omitted)); see also 5 U.S.C. § 554(d)(2) (2006) (stating that an agency adjudicator "may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency"); VANESSA K. BURROWS, CONG. RESEARCH SERV., ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 8 (2008) (noting that section 554(d) of the APA expressly prohibits the supervision of ALJs by agency employees who perform investigative or prosecutorial functions).

12. Marks, *supra* note 9, at 4.

13. 8 C.F.R. § 1003.1(d)(ii).

14. Legomsky, *supra* note 2, at 1667.

15. *Id.* at 1670; see also Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 375–77 (2006) (recounting that the attorney general's reduction of BIA positions in 2002 fell most heavily upon BIA members most sympathetic to immigrant claims).

16. Baum, *supra* note 3, at 1529–31.

decisions documented by the Government Accountability Office,<sup>17</sup> Transactional Records Access Clearinghouse (TRAC),<sup>18</sup> and Professor Jaya Ramji-Nogales and her colleagues.<sup>19</sup>

Moreover, an informed public expects immigration courts to function as impartial courts. Perhaps the most notable thing about Monica Goodling and Kyle Sampson's illegally hiring IJs<sup>20</sup> was the widespread hostile reaction it engendered and the correction that the DOJ quickly put into place.<sup>21</sup> And the DOJ report on the incident shows that Goodling and Sampson's goal was not to influence immigration removal adjudication but rather to find jobs for conservative party loyalists.<sup>22</sup> Still, even if Goodling and Sampson did not know what IJs do, evidence suggests that their appointees have ruled against asylum seekers more than other judges on their courts.<sup>23</sup>

In short, the role conflict created by the current arrangement and the possibility that some future administration could unleash its own Goodlings and Sampsons to meddle in the courts make a strong case for statutorily removing the IJs from DOJ management and oversight. Professor Legomsky wisely recommends APA protection

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17. U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 7-8 (2008) (reporting a considerable variation in asylum decisions across immigration courts and judges).

18. See, e.g., TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LATEST DATA FROM IMMIGRATION COURTS SHOW DECLINE IN ASYLUM DISPARITY (2009), <http://www.trac.syr.edu/immigration/reports/209> (documenting reduced, though still significant, disparities in asylum decisions).

19. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 9, 34-52, 77-86 (2009). Ramji-Nogales and her colleagues initially identified these disparities in an earlier version of *Refugee Roulette*. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 328-49 (2007).

20. See Legomsky, *supra* note 2, at 1665-67 (discussing the DOJ's BIA member and IJ hiring practices).

21. See *id.* at 1665 (discussing the DOJ's response to the politicized hiring allegations).

22. See OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEPT OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 117-18, 121-22 (2008), available at <http://www.justice.gov/oig/special/s0807/final.pdf> (analyzing Goodling and Sampson's conduct in the selection of IJ and BIA candidates).

23. See, e.g., Charlie Savage, *Vetted Judges More Likely to Reject Asylum Bids*, N.Y. TIMES, Aug. 24, 2008, at A17 (describing an analysis of DOJ data that showed several of the politically selected judges to be among the least likely IJs to grant asylum).

rather than renewable terms, which would be the likely arrangement were IJs placed in an Article I court.<sup>24</sup>

I see one drawback, however, to an immigration trial bench in a freestanding executive branch agency. It relates to funding. Lack of resources understandably gets first billing in Professor Legomsky's<sup>25</sup>—and almost everyone else's—catalog of immigration court problems. Current funding provides insufficient staff support services and allows too few IJs for the number of cases, causing a distressingly high caseload per judge. In 2008, IJs averaged more than 1,500 receipts, including about 1,300 proceedings, with considerable variation—proceedings per judge varied from 337 to 3,504.<sup>26</sup>

The ultimate source of funds for EOIR, of course, is Congress, not the DOJ. The DOJ requests and administers the funds Congress provides, generally within the limits Congress specifies. IJs have been relentless in criticizing the DOJ, for example, for “fiscal cutbacks to critical immigration court resources, including training programs,”<sup>27</sup> and “EOIR’s failure to provide the resources necessary for timely adjudications.”<sup>28</sup> But moving immigration courts out of the DOJ, while sparing them what Professor Legomsky calls “the Justice Department’s budgetary and logistical pressures,”<sup>29</sup> would subject them to the Darwinian process by which agencies compete for funding. First, the Office of Management and Budget (OMB) trims agency funding requests for inclusion in the president’s executive-branch-wide appropriations request. Once the president submits that request to Congress, agencies compete for funds with other agencies, under the jurisdiction of whatever appropriations subcommittees to which the House and Senate leadership has assigned them. Some freestanding executive branch adjudicative bodies have apparently

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24. See Legomsky, *supra* note 2, at 1679 (“[T]hough Article I judges might enjoy greater job security than immigration judges currently do, they might actually have less job security than they would under an ALJ model.”).

25. *Id.* at 1651–57.

26. These calculations, Russell R. Wheeler, IJ Receipt Data (Jan. 13, 2010) (unpublished spreadsheet, on file with the *Duke Law Journal*), are based on the 224 judges listed on the EOIR website and receipt and other data reported in the EOIR 2008 Statistical Year Book. See EOIR, U.S. Dep’t of Justice, EOIR Immigration Court Listing, <http://www.justice.gov/eoir/sibpages/ICadr.htm> (last visited Mar. 20, 2010) (listing all IJs); EOIR, *supra* note 5, at B2 fig.1, B7 figs.2 & 3 (listing total immigration court receipts and total immigration court proceedings).

27. Letter from Dana Leigh Marks, President, Nat’l Ass’n of Immigration Judges, to Senator Edward Kennedy (Mar. 26, 2008) (on file with the *Duke Law Journal*).

28. Marks, *supra* note 9, at 13.

29. Legomsky, *supra* note 2, at 1686.

done fairly well in the appropriations process, no doubt in part because they have politically sympathetic clienteles, such as veterans, or politically popular missions, such as uniform application of the tax laws. Query, though, the fate of a freestanding body devoted solely to immigrant removal litigation, especially to the extent that the appropriators perceive its clientele as undocumented aliens whom the government wants out of the country.

As uncomfortable as IJs may be under the DOJ's budgetary umbrella, that situation—at least with a DOJ committed to ensuring their effective operation—may be preferable to swimming alone, first in OMB's budget-hawk review, and then in a hostile congressional environment. By analogy, in 1993, federal defenders, who chafe at being under the budgetary umbrella of the federal judges on the Judicial Conference of the United States, proposed the “establish[ment] within the judicial branch [but independent of the Conference] of a Center for Federal Criminal Defender Services.”<sup>30</sup> The Judicial Conference rejected the proposal,<sup>31</sup> reasoning, “[n]otwithstanding the importance of the Sixth Amendment and . . . programs [to implement it for indigent federal offenders], the fact of the matter is that these programs are unpopular and have no ‘constituency,’ no power base, and no better champion than the judiciary.”<sup>32</sup> That statement describes immigration courts, except that they have no champion other than proimmigrant lobbying groups that have had little effect in getting EOIR the resources it needs.

### *B. A New Article III Court for Immigration Appeals*

Professor Legomsky would also eliminate the current two-stage appellate process by abolishing the BIA and vesting sole appellate jurisdiction in a new U.S. Court of Appeals for Immigration (CAI) comprising sitting district judges, and perhaps some circuit judges, assigned to the court full-time for a period of two to three years. The proposal, however, presents some serious practical problems that would make enactment and, in the event of enactment,

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30. COMM. ON DEFENDER SERVS., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE COMMITTEE ON DEFENDER SERVICES TO THE INTERIM REPORT OF THE CRIMINAL JUSTICE ACT REVIEW COMMITTEE 14, 15 (1993) (on file with the *Duke Law Journal*).

31. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 24 (1993), available at <http://www.uscourts.gov/judconf/93-Mar.pdf>.

32. COMM. ON DEFENDER SERVS., *supra* note 30, at 15.



implementation, very difficult. These practical, devil-in-the-details problems show the difficulty of crafting a coherent structure for immigration adjudication, especially in an era of polarized politics.

Professor Legomsky's CAI presents several advantages. It would likely shorten appellate review of removal orders by eliminating one of the two steps currently available. It would also import needed values into removal adjudication appellate review (keeping in mind Professor Baum's caution that other specialized courts have not always lived up to their creators' expectations<sup>33</sup>). It would provide more independent decisionmakers. It would provide both a generalist and specialized perspective, given the Article III experience requirements and the relatively short CAI term of service.<sup>34</sup> Interest groups could shape the CAI's decisions by influencing the selection of its judges only if they made views on immigration law and policy part of the nomination and confirmation process for all district and circuit judge vacancies.<sup>35</sup> Baum also notes, though, that concentrating appeals in a specialized court can affect the perspectives of its judges,<sup>36</sup> which is perhaps a special consideration for the CAI, given that almost all of its members would be district judges with no experience with removal adjudication. The CAI's jurisdiction would embrace that currently exercised by the BIA, allowing the CAI to hear appeals now walled off from regional appellate court review.<sup>37</sup>

1. *Estimating the Number of CAI Judgeships Needed.* The first problem facing the creators of the CAI would be figuring out how many judges it would need to function. Estimating the number of appeals that would reach it—and how many of those appeals could be terminated procedurally—would be hard. Moreover, the Judicial Conference's method for estimating the number of circuit judges necessary for a given caseload is rudimentary at best.

Professor Legomsky's draft bill would direct the Judicial Conference to recommend to Congress the number of judges for the

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33. See Baum, *supra* note 3, at 1542 & n.197 (offering the example that executive branch officials often staff specialized courts based on patronage considerations, rather than policy interests).

34. Legomsky, *supra* note 2, at 1692–93.

35. See Baum, *supra* note 3, at 1529 (noting that judicial decisionmaking is more effectively influenced through ex ante selection than through ex post mechanisms).

36. See *id.* at 1535 (explaining that concentration of a type of case is likely to produce increased uniformity in legal interpretation and greater susceptibility to external influence).

37. Legomsky, *supra* note 2, at 1663.

CAI and would require each circuit council to select life-tenured judges within the circuit to serve on it for a two-year period. The judges would be drawn from each circuit in proportion to the percentage that each circuit's judges comprise all district and circuit judges nationally.<sup>38</sup> The Conference would also recommend how many additional district and circuit judgeships Congress should create to compensate the courts for the judges serving temporarily on the CAI, factoring into its calculation the reduced court of appeals caseload due to the elimination of BIA appeals.<sup>39</sup>

Predicting with much precision the number of judges needed to staff the CAI would be no easy task. For the rough calculations that follow, I draw data from 2008, 2009, and 2010 sources, as available. I also use, when possible, data that give the benefit of the doubt to Professor Legomsky's proposal.

Estimating the likely caseload of the CAI starts with the 30,435 appeals of IJ decisions and 1,997 appeals of DHS decisions that the BIA received in 2008.<sup>40</sup> Professor Legomsky notes various factors that could affect whether the CAI could expect similar filing levels, such as national economic upturns or downturns.<sup>41</sup> Decisions of a national corps of properly resourced ALJIs might command more respect than do current IJ decisions and thus might decrease appeals.<sup>42</sup> Conversely, though, a CAI perceived as more competent than the BIA might cause an alien to rethink the cost-benefit calculus for taking an appeal. An alien unwilling to bear the costs of a stopover at the BIA and a further appeal to a regional appellate court might be willing to spend the money for a one-shot appeal to the CAI. And incipient efforts to promote more and better representation—pro bono and otherwise<sup>43</sup>—could increase the appeal rate.

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38. *Id.* at 1715.

39. *Id.* at 1714–15.

40. EOIR, *supra* note 5, at S2.

41. Legomsky, *supra* note 2, at 1698–99.

42. *Id.* at 1700.

43. See, e.g., Robert A. Katzmann, *Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor*, 78 FORDHAM L. REV. 453, 453–59 (2009) (discussing efforts to increase and improve representation of immigrants in New York City). For the reports of three task forces that Judge Katzmann has assembled to enhance pro bono and paid representation of aliens in immigration adjudication in New York City, see Jennifer L. Colyer et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461 (2009); Claudia Slovinsky, *Introduction*, 78 FORDHAM L. REV. 515 (2009); Jojo Annobil, *The Immigration Representation Project: Meeting the Critical Needs of Low-Wage and Indigent New Yorkers Facing Removal*, 78 FORDHAM L. REV. 517 (2009); Peter L. Markowitz, *Barriers to*

Thus, without more definitive information, the BIA's 32,432 cases in 2008 can serve as a tenuous predictor of the CAI's caseload. The CAI would probably terminate more than half of those cases procedurally. In 2008, 48 percent of the courts of appeals' terminations were procedural.<sup>44</sup> Appellate staff disposed of over 15,000 of the 27,161 procedural terminations with no judicial involvement. Judge time spent on the roughly 12,000 other procedural terminations was considerably less than that devoted to the 29,608 merits terminations.<sup>45</sup> The rate of procedural terminations for administrative appeals, almost all of which are BIA appeals,<sup>46</sup> was about the same for all types of cases. Available data do not indicate whether, within the category of administrative appeals, BIA appeals had higher rates of procedural terminations than did appeals from other agencies.

The proportion of staff-dominated procedural terminations would probably go up in a CAI that received the total BIA caseload, because it is quite likely that many cases that would have been terminated procedurally never made it from the BIA to the courts of appeals. Also, the CAI caseload would not include as many time-consuming cases as are on the dockets of the regional courts of appeals. On the other hand, those dockets have substantial numbers of what are, to use Professor Baum's term, "easy cases."<sup>47</sup> Of the 29,608 court of appeals merits terminations in 2008, almost a quarter were either prisoner cases or mostly undemanding original

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*Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541 (2009); Careen Shannon, *Regulating Immigrant Legal Service Providers: Inadequate Representation and Notario Fraud*, 78 FORDHAM L. REV. 577 (2009). Other pro bono representation projects are active around the country. For example, there are projects in Houston, see ABA, South Texas Pro Bono Asylum Representation Project (ProBAR), <http://www.abanet.org/publicserv/immigration/probar.shtml> (last visited Mar. 20, 2010); San Diego, see ABA, Immigration Justice Project of San Diego, <http://new.abanet.org/Immigration/Pages/ImmigrationJusticeProject.aspx> (last visited Mar. 20, 2010); and Florida, see Fla. Immigrant Advocacy Ctr., Mission Statement, <http://www.fiacfla.org/mission.php> (last visited Mar. 20, 2010).

44. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 84 tbl.B-1 (2008), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf> (showing that 2,327 cases were disposed of by consolidation and that a handful of procedural terminations involved cross appeals).

45. See *id.* at 115 tbl.B-5A.

46. See *id.* at 84 tbl.B-1, 96 tbl.B-3.

47. See Baum, *supra* note 3, at 1508 (characterizing easy cases as those with "one obvious outcome under the law").

proceedings.<sup>48</sup> And not all immigration cases are easy cases; this is especially true of asylum cases, which require appellate judges to determine whether substantial evidence supports IJ decisions about witness credibility.

With all of these imponderables, a CAI in 2010 would—based on conservative estimates—terminate about ten thousand cases on the merits and twenty thousand procedurally, with most of these procedural terminations requiring little, if any, judge time. For the analysis that follows, I consider only the roughly estimated ten thousand merits terminations per year. How many judges would the CAI need to handle those cases, and thus how many new judgeships should Congress create to compensate the district and appellate courts for loaning their judges to the new court? Were Congress serious about creating a one-step immigration appellate process and assigning it to a single Article III court, Congress would probably expect that court to handle its cases in pretty much the same fashion that the regional appellate courts handle their cases—through three-judge panels. (I recognize, though, Professor Baum’s point that Congress might prescribe rules and procedures to favor the government.<sup>49</sup>) The BIA in 2009 disposed of 94 percent of its cases through one-member, usually very short, decisions,<sup>50</sup> and Professor Legomsky documents the problems this arrangement creates.<sup>51</sup> Appellate review in an Article III court is a different animal than in the BIA—the courts of appeals in 2008 averaged 340 terminations per judgeship nationwide<sup>52</sup> versus a BIA member’s 2,500 per year.<sup>53</sup> And, although the BIA heard oral argument in only one case in 2009,<sup>54</sup> the courts of appeals, based on admittedly limited data, probably give

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48. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 44, at 84 tbl.B-1. Original proceedings are principally petitions for various writs that originate in the courts of appeals and petitions to file second or successive habeas corpus petitions under 28 U.S.C. § 2244(b)(3)(A).

49. See Baum, *supra* note 3, at 1560 (describing specialized courts’ substantive and procedural rules as a mechanism of ex ante congressional control).

50. Legomsky, *supra* note 2, at 1657.

51. See *id.* at 1664–65 (explaining that single-member decisions increase the probability of errors, subjective biases, and inconsistency).

52. This figure is calculated based on data in ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 44, at 84 tbl.B-1.

53. Legomsky, *supra* note 2, at 1654.

54. *Id.* at 1707.

oral argument to somewhere between 10 and 20 percent of BIA appeals,<sup>55</sup> versus 30 percent across the entire caseload.<sup>56</sup>

How many judges would the CAI need to give adequate attention to ten thousand merits panel cases from the immigration courts? The starting point is to determine the number of regional appellate court judges who terminated 29,608 merits panel cases in 2008.<sup>57</sup> It is difficult, though, to pin down that number. There are always vacancies in the regional appellate courts' 167 statutorily authorized judgeships (an unusually high eighteen in mid-March 2010<sup>58</sup>). And although senior judges in 2009 participated in 17.8 percent of all oral arguments and submissions of briefs,<sup>59</sup> and seventeen active circuit and 186 active district judges sat temporarily in the courts of appeals in 2008,<sup>60</sup> there is no published figure as to the number of "full-time-equivalent" judges these judges represent.

Furthermore, although the Judicial Conference has a fairly sophisticated system in place to weigh the judicial demands presented by different types of district cases, it does not have a reliable method of weighting appellate cases according to the judge time they demand.<sup>61</sup> If it had such a system for appellate cases, the Conference

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55. A Second Circuit judge estimated that between 15 and 20 percent of BIA appeals receive oral argument. Robert A. Katzmann, J., U.S. Court of Appeals for the Second Circuit, Remarks at the Brookings Institution's Judicial Issues Forum: Immigration and the Courts 56 (Feb. 20, 2009), 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). One Ninth Circuit judge said there is oral argument in "less than 20%" of BIA appeals, *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 182 (2006) (letter of Sidney R. Thomas, J., U.S. Court of Appeals for the Ninth Circuit), available at <http://www.access.gpo.gov/congress/senate/pdf/109hr/28339.pdf>, and another said approximately 10 percent "proceeded to merits panels of three judges" in 2005, *id.* at 51 (statement of Carlos T. Bea, J., U.S. Court of Appeals for the Ninth Circuit).

56. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 44, at 84 tbl.B-1 (citing 8,983 cases terminated after oral hearing, out of 29,608 total cases terminated on the merits).

57. *Id.*

58. U.S. Courts, Judicial Vacancies, <http://www.uscourts.gov/judicialvac.cfm> (last visited Mar. 20, 2010).

59. U.S. Courts, Work of Senior Judges Provides Much Help, <http://www.uscourts.gov/newsroom/2010/SeniorJudges.cfm> (last visited Mar. 20, 2010).

60. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 44, at 404 tbl.V-2.

61. See PATRICIA LOMBARD & CAROL KRAFKA, FED. JUDICIAL CTR., 2003-2004 DISTRICT COURT CASE-WEIGHTING STUDY: FINAL REPORT TO THE SUBCOMMITTEE ON JUDICIAL STATISTICS OF THE COMMITTEE ON JUDICIAL RESOURCES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9-21 (2005) (discussing the goals and limitations of a method for calculating district case weights to replace the outdated set then in use). *But see* WILLIAM O. JENKINS, U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-09-1050T, FEDERAL JUDGESHIP: THE GENERAL ACCURACY OF DISTRICT AND APPELLATE JUDGESHIP CASE-

could apply the weights assigned to BIA appeals to the BIA's roughly thirty thousand IJ appeals to obtain at least a rough estimate of the number of judges needed for the CAI. The current 167 court of appeals judgeships are a product of rough statistical estimates ("a standard of 500 filings . . . per panel and with pro se appeals weighted as one third of a case"<sup>62</sup>) as applied in 1990 (the most recent year Congress created new appellate judgeships) along with a variety of other factors, including the refusal of some appellate courts to request additional judgeships that their increased caseloads would justify.

Given the lack of empirical guidance, a tenuous assumption is that forty judges would be needed to handle the ten thousand or so merits panel cases that would come to the CAI from the immigration courts. This is a conservative estimate, which allows 250 merits terminations per CAI judgeship, compared to 172 per judgeship in the regional courts of appeals in 2008, and does not include any judge time for procedural terminations. Assume as well that the Conference would ask Congress to create forty additional judgeships to replace the judges assigned to the CAI. (Professor Legomsky would tell the Conference to factor in the appellate work reduction from the absence of BIA appeals; however, for reasons explained below, that would be difficult to do from a practical standpoint.)

2. *Enacting the Judgeship Legislation.* Congress has not enacted an omnibus (that is, judiciary-wide) judgeship bill since 1990,<sup>63</sup> although it has created a handful of district judgeships, principally in the districts along the border with Mexico.<sup>64</sup> Repeated attempts to enact an omnibus bill have failed, and prospects are not great for the

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RELATED WORKLOAD MEASURES 3-4 (2009) (arguing that the methodology used to estimate judicial case weights was inadequate).

62. *Federal Judgeship Act of 2008: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 427 (2008) (statement of George Z. Singal, C.J., U.S. District Court for the District of Maine).

63. *See* Civil Justice Expense and Delay Reduction Plans, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified in scattered sections of the U.S.C.).

64. *E.g.*, 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 312, 116 Stat. 1758, 1786-88 (2002) (codified as amended at 28 U.S.C. § 133 (2006)) (adding additional permanent district judgeships for, among other districts, the Western District of Texas, as well as additional temporary district judgeships for, among other districts, the District of Arizona, the District of New Mexico, and the Eastern District of Texas); Federal Funding, Fiscal Year 2001, Pub. L. No. 106-553, § 305, 114 Stat. 2762, 2762A-84 to -85 (2000) (codified as amended at 28 U.S.C. § 133 (2006)) (adding additional district judgeships for, among other districts, the District of Arizona, the District of New Mexico, and the Western District of Texas).

omnibus judgeship bill introduced in the 111th Congress, which embodies the Judicial Conference's request for sixty-nine new judgeships—twelve circuit and fifty-seven district judgeships.<sup>65</sup> Prospects for enactment of the CAI would be hindered by three factors: costs, the polarized politics of judicial selection, and resistance from federal judges.

*a. Costs of the Judgeships.* Congress generally requires that most direct spending increases be offset by revenue increases or reductions in other spending—"PAYGO" in shorthand.<sup>66</sup> Professor Legomsky asserts that his proposal would generate savings from four sources: (1) the economy that would result, on a case-by-case basis, from review in the CAI as opposed to the BIA, based on lower salaries of federal court clerks and staff attorneys compared to BIA staff attorneys; (2) savings to the judicial branch from the elimination of BIA appeals in the regional courts of appeals; (3) savings to the DOJ for the same reason; and (4) reduced DHS costs of detaining aliens due to a reduction in elapsed time from removal order to appellate determination.<sup>67</sup> He argues that although his cost analysis is crude, "the proposal would substantially reduce the total fiscal cost of appellate review of removal orders."<sup>68</sup> With deference, most of these cost savings are illusory, because the question is not whether the proposal would reduce the cost of appellate review of removal orders but rather whether the proposal would reduce overall spending by the agencies currently involved in BIA and regional appellate review of removal orders. Except for reduced detention costs, I see no appreciable savings.

First, the costs of operating a forty-judge CAI would, based on my estimates, be about the same as operating the BIA. As Professor Legomsky notes, the EOIR cannot specify how much of its roughly three-hundred-million-dollar budget goes to the BIA. Given this somewhat surprising fact, the next-best option is an estimate based on information that the DOJ has published and information that the EOIR has released. Legomsky makes a convincing case that the costs to maintain a BIA member are higher than those to maintain a

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65. See Federal Judgeship Act of 2009, S. 1653, 111th Cong. (2009); Federal Judgeship Act of 2009, H.R. 3662, 111th Cong. (2009).

66. For the most recent enactment, see Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, tit. I, 124 Stat. 8 (codified in scattered sections of 2 U.S.C.).

67. Legomsky, *supra* note 2, at 1696–1703.

68. *Id.* at 1702.

district or circuit judge, because the principal-to-staff ratio is much greater for the BIA than for circuit or district judges, and BIA staff attorneys earn considerably more than Article III judges' chambers clerks and the courts' staff attorneys.<sup>69</sup> But that fact appears to lose relevance given even my conservative estimate of a forty-judge CAI.

I developed cost estimates using the salary and personnel data that the EOIR provided to Professor Legomsky,<sup>70</sup> fiscal and personnel data posted on the DOJ website, and assumptions about staffing levels within the components of the EOIR and those units' comparative expenditures on travel and contractors.<sup>71</sup> My estimates of the costs are: the BIA, about \$96 million; the immigration courts, about \$119 million; the chief administrative hearing officer (a small cadre of APA ALJs within the EOIR), about \$8 million; and the director and other management units within the EOIR, about \$78 million.<sup>72</sup>

Then, using data provided by the Administrative Office of the U.S. Courts on the estimated annual recurring cost of maintaining a district or circuit judge, including salaries and benefits of judges and their chambers staff, and the operating costs for the chambers,<sup>73</sup> along with additional personnel and cost data in the Administrative Office's "Fiscal Year 2011 Congressional Budget Justification,"<sup>74</sup> I estimated

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69. *Id.* at 1696–98.

70. *Id.* at 1652 n.73.

71. The Justice Department data I used are available at <http://www.justice.gov/jmd/2011justification/>, under the heading Administrative Review and Appeals, which embraces EOIR and the Office of the Pardon Attorney. The pardon attorney budget, however, is so small—around two million dollars of a roughly three-hundred-million-dollar budget—as to have no discernable impact on my estimates, and I eliminated pardon attorney costs whenever they were specified. The Word document (“fy11-ara justification.doc”) provides some structural information. The Excel spreadsheet (“fy11-ara justification-exhibits.xls”) provides, at Exhibit I, “Detail of Permanent Positions by Category,” information on the number of attorneys, paralegals, and other employees within the EOIR. Exhibit L, “Summary of Requirements by Object Class,” identifies how much the EOIR planned to spend in 2010 in various expense categories, such as rent payments to the General Services Administration, “[o]ther services” (that is, contractors, such as, I assume, translators), and equipment maintenance.

72. My Excel spreadsheets with these cost estimates are on file with the *Duke Law Journal*. Russell R. Wheeler, EOIR CAI Budget Estimate (Jan. 13, 2010) (unpublished spreadsheet, on file with the *Duke Law Journal*). Thanks to Norman Baker of the Federal Judicial Center for calling my attention to sources used in these cost estimates.

73. Telephone Interview with Penny Fleming, Chief, Financial Liaison & Analysis Office, Admin. Office of the U.S. Courts (Jan. 14, 2010). To be precise, the estimates are \$980,000 for a circuit judgeship and \$981,000 for a district judgeship.

74. This document, on file with the *Duke Law Journal*, presents backup information to support the judicial branch's annual appropriations request. I used information at page 10 of the



the cost of a forty-judge U.S. appellate court, with a full complement of chambers law clerks and staff attorneys, to be about \$105 million. Because judges on a court doing only immigration appeals might not need a full complement of law clerks and staff attorneys, I reduced the number of these staff members, for a revised estimate of about \$92 million.

Professor Legomsky's second and third sources of asserted cost savings come from eliminating the current round of BIA appeals in the regional appellate courts. It is true that under his proposal the judicial branch would no longer dispose of ten thousand or so annual BIA appeals, and the DOJ would no longer litigate them, but it hardly follows that spending by the judicial branch or the DOJ would decrease proportionately. Just as the courts of appeals have adjusted their procedures to handle the increase in BIA and other appeals with no corresponding increase in judgeships, they would use the judge and staff time previously devoted to BIA appeals to handle increased filings in other areas, and, perhaps, to ratchet back somewhat the use of truncated procedures—perhaps by granting oral argument or writing published opinions in a few more cases than they otherwise could. Likewise, were BIA appeals to go away, the DOJ would not fire the attorneys who litigated those appeals but rather would deploy them to other litigation, including perhaps an appellate process in the CAI that might be more demanding of lawyers than that of the BIA.

The only tangible savings from adoption of Professor Legomsky's proposal arise from the reduction in the amount of time aliens in removal proceedings would spend in detention due to the likely decrease in elapsed time from IJ order to appellate disposition. I cannot say, though, as Legomsky does, that those savings would be "significant," however that is defined.

*b. Polarized Judicial Appointment Politics.* The politics of judicial appointments creates another impediment to the creation of the CAI. The judgeship bills now before Congress have no Republican cosponsors because the judgeships would be in place upon enactment for President Obama to try to fill. In 2007, a similar bill had bipartisan support, in part because it provided that the judgeships would not be effective until January 20, 2009. Bipartisan

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"Summary" ("Comparative Summary of Obligations by Object Classification"), and at page 5.9 ("Summary of Personal Compensation and Benefits by Activity").

support, though, did not produce a judgeship bill for President Bush to sign.

Creating forty judgeships—even if only to provide the district and appellate courts with sufficient numbers to stock the CAI—would nevertheless allow the current president to change the overall makeup of the judiciary as represented by the party of the appointing president. And, if the immigration court caseload were to decline, the size of the CAI could be reduced, moving more of these appointees back to the circuit and district courts. Moreover, although Professor Legomsky assumes that “each circuit would contribute district and circuit judges proportionately to the total number of district and circuit judges in that circuit,”<sup>75</sup> his draft bill does not require the appointment of circuit judges to the new court. It simply requires the assignment of “the number of judges that is proportional to the total number of authorized article III circuit and district judgeships in such circuit.”<sup>76</sup> Quite likely there would be pressure in the judicial councils (all of which have a one-circuit-judge majority)<sup>77</sup> to draw judges exclusively from the district courts, on the view that the court of appeals needs additional judgeships more than some of the circuit’s less-busy district courts. And, given that the additional circuit judges might not be assigned to the new court, the party out of power will resist the bill because it would change the party-of-appointing-president composition of the courts of appeals.

*c. Resistance from Federal Judges.* Professor Legomsky’s proposal would have to overcome stiff resistance from the judicial branch itself. First, its passage would likely doom any chance that Congress would also enact the long-overdue omnibus judgeship bill, which already faces stiff headwinds. If the president and his supporters could persuade Congress to give the president or his successor forty more judgeships to fill, it is highly unlikely that they could persuade Congress to create still another large group of judgeships. Congress, remember, has refused to enact an omnibus judgeship bill since 1990. Judges might also resist creation of

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75. Legomsky, *supra* note 2, at 1686–87.

76. Stephen H. Legomsky, Second Draft of Proposed Bill for Restructuring Immigration Adjudication § 3(a) (Jan. 14, 2010) (unpublished manuscript, on file with the *Duke Law Journal*) (proposing amendments to section 242 of the INA).

77. See 28 U.S.C. § 332(a)(1) (2006) (creating judicial councils “consisting of the chief judge of the circuit, who shall preside, and an equal number of circuit judges and district judges”).

additional judgeships to stock the CAI—as opposed to providing omnibus judgeship relief that the judges themselves have requested—because at least some judges believe that doing so would, in Justice Frankfurter’s words, “result, by its own Gresham’s law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts.”<sup>78</sup>

Second, federal judges would object to the prospect of an assignment they did not anticipate when they accepted their judicial appointment—a steady diet of immigration cases, the possibility of temporary relocation to another city (or travel to the court site mainly for relatively rare hearings), lost personal interaction with colleagues, and a concern that their generalist judicial skills would atrophy during their two-year exile. Professor Legomsky says that “some of these disadvantages are minor and . . . others are easily remedied.”<sup>79</sup> I am not so sure. It is true that few circuit judges reside near their court’s headquarters. But, unlike established regional appellate court judges, the members of the CAI would probably want a lot of personal interaction, especially because they would be almost all trial judges in a new role (deciding appeals) in an area of the law that would be new and arcane to them.

Finally, there is no guarantee that Congress, if it created the CAI, would indeed provide the circuit and district judgeships necessary to compensate for judges assigned to the new court (in part because the Judicial Conference lacks the tools to make a solid empirical case for its recommendation<sup>80</sup>). As Professor Baum explains,<sup>81</sup> Senator Specter’s short-lived 2006 bill to transfer all BIA appeals to the Federal Circuit would have provided only three more judges for that court, which would have been overwhelmed by the caseload. The overall court of appeals caseload would no longer include BIA appeals (10,280 in 2008), but that benefit would not be felt evenly in all courts—or at all in the district courts.

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78. *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 59 (1955) (Frankfurter, J., concurring).

79. Legomsky, *supra* note 2, at 1706.

80. *See Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 90, 92 (2008) (statement of William O. Jenkins, Director, Homeland Security and Justice, U.S. Government Accountability Office) (stating that “there is no empirical bases or [sic] assessing the potential accuracy of adjusted case filings as a measure of case-related judge workload”—the measure upon which the Judicial Conference based its recommendation).

81. *See* Baum, *supra* note 3, at 1557 (discussing Senator Specter’s proposal).

3. *Implementing the New Court.* Table 1 shows the contribution, according to Professor Legomsky's formula,<sup>82</sup> expected from each circuit to a forty-judge CAI, in descending order of contribution. For example, the Ninth Circuit has 16.39 percent of all circuit and district judgeships. Applying this percentage to a forty-judge CAI, the Ninth Circuit would have to contribute 6.55 judges. The circuit's 107 district judgeships and twenty-nine circuit judgeships constitute 78.68 and 21.32 percent, respectively, of the circuit's 136 total judgeships. So, with rounding, the Ninth Circuit would get five new district judgeships and one new circuit judgeship.

The numbers suggest some logistical difficulties facing the Judicial Conference and Congress in creating additional judgeships and the circuit councils in making assignments to the CAI.

*Table 1. Judgeship Allocations to the Circuits to Support a Forty-Judge CAI*

<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	<b>G</b>	<b>H</b>	<b>I</b>	<b>J</b>
<b>Circuit</b>	<b>DJs</b>	<b>CJs</b>	<b>Total</b>	<b>% DJs</b>	<b>% CJs</b>	<b>% all Js</b>	<b>All Js</b>	<b>DJs</b>	<b>CJs</b>
<b>9</b>	107	29	136	78.68%	21.32%	16.39%	6.55	5.16	1.40
<b>5</b>	82	17	99	82.83%	17.17%	11.93%	4.77	3.95	0.82
<b>11</b>	67	12	79	84.81%	15.19%	9.52%	3.81	3.23	0.58
<b>6</b>	62	16	78	79.49%	20.51%	9.40%	3.76	2.99	0.77
<b>2</b>	62	13	75	82.67%	17.33%	9.04%	3.61	2.99	0.63
<b>3</b>	59	14	73	80.82%	19.18%	8.80%	3.52	2.84	0.67
<b>4</b>	55	15	70	78.57%	21.43%	8.43%	3.37	2.65	0.72
<b>7</b>	47	11	58	81.03%	18.97%	6.99%	2.80	2.27	0.53
<b>8</b>	41	11	52	78.85%	21.15%	6.27%	2.51	1.98	0.53
<b>10</b>	37	12	49	75.51%	24.49%	5.90%	2.36	1.78	0.58
<b>1</b>	29	6	35	82.86%	17.14%	4.22%	1.69	1.40	0.29
<b>DC</b>	15	11	26	57.69%	42.31%	3.13%	1.25	0.72	0.53
	663	167	830	79.88%	20.12%	100.00%	40.00	31.95	8.05

Professor Legomsky proposes that the Conference, in recommending the number of judgeships necessary to compensate for those assigned to the CAI, reduce that number to reflect the elimination of BIA appeals in the regional courts of appeals.<sup>83</sup> Column J shows that the Ninth Circuit would get one additional circuit judge (rounding down from 1.4). But how might the

82. See *supra* note 76 and accompanying text.

83. Legomsky, *supra* note 2, at 1714–15.

Conference adjust the smaller fractions produced by the application of the formula?

Second, the bill directs assignments to the new court “in accordance with the formula . . . with reasonable adjustments for rounding.”<sup>84</sup> It would be easy enough to round the number of judges that each circuit would contribute to the new court (column H)—seven from the Ninth Circuit, five from the Fifth, and so on. But where would Congress place the compensating judgeships without knowing whether the judicial councils would assign any circuit judges to the new court or from which districts the councils would select judges for CAI assignment? (Every circuit but the District of Columbia has more districts than the number of judges it would receive, as column H of Table 1 shows.) It is unlikely, given senators’ desire to control patronage, that Congress would authorize district judgeships for a circuit but let the circuit council determine where to assign them.

For illustration, assume that, as of early 2010, Congress had created the CAI along with eight additional circuit judgeships and thirty-two additional district judgeships. Assume as well that one of the eight circuit judgeships was for the Fourth Circuit. Because the Fourth Circuit’s court of appeals has three vacancies (as of mid-March 2010),<sup>85</sup> the circuit council would be unlikely to loan an appellate judge to the CAI unless statutorily mandated to do so. Thus, the council would have to turn to the district courts to find the three judges that the formula demands it contribute to the CAI. But if the Fourth Circuit received one circuit judgeship, it could not receive all three district judgeships to which its formula-based 2.65 district judgeships, when rounded, would entitle it because it is entitled to only three additional judgeships overall.

In a rational world, Congress would assign the Fourth Circuit’s two additional district judges to its largest districts—Eastern Virginia (currently eleven judgeships) and either Maryland or South Carolina (currently ten judgeships each)—on the view that the larger the court, the easier it is to part with a judgeship for two years because there are more judges to fill in to handle the docket. It is true that, under Professor Legomsky’s proposal, the district loaning a judgeship to the CAI may have received an additional judgeship to compensate it for the loan. But the districts may have other vacancies: Eastern Virginia,

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84. Legomsky, *supra* note 76, § 3(a).

85. U.S. Courts, *supra* note 58.

with twelve judgeships under the hypothetical CAI statute, would have an easier time covering its docket, even with one judgeship temporarily assigned to the CAI and another vacant (as it has been since May 2007), than would a six-judgeship Eastern North Carolina, with one of the six loaned to the CAI and another vacant (as it has been since December 2005).

Which districts would actually get the judgeships, however, might well turn on which legislators from the Fourth Circuit's five states are best positioned to influence the legislation. Regardless, the circuit council would need to find one judge for the CAI from a district that did not receive an additional judgeship.

Moreover, what happens once the judges first assigned to the CAI complete their two-year term? Would their districts, or at least the two that received the additional judgeships, be obliged to send two other judges to the CAI, rather than have the council turn to districts that did not receive additional judgeships? If so, would the courts that received the additional judgeships become the permanent loaner courts for the CAI? What effect would that have on whether would-be judges in those districts would seek or accept nominations as district judges, knowing that they would likely be tapped for a stint on the CAI sometime after three years of service? Furthermore, these hypotheticals assume that the president has nominated and the Senate has confirmed the additional judges for the new seats created to stock the CAI. In today's climate of polarized judicial appointments politics, that assumption is highly risky.

### *C. Final Observation*

Professor Legomsky's proposal brings some much-needed fresh thinking to the debate over immigration adjudication reform. He has tried to fashion a compromise that would satisfy all—or at least most—stakeholders in this debate. But, especially in today's dysfunctional political environment, the whole concept of a CAI presents too many cost and logistical obstacles. Converting IJs to ALJs in an independent agency might be more likely to be enacted than creating the CAI, but doing so might make it harder to obtain resources for the ALJIs, and resources, rather than organizational placement, are the main barrier to consistently effective IJ performance.

## II. A DIFFERENT APPROACH TO IMPROVING THE IMMIGRATION COURTS

Immigration courts—for all the ink devoted to them in recent years—have been subjected to rather narrow analyses of how they function as courts, and there has been little effort to learn how lessons gleaned about the ingredients for effective courts might be applied to immigration courts. I focus on immigration courts because they are where the litigation journey ends for the great majority of individuals in removal proceedings.<sup>86</sup>

Given barriers to major structural change, perhaps the best hope for improvement in immigration adjudication at the first-instance level is for a new DOJ approach to immigration court management. Expecting this may be as implausible as expecting major structural changes—and, as Professor Legomsky explains, a new executive branch policy could be ephemeral, good only until the next attorney general takes over<sup>87</sup>—but it is better than not trying anything. And this new approach to the immigration courts would also benefit a new independent adjudicative agency, in the unlikely event that Congress were to establish it.

In this Part, I suggest that the DOJ and the immigration courts look to successful efforts to improve the performance of third branch courts—defining performance broadly to include not only expeditious case disposition, but also judges’ accountability, transparency, and attentiveness to the needs of court users. Performance-enhancing efforts include the identification of minimum standards of court organization and management, the identification of minimum standards of court performance, and efforts to change courts’ organizational culture.

### A. *Using Third Branch Analytic Methods and Findings to Assess and Improve First Branch Courts*

“Immigration Court basically looks, feels, and operates like most other courts [even though] some of its characteristics strike even

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86. See EOIR, *supra* note 5, at Y1 (“Only a relatively small percentage of immigration judge decisions are appealed to the BIA.”).

87. See Legomsky, *supra* note 2, at 1677 (“No matter how much trust a given attorney general might inspire among subordinates, the genie is now out of the bottle. . . . [A]ny action the DOJ takes to restore the adjudicators’ job security can be undone at any time by a successor administration or a successor attorney general.”).

experienced litigators as foreign.”<sup>88</sup> Beyond their look and feel, though, are other factors that make immigration courts less like many first branch courts and more like third branch courts. The Federal Administrative Law Judges Conference Website in January 2010 reported that there are “over 1,300 Administrative Law Judges assigned to 31 Federal agencies.”<sup>89</sup> Excluding the Social Security Administration’s 1,184 judges, the Labor Department’s fifty judges, and the National Labor Relations Board’s sixty judges, agencies employ between one and nineteen ALJs.<sup>90</sup> A 2002 canvass identified 3,370 non-APA judges.<sup>91</sup> In many, though certainly not all,<sup>92</sup> of these agencies caseloads tend to be small, although the cases are often complex and serious, sometimes lasting for several years. Many of these courts are based exclusively in Washington, D.C., or its suburbs.

In short, unlike most executive branch courts, the immigration courts resemble a state trial court system or the U.S. bankruptcy courts. Immigration courts are scattered over a large geographic jurisdiction and have larger caseloads than most executive branch judiciaries. IJs are specialists, as are U.S. bankruptcy judges and, Professor Baum notes, many state trial judges.<sup>93</sup> Furthermore, like third branch adjudication, immigration adjudication concerns not simply public welfare benefits, but the fundamental rights of the litigants—especially if losing means returning to an authoritarian regime to face persecution.

### B. *Standards for Assessing Courts*

Efforts to change the structure and operation of third branch courts have taken many forms, but the creation and use of minimum standards to assess courts has been one of the most pervasive.

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88. Stacy Caplow, *ReNorming Immigration Court*, 13 NEXUS 85, 87 (2008).

89. Fed. Admin. Law Judges Conference, What Is FALJC?, <http://005754d.netsolhost.com/faljc1.html> (last visited Mar. 20, 2010). Thanks to Governance Institute research fellows Jerry Richman and Dominic Nardi for information on administrative judges.

90. *Id.*

91. Michael Asimow, *The Spreading Umbrella: Extending the APA’s Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1008 (2004).

92. Veterans Law judges averaged 729 cases per judge; Social Security Administration ALJs averaged 544 cases per judge. COMM’N ON IMMIGRATION, ABA, REFORMING THE IMMIGRATION SYSTEM: EXECUTIVE SUMMARY, at ES-28 (2010), available at <http://new.abanet.org/Immigration/Documents/ReformingtheImmigrationSystemExecutiveSummary.pdf>.

93. See Baum, *supra* note 3, at 1532–36 (examining forms of specialization within the judicial branch).



Importing into immigration courts standards born outside the administrative law context is not necessarily novel. As Professor Legomsky has explained elsewhere,<sup>94</sup> and Professor Jennifer Chacón explains in this Symposium,<sup>95</sup> Congress has been reshaping immigration adjudication, which is technically civil and administrative, using criminal prosecution norms such as an emphasis on detention, albeit without adopting parallel procedural norms to protect individual rights, such as government-provided counsel for indigent aliens.

The challenge is to identify and apply to immigration courts standards and analytical approaches that are more appropriate than one-sided criminal enforcement standards. The analysis that follows is tentative, limited, and exploratory, and I welcome comments and challenges to it. I realize, too, that the current caseload per IJ may make a pipe dream of this approach, including application of the diagnostics necessary to implement it.

There are three types of third branch standards: judicial administration standards, performance standards, and cultural standards.

1. *Judicial Administration Standards.* It seems likely that how courts are organized—for example, whether trial courts are consolidated or dispersed and where supervisory authority is lodged—may have some influence on courts’ ability to deliver justice effectively, expeditiously, and economically. “Have some influence,” however, does not mean “control entirely.”

Starting in the 1930s, the American Bar Association (ABA) developed “Minimum Standards of Judicial Administration.”<sup>96</sup> The ABA approved revisions of these standards in 1974<sup>97</sup> and 1990,<sup>98</sup> and

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94. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).

95. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010).

96. NAT’L CONFERENCE OF JUDICIAL COUNCILS, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION: A SURVEY OF THE EXTENT TO WHICH THE STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR IMPROVING THE ADMINISTRATION OF JUSTICE HAVE BEEN ACCEPTED THROUGHOUT THE COUNTRY, at xxi (Arthur T. Vanderbilt ed., 1949).

97. See COMM’N ON STANDARDS OF JUDICIAL ADMIN., ABA, STANDARDS RELATING TO COURT ORGANIZATION (1974).

98. See 1 JUDICIAL ADMIN. DIV., ABA, STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO COURT ORGANIZATION (1990).

added standards for trial courts in 1992.<sup>99</sup> The standards, developed by committees of state judges and court administrators, embrace the so-called unified court approach, in which all courts in a state are under the administrative and rulemaking authority of the chief justice of the highest state court.<sup>100</sup> The highest court of the state may be roughly analogous to the chief IJs within the EOIR. The revised standards recognize as well the need for strong and collegial local leadership.<sup>101</sup> The ABA has promulgated additional standards in various relevant areas, as have other groups. Professor Stacy Caplow referenced some of these standards—for example, the ABA Standards for State Judicial Selection—in her analysis of immigration courts.<sup>102</sup> The Arnold & Porter February 2010 report on immigration courts for the ABA Commission on Immigration proposes performance reviews for IJs based on ABA and Institute for the Advancement of the American Legal System guidelines, along with a consolidated code of conduct adapted from the ABA Model Code of Judicial Conduct.<sup>103</sup>

2. *Court Performance Standards.* In 1990, partly in reaction to the ABA judicial administration standards, the National Center for State Courts published its Trial Court Performance Standards.<sup>104</sup> These performance standards, part of a national emphasis on organizational performance measures,<sup>105</sup> reflect the view that even though the judicial administration standards state a well-informed conventional wisdom about how to organize and manage courts, what is ultimately important is how courts perform—whether they deliver justice fairly and expeditiously, for example, and use taxpayer funds responsibly.

The National Center's standards in five performance areas are aspirational statements of how litigants, other court users, and

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99. See 2 JUDICIAL ADMIN. DIV., ABA, STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO TRIAL COURTS (1992).

100. 1 JUDICIAL ADMIN. DIV., *supra* note 98, at 3–4.

101. See *id.* at 3–5 (“All judges throughout the system should have a voice in policymaking . . .”).

102. Caplow, *supra* note 88, at 99 & n.54.

103. COMM'N ON IMMIGRATION, *supra* note 92, at ES-29.

104. NAT'L CTR. FOR STATE COURTS, TRIAL COURT PERFORMANCE STANDARDS (2010), [http://www.ncsconline.org/D\\_Research/TCPS/index.html](http://www.ncsconline.org/D_Research/TCPS/index.html).

105. See Richard Y. Schauffler, *Judicial Accountability in the US State Courts: Measuring Court Performance*, 3 UTRECHT L. REV. 112, 113, 118–19 (2007) (explaining the political context surrounding the push toward performance measurement in state courts).

taxpayers expect courts to perform.<sup>106</sup> Table 2 provides some examples:

*Table 2. Trial Court Performance Standards*

<b>Performance Area</b>	<b>Sample Standard</b>
1. Access to Justice	1.4 Courtesy, Responsiveness, and Respect—Judges and other trial court personnel are courteous and responsive to the public, and accord respect to all with whom they come into contact.
2. Expedition and Timeliness	2.1 Case Processing—The trial court establishes and complies with recognized guidelines for timely case processing while, at the same time, keeping current with its incoming caseload.
3. Equality, Fairness, and Integrity	3.4 Clarity—The trial court renders decisions that unambiguously address the issues presented to it and clearly indicate how compliance will be achieved.
4. Independence and Accountability	4.5 Responses to Change—The trial court anticipates new conditions and adjusts its operations as necessary.
5. Public Trust and Confidence (noting that courts have several constituencies <sup>107</sup> )	5.3 Judicial Independence and Accountability—The public perceives the trial court as independent, not unduly influenced by other components of government, and accountable.

These standards were released with a set of instruments for measuring court performance; however, these instruments were so intimidating that the National Center published in 2005 a simplified set of “CourTools”—ten core measures of court performance. These measures include: “Access and Fairness,” “Clearance Rates,” “Time to Disposition,” “Age of Active Pending Caseload,” “Trial Date Certainty,” “Reliability and Integrity of Case Files,” “Court

106. NAT’L CTR. FOR STATE COURTS, *supra* note 104, at Preface.

107. Courts’ constituencies include “the vast majority of citizens and taxpayers who seldom experience the courts directly,” “opinion leaders,” “citizens who appear before the court,” judges and court employees, and lawyers “who may have an ‘inside’ perspective on how well the court is performing.” *Id.* at Performance Area 5.

Employee Satisfaction,” and “Cost per Case.”<sup>108</sup> Partly in response to a 2005 Conference of State Court Administrators call for state courts to implement performance measures,<sup>109</sup> individual courts and entire state court systems have started to use the CourTools, often placing the resulting scores on their public websites.<sup>110</sup>

3. *Court Culture.* Performance standards help judges and court managers identify how courts should perform and how to measure whether courts are performing as they should, but they offer little guidance about how to manage courts to achieve high performance. This realization led to a third effort to improve state courts—analysis of their cultures and a search for links between culture and performance, with the goal of shifting current cultures toward those associated with high performance.

The 2007 pathbreaking work in this area, *Trial Courts as Organizations*,<sup>111</sup> adapted analytical tools for assessing corporate culture and put them to use in twelve trial courts in three states. Brian Ostrom and his colleagues explained that “[a] court’s management culture is reflected in what is valued, the norms and expectations, the leadership style, the communication patterns, the procedures and routines, and the definition of success that makes the court unique. More simply: ‘the way things get done around here.’”<sup>112</sup>

Based on a national survey of some seventy court experts, they identified four court “cultural archetypes”<sup>113</sup>—“communal” (which prizes “collegial decision-making”),<sup>114</sup> “networked” (which emphasizes “creativity and innovation”),<sup>115</sup> “autonomous” (which embodies a “judicial preference for limited administrative

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108. The remaining two measures—“Collection of Monetary Penalties” and “Effective Use of Jurors”—have no applicability to immigration courts. See Nat’l Ctr. for State Courts, CourTools, <http://courtools.org> (last visited Mar. 28, 2010).

109. Schauffler, *supra* note 105, at 121.

110. For evidence of the use of CourTools, see the site links for “State/County Specific,” Nat’l Ctr. for State Courts, Performance Measurement Resource Guide, <http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=CtPerS#639> (last visited Mar. 20, 2010), and see also, for example, Utah State Courts, Utah Court Performance Measures, <http://www.utcourts.gov/courtools/> (last visited Mar. 20, 2010).

111. BRIAN J. OSTROM ET AL., TRIAL COURTS AS ORGANIZATIONS (2007).

112. *Id.* at 4–5.

113. *Id.* at 36–38, 68–69. For a graphical summary of the attributes that Ostrom and his colleagues associate with these archetypes, see *id.* at 40 tbl.2-3.

114. *Id.* at 69 (emphasis omitted).

115. *Id.* at 74 (emphasis omitted).

controls”),<sup>116</sup> and “hierarchical” (in which “the chain of command is clear”).<sup>117</sup> They recognized that none of the archetypes would be perfectly or exclusively represented in any court; “court culture is a matter of emphasis and degree rather than perfect alignment.”<sup>118</sup> To determine each of the twelve courts’ primary cultural type and its strength in the five performance areas, they fashioned a “Court Culture Assessment Instrument”<sup>119</sup> and administered it to judges with a criminal docket and to senior court administrators.<sup>120</sup>

Ostrom and his colleagues assessed the “performance consequences”<sup>121</sup> of each court’s primary culture in several of the Trial Court Performance Standards areas. In terms of time to disposition, they expected and found that hierarchical courts are more likely than others to meet the ABA’s 1987 time standards for criminal felony clearance rates.<sup>122</sup> As for the standards of access, fairness, and managerial effectiveness—“values [that] involve the rights and concerns of participants in the trial process other than judges and administrators”<sup>123</sup>—they surveyed attorneys who practiced in the twelve courts and found mixed results. Generally, though, both prosecutors and defense attorneys articulated the belief that courts with autonomous cultures have “a greater degree of access, fairness, and managerial effectiveness” than courts with hierarchical cultures,<sup>124</sup> because “[a]ttorneys will see themselves as . . . having greater access[and] being treated more fairly, and courts acting more effectively in cultures where the attorneys have a greater say in how business is conducted.”<sup>125</sup>

Ostrom and his colleagues asked judges and administrators which cultures they preferred—that is, in what ways they might want their courts to do business differently. They expected and found, as to managing cases and dealing with change, that judges and administrators generally preferred the aspects of hierarchical culture—doing business “on the basis of clear and orderly rules,

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116. *Id.* at 79 (emphasis omitted).

117. *Id.* at 84 (emphasis omitted).

118. *Id.* at 42.

119. *Id.* at 47.

120. *Id.* at 47–57.

121. *Id.* at 91.

122. *Id.* at 94.

123. *Id.* at 99.

124. *Id.* at 108.

125. *Id.* at 108–09.

expertise, and modern management techniques.”<sup>126</sup> As to judge-staff relations and internal organizations, they found a preference for networked cultures, in which business is done “on the basis of inclusiveness. . . . [b]ecause judges and court administrators have ongoing relationships and must consult each other to discuss ways to implement policies, allocate resources, . . . configure court staff,” and avoid “personnel conflicts.”<sup>127</sup> For court leadership, they found that judges and administrators favored a communal culture—doing court business on a “collegial basis, where trust and mutual respect reign axiomatically.”<sup>128</sup> Finally, they found little interest in an autonomous court culture.

### C. *Applying Standards and Assessing Cultures in Immigration Courts*

From *Trial Courts as Organizations* and similar assessments emerge several observations about the culture-performance link that may be applicable to immigration courts. I hope to develop a broader framework for analysis and a research method to determine whether lessons learned about the organization and performance of third branch courts might be used beneficially in and by immigration courts. In this Section, I identify, as examples, two essential lessons that emerge from the analysis of third branch courts—chief judge leadership and measuring judicial performance. The “International Framework for Court Excellence,” developed by a consortium including members of the National Center for State Courts, several international and foreign court organizations, and the Federal Judicial Center, seeks to promote high performance in seven performance areas: court management and leadership; court policies; human, material, and financial resources; court proceedings; client needs and satisfaction; affordable and accessible court services; and public trust and confidence.<sup>129</sup> The consortium’s basic conclusion is: “To become an excellent court, proactive management and leadership are required at all levels, not only at the top, and performance targets have to be determined and attained. Well-informed decision-making [about achieving high performance]

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126. *Id.* at 112.

127. *Id.* at 112–13.

128. *Id.*

129. INT’L CONSORTIUM FOR COURT EXCELLENCE, INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE 2, 4, 26 (2008), available at <http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf>.

requires sound measurement of key performance areas and reliable data.”<sup>130</sup>

1. *Chief Judge Leadership.* One observation of third branch courts involves the ways in which the chief judge in each multijudge court can enhance the court’s performance by establishing policies through collegial decisionmaking, monitoring performance, building and sustaining morale, and searching for alternative ways for the court and its judges to operate. This observation does not seem to have infiltrated the EOIR or its DOJ overseers; indeed, unlike third branch courts, multijudge immigration courts do not each have their own chief judge.

The immigration courts currently have eight Assistant Chief IJs (ACIJs) who are each responsible for between four and eleven immigration courts, usually on a rough geographic basis.<sup>131</sup> One has responsibility, for example, for the three courts in or near New York City and the court in Ulster.<sup>132</sup> Another has responsibility for eleven courts in Arizona, California, Nevada, Virginia, and Maryland.<sup>133</sup> Seven of these eight ACIJs are residents in one of the courts under their purview,<sup>134</sup> but that leaves thirty-eight of the forty-five multijudge courts without a chief judge as a member of the court. The jobs of these ACIJs seem highly taxing, and the ABA’s 2010 report recommends a significant increase in the number of ACIJs.<sup>135</sup>

Instead of more ACIJs, though, the DOJ, the EOIR, and the immigration courts should consider the conventional third branch approach of a chief judge for every multijudge court, or at least for all immigration courts with three or more judges. As of December 2009, twenty-nine of the fifty-seven courts had three or more judges, and those courts accounted for almost 80 percent of the receipts and of completed proceedings in 2008.<sup>136</sup>

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130. *Id.* at 11.

131. *See* U.S. Dep’t of Justice, ACIJ Assignments: Dec. 2009, <http://www.justice.gov/eoir/sibpages/ACIJAssignments.htm#ACIJ> (last visited Mar. 20, 2010) (listing the ACIJs and their court assignments).

132. *Id.*

133. *Id.*

134. *Compare id.* (listing ACIJ assignments) *with* EOIR, *supra* note 26 (listing immigration judges by court).

135. COMM’N ON IMMIGRATION, *supra* note 92, at ES-29.

136. *See* EOIR, *supra* note 5, at B3 tbl.1; EOIR, *supra* note 26.

As much as small numbers and geographic remoteness may limit the ACIJs' effectiveness (and I have no knowledge of their effectiveness), there may also be limitations stemming from what appears to be the job description. On the EOIR website, immediately below the link to the ACIJs and their areas of responsibility, are links to directions for filing complaints about IJ conduct.<sup>137</sup> Picking up on the "chief judge as supervisor" tone, the ABA Commission report lists its recommendations for more ACIJs in a section headed "Inadequate Supervision and Discipline,"<sup>138</sup> and a recent TRAC report on implementation of the attorney general's 2006 changes reflects the same orientation.<sup>139</sup>

The emphasis on ACIJs as supervisors and discipliners reflects the well-publicized concern over abusive and intemperate behavior by some IJs—those Professor Legomsky calls the "bad apples."<sup>140</sup> Part of any chief judge's job is dealing with judicial misconduct—by looking for its causes and seeking individual remedies, from counseling to public reprimands to reporting the judge to a disciplinary body. But dealing with bad apples is not a chief judge's only function.

Ostrom and his colleagues describe a different type of chief judge, focused less on supervising a group of bureaucrats and more on leading a group of professionals "by fostering agreement among members and staff of the court in a collegial manner" and "encourag[ing] other judges and staff to embrace one set of cultural orientations in case management style and change management and another set in judge-staff relations and internal organization."<sup>141</sup> This observation is hardly novel. Steven Flanders's 1977 study of factors associated with successful court and case management in federal district courts attributed the characteristics observed in high performing courts largely to those courts' chief judges and what he called their "exceptional personal skills," as well as their ability to

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137. EOIR, *supra* note 26.

138. COMM'N ON IMMIGRATION, *supra* note 92, at ES-29.

139. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), <http://trac.syr.edu/immigration/reports/210/> (detailing Government Accountability Office criticism of the attorney general's ACIJ "[p]ilot [p]rogram [t]o [d]eploy [s]upervisors to [r]egional [o]ffices").

140. Legomsky, *supra* note 2, at 1675.

141. OSTROM ET AL., *supra* note 111, at 127 (emphasis omitted).



forge compromises, deal effectively with procedural issues, and work hard.<sup>142</sup>

The emphasis of the ABA judicial administration standards comports generally with Ostrom and his colleagues' findings. For example, although the ABA recognizes the chief justice as the central authority of each state's court system, it says that each trial court should have its own administration "so that it can manage its business."<sup>143</sup> In this scheme, the chief judge of each court assumes a key role, not only as "the locus of responsibility for internal management, coordination between units, and conduct of external relations,"<sup>144</sup> but also to "[s]et an example in performance of judicial and administrative functions," emphasizing the importance of "tact, the ability to listen, attention to the interests of others, and persuasiveness."<sup>145</sup>

I have no evidence to suggest whether the current ACIJs function in a similar manner. At least one IJ writing specifically about the problem of unrepresented aliens praises her ACIJ for encouraging the judges to seek ways to improve aliens' legal representation, *pro bono* and otherwise.<sup>146</sup>

But it is unlikely that the current ACIJ arrangement fosters—or, given the numbers, even permits—the kind of chief judge stewardship envisioned for third branch courts.

*2. Performance Measures.* The other principle that emerges is the importance of measuring performance. For the immigration courts, measurement should be done in more areas and with more precision than casually chronicling IJs' growing backlogs and collecting (some admittedly horrific) anecdotes about some IJs' irresponsible and discourteous behavior. "Excellent courts systematically measure the quality as well as the efficiency and effectiveness of the services they deliver,"<sup>147</sup> and those services extend well beyond disposing of cases quickly to include, for example, the first of the CourTools core measures, "Access and Fairness." Ostrom

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142. STEVEN FLANDERS, FED. JUDICIAL CTR., NO. FJC-R-77-6-1, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 78 (1977).

143. 2 JUDICIAL ADMIN. DIV., *supra* note 99, at 29.

144. *Id.* at 17.

145. *Id.* at 44–46.

146. Noel Brennan, *A View from the Immigration Bench*, 78 FORDHAM L. REV. 623, 627 (2009). Judge Brennan is an IJ at the main immigration court in New York City.

147. INT'L CONSORTIUM FOR COURT EXCELLENCE, *supra* note 129, at 33.

and his colleagues similarly emphasize systematic rather than casual and anecdotal measurement, and they suggest that the chief judge follow up when a judge fails to comply with agreed-upon reporting protocols.<sup>148</sup>

Performance measurement can be both court based, such as CourTools, and individual judge based, typically, judicial performance evaluation (JPE), and can serve various purposes. Courts use CourTools as a management assessment device and to be accountable and transparent to court users and resource providers. “JPE” is a shorthand term of art that refers to a particular approach to measuring aspects of a judge’s performance. Various forms of JPE, which first appeared in the 1970s<sup>149</sup> and was the subject of 1985 ABA standards,<sup>150</sup> are in use, typically by statute or court rule, in at least nineteen states, the District of Columbia, and Puerto Rico.<sup>151</sup> Independent commissions use surveys and interviews of those who interact with the judge, case management data, and the judge’s work product to evaluate a judge on a regular schedule in the performance areas of legal knowledge, integrity and impartiality, communication skills, judicial temperament, and administrative skills.<sup>152</sup> These evaluations serve various purposes: to assess the need for judicial education; to provide judges with objective information about their strong and weak points; and, in some states, to assist voters or others who decide whether to retain judges in office.<sup>153</sup> Performance evaluation supporters insist that judicial discipline is not a purpose of JPE and warn against disseminating a judge’s JPE information to judicial disciplinary bodies.<sup>154</sup>

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148. OSTROM ET AL., *supra* note 111, at 145.

149. Rebecca Kourlis & Jordan Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 10 n.9 (2008).

150. See SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, ABA, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (1985). The Guidelines were reaffirmed in 2005. See ABA, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (2005), available at [http://www.abanet.org/jd/lawyersconf/pdf/jpec\\_final.pdf](http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf).

151. Kourlis & Singer, *supra* note 149, at 9.

152. *Id.* at 10.

153. *Id.* at 9.

154. See ABA, *supra* note 150, at 1 (“Guideline 2-3. The uses of judicial performance evaluation do not include judicial discipline. The information developed in a judicial evaluation program should not be disseminated to authorities charged with disciplinary responsibility, unless required by law or by rules of professional conduct.”).

It bears emphasis that some of the DOJ administrative policies that most bother IJs are, in principle, integral components of high performing courts, including performance assessments and case-processing standards. Professor Legomsky and others rightly ask whether the performance evaluations used for the immigration courts (and the BIA) stress productivity to the exclusion of other judicial virtues,<sup>155</sup> and IJs cite what the National Association of Immigration Judges refers to as “a well-recognized and long-established principle that administrative law judges must be exempt from the provisions of agency administered performance evaluations . . . precisely to ensure their independence in decision-making.”<sup>156</sup>

But the skewed emphasis that Professor Legomsky finds in the EOIR instruments, as well as their administration by executive branch supervisors, are not indictments of the concept of measuring judicial performance. They are indictments, rather, of how DOJ has implemented the concept. By analogy, JPE proponents see properly constructed and administered judicial performance evaluations as an antidote to interest groups that, in the post-*Republican Party of Minnesota v. White*<sup>157</sup> era, demand that judicial candidates complete questionnaires concerning their views on substantive legal matters.<sup>158</sup>

### 3. *Importing Third Branch Court Tools into Immigration Courts.*

I do not yet have a proposal for how a well-intentioned DOJ (or Professor Legomsky’s proposed freestanding Office of the Chief Administrative Law Judge for Immigration) can bring to immigration courts the staples of well-performing third branch courts, such as chief judges in each multijudge court or performance measures in the full range of court functions. The key considerations, though, are heavy involvement by the judges themselves and by independent, knowledgeable observers, as well as maintaining management oversight sufficient to provide accountability to Congress. And although the stunningly high per-judge caseloads may make it

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155. See, e.g., Legomsky, *supra* note 2, at 128–29 n.123 (discussing the BIA’s emphasis on productivity).

156. Marks, *supra* note 9, at 14.

157. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (striking down, as violating the First Amendment, an ethics code that prohibited judicial candidates from announcing their views on disputed issues).

158. See, e.g., Terry Carter, *The Big Bopper: This Terre Haute Lawyer Is Exploding the Canons of Judicial Campaign Ethics*, A.B.A. J., Nov. 2006, at 30, 34 (2006) (discussing “the use of interest-group questionnaires being sent to judges up for retention or re-election and to their challengers”).

impractical to right the ship as opposed to constantly bailing it out, there may be room for trying new approaches in courts with per-judge caseloads below the average. In 2008, fourteen immigration courts had less than nine hundred proceedings per judge—generally closer to the range that the ABA Immigration Commission report seemed to find acceptable in other administrative courts<sup>159</sup>—and these fourteen courts include nine courts with three or more judges.<sup>160</sup> (Raw caseload numbers, however, may hide differences in case types and thus in the work required to dispose of different caseloads.)

### CONCLUSION

Reinhold Niebuhr famously noted in 1944 that “democracy is a method of finding proximate solutions for insoluble problems.”<sup>161</sup> The immigration adjudication system has proved to be an insoluble problem. It does not trivialize Niebuhr’s analysis of how to deal with profound social and political problems to envision, with respect to immigration adjudication, what he called “indeterminate creative ventures.”<sup>162</sup>

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159. COMM’N ON IMMIGRATION, *supra* note 92, at ES-28.

160. These calculations are based on the 224 judges listed on the EOIR website under Immigration Courts Nationwide and on receipt and other data reported in the EOIR 2008 Statistical Year Book. *See* EOIR, *supra* note 5, at B2; EOIR, *supra* note 26.

161. REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 118 (1944).

162. *Id.* at 144.