THE 14TH CIRCUIT

JAYANTH K. KRISHNAN*

ABSTRACT

2025 will mark the fifteenth anniversary of Professor Stephen Legomsky's landmark article proposing "radical surgery" on American immigration adjudication. Professor Legomsky argued for creating an Article III Court of Appeals for Immigration (CAI), replacing both the Justice Department's Board of Immigration Appeals (BIA) and the immigration jurisdiction of the regional circuit courts.

For Professor Legomsky, his restructuring would: (1) reduce costs, delays, and needless duplications inherent in how the BIA and regional circuits functioned; (2) enhance uniformity of immigration case law; (3) ensure greater independence by a now nationwide Article III appellate court; (4) allow for this new court to regain key subject matter jurisdiction stripped in 1996; and (5) appeal to ideologically diverse stakeholders.

However, as the years have passed, reformers have eschewed Professor Legomsky's plan and pursued a different route: advocating for congressional, Article I immigration courts.

While supportive of this latter call, this study nevertheless contends that more drastic measures are required to solve the immigration adjudication crisis. It thus resurrects, defends, and—crucially—adapts Professor Legomsky's CAI to the present moment. To begin, with the existence of the eleven regional circuit courts, the DC Circuit, and the Federal Circuit, this study refers to the proposed appellate immigration court as the 14th Circuit.[1]

More substantively, the focus is on specific queries Professor Legomsky adjacently addressed, which are now extremely significant. For example,

* Milt and Judi Stewart Professor of Law and Director of the Stewart Center on the Global Legal Profession, Indiana University-Bloomington Maurer School of Law. The author expresses thanks to many people who provided incredible feedback at various stages. They include, early on, Mark Janis, Steve Sanders, Jeff Stake, Shana Wallace, and Deborah Widiss. For ongoing conversations and comments throughout this process, the author is particularly grateful to Tung Yin. Others too offered valuable insights, including Ingrid Eagly, Luis Fuentes-Rohwer, Charles Geyh, Jeffrey Greenbaum, Kevin Johnson, Christiana Ochoa, Julia Raczek, and Tim Waters. Addison Mummert provided terrific editorial assistance. And for their wonderful research support, the author thanks Aaron Shi and Zenas Shi. Finally, a special and profound dedication goes to Stephen Legomsky whose work was the inspiration for this article. Steve was absolutely amazing in his supportive comments and encouragement. The author is indebted to him.

1. For this article, the numeric "14th" (rather than spelling out the word Fourteenth) is used purely for visually descriptive purposes. This article follows the standard protocol of spelling out the names of the other circuit courts of appeals, per Bluebook guidance.

might a 14th Circuit put at risk favorable judgments serving as good law in places like the Second and Ninth Circuits? Why would advocates who have fought to secure the rights of immigrants in these regions cede jurisdiction to an otherwise unknown court? Furthermore, who should sit on this court? Why is such a court necessary at all? And what is the political feasibility of passing this measure today?

Upon answering these questions, this study concludes that, if constructed properly, a 14th Circuit for immigration could well accomplish major reforms—at a reduced cost and with less delay. This court could also accommodate conflicting political priorities that have stifled progress and provide a fairer process for this country's perpetually vulnerable noncitizen population.

TABLE OF CONTENTS

INTRODUCTION 1227
I. THE LEGOMSKY ARGUMENT 1231
A. *The Article III Proposal* 1231
B. *Caution and Concern* 1234
II. ADDRESSING THE FAVORABLE PRECEDENT QUESTION: A CHALLENGE FOR THE 14TH CIRCUIT 1236
A. *Background* 1236
B. *Gaming Out the Worrisome Scenario* 1239
1. *Comparisons with the Federal Circuit* 1239
2. *The Benefits of Not Having a Sole Immigration Appellate Court* 1241
III. ADDRESSING THE CONCERNS 1245
A. *Optional Selection Component* 1245
B. *Staffing* 1250
C. *The Nuts and Bolts of Resolving Disputes* 1256
CONCLUSION 1259

INTRODUCTION

Over the years, immigrant-rights supporters have argued that immigration adjudication in the United States is in need of immediate reform.[2] Currently, the immigration courts of first resort and the appellate body—the Board of Immigration Appeals—are located within the Department of Justice (DOJ).[3] These two layers of immigration courts are overseen by a DOJ agency known as EOIR—the Executive Office of Immigration Review.[4] In theory, judges on these courts are supposed to be independent and autonomous.[5] However, given that it is the Attorney

2. For background on this discussion, *see* Am. Immigr. Laws. Ass'n, *It's Time for Immigration Reform*, YOUTUBE (Jan. 31, 2020), https://youtu.be/8fkt-g4XG_A [https://perma.cc/7VUG-KXS9]; *see also ABA Signs Joint Letter to Congress on Establishing an Independent Immigration Court System*, A.B.A. (July 9, 2019) [hereinafter *ABA Signs Joint Letter*], https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/aba-signs-joint-letter-to-congress-on-establishing-an-independen/ [https://perma.cc/NYG5-FG4X].

3. Am. Immigr. Laws. Ass'n, *supra* note 2; *ABA Signs Joint Letter*, *supra* note 2; *see also* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 71–72 (9th ed. 2021).

4. *See Executive Office for Immigration Review*, U.S. DEP'T JUST., https://www.justice.gov/eoir [https://perma.cc/H4US-U4Y2].

5. *See* INNOVATION L. LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (June 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/P3AH-XLWN] ("In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the [INA] and regulations."); *see also* Amit Jain,

General of the United States—a political appointee of the President—who leads the Department and who can "single-handedly pull the . . . case from any [immigration] court anywhere nationwide and issue a sweeping"[6] ruling that contradicts what was decided below, it is not surprising that many observers believe that this process is inherently flawed.

For these reasons, reformers have called upon Congress to use its powers under Article I of the Constitution to establish a new set of immigration courts.[7] A key part of the proposal would be to enhance judicial independence.[8] At present, immigration judges do not have tenure—they can be dismissed upon the proclivities of whoever presides as Attorney General. Furthermore, with each new presidential administration, priorities on immigration policy can change, which can result in immigration judges needing to reorganize their dockets to accommodate their superiors' preferences.[9] This move, in turn, can push cases (that have been long awaiting rulings) to the back of the line, adding more delay to an already backlogged process.[10]

Therefore, to increase the independence of immigration judges, reformers have urged Congress to create courts akin to what it has done for other areas of the law, including tax, bankruptcy, veterans' claims, and the armed forces.[11] They advocate for the establishment of Article I immigration courts, thereby removing these forums from the Justice Department. In addition, Article I immigration judges would enjoy greater

---

Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts," 33 GEO. IMMIGR. L.J. 261 (2019). For a related discussion of how prosecutors in immigration cases also come from the Executive Branch, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243 (2010).

6. Am. Immigr. Laws. Ass'n, *supra* note 2 (quoting Jeremy McKinney, a lawyer for the organization). For one report on this concern of judicial independence in the immigration courts, see *Judicial Oversight v. Judicial Independence*, TRAC REPS., https://trac.syr.edu/immigration/reports/194/include/side_4.html [https://perma.cc/M72Y-442G]; and Jayanth K. Krishnan, *Judicial Power—Immigration-Style*, 73 ADMIN. L. REV. 317, 325–28 (2021).

7. *See* Am. Immigr. Laws. Ass'n, *supra* note 2; *see also* Dana Leigh Marks, *I'm an Immigration Judge. Here's How We Can Fix Our Courts.*, WASH. POST (Apr. 12, 2019, 3:31 PM), https://www.washingtonpost.com/opinions/im-an-immigration-judge-hereshow-we-can-fix-our-courts/2019/04/12/76afe914-5d3e-11e9-a00e050dc7b82693_story.html [https://perma.cc/33CW-UJFX]; Krishnan, *supra* note 6.

8. Am. Immigr. Laws. Ass'n, *supra* note 2; Marks, *supra* note 7; Krishnan, *supra* note 6.

9. *See* Am. Immigr. Laws. Ass'n, *supra* note 2. Judge Paul Schmidt refers to this process as "aimless docket reshuffling." *Id.*

10. *See* Marks, *supra* note 7 (observing that immigration judges are currently under huge pressure to clear several hundreds of cases per year or be given poor job evaluation scores). For one of the richest empirical studies in the literature on the immigration courts, see Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015).

11. *See* Am. Immigr. Laws. Ass'n, *supra* note 2; *see also* Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17 (2013). For additional background, see Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1 (2018).

(albeit incomplete) security of a tenurable period in office, which would further reduce the political pressure that they face.[12]

In the spring of 2022, U.S. Representative Zoe Lofgren sponsored federal legislation backing the creation of Article I immigration courts. Her proposed law, known as the "Real Courts, Rule of Law Act of 2022," affirmatively transfers immigration adjudication out of the DOJ and into a new independent framework statutorily governed by Congress.[13] Under the bill, first-resort immigration courts would be spread across the United States, and cases could be appealed to a higher body known as the "appellate division" that would take the place of the BIA.[14]

Representative Lofgren's bill drew upon years of work by defenders of immigrants. And this study supports her proposal.

Consider, however, the possibility of an additional reform: creating an *Article III* federal circuit court exclusively for immigration appeals. In 2010, Professor Stephen Legomsky published a landmark article proposing such a "Court of Appeals for Immigration (CAI)."[15] While Professor Legomsky applauded the efforts of Article I advocates as a substantial improvement over the status quo, his view was that "radical surgery"[16] was required. Because matters on federal appeal currently go to the circuit court jurisdictionally overseeing the initial immigration hearing, similar cases can have vastly different outcomes depending upon the adjudicating circuit.[17]

---

12. For a summary of this discussion and how there are different views on what such Article I courts might look like and how long tenure might last, see Krishnan, *supra* note 6, at 346–51 (highlighting the different perspectives taken by, for example, Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501 (2010); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 18–20 (1980); and Rebecca Baibak, *Creating an Article I Immigration Court*, 86 U. CIN. L. REV. 997 (2019)).

13. *See* Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. (2022).

14. *Id.* For detailed background on the bill, see Press Release, Zoe Lofgren, U.S. Congresswoman for Cal.'s 18th Dist., Lofgren Introduces Landmark Legislation to Reform the U.S. Immigration Court System (Feb. 3, 2022), https://lofgren.house.gov/media/press-releases/lofgren-introduces-landmark-legislation-reform-us-immigration-court-system [https://perma.cc/6HQ3-BFVV]. As this site describes, "[t]he newly formed United States Immigration Court will be comprised of a trial division, an appellate division, and an administrative division." *Id.* The appellate division would have "21 immigration appeals judges." *See* H.R. 6577, *supra* note 13. The administrative division would be the independent version of EOIR, which would have an "administrative office and an administrative council." *Id.* at 9. The administrative council would be made up of the chief judge of the appeals board plus the chief judge of each of the trial courts located throughout the country. *Id.* at 10. From the appellate division cases could be "reviewed by the United States court of appeals for the judicial circuit wherein venue [of the initial trial court] lies." *Id.* at 45; *see also* Jayanth K. Krishnan, *Facts Versus Discretion: The Debate over Immigration Adjudication*, 37 GEO. IMMIGR. L.J. 1, 24–28 (2022).

15. *See* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1714 (2010).

16. *Id.* at 1636.

17. *Id.* at 1706; *see also* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

For Professor Legomsky, his restructuring would: (1) reduce costs, delays, and needless duplications inherent in how the BIA and regional circuits functioned; (2) enhance uniformity of immigration case law; (3) ensure greater independence by a now nationwide Article III appellate court; (4) allow for this new court to regain key subject matter jurisdiction stripped in 1996; and (5) appeal to ideologically diverse stakeholders.[18]

To be sure, the Legomsky proposal was seen as bold and innovative at the time. There were others, however, who expressed caution.[19] Moreover, as evidenced by Representative Lofgren's bill, the energy behind recent reforms has been in the direction of advocating for congressional, Article I immigration courts.

That said, this study contends that more drastic measures are required to solve the immigration adjudication crisis. It thus resurrects, defends, and—*crucially*—adapts Professor Legomsky's CAI to the present moment. As an initial update, with the existence of the eleven regional circuit courts, the DC Circuit, and the Federal Circuit, this study refers to the proposed appellate immigration court as the 14th Circuit.[20]

More substantively, the focus is on specific queries Professor Legomsky adjacently addressed, which are now extremely significant. For example, might a 14th Circuit put at risk favorable judgments serving as good law in places like the Second and Ninth Circuits? Why would advocates who have fought to secure the rights of immigrants in these regions cede jurisdiction to an otherwise unknown court? Furthermore, who should sit on this court? Why is such a court necessary at all? And what is the political feasibility of passing this measure today?

Upon answering these questions, this study concludes that, if constructed properly, a 14th Circuit for immigration could well accomplish major reforms—at a reduced cost and with less delay. This court could also accommodate conflicting political priorities that have stifled progress and provide a fairer process for this country's perpetually vulnerable noncitizen population.

* * *

18. *See* Legomsky, *supra* note 15, at 1685–1710.

19. *See* Baum, *supra* note 12; *see also* Russell R. Wheeler, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L.J. 1847 (2010).

20. It should be noted that this term, 14th Circuit, has been used as a fictious federal circuit court of appeals in various moot court competitions in U.S. law schools for many years. In doing a search on Westlaw Precision's database with the terms "Fourteenth Circuit" & "Moot Court," forty-five such results emerged, with Tulane Law School being cited for using the term thirty-two times in its competitions.

This study will adhere to the following format. Part II provides an overview of Professor Legomsky's argument, particularly as it relates to his call for an Article III appellate court for immigration. Additionally in this section, there will be a discussion of the concerns that have been raised by his proposal.[21]

Part III then addresses a topic that Professor Legomsky recognized could be a hurdle, but it was one that he devoted only marginal attention to in his article.[22] Namely, the 14th Circuit could develop a body of law that eventually undoes earlier, more immigrant-friendly rulings from other federal appellate courts.[23] There will be an in-depth analysis of this subject and why these concerns should be taken seriously.[24]

Part IV, which serves as the heart of this article, then explains how these worries may be assuaged.[25] A series of proposals are set forth dealing with ways to address: a) the apprehension over losing favorable precedent, b) the logistics and politics of how to staff the court, and c) how the nuts and bolts of adjudication would actually take place.[26]

Finally, Part V examines the implications of constructing such an Article III court.[27] The conclusion reached is that Professor Legomsky got it right: establishing this new body, while admittedly challenging, has the potential for helping to alleviate the dire circumstances that immigrants have long endured within the current immigration adjudicative structure.[28]

I. THE LEGOMSKY ARGUMENT

A. The Article III Proposal

Since it was published in 2010, researchers have repeatedly cited Professor Legomsky's article on revamping the immigration adjudication process.[29] The article was presented as part of an important symposium on

21. *See infra* Part II.
22. *See* Legomsky, *supra* note 15, at 1706.
23. *See infra* Part III.
24. *Id.*
25. Indeed, this discussion will offer a brief comparative history of another specialty appellate forum that emerged in 1982—the U.S. Court of Appeals for the Federal Circuit. The majority of this court's docket involves cases "including international trade, government contracts . . . certain monetary claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims." *See Court Jurisdiction*, U.S. CT. APPEALS FOR FED. CIR., https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/ [https://perma.cc/57QG-C8TM].
26. *See infra* Part IV.
27. *See infra* Part V.
28. *See infra* Part V.
29. On Westlaw Precision, for example, in the "secondary sources" database, the piece has been cited 147 times.

immigration reform hosted by the *Duke Law Journal*.[30] That same year, the American Bar Association (ABA) released a major report entitled "Reforming the Immigration System," where Professor Legomsky's scholarly influence can be seen throughout the entire document.[31]

Regarding the article, in particular, Professor Legomsky structures his piece in a very deliberate manner. He begins by laying out the problems of the current immigration litigation system, followed by a discussion of the lack of resources and personnel that have historically befallen the EOIR.[32] He then covers what he calls "the usual proposed solution"[33] that includes creating an Article I immigration court, which would have an accompanying appellate review board.[34]

By contrast (also within this section), Professor Legomsky argues for "converting [the] EOIR into an independent [*executive branch*] tribunal outside the Justice Department."[35] Professor Won Kidane has written one of the most comprehensive reviews of Professor Legomsky's proposal. [36] For Professor Kidane, the Legomsky plan is compelling because it would transform the current Justice Department adjudicators "into ordinary administrative law judges with all the accompanying benefits and protections."[37] The adjudication process thus would become more

30. *See* Fortieth Annual Administrative Law Issue: Immigration Law and Adjudication, 59 DUKE L.J. 1501 (2010).

31. *See* AM BAR ASS'N COMM'N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES (2010), https://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf [https://perma.cc/Z9A4-HD4T]. Professor Legomsky's name appears some 30 times throughout the report, and this does not even include the number of "*id.*" citations. *Id.*

32. *See* Exec. Off. for Immigr. Rev., *About the Office*, U.S. DEP'T JUST. (Sept. 11, 2024), https://www.justice.gov/eoir/about-office [https://perma.cc/ZG2K-A3VF] (noting that this office "conducts immigration proceedings, appellate reviews, and administrative hearings").

33. *See* Legomsky, *supra* note 15, at 1676–83. For a more critical perspective on the construction of Article I courts, at least in terms of veterans' benefits, which could have similar detrimental effects on Article I immigration courts, see Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 547–50 (2011). Also in this same vein, relating to social security Article I courts, see Margaret H. Taylor, Refugee Roulette *in an Administrative Law Context: The* Déjà Vu *of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475 (2007).

34. *See* Legomsky, *supra* note 15, at 1676–83. This is essentially the Zofgren bill mentioned in Part I.

35. *Id.* at 1683. Note, the American Bar Association report from 2010 endorsed this proposal, even though its preference was for the creation of an Article I immigration court system. AM BAR ASS'N COMM'N ON IMMIGR., *supra* note 31, at 6–36. For a discussion of this point, see Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges,"* 104 MINN L. REV. 1275, 1336 n.356 (2020) ("[T]he independent agency model . . . 'would be an enormous improvement over the current system and offers a strong alternative if the Article I court is deemed infeasible or unacceptable to Congress and/or the President.'" (quoting AM BAR ASS'N COMM'N ON IMMIGR., *supra* note 31, at 6–36)).

36. *See* Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647 (2012).

37. *Id.* at 707.

professionalized and independent, and thereby more legitimate in the eyes of not just the noncitizens who appear in these hearings but the general public as well.[38]

Still, the most pronounced aspect of Professor Legomsky's proposal involved the establishment of the CAI.[39] This court would "replace *both* the BIA and the current role of the regional courts of appeals in immigration cases."[40] A key element of this new forum would be that active judges from the federal bench who sit either on the district or appellate courts would rotate onto this new immigration circuit for two-year terms.[41] As Professor Legomsky notes, "each circuit would contribute district and circuit judges proportionately to the total number of district and circuit judges in that circuit."[42]

From there, Professor Legomsky goes into the details of his proposal. He copiously discusses why his plan satisfies potential constitutional concerns.[43] (For one thing, the judges who he imagines would be presiding already have been confirmed according to Article III's strictures.[44]) In addition, he argues that having such an appellate forum would help to "depoliticize"[45] how immigration cases are presently adjudicated. Furthermore, it would lead to highly respected "generalist"[46] judges being able to focus on a specialized area of law in an efficient, nimble, and centralized manner.[47] Finally, the creation of this type of federal appellate court would reverse the ill effects put into place by the 1996 immigration law—particularly that part of the statute that stripped the ability of the circuit courts to "review . . . most discretionary decisions [of the immigration courts] and most crime-related removal orders."[48]

Professor Legomsky's reimagining of immigration adjudication certainly caught the eye of various observers and was seen as innovative[49] —but also provocative. In a moment, there will be a vigorous defense of his

38. *Id.* at 707–08 (noting that Professor Legomsky "does not, however, define the exact responsibilities of the ALJ, nor does he address the issue of the conduct of proceedings before the ALJs. It could be assumed that he would probably maintain the existing adjudicatory environment while freeing the judges from political control").

39. *See* Legomsky, *supra* note 15, at 1714–16.

40. *Id.* at 1686.

41. *Id.* at 1686–87.

42. *Id.* (noting that "[o]nly active Article III judges with a minimum number of years of service on federal courts of general jurisdiction . . . would be eligible for the regular two-year assignments to this new court. To fill a temporary need for additional judges, it would be possible to assign other active judges and senior judges to the new court on an ad hoc basis").

43. *Id.* at 1687–88.

44. *Id.* at 1714–16.

45. *Id.* at 1689.

46. *Id.* at 1692.

47. *Id.* at 1692–710.

48. *Id.* at 1696.

49. *See, e.g.*, AM BAR ASS'N COMM'N ON IMMIGR., *supra* note 31.

proposal, accompanied by crucial adaptations.[50] Before that, however, (and perhaps not surprisingly), some observers have expressed both caution and criticism toward the suggestion that establishing an Article III immigration court would be practically possible and normatively good. These perspectives are discussed next.

B. Caution and Concern

As part of the same symposium that published Professor Legomsky's article, other prominent scholars participated and offered their respective takes on different issues plaguing the U.S. immigration system.[51] Two of the writers focused specifically on Professor Legomsky's proposal.

First, Professor Lawrence Baum, in his piece, sounded a note of caution for policymakers who might be contemplating such an idea.[52] As he argued, despite the many problems of how the system is structured, immigration cases were inherently complicated and time-consuming, as well as stressful and pressure-filled for the noncitizen.[53] For this reason, Professor Baum asserted that all reforms "should be made with careful consideration of the potential effects, including the uncertainties that exist in predicting those effects."[54]

As part of his hesitancy to embrace the Article III idea, Professor Baum pointed out that there was no way to know whether the creation of such a judicially specialized institution would necessarily provide greater benefits.[55] In fact, because 75% of immigration cases in the federal appellate courts were heard in two circuits—the Second and Ninth—Professor Baum suggested that there was real question as to whether the judges sitting on

50. *See infra* Part IV.

51. *See, e.g.*, Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723 (2010); Cristina M. Rodriguez, *Constraint through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787 (2010).

52. *See* Baum, *supra* note 12.

53. *See* Baum, *supra* note 12, at 1507–31.

54. *Id.* at 1561. Professor Baum also discusses another proposal that was made in 2006 by then Senator Arlen Specter, which involved adding to the existing U.S. Court of Appeals for the Federal Circuit a specialized immigration docket. *Id.* at 1555. The plan was for a "number of judges [to] be added to the Federal Circuit to help the court handle the new [immigration] caseload." *Id.* Following this subject, several legal academics issued an objection letter to Senator Specter asking for "this proposal [to] be withdrawn immediately," contending that specialization was not all that it was lauded to be, along with worrying that it also would be "more prone than generalist courts to being "captured" by opposing interest groups or the agency they review." Letter to Sen. Arlen Specter from Harold Koh, Yale L. Sch. Dean, et al. (Mar. 14, 2006), https://law.yale.edu/sites/default/files/documents/pdf/LettertoSenSpecter.pdf [https://perma.cc/79UV-ZQ36].

55. *See* Baum, *supra* note 12, at 1556.

Professor Legomsky's proposed court would eventually "become any more expert in the field than the judges of the"[56] already existing appellate courts.

Professor Baum raised other concerns as well. For example, given ever-present resource constraints, he wondered how staffing of the new court would work logistically and whether it might place great strain on other parts of the judiciary.[57] The evidence was also mixed from another specialized appellate court—the U.S. Court of Appeals for the Federal Circuit—as to whether having such a body would make the law more uniform.[58] According to Professor Baum, this had not been the experience within the Federal Circuit.[59] And Professor Baum was not sanguine that the judges on this new Article III immigration court would necessarily be fairer, equitable, and less politically oriented.[60]

The other author who expressed concern during this symposium was Dr. Russell Wheeler. For Dr. Wheeler, Professor Legomsky's proposal had "some commendable features."[61] But he went on to say that the practical realities of political life in Washington D.C. made the passage of such a bill virtually impossible, since there was little congressional desire "to create additional judgeships for any purpose."[62] Moreover, because of the uncertainty of the true number of cases that would eventually be on the docket of this new court,[63] it would be hard for legislators to justify the enactment of such a law in the first place.[64]

---

56. *Id.* "To this concern, however, there are ready answers. Even in the Second and Ninth Circuits, immigration still accounts for just a minority of the courts' overall caseloads; 100% immersion would surely supply a deeper expertise. The expertise of a specialized staff, combined with additional specialized research sources, would further enhance the benefits of the proposed court's specific expertise." Author exchange with Stephen H. Legomsky, John S. Lehmann Univ. Professor Emeritus, Washington Univ. Sch. of L. (Feb. 11, 2024).

57. *See* Baum, *supra* note 12, at 1556.

58. *Id.*

59. *Id.*

60. *Id.* at 1557–60 (noting on this last point, in particular, that, for example, "if Congress were collectively unsympathetic to asylum seekers, its lack of sympathy likely would result in rules that favored the government's legal position").

61. *See* Wheeler, *supra* note 19, at 1849.

62. *Id.* at 1850.

63. *Id.* at 1849. Dr. Wheeler engages in a detailed discussion about the actual number of cases that he projects that the new appellate court would hear. Given that this piece was written in 2010, he uses data from 2008 to gauge the number of cases that the BIA heard that year, which he tabulates to be 32,432. *Id.* at 1857. After analyzing the types of cases that the BIA adjudicated in 2008, he concludes that if an Article III appellate court were established and replaced the BIA, then for 2010, it would hear "about ten thousand cases on the merits and twenty thousand procedurally, with most of these procedural terminations requiring little, if any, judge time." *Id.* at 1858. From there, he then determines that "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." *Id.* at 1860.

64. To Dr. Wheeler's observations, in particular, Professor Legomsky replied to the author with this important and persuasive counter:

Notwithstanding Professor Baum's and Dr. Wheeler's assessments, the fact is that most of the attention as of late has been on how best to reform immigration adjudication through Article I. This study, though, hopes to resurrect Professor Legomsky's valuable Article III proposal from years back—going beyond the arguments he put forth in 2010.[65] One matter worth confronting first, however, is what might happen to beneficial precedent for immigrants within those certain circuits if such a court were established.[66] Might these favorable decisions be in jeopardy of being erased? We turn to that important issue next.

II. ADDRESSING THE FAVORABLE PRECEDENT QUESTION: A CHALLENGE FOR THE 14TH CIRCUIT

A. Background

A key motivation for building a 14th Circuit is that it would provide what Max Weber might call coherent rationality to the disparate rulings that emerge across the country.[67] However, even as a staunch promoter of this new type of court, Professor Legomsky hastened to mention that he does "resist the temptation to tout the uniformity"[68] angle, additionally stating that "circuit splits can have positive benefits."[69] For instance, when such situations do occur, they can lead to diverse approaches and analyses on contested issues of law.[70] And Professor Legomsky did note that such splits

---

> Dr. Wheeler's pessimism over the prospects of Congress creating additional judgeships is understandable. But Professor Legomsky does not concede that his proposal would require any additional judgeships. As intuitive as Dr. Wheeler's assumption might be—after all, one would normally assume that it costs more to fund a federal judgeship than a spot on the BIA—Professor Legomsky argues that his proposed structure would, if anything, result in a net fiscal savings, not an additional cost. He gives three reasons. First, as his data show, the combined salaries of the BIA members and their huge attorney support staff are actually greater (on a per-case basis) than the combined salaries of the federal court of appeals judges and their law clerks. Second, his proposal would eliminate one of the two current rounds of appellate review, thus producing further savings. And finally, the proposed restructuring would eliminate the need for the prosecuting attorneys in the appellate division of the Justice Department's Office of Immigration Litigation; their sole function is to represent the government in the BIA phase of the current process.

Author exchange with Stephen H. Legomsky, *supra* note 56; *see also* Legomsky, *supra* note 15, at 1696–703.

65. *See infra* Part IV.

66. *See infra* Part III.

67. For a discussion of Weber's typology of rationality, see Stephen Kalberg, *Max Weber's Types of Rationality: Cornerstones for the Analysis of Rationalization Processes in History*, 85 AM. J. SOCIO. 1145 (1980).

68. *See* Legomsky, *supra* note 15, at 1705.

69. *Id.* at 1706.

70. *Id.*

may provide an opportunity for the Supreme Court to resolve disputes once and for all.[71]

Yet beyond these comments, there was no further elaboration. Moreover, the Court's current six-to-three conservative majority leaves many immigration advocates today understandably worried.[72]

Furthermore, the Court's composition would certainly affect the 14th Circuit's way of operating.[73] One of the most influential sources that tracks immigration decisions is the *Immigration Prof Blog* founded by Dean Kevin Johnson.[74] Dean Johnson, in reflecting upon the most recent 2022–2023 term, concluded that in two of the three merits cases that the Court heard, the noncitizen litigant lost.[75] For the 2021 term, Dean Johnson documented that "what can be classified as the pro-immigrant position failed in four of the five immigration cases, showing the direction of the current Supreme Court's conservative super-majority."[76] And the same exact pattern occurred the year prior.[77]

If the Supreme Court continues in its general mode of issuing unfavorable immigration decisions, then the impact will no doubt be felt by

---

71. *Id.* (noting also that the United States already has one centralized court that oversees the entire judicial system and there could be drawbacks by having a second such, sub-supreme court in existence now as well). And the presence of regional appellate courts is logistically easier for parties because the court hearing the appeal is often close by, thus cutting down travel time for the lawyers and their clients. *Id.* at 1706–08 (noting, however, that this type of rationale is not particularly persuasive given how large some circuits are already, and that there could be relatively simply workarounds if a new centralized court were to emerge).

72. *See infra* Part IV.

73. *Id.*

74. *See* IMMIGR. PROF. BLOG, https://lawprofessors.typepad.com/immigration/ [https://perma.cc/2YCF-YBK6]. The hosts of the blog include Professor Ming Hsu Chen (UC College of Law San Francisco), Professor Ingrid Eagly (UCLA Law), Dean Kevin Johnson (UC Davis Law School), Professor Bill Hing (University of San Francisco School of Law), Professor Kit Johnson (University of Oklahoma College of Law), and Professor Austin Kocher (Transactional Records Access Clearinghouse and Syracuse University).

75. *See* Immigration Prof, *Immigration in the Supreme Court, 2022 Term*, IMMIGR. PROF. BLOG (July 1, 2023), https://lawprofessors.typepad.com/immigration/2023/07/immigration-decisions-in-the-2022-term-of-the-supreme-court.html [https://perma.cc/9QSG-X874] (noting that these two cases were *United States v. Hansen*, 599 U.S. 762 (2023) and *Pugin v. Garland*, 599 U.S. 600 (2023), and the one case where the noncitizen won against the U.S. government was *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023)). And in another case, the U.S. government and the noncitizen litigants won jointly against Texas and Louisiana, which sought to invalidate the federal government's "more targeted approach focused on criminal noncitizens and other dangers to public safety than the Trump administration's 'zero tolerance' approach to all undocumented immigrants." *Id.* (noting that the case here was *United States v. Texas*, 599 U.S. 670 (2023)).

76. *See* Immigration Prof, *Immigration in the Supreme Court, 2021 Term*, IMMIGR. PROF. BLOG (July 1, 2022), https://lawprofessors.typepad.com/immigration/2022/07/immigration-in-the-supreme-court-2021-term.html [https://perma.cc/UGW6-HKBS].

77. *See* Immigration Prof, *Immigration in the Supreme Court, 2020 Term*, IMMIGR. PROF. BLOG (June 29, 2021), https://lawprofessors.typepad.com/immigration/2021/06/immigration-decisions-by-the-supreme-court-2020-term.html [https://perma.cc/A7T8-QTVA] (noting that "[t]he U.S. government prevailed in four of the five cases, an 80 percent success rate for the government . . . ."). This was Justice Amy Coney Barrett's first year on the Court.

the 14th Circuit. Essentially, if the 14th Circuit is interested in not seeing itself frequently overturned, it will likely adhere closely to how the Supreme Court has approached these types of cases. Given the high number of cases that the 14th Circuit would inevitably be hearing, this could place in jeopardy the rights presently enjoyed by many immigrants who are governed by more sympathetic regional appellate courts.[78]

At the same time, a recent study by Professors Rebecca Brown and Lee Epstein may offer a bit of comfort to those worried about an aggressive, "overreaching"[79] Supreme Court influencing the legal landscape of the federal judiciary—including a potential 14th Circuit. Focusing on the time period between 1937 and 2021, these authors found that "the Roberts Court (2005-2021 terms) was especially tough on the president, ruling in his favor only 35% of the time."[80] In looking at the 2019 term, which was when the Court was a five-to-four conservative majority (with the additions of Justices Gorsuch and Kavanaugh), there were eight immigration cases that were heard.[81] Of these, there were major rulings that went in favor of the noncitizen and against the Trump Administration.[82]

However, the authors qualify their argument with an important caveat. Namely, their "data [also] show that the Roberts justices are especially and uniquely willing to put the brakes on a president who does not share their

78. This point will be discussed in *infra* Part IV.

79. *See* Rebecca L. Brown & Lee Epstein, *Is the US Supreme Court a Reliable Backstop for an Overreaching US President? Maybe, but Is an Overreaching (Partisan) Court Worse?*, 53 PRESIDENTIAL STUD. Q. 234 (2023).

80. *Id.* at 235.

81. *See* Immigration Prof, *Immigration Decisions in the Supreme Court 2019 Term, Upcoming Cases in the 2020 Term*, IMMIGR. PROF. BLOG (June 25, 2020), https://lawprofessors.typepad.com/immigration/2020/06/immigration-in-the-supreme-court-2019-term-.html#google_vignette [https://perma.cc/US79-M5KB] (noting that these "eight cases . . . [were] a couple more than the Court's average number of immigration decisions in a Term").

82. *Id.* For example, in *Nasrallah v. Barr*, the Court dealt with the question of whether 8 U.S.C. §1252 (a)(2)(C) and (D) prevented the federal courts from reviewing the facts of an immigration case involving the Convention against Torture. In this case, the government sought to bar such review. However, in a seven-to-two decision, Justice Kavanaugh, writing for the majority, ruled that the language of the statute authorized the federal courts to retain their ability to engage in judicial review where torture claims like these were presented. Nasrallah v. Barr, 590 U.S. 573 (2020). Perhaps even more notably, there was the Court's decision in *DHS v. Regents of the University of California*, 591 U.S. 1 (2020). In this case, the Court found that the Trump Administration's Department of Homeland Security had engaged in arbitrary and capricious action in rescinding the benefits provided by President Obama's 2012 Deferred Action for Childhood Arrivals program. The crux of the opinion, written by Chief Justice Roberts, was that the DHS did not abide by the strict provisions of the Administrative Procedure Act, and accordingly, the Court found that the government had overreached in its rescission of the Obama Executive Order. *Id.*; *see also* Immigration Prof, *supra* note 81. Note, since this decision, the case has gone back up and down the federal courts. It is expected to reach the Supreme Court again in the near future. For a discussion of the recent history of this litigation, see *DACA*, NAT'L IMMIGR. L. CTR., https://www.nilc.org/work/daca/ [https://perma.cc/MN7U-FP42]; *Practice Alert: Recent Developments in the DACA Litigation*, IMMIGRANT LEGAL RES. CTR. (Sept. 27, 2023), https://www.ilrc.org/resources/practice-alert-recent-developments-daca-litigation [https://perma.cc/V4KT-GGUD].

partisan affiliation, while far less likely to check a president of the same party, especially if the president appointed the justice (the 'loyalty bias')."[83] Indeed, several other immigration judgments were hostile to claims brought by noncitizens during that same 2019 term.[84]

In sum, the various adverse decisions for immigrants over the last several years show that there is great risk of taking a case to the Supreme Court in this present moment.[85] These adverse rulings have shaped the overall environment within which the lower federal courts have to operate—including, presumably, a 14th Circuit court if it were to emerge.[86] In fact, one question is whether the 14th Circuit would simply morph into mimicking the Supreme Court, but with the effect being more consequential, since its judgments would be national. For many immigrant-rights advocates, the answer is a troubling and resounding yes.[87]

B. Gaming Out the Worrisome Scenario

1. Comparisons with the Federal Circuit

In 2013, Judge Diane Wood of the Seventh Circuit delivered a lecture in Chicago whereby she questioned the wisdom of having one federal appellate court with exclusive jurisdiction over a particular area of the law.[88] For Judge Wood, the specific subject matter she was addressing was not

83. *See* Brown & Epstein, *supra* note 79, at 235.

84. Included among these cases was perhaps one of the most severe: *DHS v. Thuraissigiam*, 591 U.S. 103 (2020). In this particular ruling, written by Justice Samuel Alito, the Court upheld 8 U.S.C. § 1252(e)(2), which precluded judicial review of expedited removal claims brought by immigrants seeking habeas review. Justice Alito also wrote the majority in *Hernandez v. Mesa*, which found that "the family of a young Mexican national who was killed by a U.S. border officer in a cross-border shooting did not have a private right of action to sue." *See* Immigration Prof, *supra* note 81 (citing Hernandez v. Mesa, 589 U.S. 93 (2020)). And there were other adverse decisions for immigrants that term as well. *See id.* (citing United States v. Sineneng-Smith, 590 U.S. 371 (2020); Barton v. Barr, 590 U.S. 222 (2020); Kansas v. Garcia, 589 U.S. 191 (2020)).

85. *See* Immigration Prof, *supra* notes 75–77, 81.

86. *Id.*

87. In the author's discussions with Professor Legomsky, he noted that these concerns were legitimate, but he offered two replies. "First, among the various regional courts of appeals, there are [already] decisional patterns both favorable and unfavorable to immigrants." Author exchange with Stephen H. Legomsky, *supra* note 56. In his proposal, discussed *infra* Section IV.B, he argues for rotating judges onto his CAI "who would come from all of those regional courts of appeals." *Id.* Furthermore, he also states that "there is no reason to assume that they would be any more, or any less, favorable to immigrants than they were when sitting in their home courts." *Id.* Second, Professor Legomsky argues that "there is no reason to assume that the Supreme Court—worrisome as its extreme political conservatism can be—would be any more likely to overturn an immigrant-friendly decision of" his CAI "than to overturn the same decision from any of the regional courts of appeals under the present system. If anything, one would expect that the specialized expertise of the new court would justify some measure of deference. And in either case, the impact of the Supreme Court's decision would extend nationwide." *See id.*

88. Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1 (2013).

immigration. Rather it was intellectual property, and in particular, patent cases.[89] But her argument relates to our discussion because her concerns are those that could easily be raised by opponents to the 14th Circuit.[90]

As background, in 1982, Congress passed the Federal Courts Improvement Act.[91] This statute merged "the Court of Customs and Patent Appeals and the old Court of Claims,"[92] creating the U.S. Court of Appeals for the Federal Circuit. Today, this appellate court has sole jurisdiction to hear patent appeals from the federal district courts, the Patent and Trademark Office, and the International Trade Commission.[93] (Judge Wood noted that other legal areas also fall under the Federal Circuit's appellate jurisdiction, and although these cases have made up more than half of the court's docket over the years, it is patent law that has gained the most public attention.[94])

For Judge Wood, the Federal Circuit's exclusive appellate jurisdiction over patent law cases has not yielded the benefits that proponents thought it might.[95] Similar to Professor Baum's argument, Judge Wood observed that the Federal Circuit has not demonstrated enhanced expertise, efficiency, and coherence in its patent law decisions.[96] Additionally, there has not been greater "quality or accuracy"[97] of justice in the court's rulings either.[98]

There was another crucial aspect that was sacrificed in the process: by eliminating the ability of different regional appellate courts to weigh in on patent law questions, important experience and knowledge from these sitting (albeit generalist) judges who had developed a special understanding of patent law was lost.[99] In fact, Judge Wood suggested that it might be wise to "re-introduce into the country the same kind of marketplace of ideas at the court of appeals level that we have for almost every other kind of

89. *Id.*

90. *Id.* (noting a series of concerns that will be discussed in this section).

91. *Id.* Also, for a classic case study of this court, see Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

92. *See* Wood, *supra* note 88, at 2.

93. *Id.* at 1 (noting that for the PTO, the specific body where appeals would come from would be the Board of Patent Appeals and Interferences).

94. *Id.* at 2. See also the U.S. Court of Appeals for the Federal Circuit's website, *Court Jurisdiction*, *supra* note 25 (noting that it "also reviews certain administrative agency decisions, including those from the U.S. Trademark Trial and Appeal Board, the U.S. Patent Trial and Appeal Board, the Boards of Contract Appeals, the U.S. Merit Systems Protection Board, the Office Congressional Workplace Rights, the Government Accountability Office Personnel Appeals Board, and the U.S. International Trade Commission").

95. For further background on this court, see Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992).

96. *See* Wood, *supra* note 88, at 3–7.

97. *Id.* at 3.

98. *Id.*

99. *Id.* at 7–9.

claim."[100] In other words, having the different circuits serve as testing sites would allow for a diversity of viewpoints to develop, which could be informative for the Supreme Court if it decided to ultimately resolve an existing circuit split.[101] Unfortunately, the presence of a unified federal court of appeals chokes off this possibility entirely.[102]

These same worries are transferrable to a discussion of a 14th Circuit for immigration. In fact, as an aside, Judge Wood even briefly discussed immigration in her essay, noting that the current regional circuit courts are the best and most "responsible [venues] for [adjudicating] petitions for review from the Board of Immigration Appeals."[103] Certainly, many rights advocates living in relatively immigrant-friendly jurisdictions would concur with this statement.[104]

2. The Benefits of Not *Having a Sole Immigration Appellate Court*

In December 2019, Emmanuel Priva, a Haitian citizen who had acquired conditional permanent residency in the United States, was convicted of visa fraud.[105] He was serving his sentence in Georgia when he received a notice from the Department of Homeland Security (DHS) that, because he had committed an aggravated felony, he was subject to deportation through an expedited removal hearing under 8 U.S.C. §1228(b).[106] Expedited removal allows DHS officers to unilaterally issue deportation orders, but noncitizens can "access the asylum system if they express fear of persecution, torture, or of returning to their home country."[107] Because Priva had been convicted of an aggravated felony, he was ineligible to seek asylum in particular, but he could (and did) petition for a more limited form of relief known as

---

100. *Id.* at 7.

101. *Id.* This concept of thinking about the federal courts as laboratories has been found in other sources. *See* Maureen N. Armour, *Federal Courts as Constitutional Laboratories: The Rat's Point of View*, 57 DRAKE L. REV. 135 (2008); Jeanne C. Fromer, *District Courts as Patent Laboratories*, 1 U.C. IRVINE L. REV. 307 (2011); *see also* Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 387 (arguing that following the establishment of the Federal Circuit that the U.S. Supreme Court scaled back its involvement in patent cases and further arguing that the Court ought to play a more "intermediate, managerial role" going thereafter).

102. *See* Wood, *supra* note 88.

103. *Id* at 7.

104. For a discussion of this point, *see infra* Section III.B.2.

105. Priva v. U.S. Att'y Gen., 34 F.4th 946, 948 (11th Cir. 2022).

106. *Id.*

107. AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1 (2023), https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal_factsheet_2023.pdf [https://perma.cc/F3HG-CBUK]. Note, it is important to keep in mind that this case involved expedited administrative removal under 8 U.S.C. § 1228(b). This point is to be distinguished from 8 U.S.C. § 1225(b), which involves "expedited removal . . . [of] noncitizens who arrive at a port of entry if they do not have entry documents or if they have tried to enter through fraud or misrepresentation, with certain exceptions." *Id.* My great thanks to Ingrid Eagly for highlighting this distinction for me.

withholding of deportation, which was the request he made to the DHS officer.[108]

After three separate hearings, where Priva had counsel representing him at each one, the DHS officer finally decided against granting the request for relief.[109] As was his right, Priva appealed to an immigration judge.[110] Priva was sent a notice of when he was to appear, and on that form, there was information stating that he could bring a lawyer to the proceeding at "no expense to the government."[111] At the hearing itself, Priva was unrepresented, which the judge simply noted but made no further inquiry regarding this fact.[112]

Eventually, the immigration judge ruled against Priva.[113] Because of a regulation that took effect in January of 2021 involving these types of cases,[114] Priva had no further administrative recourse, so he brought an appeal to the Eleventh Circuit, where he argued that the immigration judge violated his due process rights by not asking him about his lack of legal representation.[115] The Eleventh Circuit dismissed Priva's appeal.[116] It stated that even if the immigration judge were obliged to have dug deeper, there was no evidence that Priva was substantially prejudiced by the judge's failure to do so.[117]

The court's ruling in *Priva* has not been uniformly adopted across the circuits. In fact, there is a deep split: the Fourth, Fifth, Eighth, and Tenth Circuits have sided with the Eleventh.[118] By contrast, the Second, Third, Seventh, and Ninth Circuits have held that the failure to provide the

108. *Priva*, 34 F.4th at 948–51.

109. *Id.* at 951 (noting that "the asylum officer found Priva credible but concluded there was 'no reasonable fear of persecution established and no reasonable fear of torture established'").

110. *Id.* at 951–52.

111. *Id.* at 951. Note, this right is statutorily codified. 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.").

112. *Priva*, 34 F.4th at 951.

113. *Id.* at 952.

114. On January 11, 2021, 8 C.F.R. § 208.31(g)(1) (2025) went into effect, which stated that for noncitizens seeking asylum but who were "convicted of an aggravated felony under the Immigration and Nationality Act ("INA") § 238(b) . . . no further administrative appeal [would be] available" upon a ruling made by the immigration judge. *Id.* at 948. Even dating back to the 1999 Federal Register, it appears that those in someone like Priva's position could only gain withholding and Convention Against Torture protection (as opposed to asylum). *See* Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 (Feb. 19, 1999) (to be codified at 8 C.F.R. pts. 3, 103, 208, 235, 238, 240, 241, 253, and 507). My thanks to Ingrid Eagly for highlighting this point to me.

115. *See Priva*, 34 F.4th at 952.

116. *Id.* at 954–57.

117. *Id.*

118. *See id.* at 961 (Wilson, J., dissenting) (citing Njoroge v. Holder, 753 F.3d 809, 812 (8th Cir. 2014); Ogbemudia v. INS, 988 F.2d 595, 598 (5th Cir. 1993); Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990); Farrokhi v. INS, 900 F.2d 697, 702 (4th Cir. 1990)).

noncitizen with the opportunity to have counsel—or to give the noncitizen the ability to affirmatively decline representation—amounts to a denial of due process per se, without any need to show substantial prejudice.[119]

This background relates to our 14th Circuit discussion. For noncitizens in jurisdictions that follow the no substantial prejudice rule, their advocates may not want to see a court with powers to issue a nationwide ruling weigh in on this matter—especially where that court might be hostile to immigrant rights. In other words, per Judge Wood, allowing the different regional appellate courts to serve as a diverse "marketplace of ideas"[120] might preserve the rights of immigrants in these more friendly circuits.[121]

Additionally, supporting evidence from the EOIR has found that there are wide disparities in how frequently federal appellate courts affirm rulings from the immigration courts. The data, which examine the immigration courts' appellate body, the BIA, reveal that the Fifth Circuit is one such appellate court that has low rates of reversals.[122] Even before Donald Trump assumed office, the Fifth Circuit was reluctant to overturn decisions from the BIA—as Table 1 highlights.

TABLE 1: RATES OF REVERSAL OF THE BIA: JANUARY–DECEMBER 2015[123]

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	40	30	10	25.0
Ninth	927	759	168	18.1
Tenth	61	51	10	16.4
First	36	31	5	13.9
Third	117	104	13	11.1
Eleventh	82	75	7	8.5
Sixth	72	67	5	6.9
Second	289	269	20	6.9
Fourth	111	104	7	6.3
Eighth	46	44	2	4.3
Fifth	122	119	3	2.5
All	1903	1653	250	13.1

119. *See id.* at 961 (citing Montilla v. INS, 926 F.2d 162, 169 (2d Cir. 1991); Leslie v. Att'y Gen. of U.S., 611 F.3d 171, 181 (3d Cir. 2010); Castaneda-Delgado v. INS, 525 F.2d 1295, 1302 (7th Cir. 1975); Montes-Lopez v. Holder, 694 F.3d 1085, 1092 (9th Cir. 2012)). In fact, the key decision that Priva referred to in his case was *Zuniga v. Barr*, 946 F.3d 464 (9th Cir. 2019). *Priva*, 34 F.4th at 953.

120. *See* Wood, *supra* note 88, at 9.

121. *Id.*

122. *Id.* (noting that the Fifth Circuit has the lowest "percent of pro-migrant decisions" at 2.5%).

123. John Guendelsberger, *Circuit Court Decisions for December 2015 and Calendar Year 2015 Totals*, IMMIGR. L. ADVISOR, Jan. 2016, at 5.

As is indicated here, in 2015, the BIA was reversed in only 2.5% of the cases heard by the Fifth Circuit. In comparison, 25% of the cases that the Seventh Circuit heard were reversed, and the Ninth Circuit had an 18.1% reversal rate.[124]

Below, Table 2, which looks at the most recent publicly available data, highlights similar variation.

TABLE 2: RATES OF REVERSAL OF THE BIA: JULY–SEPTEMBER 2022[125]

Circuit	Affirmed	Reversed	Total	% Reversed
First	3	2	5	40.0
Second	55	7	62	11.3
Third	22	5	27	18.5
Fourth	16	4	20	20.0
Fifth	131	7	138	5.1
Sixth	10	2	12	16.7
Seventh	6	0	6	0.0
Eighth	15	0	15	0.0
Ninth	280	33	313	10.5
Tenth	8	2	10	20.0
Eleventh	25	3	28	10.7
All	571	65	636	10.2

Given these disparities, one could imagine the following scenario. The BIA issues a ruling against a noncitizen, which is affirmed by the Fifth Circuit. The noncitizen's lawyer wishes to appeal this judgment to the Supreme Court. At this point, highly strategic lawyers in places like the Ninth Circuit might understandably shy away from supporting such a petition for fear of having that Fifth Circuit ruling affirmed and become 'national.'[126]

124. *Id.* (noting that the cases that came before the circuits during this time period constituted matters involving asylum, withholding, or Convention Against Torture claims; "direct appeals from denials of other forms of relief from removal or from findings of removal; and . . . appeals from denials of motions to reopen or reconsider").

125. S. Kathleen Pepper, *Circuit Court Decisions for July – September 2022*, IMMIGR. L. ADVISOR, Fall 2022, at 8.

126. According to Professor Legomsky,

> Of course, it is also possible that the new court [for immigration] would rule favorably on this and other issues, thus extending the benefits of its rulings nationwide rather than limiting them to selected circuits. Moreover, why should some immigrants be denied the procedural rights granted to other similarly situated immigrants simply because they have the misfortune to live in more conservative circuits?

Author exchange with Stephen H. Legomsky, *supra* note 56.

Of course, this concern may be tempered by the fact that so few cases are granted cert by the Supreme Court. (Priva's own cert petition was denied in December of 2022.[127]) However, what if there were a 14th Circuit in place that exclusively heard appeals from the immigration courts, with no regional Article III option?[128] The possibility then would dramatically increase that not only would these appeals be heard but that many decisions coming out of this court—which might be extremely disadvantageous to noncitizens—could go national.

In this situation, rights advocates might gravely worry about establishing such a national appellate immigration court. So, how might this trepidation be quelled? The solution perhaps rests in thinking about the creation of the 14th Circuit in a more flexible fashion.

III. ADDRESSING THE CONCERNS

A. Optional Selection Component

From the get-go, Professor Legomsky readily acknowledged that his idea for creating a unitary federal court of appeals for immigration would be a massive revamp.[129] These were drastic times that required drastic measures, according to Professor Legomsky, and so replacing the BIA and the existing immigration jurisdiction of the regional federal circuit courts with one omnibus appellate forum was crucial for reforming what was clearly a broken system.[130]

However, that such a 14th Circuit court could erase positive precedent in favorable appellate jurisdictions is a real concern. The literature from scholars who study the subject of "cause lawyering" shows that attorneys representing clients whose cases are part of a larger movement routinely

---

127. 143 S. Ct. 526 (2022) (mem.). Furthermore, according to Professor Legomsky,

> The fact that the challenged decision [would be] that of the new Court of Appeals for Immigration (as opposed to one of the regional courts of appeals) should not make the Supreme Court any more or less likely to grant certiorari in the first place. Under either system, a Supreme Court precedent would apply nationwide. Its decision whether to grant certiorari would presumably depend on the usual factors that drive those decisions – mainly its views on the merits of the case and the importance it attaches to the issues, not on which court handed down the decision it is being asked to review.

Author exchange with Stephen H. Legomsky, *supra* note 56.

128. Note, the appeal from the "immigration courts," in this scenario, could come from the BIA, if the current Justice Department immigration courts were left intact. Or even in Professor Legomsky's proposal, where he discusses converting the EOIR courts to independent executive agency courts, there would be an appellate division within this structure. *See* Legomsky, *supra* note 15, at 1683. So, the term here "immigration courts" could refer to one of either of these situations.

129. *See* Legomsky, supra note 15, at 1636 ("[T]his Article proposes radical surgery, replacing both administrative appeals and regional court of appeals review with a single round of appellate review by a new, Article III immigration court.").

130. *Id.*

make tactical decisions regarding if, when, and where to file their petitions.[131] If there were no regional appellate courts and only the 14th Circuit, it is certainly conceivable that lawyers might balk at filing an Article III appeal out of fear that existing, favorable precedent in some jurisdictions might be overturned and thus harm the greater immigrant cause.[132]

Therefore, what if an alternative plan could be constructed to mitigate this problem? In her assessment of the Federal Circuit, Judge Wood stated that her position was "not whether we should *abolish* the Federal Circuit, or even whether we should strip it entirely of its patent jurisdiction."[133] Rather, because she valued the contributions that the regional appellate courts had made over the years, she argued for:

> parties [to] have a choice: they could take their appeals to the Federal Circuit, thereby benefitting from that court's long experience in the field, or they could file in the regional circuit in which their claim was first filed. This is the Fleetwood Mac model: "You can go your own way."[134]

Drawing on Judge Wood's suggestion, could an optional selection component be incorporated into the framework for creating a 14th Circuit for immigration? The answer is quite possibly yes. Returning to the above-discussed circuit split involving the *Priva* case, here is how the process might work.[135]

Let us assume that Immigrant Y resides in Portland, Oregon. Y had no lawyer at her immigration hearing and was not informed of her statutory

---

131. STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold eds., 2005); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006); Susan Sterett, *Caring about Individual Cases: Immigration Lawyering in Britain*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 293 (Austin Sarat & Stuart Scheingold eds., 1998); Susan Bibler Coutin, *Cause Lawyering and Political Advocacy: Moving Law on Behalf of Central American Refugees*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra*, at 101; Susan Bibler Coutin, *Cause Lawyering in the Shadow of the State: A U.S. Immigration Example*, *in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra*, at 117.

132. Interestingly, when it comes to circuit splits, there is little systematic research on whether lawyers choose not to go to the Supreme Court for fear of an adverse, national ruling. One scholar who has examined related questions is Kevin T. McGuire. *See, e.g.*, Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187 (1995); Kevin T. McGuire, *Lawyers and the U.S. Supreme Court: The Washington Community and Legal Elites*, 37 AM. J. POL. SCI. 365 (1993); Kevin T. McGuire, *Advocacy in the U.S. Supreme Court: Expertise Within the Appellate Bar*, 11 CONST. COMMENT. 267 (1994).

133. *See* Wood, *supra* note 88, at 9.

134. *Id.*

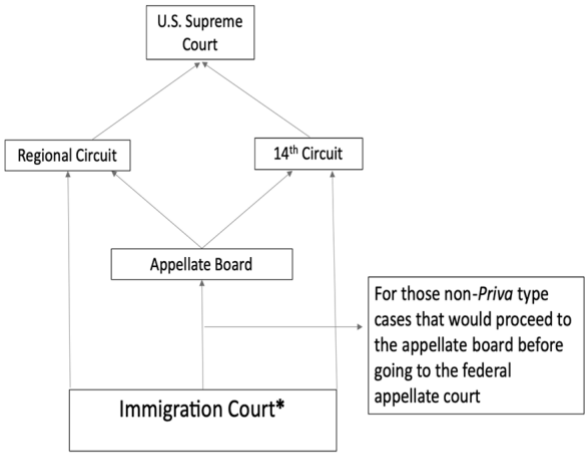
135. *See supra* Section III.B.2.

right to representation by the immigration judge. The hearing thereafter proceeded, and the judge found Y deportable and denied Y's request for cancellation of removal.[136]

Under the typical procedure, Y would be able to petition this denial for an administrative review. However, because of the regulation mentioned above that precludes such an administrative appeal in these situations, Y's only recourse would be to seek redress in an Article III federal appellate court, which in this case would be the Ninth Circuit.[137]

Recall that, fortunately for Y, there is favorable precedent on this issue from the Ninth Circuit. While this past case law does not automatically mean that Y would prevail on appeal, Y could feel some confidence that she might. However, if there were no regional appellate court, and the 14th Circuit was the only forum available, the outcome would be more uncertain. Therefore, consider Figure 1, which visualizes how this scenario might play out with an optional selection feature.

FIGURE 1: THE OPTIONAL SELECTION COMPONENT FOR THE 14TH CIRCUIT



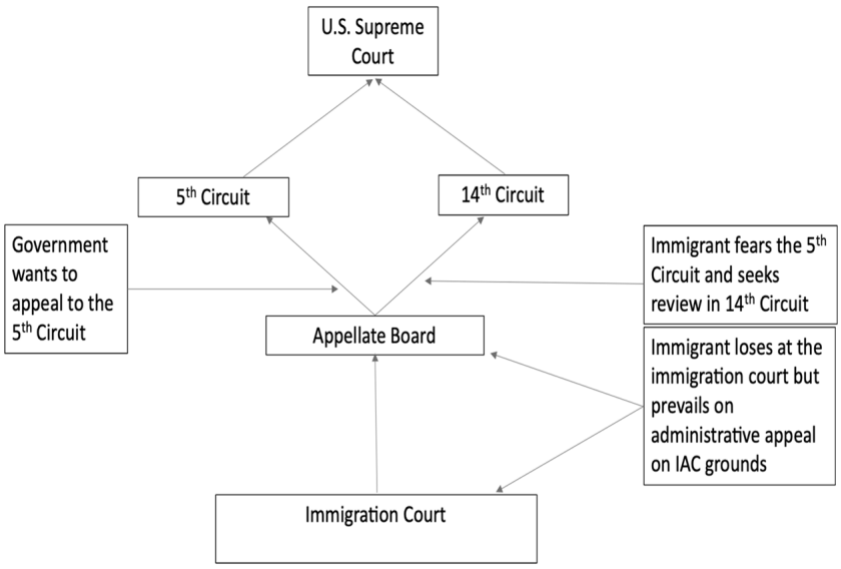
136. For an empirical study on the different forms of discretionary relief, including asylum, adjustment of status, voluntary departure, and cancellation of removal, see Jayanth K. Krishnan, *The Immigrant Struggle for Effective Counsel: An Empirical Assessment*, 2022 U. ILL. L. REV. 1021.

137. *See supra* Section III.B.2; *see also supra* note 128 (noting that if Professor Legomsky's model for replacing the EOIR with an independent executive agency staffed by independent administrative immigration judges were in place, then under normal circumstances—for him—a typical case would go to an independent administrative immigration law judge first and then proceed to an independent appellate division within that agency).

As the diagram shows, for cases like *Priva*, the optional selection component would allow Y to have a choice between going to the Ninth Circuit or to the 14th Circuit. The same option would be available for those typical, non-*Priva* cases that work their way through the initial immigration court that then come out of the administrative appellate body.[138]

The question that likely would emerge, however, is whether only the immigrant would have the choice of which appellate forum to petition or whether the government would also be entitled to this option. Imagine a scenario such as Figure 2 below, where an immigrant based in Louisiana loses at the initial immigration hearing but prevails on administrative appeal, which finds that the immigrant had ineffective assistance of counsel (IAC).

FIGURE 2: WHOSE CHOICE PREVAILS?



138. Note, the term "administrative appellate body" is intentionally used to accommodate a BIA appellate scenario or a Legomsky-type independent executive appellate board scenario. *See* supra notes 128, 137. Also, this type of proposed framework occurs in other areas of American adjudication. *See* Wood, *supra* note 88, at 9. For example, the National Labor Relations Act allows aggrieved employees to appeal a decision from the National Labor Relations Board: "(1) in a court of appeals where the alleged unfair labor practice occurred; (2) in a court of appeals where the party 'resides or transacts business'; or (3) in the D.C. Circuit." *Id.* (citing 29 U.S.C. § 160(f)).

Previous research on this topic has shown variation as to how sympathetic the different circuit courts are to such claims.[139] For its part, the Fifth Circuit has not been particularly welcoming to the IAC pleas of immigrants.[140] So, it is not hard to imagine the government wanting to appeal to the Fifth Circuit rather than going to an unknown, newly created 14th Circuit. But what happens here where the immigrant might prefer to roll the dice and go to the 14th Circuit, given the historic hostility of the Fifth Circuit? Whose choice should prevail?

One answer might be that regardless of what the federal government may want, the only party that should be able to choose the venue is the immigrant. After all, the power differentials are enormous, and the way that the immigration court system is structured tilts heavily in favor of the executive branch.[141] As such, it only makes sense that to balance out this disparity, the immigrant be given the opportunity to select the appellate court where the security of having a fair hearing can be felt the most.

The other way to handle this issue would be to allow both sides to make a request to the respective appellate forum in which they wish to have the case heard. If there is a conflict because of a "race to the courthouse situation,"[142] then it may be useful to consider the following approach. Specifically, the case could be referred to the Judicial Conference Committee on Inter-Circuit Assignments.[143] This committee is one of twenty that make up the Federal Judicial Conference, which has as its presiding officer the Chief Justice of the United States.[144] The Judicial Conference itself "is the policymaking body of the federal court system,"[145] and it is comprised of "the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade."[146]

For an immigration case, the inter-circuit committee could be ideal for resolving a disagreement between the government and the noncitizen on where to hold the appeal. Without question, this committee would need to be allocated greater resources from Congress (via the Federal Judicial

139. *See* Krishnan, *supra* note 136; *see also* Jayanth K. Krishnan, *Lawyers for the Undocumented: Addressing a Split Circuit Dilemma for Asylum Seekers*, 82 OHIO ST. L.J. 163 (2021).

140. *See* Krishnan, *supra* note 136, at 1035–36.

141. All of these points have been discussed in detail by various scholars and cited accordingly. *See supra* Part I; notes 7–15.

142. *See* Wood, *supra* note 88, at 9.

143. *See About the Judicial Conference of the United States*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/K3JA-LHC7].

144. *Id.*

145. *Chief Justice Names Conference Committee Chairs*, U.S. CTS. (Oct. 14, 2022), https://www.uscourts.gov/news/2022/10/14/chief-justice-names-conference-committee-chairs [https://perma.cc/9W7G-53E8].

146. *Id.*

Center) in order to put into place potentially additional judges and professionalized staff to coordinate these logistics. But given the importance of the issue to the federal government (not to mention to the country), Chief Justice Roberts would have a powerful case to make in his annual report to Congress, where he has previously pressed for increased funding in order to enhance the different ways justice can be administered through the courts.[147]

Assuming that the resources and the will are there, one could envision having this impartial inter-circuit committee engage in a random selection process between the 14th Circuit and the other regional appellate court on where the petition should be heard. Through this method, case law development could gradually occur within the 14th Circuit. It would also allow for the regional courts to continue to flourish as their own respective jurisprudential laboratories.[148]

B. Staffing

As we discussed earlier, Professor Legomsky argued for staffing his proposed immigration court with a combination of appellate and district court judges.[149] Using a proportionality format, he suggested that the more populous the circuit was in terms of Article III judges, the more

147. For the most recent annual report from the Chief Justice, see JOHN G. ROBERTS, 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf [https://perma.cc/3Q8Q-GAXH]. And for specific requests that the Chief Justice has made, see 2012 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2012), https://sblog.s3.amazonaws.com/wp-content/uploads/2012/12/2012Year-EndReport.pdf [https://perma.cc/53CS-RFND]. As it relates to requests for more security funding, see Zach Schonfeld, *Supreme Court Requests Security Funding Increase Following Threats*, THE HILL (Mar. 9, 2023, 1:53 PM), https://thehill.com/regulation/court-battles/3892174-supreme-court-requests-security-funding-increase-following-threats/ [https://perma.cc/ANF6-F7JR].

148. This proposal draws from Judge Wood's discussion in her paper, wherein she argued that to resolve choice of circuit conflicts between the regional appellate court and the Federal Circuit, the case could be referred to the Judicial Panel on Multidistrict Litigation (JPML). *See* Wood, *supra* note 88, at 9–10. Created by congressional statute in 1968, under 28 U.S.C. § 1407, this body's charge

> is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings.

About the Panel, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., https://www.jpml.uscourts.gov/about-panel [https://perma.cc/2BHK-MF7L]. To date, there have been over 3,000 consolidation petitions submitted to the JPML, with the Panel creating over 1,800 case dockets, comprising more than a million actual cases. *Id.* The areas that have been covered by the JPML vary greatly, but the objective is clear: "to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary." *Id.* This study appreciates Judge Wood's proposal and clearly is influenced by it. But the JPML did not seem like an apt fit for how to resolve the specific circuit conflict between a regional appellate court and the 14th Circuit. Thus, it gave way to the inter-circuit committee, which appears more appropriate.

149. *See* Legomsky, *supra* note 15, at 1686–87; *see also supra* Section II.A.

representation there would be of judges from that circuit.[150] Professor Legomsky also added another dimension: these judges would sit for two years before being rotated off for another cohort that would enter and serve.[151] The idea would be to bring in these generalist judges who could offer a broad perspective on the law and then immerse them in immigration.[152] Their judicial decisions would contain developed expertise that would be undergirded by those years of experience gained as a generalist.[153] These judgments would also serve as the basis for a burgeoning common law within this new court that subsequent judges could build upon going forward.[154]

At the same time, and to address those questions raised by both Professor Baum and Dr. Wheeler, there might be another way to approach how best to staff a newly created 14th Circuit.[155] Consider, for example, placing a sunset provision on the optional venue selection component. The underlying premise for creating the 14th Circuit is that it would help to provide coherence and rationalize a system that otherwise offers checkerboarded justice depending upon where the noncitizen is located.[156] But what if staffing could be done in a manner that would ensure that favorable immigration precedent would not necessarily disappear and, in fact, continue to have influence over 14th Circuit jurisprudence? Then, there may be a path toward satisfying concerned advocates who might worry about having only one central immigration appellate court.

Here is how the plan might look. To begin, the ability to choose between going to the 14th Circuit or a regional circuit court would not last in perpetuity. From the moment that the 14th Circuit is established, this study proposes that the optional selection component would be available for twelve years. (This period would cover at least three presidential cycles.)

150. Legomsky, *supra* note 15, at 1686–87 ("[E]ach circuit would contribute district and circuit judges proportionately to the total number of district and circuit judges in that circuit.").

151. *Id.* at 1687 (noting that where vacancies emerged or more judges were needed, the court could turn to additional current or senior status judges to assist on a short-term basis).

152. *Id.* at 1692–96; *see also id.* at 1714 ("The president, with the advice and consent of the Senate, would appoint a chief judge of the CAI for a term of seven years. Each circuit would assign both circuit and district judges to sit on the new court for two-year terms. If the draft bill becomes law, Congress would need to enact subsequent legislation specifying the number of judges it wishes to authorize for the new court, as well as any corresponding adjustments Congress wishes to make to the number of authorized judgeships for the existing courts of appeals and district courts.").

153. *Id.* at 1692–93 ("[S]ome judges on the existing regional courts of appeals have already acquired a good deal of specialized expertise simply by having handled a large number of immigration cases.").

154. *Id.*

155. Recall from the above discussion of Professor Baum and Dr. Wheeler's responses, both commentators were skeptical that a new federal immigration appellate court could be staffed in a way that would bring about all of the benefits argued for by Professor Legomsky or that it would be even politically feasible to pull off. For a review of their respective views, see *supra* Section II.B.

156. *See supra* Parts II, III.

The public will have had time to become used to the existence of the 14th Circuit and will have seen decisions coming out from this court. In addition, legal scholars will have had an opportunity to study how these rulings compare with what has been decided in the other regional courts of appeals.

Moreover, for the interim period, instead of judges coming in for two years and then rotating off, the 14th Circuit could be filled with only senior-status judges, who would bring a wealth of experience during those initial twelve years.[157] (Another benefit is that deploying senior status judges would not draw away from current sitting judges whose dockets are already packed.[158])

At present, there are 625 senior judges.[159] Like with Professor Legomsky's suggestion, the thought here is that the allocation of interim senior judges on the 14th Circuit would be done proportionally to the size of the different circuits across the country. Thus, the Ninth Circuit would have the largest number of interim senior judges, and the First Circuit would have the fewest.[160]

From there, one could imagine that our 14th Circuit could have in place, say, thirty interim judges,[161] who would eventually be replaced by thirty lifetime, presidentially appointed judges after that initial twelve-year period expires.[162] (Both during the interim and then post-interim phases, the panels hearing the appeals would be staffed by three judges who would be randomly selected.[163])

Having this interim period should be attractive to immigrant rights advocates. Bluntly speaking, given that more of these judges would be drawn from circuits that tend to show greater sympathy for immigrants, this

157. For a general discussion of the role senior status judges play on the Ninth Circuit, see *Court Coverage Tutorial: General Information*, U.S. CTS. FOR NINTH CIR. https://www.ca9.uscourts.gov/news-media/media-education-1/ [https://perma.cc/3KWX-YZJQ].

158. For a study that covered a five-year period examining the dockets of federal judges, see *Some Federal Judges Handle Inordinate Caseloads*, TRAC REPS. (Mar. 14, 2018), https://trac.syr.edu/tracreports/judge/501/ [https://perma.cc/XQL3-KN42]; *see also* ROBERTS, *supra* note 147, at 9–10 (noting that "[t]he federal district courts docketed 339,731 civil cases in FY 2023, an increase of 24 percent from the prior year," and that while the circuit courts saw a drop of four percent in filings, the total number was still at close to 40,000).

159. Khaleda Rahman, *Federal Judges Keep Getting Older . . . and They Are Hard to Remove*, NEWSWEEK (July 11, 2023, 5:12 AM), https://www.newsweek.com/extremely-old-federal-judges-clogging-courts-1812003 [https://perma.cc/XG6R-HXJX].

160. In his proposal, Professor Legomsky suggests that "[t]he Judicial Council of each circuit would make selections from the pool of eligible judges." Legomsky, *supra* note 15, at 1687. There is no reason why such a system could not be in place for the selection of senior status judges either.

161. Again, these interim judges could be either drawn from Professor Legomsky's model or from the senior status model. *See Court Coverage Tutorial: General Information*, *supra* note 157 ("The Ninth Circuit is currently authorized 29 appellate judgeships.").

162. For details on this point, please refer back to above discussion.

163. For a general discussion of how panels are selected on the Ninth Circuit, see *Court Coverage Tutorial: General Information*, *supra* note 157.

arrangement would likely provide comfort to those who are concerned about an *a priori*, built-in judicial bias in favor of the government.[164]

Conversely, those who believe in more restrictive rights for immigrants should be willing to buy into this plan as well. The reason is that since immigration will undoubtedly remain a divisive political issue, hardliners will have twelve years to make their case to the public. If they are persuasive, they will be able to help elect a president who adheres to these beliefs and who will then have an opportunity to make permanent appointments to the 14th Circuit.[165]

In other words, those who frequently tout leaving crucial policy decisions (such as immigration) to the electorate will have their chance to follow through on this ideological position. They can take their case to the public and argue that electing Presidential Candidate A over Presidential Candidate B is the preferred way to go, since the former will ensure conservative appointments to the federal judiciary—including to the 14th Circuit. Otherwise put, these hardliners will have the responsibility to make the best case they can to the public, and it will be the will of the public that determines whether a court like the 14th Circuit is shaped by a president who is more or less sympathetic to the legal claims being made by immigrants.

Empirically, it is also worth noting that although the more liberal circuits would have greater representation on the 14th Circuit in the interim period, as Figure 3 shows, at present there are actually more senior status judges who were appointed by Republican presidents than Democratic presidents.[166]

---

164. One counter to this point is that, depending on the year that this proposal would be adopted, it is possible that the pool of senior status judges (even from circuits such as the Second and Ninth) would be mainly those who were appointed by Republican presidents. Since 2000, there were eight years of George W. Bush who was president and four years of Donald Trump. This possibility would surely be one that would please conservatives and immigration hardliners, but progressives might take comfort in remembering that there were eight years of Barack Obama who was president and four years of Joseph Biden. So much, therefore, would depend upon when this proposal was adopted, in terms of the specific year.

165. It is not hard to imagine presidential candidates running on this issue, similar to how they use the pulpit to talk about federal judicial appointments more generally.

166. These data were assembled in the following manner by the author's research assistant, Zenas Shi, and then confirmed by the author, as of January 24, 2024. The steps included going to the Federal Judicial Center's website, which provides a biographical directory of every Article III judge to have ever served in the United States. From there, the directory was distilled down to retaining only senior status judges who are alive today and remain on the bench. The sum from this method resulted in 628 senior-status judges, with three being retired Supreme Court justices (Stephen Breyer, Anthony Kennedy, and David Souter). They were not included as part of the 625 mainly because this study's proposal opted to follow Professor Legomsky's method of only looking at district court and circuit court judges. To access this database, see *Biographical Directory of Article III Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export [https://perma.cc/W4G3-34P3] (select Format 2: Organized by Category for the database from which the data was gathered, including the party that nominated the respective judge to the bench).

FIGURE 3: PERCENTAGE OF SENIOR STATUS JUDGES BY POLITICAL PARTY OF NOMINATING PRESIDENT

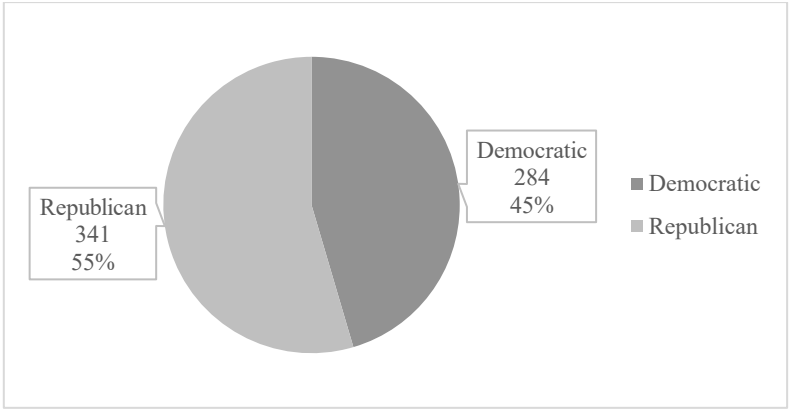
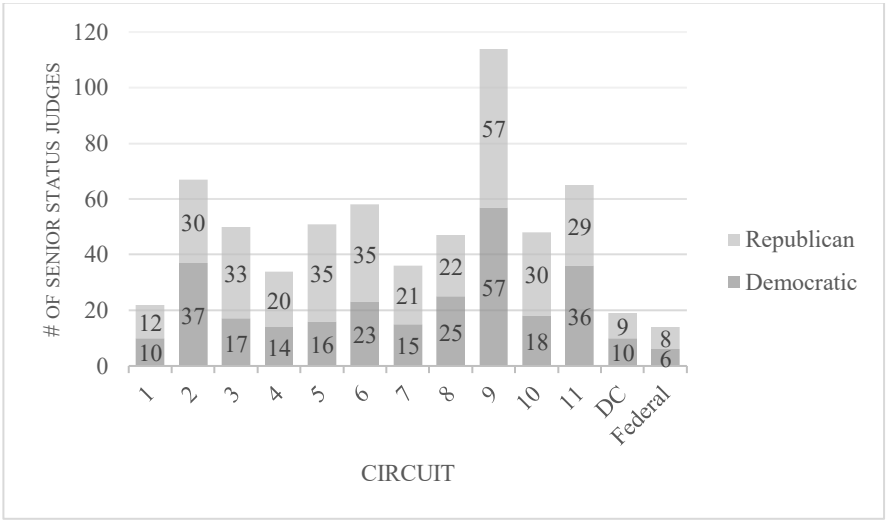


Figure 4 then breaks down the data by circuit.[167]

FIGURE 4: NUMBER OF SENIOR STATUS JUDGES BY CIRCUIT AND POLITICAL PARTY OF APPOINTING PRESIDENT



As the statistics reveal, in some circuits there is a relatively even distribution of Republican and Democratic appointed senior judges, while

167. *Id.* (indicating the court in which every senior status judge sits and the circuit they are grouped into).

that is not so much the case in others.[168] The bottom line is that drawing from the senior judge pool in a proportional representation manner allows for the more progressive circuits to be adequately represented, while ensuring that judges who are more likely to be favored by conservatives will have their voices heard as well.

And the specific way this appointment plan could work would be that, during the interim period, the President would nominate a chief judge to the 14th Circuit who would need to be confirmed by the Senate.[169] The chief judge then, in accordance with 28 U.S.C. § 294, would invite senior status judges to this new court, where they would each have to "consent to the assignment."[170] This process, which is referred to as "sitting by designation,"[171] clearly would place enormous power within the hands of the chief judge, who could theoretically select only other ideologically like-minded senior judges.

To guard against this potential skewing effect, Congress could require that there be a random selection or lottery conducted by the chief judge's staff of those senior judges who consent to the assignment. Alternatively, if too few senior judges consent, then the chief judge could turn to each circuit's respective Judicial Council. This body is made up "of an equal number of circuit judges and district judges of the circuit [with membership] . . . determined by majority vote of all such judges of the circuit in regular active service."[172] The purpose of the Judicial Council is to ensure "the effective and expeditious administration of justice within its circuit."[173] The idea would be that if not enough senior judges consented to being appointed, the Judicial Council, as part of its governance mandate, could assign senior judges for a period of time onto the 14th Circuit.[174]

---

168. *Id.*

169. This point draws upon Professor Legomsky's idea. *See* Legomsky, *supra* note 15, at 1714 ("The president, with the advice and consent of the Senate, would appoint a chief judge of the CAI for a term of seven years.")

170. *See* Marin K. Levy, *Visiting Judges: Riding Circuit and Beyond*, 106 JUDICATURE 21 (2023), ("The chief judge of the borrowing court must certify that assistance is needed and submit a request for aid to the Judicial Conference Committee on Intercircuit Assignments, which in turn handles the arrangements of visits and submits the formal request to the chief justice [of the United States].").

171. *Id.*

172. *See* 28. U.S.C. § 332 (a)(1). In addition, under (a)(2), the "members of the council shall serve for terms established by a majority vote of all judges of the circuit in regular active service." *Id.* § 332 (a)(2).

173. *Id.* § 332 (d)(1).

174. This idea of having the judicial circuit councils involved draws upon Professor Legomsky's article. *See* Legomsky, *supra* note 15, at 1687. Another possibility could be that the chief judge, in consultation with the Federal Judicial Conference Committee on Inter-circuit Assignments, could be required by Congress to ensure a more balanced cohort during this interim period. This arrangement could also result in setting out the duration of how long each senior status judge would sit. For a discussion and commentary on how the Judicial Conference Committee on Intercircuit Assignment

Following the conclusion of the twelve-year interim period, the next question to ask is how the transition to a permanent, presidentially appointed 14th Circuit would work. On this point, rather than replacing all thirty interim judges at once, Congress could pass legislation staggering the process.[175] So, for example, one-third of the interim judges would be replaced by life tenure appointees within the first four years. Subsequently, another third would be replaced during the next four years. Then the final third would be replaced four years after that. Although it would be another full twelve years (in addition to the twelve-year interim period) before the 14th Circuit had all thirty judges permanently appointed, this gradualness would help to accommodate potential, unanticipated hurdles that could emerge along the way.[176]

C. The Nuts and Bolts of Resolving Disputes

How precisely would the 14th Circuit operate during the interim and post-interim periods? How would the panels function? Would there be a possibility of an *intra*-circuit split among the panels, and if so, how would that be resolved?

In his proposal, Professor Legomsky discussed different possibilities of construction. Recall that his Article III circuit court would hear cases incoming on appeal from his new executive branch tribunal that would have both administrative "trial and appellate divisions."[177] From there, he

---

needs to be more transparent, see Letter from Gabe Roth, Exec. Dir., Fix the Ct., & Ally Coll, President, Purple Campaign, to Chairman Jerry Nadler, Chairman Hank Johnson, Ranking Member Jim Jordan, & Ranking Member Darrell Issa (Jan. 10, 2022), https://fixthecourt.com/wp-content/uploads/2022/01/Ltr-on-lack-of-transparency-in-intercircuit-assignments-1.10.22.pdf [https://perma.cc/YM6J-YP63].

175. For much of this part of the paper, I am grateful to Professor Tung Yin, who is an expert on the federal courts, for his feedback and guidance.

176. An alternative (perhaps more clunky) blueprint would be staggering the permanent appointment process during the interim period itself. Under this model, the president would get five permanent appointments every two years, so that one presidential term would see a maximum of ten appointees. (The other judges would be there on an interim, sitting in designation basis.) In theory then, by the end of the third presidential term, the thirtieth seat on the 14th Circuit would be filled.

177. *See* Legomsky, *supra* note 15, at 1683, 1684–85, 1707–08. A key question that might emerge relates to whether immigration-related cases that originate in the federal district courts could find themselves eventually in the 14th Circuit on appeal. Or would the regional circuit courts still have overseeing jurisdiction? Imagine, for example, a case involving an 8 U.S.C. § 1326 prosecution of a noncitizen who has unlawfully reentered the country. Or consider a case involving whether a state, like Texas, can authorize its local law enforcement to arrest undocumented noncitizens. In both of these situations, the matters would start in an Article III federal district court, and they would work their way up to a regional circuit court and then potentially onto the U.S. Supreme Court. Where would the 14th Circuit fit? This study limits the 14th Circuit's jurisdiction to those cases that are administrative and originate within the executive branch's lower-level immigration divisions. To be sure, there are those Article III cases that are "crimmigration" in nature, and where interpretation of immigration law issues can and does occur, and so we could see splits between a regional circuit court of appeals and the 14th

suggested that his Article III appellate court could have "multiple U.S. Courts of Appeals for Immigration, empowering each to develop its own precedents, . . . or it could simply establish multiple venues for the same court, in much the same way each regional court of appeals now operates internally."[178]

In order to place more flesh on this framework, let us imagine the following situation. The 14th Circuit has been established, but we are in the interim period where the other regional appellate courts are still functioning. Then, let us say that we have two similar cases being heard in two different jurisdictions. The first one involves a noncitizen in San Francisco whose application for cancellation of removal has been denied at the administrative level. During our interim period, that individual would have the option of appealing to the Ninth Circuit or the 14th Circuit. The former might be more attractive, given its reputation, compared to the unknown latter.

The second case involves a noncitizen from Houston whose cancellation of removal petition has also been denied at the administrative level. Assume that the facts of this case are similar to the one from California: both noncitizens are from the same country; they have the same justifications for making their requests; and they both have competent legal representation. The main difference is that the noncitizen from Texas fears going to the Fifth Circuit because that court has been historically unsympathetic to these appeals. Thus, the noncitizen petitions the 14th Circuit, figuring that there is nothing to lose.[179] (Assume for the sake of this hypothetical, the government does not object.)

The respective appeals are then heard. The Ninth Circuit decides for the noncitizen and remands with favorable instructions that will lead to the petitioner being able to stay in the country. By contrast, the 14th Circuit rules against the noncitizen. From here, this study proposes that even though the 14th Circuit will eventually have jurisdiction over the entire country, its ruling in this case would be limited to the parties at hand during the interim period. Of course, such decisions by the 14th Circuit will serve as helpful guidance for the permanently appointed judges who come to the bench after

---

Circuit. As will be argued below, for a certain interim period of time, these splits could co-exist. Eventually, however, per the argument made, where there is an immigration question that ultimately needs to be settled, the 14th Circuit's position would govern at the end of this interim phase. My thanks to Ingrid Eagly for posing this important question to me.

178. *Id.* at 1708. Professor Legomsky acknowledged that the former could lead to the possibility of splits among the different immigration appellate courts, which is what Judge Wood has championed and presumably would support.

179. For the purposes of this hypothetical, we will make one of the following three assumptions: a) the government acquiesces to the forum selection by the noncitizen; or b) the noncitizen dictates where the circuit appeal takes place in an optional selection component situation; or c) the JPML has decided to place the first case in the Ninth Circuit and the Houston case in the 14th Circuit.

the interim period. But for now, the interim rulings will apply only to the parties who appear in these specific cases.

There are a few reasons for having this restriction in place during the interim period. For one thing, there is the issue of allowing the new court to get its proverbial "sea legs" as it is coming into existence. There is also attending to the worry that precedent within certain circuits ought not be erased in one fell swoop. And it may be that once the permanent judges of the 14th Circuit are appointed, they will want to reconsider rulings that were made during the interim period. As such, they may not be receptive to being bound by nationalized precedent established during these interim years.[180]

But once the court is permanently seated, how would decisions be handled, and how would precedent be treated? Consider what happened on October 1, 1981. It was on that date when the Eleventh Circuit was created, overseeing the states of Alabama, Florida, and Georgia.[181] Previously, those three states were part of the Fifth Circuit, but congressional action divided this region into two separate federal appellate jurisdictions.[182]

This information is relevant because the Eleventh Circuit decided that it would be bound by all Fifth Circuit rulings that occurred prior to its own creation.[183] Drawing on this example, this study proposes that judgments from the regional circuits, where there was no circuit split, would remain in effect as good law (for that circuit) even after the 14th Circuit was permanently seated. In situations where there was a circuit split, the 14th Circuit would be called upon to resolve the disagreement, playing now the role of the unitary appellate court in the country. And where the court was being asked to overturn existing, uncontradicted regional precedent, an en banc reversal by the 14th Circuit would need to occur.[184] (One could imagine

180. What might happen if the 14th Circuit heard a case of first impression within its court, but the First, Second, Seventh, and Ninth circuits have all gone in one direction on the issue, while the Fourth, Fifth, and Eleventh circuits have gone in another? Given that the 14th Circuit would have presumably studied these different rulings in a careful manner—and is eventually going to be the sole appellate immigration body in the country anyway—it might seem natural to want to allow for the court's decision to become national precedent even during the interim period. But for the reasons stated in this paragraph, this study would still argue that that holding should only apply to the parties at bar.

181. *See About the Court*, U.S. CT. APPEALS FOR ELEVENTH CIR., https://www.ca11.uscourts.gov/about-court#:~:text=Established%20by%20Congress%20in%201981,Northern%2C%20Middle%20and%20Southern%20Districts [https://perma.cc/PT6L-HF6D].

182. *See* Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 8 GA. ST. U. L. REV. 363 (1992) (noting that the "Reorganization Act of 1980 (Reorganization Act) divided the 'former fifth circuit' into the 'new fifth circuit', composed of the District of the Canal Zone, Louisiana, Mississippi, and Texas, and the new 'eleventh circuit,' composed of Alabama, Florida, and Georgia" (footnote omitted)).

183. *See* Cox v. United States, 3:10-cr-0008, 2014 WL 4249881, at *14 n.1 (N.D. Ga. Aug. 28, 2014).

184. This en banc rule would also be applicable to where the 14th Circuit wishes to overturn one of its own rulings as well.

that of the thirty sitting 14th Circuit judges, an en banc panel would consist of eleven or thirteen judges.[185])

* * *

Part IV has offered a detailed perspective on how a newly centralized court of appeals for immigration might operate going forward. Relying on Professor Legomsky's initial blueprint, this section has elaborated on the specifics of implementing the proposal along three different axis points. First, there was a discussion that incorporated an optional selection component for the first twelve years of the 14th Circuit's existence.[186] Second, regarding who would sit on the new court, an alternative approach for staffing was offered.[187] Finally, there was an analysis provided on the logistics of how the 14th Circuit would decide cases in the interim and post-interim years.[188] This part of the conversation also focused on how regional precedent would be handled in these periods.[189]

These additions to the Legomsky framework now give policymakers the chance to craft an updated plan. The objective is to ensure greater fairness, due process, and justice to all noncitizens, irrespective of where they are residing. The hope is that these amendments move us in that direction. Concurrently, some may naturally ask whether other areas of the law deserve their own specialized circuit courts, or whether there is something distinctive about immigration that sets it apart. The concluding section briefly examines this point.

CONCLUSION

Why should there be a federal circuit court for immigration and not one for, say, tax, bankruptcy, or other areas? One approach to this question is to look at what occurs in a comparative context. In other democratic systems, these respective judiciaries, in fact, do have courts at the appellate level to handle specialized issues of law. In Germany, for instance, the entire court structure is ordinary jurisdiction and specialized courts. The ordinary jurisdiction consists of the civil and criminal jurisdiction. The specialized courts are the administrative courts, the finance courts, the labor courts, and the social courts. In addition, there is the constitutional jurisdiction, which

185. For the Ninth Circuit, an en banc panel is eleven judges, so something comparable could be the case for the 14th Circuit. *See Court Coverage Tutorial: General Information*, *supra* note 157.

186. *See supra* Section IV.A.

187. *See supra* Section IV.B.

188. *See supra* Section IV.C.

189. *See supra* Section IV.C.

consists of the Federal Constitutional Court and the constitutional courts of the Länder.[190]

The German system, though, is not unique. The European Union has devoted an entire judicial database to track the range of specialized appellate courts and their duties within its member states.[191] Researchers have documented the growth of such specialized forums within the Global South as well.[192]

Thus, one answer to the question is that perhaps, yes, specialized appellate courts for other areas of American law may be worth considering as a way of economizing and offering more expertise. However, one expert who has written in this area and questioned this premise is the previously discussed Lawrence Baum. His book, *Specializing the Courts*, is thought of as a classic.[193] As can be gleaned from his commentary on Professor Legomsky's proposal, Professor Baum sees specialized judicial bodies, at least in the American context, as having both benefits but drawbacks as well. His book surveys an array of specialized courts in the United States, including those that oversee national security, crime, governmental economic policy, and private financial disputes.[194]

For Professor Baum, this move toward privileging specialization is based more on instrumentalism than "neutral virtues."[195] Typically, according to Professor Baum, "efficiency is the virtue most closely associated with specialization."[196] However, he argues that what often

190. *See Germany: Organisation of Justice – Judicial Systems*, EUR. E-JUSTICE (May 14, 2021), https://e-justice.europa.eu/16/EN/national_justice_systems?GERMANY&member=1#:~:text=In%20Germany%2C%20the%20court%20structure,courts%20and%20the%20social%20courts [https://perma.cc/UCD5-WMLG].

191. *See National Specialised Courts*, EUR. E-JUSTICE (Nov. 17, 2021), https://e-justice.europa.eu/19/EN/national_specialised_courts [https://perma.cc/W3WU-7FKM].

192. One country that has seen an explosion of such specialized bodies is India. For a discussion and set of concerns raised by this situation, see Marc Galanter & Jayanth K. Krishnan, *"Bread for the Poor": Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789 (2004); and Jayanth K. Krishnan et al., *Grappling at the Grassroots: Access to Justice in India's Lower Tier*, 27 HARV. HUM. RTS. J. 501 (2014). For studies of other countries on this topic, see Tyrone Kirchengast, Tatiana Badaró & Lucas Pardini, *The Mixed and Hybrid Criminal Courts of Brazil: Mainstreaming Restoration, Rehabilitation and Community Justice in a Human Rights Context*, 27 INT'L REV. VICTIMOLOGY 23 (2021); MATTHEW M. TAYLOR, JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL (2008); and S. AFR. JUDICIARY, https://www.judiciary.org.za/index.php/about-us/102-specialised-courts [https://perma.cc/28G8-CVUL] (dedicating part of its official website to explain its specialized court system). And the U.S. Federal Judicial Center has an important comparative, global source that highlights the specialized courts systems in a number of countries. *See Specialized Courts,* JUDICIARIES WORLDWIDE, https://judiciariesworldwide.fjc.gov/specialized-courts [https://perma.cc/NZT8-S3R8].

193. *See* LAWRENCE BAUM, SPECIALIZING THE COURTS (2011).

194. *Id.* at 6–25. Note, Baum decides to exclude "administrative adjudicators." *Id.* at 9. For a questioning of this decision, methodologically, see Herbert M. Kritzer, *Where Are We Going: The Generalist vs. Specialist Challenge*, 47 TULSA L. REV. 51, 53–54 (2011) (book review).

195. *See* Baum, *supra* note 12, at 218; *see also* Kritzer, *supra* note 194, at 54.

196. *See* Baum, *supra* note 12, at 218.

occurs is that policymakers who have an agenda push for court specialization so that subsequent judicial outcomes can reflect a particular ideological bent.[197] Consequently, it remains an open question as to whether the justice delivered by specialized bodies is qualitatively better than what comes out of the regular, generalized courts.[198]

Professor Baum's research is rigorous, and his ultimate ambivalence toward specialized courts may give us pause. Yet, Professor Legomsky's call for revolutionizing the appellate immigration system equally deserves serious reflection because, frankly put, he is right.[199] Immigration justice in the United States is uneven, often incoherent, and frequently determined (unfairly so) by where the noncitizen resides rather than on the merits of the case.

For this reason, Professor Herbert Kritzer's take on how we should see specialized courts is worth remembering.[200] Professor Kritzer notes that there is an "extensive literature on *procedural justice* that a party's perception that the process in the court was fair has a significant impact on that party's view"[201] toward the system overall. Based on the findings from this body of work, Professor Kritzer raises a series of points defending specialization, which we can adapt to our examination of the 14th Circuit.

---

197. *Id.* at 207–30. To this end, see FED. CTS. STUDY COMM., 2 WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990). I am grateful to my colleague, Charles Geyh, who provided me with this citation, as it discusses at pages 9–13 additional arguments for being concerned about specialized courts, including: nationalizing rulings that may not be in tune with regional sections of the country; and fears that specialized courts may be subject to "capture" by powerful interests. *See generally* FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

198. Baum, *supra* note 12, at 207–30; *see also* Kritzer, *supra* note 194, at 62 (commenting that Baum is hesitant to examine "whether court users prefer generalist or specialist courts [because that] will not answer the question of which produces high quality decisions because those preferences could reflect expected outcomes rather than 'quality' of the decisions in some other sense").

199. Indeed, in 1990, Professor Legomsky himself published a book on specialized courts, where he argued that there were twelve factors that needed to be considered before a case went to a specialized court. (His book also analyzed, speaking of comparative case studies, the countries of New Zealand and Australia.) The twelve criteria included examining: 1) What issues in a case related to "law, facts, and discretion;" 2) "Technical complexity" of the case; 3) "Degree of isolation" of the case; 4) "Cohesiveness" of related cases; 5) "Degree of repetition;" 6) "Clannishness" of those involved in the case; 7) "Degree of controversy" of the case; 8) "Peculiarity" of the case; 9) "Dynamism of the case;" 10). "Logistics" of routing a case toward specialization; 11) "Special Need for Prompt Resolution;" 12) "Unique Procedural Need." STEPHEN F. LEGOMSKY, SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION 20–32 (1990). As the discussion above has demonstrated, several of these factors clearly are present in the argument made for why establishing the 14th Circuit is justified, particularly factors #1–#5 and #10–#12. My thanks to Professor Legomsky for referring me to this important text.

200. *Id.* at 63–64.

201. *Id.* at 63 (noting, in particular, that the leading work on the subject is by Tom Tyler). For a general discussion, see E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); and Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

For example, is it not plausible that noncitizens might feel as though the process was fairer if their claims were heard within a specialized appellate court that had "expertise on the substance of a matter?"[202] Relatedly, might not the noncitizen view such an independent, specialized court on immigration with more legitimacy than a generalist court?[203] Among the broader population as well, is it not conceivable that the "public [would perceive] specialized courts more favorably than generalized ones?"[204] And especially when it comes to highly technical areas of the law, is it not likely that the justice delivered by a court will be regarded as more contemplative and equitable if the adjudicators are specialists compared to if they are not?[205]

These profoundly relevant questions raised by Professor Kritzer go to the heart of why Professor Legomsky's initial observation that "radical surgery" was needed has remained spot-on. In fact, this article's updates to Professor Legomsky's original argument only further strengthen the main justification for why a 14th Circuit continues to make sense: this new court would have the potential for enhancing the prospects of justice for those mired within the maze of immigration litigation in this country.

With all this said, caution and careful planning are of course required. Professor Charles Geyh tells the story of the Interstate Commerce Court (ICC) in the early 1900s.[206] The ICC was established to serve as "a single, specialized appellate court [that] would be better able than the regional circuit courts to decide [Interstate Commerce Commission] appeals expeditiously, wisely, and without risk of inter-circuit conflicts."[207] As Professor Geyh details, though, this court barely survived three years; its demise was the result of poor planning and a lack of buy-in from any of the essential stakeholders.[208]

Keeping these lessons in mind, the proposals provided here for the 14th Circuit are intended to avoid such a fate. To be sure, how to deal with contentious issues such as the resistance to erasing regional precedent, who sits on the court, and how to make this plan politically palatable will be an ongoing, iterative process. The hope is that this study's suggestions will take us one step closer to offering a fairer system of justice to those whose needs are all too often marginalized or altogether ignored.

---

202. *See* Kritzer, *supra* note 194, at 63.
203. *See id.* at 63–64.
204. *Id.* at 64.
205. *Id.*
206. *See* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 78–79 (2006).
207. *Id.* at 78.
208. *Id.* at 78–79.