AN EMPIRICAL STUDY OF POLITICAL CONTROL OVER IMMIGRATION ADJUDICATION

Catherine Y. Kim & Amy Semet

ABSTRACT

Immigration reform plays a central role in the Trump Administration’s political agenda. This Article presents the first comprehensive empirical assessment of the extent to which Immigration Judges (IJIs), the administrative officials charged with adjudicating whether a given noncitizen will be deported from the country, decide cases on the basis of an Administration’s political preferences rather than an independent assessment of the legal merits of a given case.

We constructed an original dataset of over 800,000 removal proceedings decided between January 2001 and November 2018. First, we found that every Administration—not just the current one—disproportionately appoints IJs with backgrounds in the former Immigration and Naturalization Service (INS), the Department of Homeland Security (DHS), or the Department of Justice (DOJ), agencies with responsibilities in prosecuting noncitizens. Second, using logistical regression to control for over a dozen variables that might impact a decision to remove, we found that the identity of the Administration that appointed an IJ was not a statistically significant predictor of the likelihood of ordering removal. That is, after controlling for other variables, Trump appointees were no more likely to order removal than Obama or Bush appointees.

Finally, using logistical regression and controlling for other variables, we found that the Administration in control at the time of decision is a statistically significant predictor of removal rates. For example, Bush appointees who served during the Bush, Obama, and Trump Eras were far more likely to order removal during the Trump Era. Specifically, when all other variables are held constant, they were 14% less likely to order removal during the Obama Era than during the current Era, and 12% less likely to order removal during the Bush Era than during the Trump Era. These results suggest that the current Executive-in-Chief exercises a profound influence over removal decisions, undermining the assumption of independence among administrative adjudicators.
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AN EMPIRICAL STUDY OF POLITICAL CONTROL OVER IMMIGRATION ADJUDICATION

Catherine Y. Kim* & Amy Semet**

INTRODUCTION

Immigration reform plays a central role in the Trump Administration’s political agenda. Headlines regarding the declaration of a national emergency to erect a wall on the southern border;¹ a “zero-tolerance” policy leading to the forced separation of children from parents;² and efforts to require Central American asylum seekers to remain in Mexico³ have been fixtures in all of the major media outlets. Far less attention, however, has been paid to the Administration’s efforts to alter adjudicative outcomes in immigration courts.⁴ Pursuant to statute, a noncitizen within the United States generally is entitled to a formal adjudicative hearing before he or she can be forced to leave the country.⁵ These proceedings do not occur before a federal judge,
Empirical Analysis of Immigration Adjudications

However, rather, they are presided over by administrative officials known as Immigration Judges. While such civil service officials are understood to exercise “independent judgment” in deciding cases, they are part of the executive branch and thus subordinate to the President. Historically, scholars have assumed that administrative adjudicators such as IJs are insulated from political influence. Indeed, due process norms arguably require such independence in individual case outcomes. Yet different Presidential Administrations have sought to influence the course of agency adjudications through time, both within the immigration context as well as in other agency contexts.

The Trump Administration has taken a particularly aggressive approach to reshaping immigration courts. President Trump has publicly and repeatedly denigrated the immigration court system. At least one

an enforcement officer without a formal hearing. § 1225(b) allowing expedited removal for recent entrants to the United States only upon designation by the Attorney General; § 1225(c) (allowing expedited rather than formal removal proceedings for noncitizens deemed as national security threats); § 1228(b) (allowing truncated removal procedures for noncitizens lacking legal permanent resident status who are convicted of aggravated felonies).

6 8 C.F.R. § 1003.10.


9 See, e.g., Alexandra Arriaga, Trump Compared People Entering U.S. From Mexico to Invaders, CHI. SUN TIMES, June 24, 2018 (quoting Trump statement on Twitter that “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order.”); Katie Rogers & Sheryl Gay Stolberg, Trump Wants No Due Process at U.S. Border, N.Y. TIMES, Jun. 25, 2018, at A1 (noting that Trump “has long been a critic of immigration judges, saying they were not effective in stopping the flow of people coming into the country” and that he opposed hiring judges because of the potential for corruption); Philip Rucker & David Weigel, Trump Opposes Trials for Migrants, WASH. POST, Jun. 25, 2018, at A01 (quoting
Immigration Judge (IJ) has been removed from dozens of cases because his lenience toward noncitizens.\textsuperscript{10} The Administration has engaged in an unprecedented recruitment effort, hiring over 130 new judges from January 2017 through 2018, increasing the number of IJs by over 30\%.\textsuperscript{11} Mainstream media outlets have reported concerns that these hires might have been made on the basis of party affiliation or ideology.\textsuperscript{12} Former Attorney General Jeff Sessions repeatedly cast doubt on the credibility of certain types of claims and certain types of claimants, while reminding IJs that they serve at his pleasure.\textsuperscript{13} At the same time, he limited IJs’ ability to grant relief in the form of asylum,\textsuperscript{14} eliminated their ability to grant temporary relief to aliens in the form of administrative closures\textsuperscript{15} and control their dockets by issuing continuances.\textsuperscript{16} The Administration also has imposed strict timelines for the completion of cases,\textsuperscript{17} a measure that almost always works to the

\textsuperscript{10} Jeff Gammage, Immigration Judges File Grievance; They Protested Justice Dept’s Removal of a Jurist in Phila.,\textsuperscript{11} PHILA. INQUIRER, Aug. 9, 2018, at A6 (describing removal of IJ Steven Morley and subsequent grievance filed on his behalf by National Ass’n of Immigration Judges).

\textsuperscript{11} DEPT’ OF JUSTICE, OFFICE OF PUBLIC AFFAIRS, EOIR ANNOUNCES LARGEST EVER IMMIGRATION JUDGE INVESTIGATIONS (Sept. 28, 2018).

\textsuperscript{12} See Tal Kopan, Immigration Judge Applicant Says Trump Administration Blocked Her over Politics,\textsuperscript{13} CNN, June 21, 2018. To be sure, the Trump administration is not the first to be accused of recruiting IJs on the basis of ideology or even patronage. In 2002, Attorney General Ashcroft removed four of the seven members of the Board of Immigration Appeals (BIA), the intermediate appellate body responsible for reviewing IJ decisions; this decision was widely seen as politically motivated, as the removed individuals generally were viewed as the most liberal on that bench. Peter J. Levinson, \textit{The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications},\textsuperscript{14} 9 BENDER’S IMMIG. BULL. 1154 (2004). In 2008, the Inspector General for the Department of Justice found that the White House under George W. Bush (Bush II) circumvented the Executive Office for Immigration Review’s (EOIR) normal hiring processes by screening candidates on the basis of political affiliation in violation of both Department policy and federal law. U.S. DEPT’ OF JUSTICE, OFFICE OF PROF’L RESPONSIBILITY AND OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION INTO ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008) (hereinafter DOJ INVESTIGATION INTO POLITICIZED HIRING). Members of Congress recently received information alleging that the Department of Justice (DOJ) has blocked multiple candidates for IJ or BIA positions based on their perceived political or ideological views. See LETTER FROM HOUSE DEMOCRATS TO JEFF SESSIONS, ATTORNEY GENERAL (Apr. 17, 2018) (demanding response to allegations of politicization of EOIR hiring process).

\textsuperscript{13} JEFF SESSIONS, U.S. ATT’Y GEN., REMARKS TO THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW LEGAL TRAINING PROGRAM D.C. (June 11, 2018).

\textsuperscript{14} A-B-, 27 I.&N. 316 (A.G. 2018).


\textsuperscript{17} McHenry Memorandum, supra note \textbf{Error! Bookmark not defined.}; see also In
disadvantage of noncitizens, who bear the burden of showing they should receive a favorable exercise of discretionary relief from removal.\(^{18}\)

This Article presents the first empirical assessment of the extent to which such political efforts are successful in altering adjudicative outcomes in the immigration context. A study of the role of politics in immigration removal adjudications is important in its own right. In fiscal year 2017 alone, over 291,258 new removal proceedings were filed in immigration courts, resulting in the deportation or “voluntary departure” of 111,060 noncitizens from the country.\(^{19}\) These court-adjudicated proceedings affect not only the individual noncitizens who are forced to leave the country, but also their family members, friends, employers, and larger communities. Indeed, removal proceedings may have an even greater impact than the 2017 figures suggest, given that an estimated twelve million noncitizens residing in the United States are at risk of deportation. The extent to which these removal decisions are controlled by political actors rather than independent adjudicators may have a significant impact on composition of our polity.

Moreover, our findings on immigration courts provide a lens to consider the potential for political influence in adjudications across the administrative state more generally.\(^{20}\) Agency adjudications are responsible for a wide swath of government decision making, including determinations of whether an individual will receive disability payments, the issuance of broadcast licenses, the resolution of labor disputes, the approval or denial of corporate mergers, violations of environmental and civil rights laws, and countless other areas of American life. Agencies of course are not cut from the same cloth, nor do they have identical procedures for adjudicating cases.\(^{21}\) Yet an assessment of the immigration court system may help identify the mechanisms most effective in protecting the independence of adjudications, and those that render such proceedings most vulnerable to political interference.

\(^{18}\) Kim, supra note 4, at 32.


After all, immigration courts are not the only administrative courts potentially vulnerable to politicization. Immigration court proceedings are not covered by the Administrative Procedure Act (APA), and IJs lack many of the employment protections enjoyed by Administrative Law Judges (ALJs). Yet even ALJs appear vulnerable to politicization. In the early 1990s, a survey of administrative judges found that 33% of ALJs within the Social Security Administration (SSA) identified threats to their independence as a problem; over a quarter reported that they felt pressured to reach different decisions and 32% reported they had been asked to do things against their better judgment. In 2014, the Wall Street Journal published a front-page article suggesting that ALJs within the Securities Exchange Commission (SEC) are systematically biased in favor of the government. In October of 2018, the Washington Post reported that the Trump Administration has politicized the recruitment of adjudicators for the Board of Veterans’ Appeals. Yet the gap between protections for ALJs and those for non-ALJs recently spurred the Administrative Conference of the United States (ACUS) to commission a report documenting the lack of political protections in the status, selection, oversight, and removal of various types of non-ALJ agency adjudicators across the administrative state, who, incidentally, far outnumber ALJs across federal agencies.

To analyze the role of political actors on removal decisions, we used data provided on the Department of Justice’s website to construct an original dataset of over 800,000 IJ decisions in removal cases from January 2001 through November 2018, spanning the three most recent Presidential Administrations or “Eras.” These cases include not only those in which a noncitizen subject to removal seeks asylum, but also those involving

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22 Marcello v. Bonds, 349 U.S. 302, 306-308 (1955) (describing legislative history of amendments following Wong Yang Sung decision to conclude that Congress clearly intended to reverse that decision and exempt deportation proceedings from Administrative Procedure Act (APA) requirements).

23 See infra notes 66-68 & accompanying text.


28 Individuals seeking asylum must establish a “well-founded fear of persecution on
applications for other forms of relief from removal\textsuperscript{29}—including removal cases involving noncitizens with lawful immigration status.\textsuperscript{30}

First, we examined trends in the employment backgrounds of IJs appointed by each Presidential Administration to assess whether Presidents try to “stack the deck” with IJs of certain employment backgrounds who might be more or less likely to order removal. We found that all three Administrations—George W. Bush (“Bush II”), Barack Obama and Donald Trump—disproportionately hire IJs with backgrounds in the former Immigration and Naturalization Service (INS), Department of Homeland Security (DHS), and other positions in the Department of Justice (DOJ), entities with responsibilities in prosecuting noncitizens. Moreover, over 90\% of IJs from each Administration had experience working for government in general (federal government, state governments, and the military). Individuals who had worked for non-profits or in private practice—and thus more likely to have defended noncitizens—were far less likely to be appointed. Crucially, however, there were no statistically significant differences in these hiring trends across the most three recent Administrations. That is, the Trump Administration was not more likely to hire former prosecutors than his predecessors.

Second, we analyzed whether judges appointed by a particular Administration were, as a whole, more or less likely to order removal than IJs appointed by other Administrations. Using logistical regression to control for over a dozen variables that might impact a decision to remove, we found that the identity of the appointing Administration was not a statistically significant predictor of the likelihood of ordering removal. That is, after controlling for other variables, Trump appointees were no more likely to order removal than Obama or Bush II appointees.

Finally, using logistical regression and controlling for the same variables, we examined the influence that a current sitting President might exercise over IJs decisions, regardless of which Administration appointed the IJ. Here, we found clear differences across Administrations—the identity of the Administration in control at the time of decision (or Presidential “Era”) is a statistically significant predictor of removal rates. For example, Bush II

\footnotesize{\textsuperscript{29}See, e.g., 8 U.S.C. §§ 1229(b) (delegating discretionary power to grant “cancellation of removal” to noncitizens who meet certain statutory criteria); 1182(h) (allowing discretionary waiver for crime-based removability); 1182(a)(9)(B)(v) (providing discretionary relief to certain unlawfully present aliens).}

\footnotesize{\textsuperscript{30}A noncitizen with lawful immigration status nonetheless may become removable if, for example, he or she engages in certain types of criminal activity, 8 U.S.C. § 1227(a)(2), fails to register a change of address, § 1227(a)(3)(A), or becomes a public charge within five years of entry, § 1227(a)(5), among other reasons.}
appointees were far more likely to order removal during the Trump Era as compared to the Obama or Bush II Era. Specifically, when all other variables are held constant, they were 14% less likely to order removal during the Obama Era than during the current Era, and 12% less likely to order removal during the Bush II Era than during the Trump Era. Similarly, Obama appointees were 4% less likely to order removal during the Obama Era than the Trump Era, holding all other variables constant. These results provide strong evidence that the current Executive-in-Chief exercises a profound influence over removal decisions, undermining the independence of administrative adjudicators. Decisions to deport an individual noncitizen do not appear to be a result of an apolitical assessment of the record of the hearing.

This finding is troubling to the extent it reveals that IJ decisions may be as driven by political considerations as much as by legal ones. Yet it may also be viewed by some as salutary, demonstrating an Administration’s ability to promote consistency, oversight, and perhaps even electoral preferences in immigration decisions. Calibrating the proper balance between adjudicatory independence on the one hand and political accountability and uniformity on the other is a task for reformers of the system to analyze. It is our hope that the findings of this study provide a much-needed empirical foundation to make such recommendations.

This Article proceeds as follows: Part I provides background on immigration courts and details the adjudicatory process for removal proceedings; it then summarizes the existing literature on the politicization of agency adjudications. In Part II, we describe the design of our empirical study, including the construction of our original dataset to analyze the research questions. Part III then sets forth the findings from our analyses. Finally, Part IV explores the normative implications of our findings and offers preliminary suggestions for reform.

I. ADMINISTRATIVE ADJUDICATION IN THE IMMIGRATION REMOVAL CONTEXT

This section briefly describes removal proceedings in immigration courts, focusing in particular on the role of IJs. It then surveys the existing literature examining the behavior of IJs and the potential role of politics in administrative adjudications more generally.

A. Removal Proceedings

Typically, when the government identifies a noncitizen who may be subject to removal from the United States, attorneys in Immigration and Customs Enforcement (ICE), housed within DHS, exercise discretion to
initiate formal removal proceedings against the individual,\textsuperscript{31} and if so, to
determine whether the individual should be detained pending such
proceedings. Removal proceedings are initiated when ICE sends a “Notice
to Appear” to the noncitizen’s last known address, thereby initiating the
“removal proceeding.”\textsuperscript{32} The Notice to Appear informs the individual of the
charges of removal, as well as the date, time and place to appear before an
IJ.\textsuperscript{33} IJs are “career” attorneys appointed under Schedule A of the excepted
services and housed in the DOJ’s Executive Office for Immigration Review
(EOIR).\textsuperscript{34}

\textsuperscript{31} “Removal proceedings” constitute over 98\% of cases heard in immigration court
according to our dataset. This Article uses the term “removal proceedings” to refer to the
formal hearings to forcibly removal of an individual from the United States. Our usage
includes both “deportation” proceedings as well as “exclusion” proceedings, as those terms
were used under pre-1996 law. Prior to 1996, individuals physically within the United States
were subject to “deportation” proceedings, regardless of whether they entered without
inspection; those seeking entry at the border or outside the United States, by contrast, were
subject to “exclusion” proceedings. Since 1996, both types of proceedings are generically
referred to as “removal” proceedings. Notably, the Immigration and Naturalization Act
(INA) today defines “deportable aliens” to exclude individuals who entered the United States
without inspection, even if they are physically within the United States, see 8 U.S.C. § 1227a.
Such individuals are now treated as though they are at the border seeking admission and thus
subject to “inadmissibility” rather than deportability. See §§ 1101(a)(13); § 1182.

Consistent with the federal government classifications, we exclude from the term
“removal proceedings” a small subset of immigration court cases that otherwise involve a
noncitizen’s ability to remain in the United States. See EOIR, IMMIGRATION COURT
PRACTICE MANUAL (Dec. 2016), available at https://www.justice.gov/eoir/office-chief-
immigration-judge-0. This subset, constituting 2\% of immigration court cases, includes: (1)
“credible fear” cases in which a noncitizen arrives at the border without documentation and
has been interviewed by an initial officer to determine whether the noncitizen shows a
credible fear of persecution, 8 C.F.R. § 1003.42; (2) “withholding only” cases involving
individuals whose “life or freedom would be threatened” “because of the alien’s race,
religion, nationality, membership in a particular social group, or political opinion,” a more
stringent criterion than the standard for asylum and which, under international law, are
precluded from being repatriated, 8 U.S.C. § 1231(b)(3); “reasonable fear” cases involving
aliens with a reinstated order of removal, 8 C.F.R. § 208.31; (4) “asylum-only” cases which
refers to a narrow set of noncitizens such as alien crewmen and stowaways who ordinarily
would not be entitled to adjudicatory proceedings but seek relief in the form of asylum; (5)
“claimed status review” in which the individual claims U.S. citizenship status; and (6) claims
under the Nicaraguan Adjustment and Central American Relief Act (NACARA) which
allows nationals of certain countries to apply for “suspension of deportation” under certain
factual circumstances. \textit{Id.}

\textsuperscript{32} 8 U.S.C. § 1229a.

\textsuperscript{33} 8 U.S.C. § 1229. In the past, Notice to Appears routinely lacked this basic information.
\textit{See} Pereira v. Sessions, 138 S. Ct. 2105 (2018) (noting that “at least in recent years, almost
always serves noncitizens with notices that fail to specify the time, place, or date of initial
removal hearings whenever the agency deems it impracticable to include such
information.”).

\textsuperscript{34} Under 5 C.F.R § 6.3(a) the head of an agency (here, the Attorney General who heads
Upon receiving the notice, noncitizens typically appear before an IJ for the first time as part of a large group of noncitizen-respondents in a “master calendar hearing.” Noncitizens may be represented by attorneys in removal proceedings without cost to the government. During the master calendar hearing, the IJ will go through the Notice to Appear and offer information on low-cost legal services available to the applicant. Noncitizens who contest the grounds for removal or seek relief from removal are then scheduled for a subsequent “individual merits hearing,” with many of the procedural protections associated with traditional trials, including witness testimony, cross examinations, and exhibits. Figure 1 describes this process.

the Department of Justice (DOJ) may fill excerpted positions by appointing individuals without civil service eligibility or competitive status. Schedule A appointees are career “positions other than those of a confidential or policy determining character.” 8 U.S.C. § 1101(b)(4).


37 In 2003, EOIR instituted a “Legal Orientation Program” (LOP) to provide legal education programs for detained noncitizens who are in removal proceedings. GAO Asylum 2008, supra note 35, at 19; U.S. Gov’t Accountability Office, GAO-17-72, Asylum: Variation Exists in Outcomes of Applications Across Immigration Courts and Judges (2016), at 11-13 (hereinafter GAO Asylum 2016). Participation in the LOP program has led to faster court times as well as more grants of asylum for participants, according to a study commissioned for EOIR by the Vera Institute of Justice. See Nina Siulc, Zhifen Cheng, Arnold Song and Olga Byrne, Vera Institute of Justice, Legal Orientation Program Evaluation and Performance Outcome Measurement Report, Phase II, A Report Prepared at the Request of the Department of Justice, Executive Office for Immigration Review, May 2008 (hereinafter Vera Institute Study).

38 8 C.F.R. § 1240.10. Noncitizens who do not appear at all are subject to removal in absentia. 8 U.S.C. § 1129a(5).

Although EOIR has wide discretion in hiring, IJ applicants must meet certain minimal qualifications, such as having a law degree and being admitted to the bar.\textsuperscript{40} The IJs are responsible for determining whether the individual falls within the grounds for removal listed in the charging document, and if so, whether the individual nonetheless warrants a discretionary grant of relief allowing him or her to remain in the country. In doing so, IJs retain a breathtaking degree of discretion, perhaps second only to the ICE prosecutors who decide whether to initiate removal proceedings against a given individual in the first instance.

Even for noncitizens who do not contest removal, IJs exercise discretion to determine whether to enter a formal order of removal, which precludes the noncitizen from reentering the United States for a period of five, ten, or even twenty years,\textsuperscript{41} or instead grant “voluntary departure,” which requires the noncitizen to leave the United States immediately at her own expense but avoids the bars to reentry associated with a formal removal order.\textsuperscript{42}

In addition, IJs often determine whether the noncitizen will be detained

\textsuperscript{40}To be an IJ, the applicant must have a law degree and be authorized to practice law in the United States; be a U.S. citizen; and have a minimum of seven years post-bar legal experience. GAO \textsc{Asylum} 2008, \textit{supra} note 35, at 12 & n.13. In terms of other qualifications, DOJ will look for experience in at least three of the following areas: “substantial litigation experience…; knowledge of immigration laws and procedures; experience handling complex legal issues; experience conducting administrative hearings; or knowledge of judicial practices and procedures.” \textit{Id.} at 17 n.23. Those appointed as IJs receive some minimal training. \textit{Id.} at 18.

\textsuperscript{41}8 U.S.C. § 1229c; \textit{see also} 8 C.F.R. § 1240.26.

\textsuperscript{42}8 U.S.C. § 1182(a)(9)(A). Those who depart voluntarily may be barred from reentering the U.S. for up to ten years and may be subject to civil and criminal penalties if they fail to depart or if they reenter without proper documentation. 8 U.S.C. § 1229c; \textit{see also} 8 C.F.R. § 1240.11(b) (“The alien may apply to the IJ for voluntary departure in lieu of removal pursuant to section 240B of the Act . . . .”).
pending removal proceedings. Congress requires that aliens charged with certain grounds for removal be detained pending removal proceedings. Aliens exempt from such mandatory detention may be detained at the discretion of ICE officials, but are entitled to a “bond redetermination hearing” before an IJ once removal proceedings have commenced. The IJ may also entertain motions filed by the nonimmigrant or DHS to reopen or reconsider a case.

At an individual merits hearing, the IJ determines whether the individual falls within the category for removal listed in the charging document. Removability, however, is rarely contested, and the bulk of proceedings are devoted to adjudicating an application for relief from removal. It is here that the discretion of the IJ is the greatest. Forms of relief from removal run the gamut in terms of statutory prerequisites; but once these criteria are satisfied, it is up to the discretion of the trial-level IJs whether to grant such relief to allow an otherwise removable alien to remain in the United States.

For example, a removable alien may nonetheless be permitted to remain in the United States if she qualifies for asylum, which requires that an application be made within one year of entry into the United States and that the noncitizen have a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” The non-citizen may file an “affirmative” application for asylum

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44 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(b).
45 8 C.F.R. § 236.1(d). For an excellent empirical analysis of variance in bond determinations by IJs, see Emily Ryo, Detained: A Study of Immigration Bond Hearings, 50 LAW & SOC’Y REV. 117 (2016).
49 Two forms of relief from removal are mandatory rather than discretionary: withholding of removal and applications pursuant to the Convention Against Torture. Both are mandated under international law and are designed to protect individuals whose lives or freedom would be threatened if repatriated. See generally, EXEC. OFF. OF IMM. REV., FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS (2009), available at https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCAT Protections.pdf.
50 8 U.S.C. §§ 1158; 1101(a)(42). Asylum cases constitute a growing segment of the immigration courts’ dockets. From fiscal year 2013 to 2017, defensive asylum claims jumped 423%, while affirmative claims increased 12%.
or a “defensive” application after a Notice to Appear has already been served.\textsuperscript{51} Even if the statutory requirements are satisfied, the decision of whether to grant or deny asylum remains discretionary.\textsuperscript{52} IJs likewise possess discretion to grant “waivers” for certain forms of crime-based removability as long as the noncitizen meets certain statutory prerequisites such as extreme hardship to a qualifying U.S. family member if the alien is deported.\textsuperscript{53} IJs may grant an unlimited number of “cancellations of removal” to longtime legal permanent residents who as long as the statutory prerequisites are met;\textsuperscript{54} even undocumented noncitizens are eligible to apply for a limited number of discretionary cancellations of removal, which would also grant them legal permanent resident status upon satisfying certain statutory requirements.\textsuperscript{55}

For decades, IJs have further exercised discretion to grant relief in the form of “administrative closure,”\textsuperscript{56} which removes the case from the court’s active docket, or entered a continuance where the noncitizen is likely to qualify for legal status sometime in the future.\textsuperscript{57} Over the past five years, between 25% and 35% of cases resulted in outcomes other than removal or voluntary departure.\textsuperscript{58}

Removal proceedings are not governed by the Administrative Procedure Act (APA),\textsuperscript{59} but they provide many of the same procedural protections—

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including the opportunity to be represented by private counsel, to present oral or written testimony, and to cross-examine the evidence against them.60 In addition, similar to the APA, the Immigration and Naturalization Act (INA) requires that removal decisions “shall be based only on the evidence produced at the hearing,”61 providing assurance that IJs reach decisions based on an independent assessment of the record rather than at the direction of political leadership.62

In some aspects, the INA arguably provides IJs with even more power than hearing officers under the APA. Unlike the APA, the INA vests adjudicative power personally in an IJ, rather than generically in the head of the agency.63 Moreover, the INA provides that an IJ’s final order of removal may only be reviewed by the federal Courts of Appeals,64 unlike the decisions of APA trial-level examiners, which statutorily are subject to review by the head of the agency.65

At the same time, the INA denies IJs many of the tenure protections afforded to the trial-level hearing officers who typically hear cases in the first instance under the APA. ALJs under the APA are not recruited directly by the agency,66 and they cannot be fired without cause.67 IJs, by contrast, are statutorily defined as “an attorney whom the Attorney General appoints as an administrative judge” to preside over removal proceedings who “shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe.”68 Yet, as the DOJ’s Inspector General concluded in

62 The implementing regulations further guarantee the independence of IJs, providing that “In deciding individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion.” 8 C.F.R. § 1003.10.
63 Compare 8 U.S.C. § 1229a (a)(1) (“An immigration judge shall conduct proceedings for deciding the admissibility or deportability of an alien”), to 5 U.S.C. § 556(b) (providing that the agency itself may preside over the taking of evidence in an adjudicative hearing).
64 8 U.S.C. § 1252(a)(5). Importantly, Congress has eliminated judicial review for many removal decisions, including those involving criminal aliens and denials of discretionary relief. 8 U.S.C. § 1252(a)(2).
67 Id.
a 2008 investigation, civil service laws as well as Department policy require employment decisions to be made “solely on the basis of relative ability, knowledge, and skills,” and preclude the Attorney General from taking adverse employment actions against IJs on the basis of politics.\textsuperscript{69}

The Attorney General, through regulations, has chipped away at some of the decisional independence statutorily vested in IJs through regulations. First, although the INA provides that the decisions of IJs are subject to review exclusively in the federal courts of appeals, the Attorney General promulgated regulations creating an interim administrative appeal body known as the Board of Immigration Appeals (BIA) to review decisions of IJs.\textsuperscript{70} Those regulations provide, however, that decisions by the BIA may be appealed to the federal courts of appeals.\textsuperscript{71}

Even more consequential for present purposes, regulations provide that instead of appealing a BIA decision to the court of appeals, the politically appointed Attorney General may refer BIA cases to him- or herself for review.\textsuperscript{72} In adjudications governed by the APA, such formal review authority is statutorily guaranteed rather than the mere creature of agency regulations.\textsuperscript{73}

This Article focuses on the potential for political control over the initial decisions of IJs, rather than the BIA or the agency head’s exercise of refer-and-review authority.\textsuperscript{74} The types of informal political influence that are the

\textsuperscript{69} DOJ Investigation of Politicized Hiring, supra note 12, at 137 (citing 5 U.S.C. § 2301(b)(2); 2302(a), (b); 28 C.F.R. § 42.1(a)).

\textsuperscript{70} 8 C.F.R. § 1003.1.

\textsuperscript{71} Id.

\textsuperscript{72} 8 C.F.R. § 1003.1(a)(1), (d)(1), (g), (h); see also 8 U.S.C. §§ 1158(b) (Attorney General or Secretary of Homeland Security “may” grant asylum to an otherwise eligible applicant), 1252(a)(2)(B)(i), (b)(4)(D) (decision to grant relief under INA § 208 is discretionary).

\textsuperscript{73} 5 U.S.C. § 557(b).

\textsuperscript{74} For scholarship examining the Attorney General’s exercise of formal authority top review BIA removal decisions, see Shah, supra note 8 (criticizing exercises of Attorney General’s power to review BIA decisions in removal proceedings); see also Alberto R. Gonzales & Patrick Glen, Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority, 101 IOWA L. REV. 841 (2016) (celebrating such exercises of authority). For studies outside the immigration context examining similar exercises of review authority by an agency’s politically appointed leadership, see Christina L. Boyd & Amanda Driscoll, Adjudicatory Oversight and Judicial Decision Making in Executive Branch Agencies, 41 AM. POL. RES. 569 (2013) (examining Secretary of Agriculture’s exercise of authority to review decisions issued by ALJs within the agency); Amy Semet, Political Decision Making at the NLRB: An Examination of the Board’s Unfair Labor Practice Decisions Through the Clinton and Bush II Years, 37 BERKELEY J. EMP. & LAB. L. 223 (2016) (examining National Labor Relations Board (NLRB) review over ALJ decisions). For a fascinating analysis of an agency in which the political leadership does not enjoy final review authority over adjudications, see Walker & Wasserman, supra note 8.
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subject of this Article include, for example, an Administration’s effort to recruit adjudicators based on an expectation that those adjudicators will issue decisions consistent with its political agenda. It might encompass the use of explicit or implicit threats of adverse employment actions (e.g., removal or reassignment) to persuade adjudicators to issue judgements promoting its goals. Or it might involve the issuance of informal directives outside of the rulemaking structure to encourage adjudicators to decide cases in a particular way or express preferences for particular adjudicatory outcomes. Such efforts to influence adjudicative outcomes at the trial level are more troublesome than formal exercises of review authority or rulemaking as they are far less transparent and typically evade judicial review.

While some institutional structures support the independence of IJs as trial level adjudicators in removal proceedings, others render their decisions susceptible to influence by political superiors. Yet there has been no systematic study of the impact of these institutional structures, as detailed in the next sub-section.

B. Existing Scholarship on Political Control Over Trial-Level Agency Adjudicators

IJs have long been criticized for apparent arbitrariness. Yet only a handful of studies have sought to empirically analyze their decision making. Few such studies have evaluated factors impacting removal decisions generally, and none of them examine the potential for politicization. For example, Ingrid Eagly and co-author Steven Shafer analyze a dataset of over one million removal proceedings to measure the effect that representation by counsel has on the likelihood of a noncitizen’s removal. Emily Ryo examined a sample of cases to measure the impact of a number of variables on the IJs decision to grant release on bond. These studies, however, do not


76 Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. PA. L. REV. 1 (2015) (finding that noncitizens represented by counsel and seeking relief are five and a half more likely to obtain such relief than similarly situated noncitizens without counsel); see also Ingrid V. Eagly, Remote Adjudication in Immigration, 109 NORTHWESTERN L. REV. 933, 933 (2015) (conducting empirical study of removal proceedings to conclude that “detained televideo litigants are more likely than detained in-person litigants to be deported, but judges do not deny respondents’ claims in televideo conferences at higher rates”).

77 Ryo, supra note 45, at 117. The variable included the number of years the noncitizen
examine the potential impact of political control by Administrative superiors on outcomes in removal proceedings.

A handful of studies measure factors that impact a decision to grant relief in the form of asylum, including political factors, but asylum cases constitute only a subset of removal cases. Asylum claims constitute a modest, albeit growing, segment of removal cases filed in immigration courts. Each of these studies exhibits limitations precluding the ability to measure the influence of an IJ’s political superiors on removal outcomes more generally. First, they are limited to asylum cases, which implicate the President’s ability to conduct diplomatic relations with foreign countries in a manner that non-asylum removal cases do not. Second, the asylum studies emphasize variables that might be highly important in a decision to grant asylum but may be less important in non-asylum cases, such as the extent to which the noncitizen’s home country has a documented practice of persecuting certain groups. Notwithstanding these limitations on generalizability, these studies lived in the United States; whether the noncitizen was represented by an attorney; had a U.S. citizen or legal permanent resident (LPR) spouse or child; was employed in the prior six months; was previously deported; had any history of obstruction of justice; had a criminal record; and whether the case had reached the Ninth Circuit. Id.

78 See e.g., Daniel E. Chand & William Schreckhise, Independence in Administrative Adjudications: When and Why Judges Are Subject to Deference and Influence, 2018 ADMIN. & SOC’Y 1 (2018) (surveying IJs and Social Security Administration (SSA) ALJs to conclude that IJs “give significantly greater deference to the positions of the public, their agency, Congress, and the president, and report more favorable attitudes toward interest groups in adjudication”); Ingrid Eagly, Steven Shafer, & Jana Whalley, Detaining Families: A Study of Asylum Adjudication in Family Detention, 106 CAL. L. REV. 785 (2018) (finding that only half of families in detention seeking asylum were represented by counsel, fewer than 2% spoke English, and 93% had their hearings conducted by video conference); Joshua B. Fischman, Measuring Inconsistency, Indeterminacy, and Error in Adjudication, 16 AM. L. & ECON. REV. 40 (2013) (using data from immigration adjudication to operationalize inconsistency, indeterminacy, and error); David Hausman & Jayashri Srikantiah, Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court, 84 FORDHAM L. REV. 1823 (2016) (analyzing use of continuances in priority docket cases initiated between August 2, 2014 and January 1, 2015, involving unaccompanied children and families with children to conclude that length of continuance “has a large effect on finding counsel, of appearing at subsequent hearings, and of eventually avoiding removal”); VERA INSTITUTE STUDY, supra note 37 (examining impact of legal orientation program providing pro bono resources to noncitizens in removal adjudications). There are also some older empirical studies of the IJs. See Deborah E. Anker, Determining Asylum Claims in the United States: Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court, 2 INT’L J. OF REFUGEE LAW 252, 264.

79 EOIR 2017 YEARBOOK, supra note 19 (noting that defensive asylum claims are up 420%).


81 Id.
provide a useful starting point for our analyses.

Several of the asylum-limited studies suggest that immigration adjudicators may be impervious to political influence. In the earliest of these studies, undertaken in the first few years of the George W. Bush presidency, Jaya Ramji-Nogales, Andy Schoenholtz, and Philip Schrag measured disparities in asylum grant rates during a four-year period from 2000 to 2004.\footnote{Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, \textit{Refugee Roulette: Disparities in Asylum Adjudication}, 60 \textit{Stan. L. Rev.} 295, 339-49 (2007). Several aspects of this study further limit its generalizability. First, the study examined only non-detained, affirmative asylum seekers in a four year period from certain “high-volume” countries in which an IJ decided at least 100 cases from said country. \textit{Id.} at 339 n.1. It examined only IJ decisions for claimants from fifteen “Asylee Producing Countries” that had at least 500 cases before the Asylum Office or immigration courts during fiscal year 2004, and excluded Mexico. \textit{Id.} The study also focused on bivariate analysis of select judge-specific and migrant-specific variables; it did not control for other institutional variables (such as the circuit court or Congress) nor did they include controls for the political or economic environment surrounding the decision maker. \textit{Id.}} Using a bivariate analysis without additional controls, they found that the political party of the President who appointed the IJ did not correlate with the likelihood of granting asylum to a statistically significant degree,\footnote{Linda Camp Keith, Jennifer Holmes, and Banks Miller conducted a similar study of asylum decisions by IJs, this time examining the time frame from 1997 to 2004. This study tests, among other things, the applicability of the “attitudinal model” of judging, in which judges are understood to “primarily pursue their policy preferences,” to IJs in asylum cases. Linda Camp Keith, Jennifer S. Holmes, and Banks P. Miller, \textit{Explaining the Divergence in Asylum Grant Rates among Immigration Judges: An Attitudinal and Cognitive Approach}, 35 \textit{L. & Pol’y Rev.} 261, 266-67 (2013). They find support for their hypothesis that “judges with liberal policy preferences will be more likely to grant asylum than judges with conservative policy preferences.” \textit{Id.} In doing so, they define a judge’s policy preferences based on his or her prior work experience. \textit{Id.} at 270-73. Thus, like Ramji-Nogales et al., this study suggests that an IJ’s decision to grant asylum is correlated with his or her professional background, a finding that they replicate in their book-length treatment of the topic. \textit{Id.; see also Miller et al., supra note 80.}} although they did find that other factors—namely the judge’s gender and prior employment history—did have a statistically significant impact.\footnote{Ramji-Nogales et al., \textit{supra} note 82, at 397 & \textit{supra} note 87.} However, various restrictions on the data would bias the analysis in favor of a grant of asylum and preclude greater generalizability.\footnote{Ramji-Nogales et al., \textit{supra} note 82, at 397 & \textit{supra} note 87.}
to predict with 82% certainty judicial outcomes with what they call “trend” features such as the judge’s average’s grant rate, the average grant rate for that particular nationality, and the grant rate for the judge’s previous five adjudications. Daniel Chand, William Schreckhise, and Marianne Bowers similarly found the political party of the appointing Attorney General to be of no moment in their statistical analysis of over 100,000 asylum cases from 2009 to 2013, with close to twenty control variables. Instead, they found that more experienced IJs and those hearing cases where the migrant is represented by an attorney are more likely to grant asylum. They also found that IJs are less likely to grant asylum in border counties, in Republican-areas, or where the local community of the IJ’s base city is poor.

The General Accounting Office (GAO) undertook two statistical analyses of EOIR data to understand the factors that predict asylum decisions. The first of these two used the party of the appointing Attorney General as one of fourteen controls in a multivariate regression for asylum grants and denials. They found that the party of the appointing President to be of no significance in predicting grant rates for either affirmative or defensive asylum petitions in the immigration courts. The second study, conducted in 2016, examined

88 Id.
89 They also found that communities who imposed more restrictive immigration policies influenced outcomes. Id.
90 Since EOIR lacked the technical capacity to conduct a large-scale statistical study of its workings, they commissioned the GAO to do two analyses in 2008 and 2016 to analyze the factors that predict asylum grant rates. GAO ASYLUM 2008, supra note 35, at 8 (noting that EOIR “lacked the expertise to statistically control for factors that could affect asylum outcomes, and this limited the completeness, accuracy and usefulness of grant rate information”). EOIR planned to use the information to help improve training and supervision of IJs. Id. at 8-9. EOIR itself conducted two studies of asylum grant rates. In 2006, the Office of Chief IJ did a study of grant rates 2001-2006; this study was then updated in June 2008. Id. at 41-42. In this study, EOIR accounted for whether the noncitizen was detained as well as whether they appeared for a merits hearing. Id. at 43. The analysis did not control for factors such as the noncitizen’s nationality, judge gender, or experience or many other common statistical controls. Id.
91 In 2008 the GAO analyzed 198,000 asylum cases against a 12.5 year period that involved seekers from the top twenty asylum producing countries and the nineteen immigration courts hearing the most number of asylum cases. GAO ASYLUM 2008, supra note 35, at 1. They then analyzed 595,795 cases filed from 1995-2014 to identify changes in their second report. GAO ASYLUM 2016, supra note 37, at 1.
92 GAO ASYLUM 2008, supra note 35, at 120-21 & tbls. 19-20. However in a more restrictive analysis of Haitian and Chinese migrants in New York, Los Angeles, and Miami, the GAO found that for Chinese applicants in New York, affirmative applicants were two
the period from May 2007 through 2016 and reached similar results on defensive asylum applications. But for affirmative asylum claims, they found that judges appointed during earlier Presidencies (George H.W. Bush (Bush I), Reagan, Carter, Nixon, and Johnson) were more likely to grant applications than later Presidencies (Bush II, Clinton, and Obama), holding other variables constant including years of judicial experience.

A book-length study by Banks Miller, Linda Keith, and Jennifer Holmes finds that IJs are more likely to grant asylum during Democratic Administrations than during Republican ones. This study is based on one of the largest datasets, examining close to 600,000 IJ asylum decisions from 1990-2010. This analysis primarily focused on the impact that state and local variables had in predicting asylum. But when they controlled for state local and political effects, they found that IJs are 7% more likely to grant asylum during times of Democratic control. In addition, another empirical study using the same EOIR data found that a change in Democratic control resulted in an increase in asylum grant rates.

Outside of the immigration law context, scholars have examined the potential role of political actors in influencing agency adjudications. The vast majority of these studies focus on the decisions of ALJs, who, as described above, enjoy a degree of formal political independence that is not extended to ordinary administrative judges such as IJs. In any event, the scholarship
on ALJs’ susceptibility to political control is mixed. In one study evaluating the behavior of ALJs in the National Labor Relations Board (NLRB), Cole Taratoot and Robert Howard found no relationship between case outcomes and the political composition of the NLRB’s leadership members.\textsuperscript{100} In a more recent study, conducted in response to the \textit{Wall Street Journal}’s reporting, Urska Velikonja finds no evidence that ALJs within the SEC are biased in favor of the enforcement agency that houses them.\textsuperscript{101} In another study, focusing on the fair housing context, Nicholas Seabrook, Eric Wilk, and Charles Lamb found that the party of the current President had no significant relationship with an ALJ’s likelihood of ruling in favor of a claimant.\textsuperscript{102} This study, however, found that Republican ALJs were more likely to rule in favor of claimants during Democratic administrations; Democratic ALJs were not more likely to deny claimants during Republican administrations.\textsuperscript{103} In an empirical study using data from a 1992 ACUS survey of ALJs, Charles Koch found that agency adjudicators—including both ALJs and non-ALJs—feel subject to political pressures.\textsuperscript{104} Koch found that among the non-ALJs surveyed, some of whom were responsible for immigration adjudications, 28% reported that threats to their independence was an occasional or frequently a problem.\textsuperscript{105} Two percent reported pressures to reach different decisions to be a frequent problem.\textsuperscript{106} About a quarter reported that they were asked to do things against their better judgment occasionally or frequently.\textsuperscript{107} Importantly, self-reporting mechanisms may not accurately reflect the actual role that political influences play. After all, trial-level decision makers may not even be aware of their own biases. Moreover, they do not show whether the decision maker resisted such pressure. Survey data

\textsuperscript{100} Cole D. Taratoot & Robert M. Howard, \textit{The Labor of Judging: Examining Administrative Law Judge Decisions}, 39 \textit{AM. POLITICS RES.} 832 (2011) (focusing on extent to which ALJ decisions conform to the attitudinal model of judging, in which the ALJs personal policy preferences correlate closely with decisional outcomes).

\textsuperscript{101} Velikonja, \textit{supra} note 25, at 315.


\textsuperscript{103} \textit{Id.}

\textsuperscript{104} Koch, \textit{supra} note 24.

\textsuperscript{105} \textit{Id.} at 283.

\textsuperscript{106} \textit{Id.} at 279.

\textsuperscript{107} Surprisingly, non-ALJs reported far fewer concerns about political pressure than ALJs, who enjoy far greater formal independence. Among ALJs within the Social Security Administration (SSA), for example, 33% identified threats to their independence at a problem, and 26% reported feeling pressure to reach different decisions; 32% reported feeling asked to do things against their better judgment. \textit{Id.}
show how adjudicators perceive political influence, but do not show whether such influence actually impacted case outcomes.

II. DESIGN OF THE EMPIRICAL STUDY

A. Construction of the Immigration Removal Dataset

To conduct our analyses, we constructed an original dataset of removal decisions from January 2001 through November 2018. EOIR posts records of every removal proceeding filed in immigration courts since 1951. These records include almost 6.5 million individual cases with more than 8 million unique proceedings completed from 1951 through November 30, 2018. We analyzed removal proceedings completed in immigration courts from January 2001 through November 2018. Removal proceedings comprised 98% of case types in the EOIR dataset.

We then further reduced the dataset in a number of ways. First, we limited the data to include only those cases for which an individual merits hearing occurred. By eliminating cases that never proceeded past the initial master calendar hearing, we excluded cases where the noncitizen conceded the grounds for removal and declined to seek any form of relief from removal (although they may have sought voluntary departure).

Second, for each case, we included only the last proceeding before any appeal. Many cases have multiple proceedings; an IJ may be asked to first schedule a merits hearing, and then be asked to rule on a bond determination, and then finally issue a decision on removal. Even after a ruling, the IJ may hear a second proceeding after granting a motion for reconsideration, or on remand from the BIA or the appellate courts. To ensure that the IJ made an independent decision “without any direction from the BIA,” we used the last decision before any appeals to the BIA or circuit court.

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108 See https://www.justice.gov/eoir. For more information about the dataset, see the Appendix. We created an original dataset using the EOIR files as well as merging in other original and constructed datasets to create the dataset. See Appendix.

109 See https://www.justice.gov/eoir. Removal proceedings consist of removal, deportation or exclusion proceedings. See supra note 31. We omitted other case types. Id.

110 EOIR provides inconsistent information on whether there is an individual merits hearing. As explained in the Appendix, for the hundreds of thousands of cases with missing entries for calendar type, we assumed that the entry was the modal category of master hearing and eliminated the observation from the analysis.

111 Each case has multiple completion dates because each proceeding has different dates.


113 See, e.g., id., at 65 (using last decision on asylum application eliminating decisions following appeals); but see Eagly, Shafer, & Whalley, supra note 78, at 860 n.335 (using first hearing in case and if that information was unavailable, the earliest date by which information was input into the system, whether it be the input date, the output date, or the completion date). We did not consider appeals on “bond issues” to be appeals on the merits of the case so if the only appeal was a bond appeal we used the date of the last proceeding.
Third, we eliminated from the dataset those decisions rendered *in absentia*,\(^{114}\) on the ground that such decisions are likely to result in removal and unlikely to reflect a judge’s independent exercise of discretion. These exclusions deleted 62,313 more unique observations from the base dataset.

Fourth, we eliminated “Rider” cases. The EOIR dataset identifies some cases as “Lead” or “Rider” cases, which are assigned to family members whose cases are associated with each other.\(^{115}\) We deleted all Rider cases on the assumption that the decision in those cases were not independent from the decision in the corresponding Lead case.\(^{116}\) Approximately 160,000 additional cases were deleted from the dataset as a result.

After compiling the base dataset, we defined the universe of cases based on the disposition of the case, i.e., whether the individual was removed from the country or required to leave after a grant of voluntary departure on the one hand, or non-removal on the other.\(^{117}\) For our purposes, orders of removal included orders to remove, orders to deport, orders to exclude, as well as voluntary departures which require the noncitizen to leave the country.\(^{118}\)

Like other studies, we excluded IJs who heard fewer than fifty cases so as to “simplify the presentation and avoid reaching inappropriate conclusions that can occur when calculations are based on a small number of cases.”\(^{119}\)

We included judges that sat outside their primary court, but we excluded

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\(^{114}\) 8 U.S.C. § 1229a(b)(5)(A). In order for the government to prevail *in absentia* cases, they must present “clear, unequivocal and convincing evidence” to show that the noncitizen is in fact removable. 8 C.F.R. § 1003.26. For the hundreds of thousands of entries missing an “in absentia” code, we assumed the modal category—here, not *in absentia.*

\(^{115}\) See infra notes 211-213 & accompanying text.

\(^{116}\) In statistics, violation of the assumption that cases are independent could result in biased estimates. Rider cases would not be independent from Lead cases.

\(^{117}\) We coded the variable as “1” (indicating removal) if decision was labeled as “Removal,” “Deported,” “Excluded,” or “Voluntary Departure.” We coded the variable as “0” (indicating non-removal) if the case was coded as “Legally Admit,” “Granted,” “Terminate,” “Other,” “1,” “J,” or “Q.” See Appendix.


\(^{119}\) See, e.g., GAO Asylum 2008, *supra* note 35, at 22 (eliminating IJs who heard less than fifty affirmative and fifty defensive asylum cases as well as IJs hearing cases in immigration courts other than their primary court); GAO Asylum 2016, *supra* note 37, at 3-4, 48 & n.6 (analyzing countries with a minimum of 800 affirmative and 800 defensive asylum cases and judges who completed a minimum of fifty defensive and fifty affirmative cases); Transactional Records Access Clearinghouse, Immigration Judges; and Transactional Records Access Clearinghouse, Asylum Disparities Persist, Regardless of Court Location and Nationality (July 31, 2006) (analyzing data from IJs deciding at least 100 cases) (hereinafter TRAC 2006).
visitors who are not appointed IJs at the time of hearing from the analysis. As reflected in Figure 2, IJs generally are assigned to hear cases in one primary base city, though IJs may occasionally transfer to another base city or serve as visitors at another base city. The cases generally are randomly assigned to IJs within a given base city.  

Figure 2

We also coded each IJ’s work history based on EOIR press releases for whether they previously worked for the former INS, DHS, or other positions within the DOJ; whether they worked for any government entity, including the federal government, state governments, or the military; and whether they worked at non-profit organizations or in the private sector. We then coded for a series of additional control variables, as described in Part II.C, largely based on what other scholars have found in other studies of immigration courts.

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120 GAO ASYLUM 2008, supra note 35, at 103 (noting random assignment).
121 See TRAC’s IJ reports at http://trac.syr.edu/immigration/reports/judgereports/ as well as EOIR information sheets (on file with authors). Other studies of this data used similar datasets. See GAO ASYLUM 2008, supra note 35, at 66-67. Some judges were appointed too far back during the 1970s or 1980s to get reliable information so we excluded those judges from our analysis.
B. Questions Presented

1. Question 1: Do Different Administrations Appoint Different Types of IJs Based on Prior Employment History?

   Presidents may appoint IJs of differing employment backgrounds with the aim of achieving more or fewer removals. For example, Presidents may assume that those with experience working for the former INS, DHS, or DOJ---each of which maintains responsibilities in prosecuting noncitizens---may be more likely to issue an order of removal.\(^{122}\) Likewise, they may assume that those with experience working at non-governmental organizations (NGOs) or in the private sector, which are more likely to defend noncitizens, may be less likely to order removal.\(^{123}\)

2. Question 2: Are IJs Appointed by a Particular Administration More or Less Likely to Order Removal than those Appointed by Other Administrations?

   Justice John Roberts recently asserted that “[w]e don’t work as Democrats or Republicans.”\(^{124}\) But the political science literature and popular notions suggest that at least in the federal courts, Presidents will try to “stack” the judiciary with judges of a given political persuasion to influence policy for years to come, long after leaving the Presidency.\(^{125}\) This assumption has carried over to the administrative state; scholars analyzing decisions of the NLRB and SSA, among other agencies, have ascribed to the judge the political party of the appointing President, often finding it one of the most important factors influencing decision making.\(^{126}\)

   IJs in the immigration arena are career bureaucrats and understood to be

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\(^{122}\) See Miller et al., \textit{supra} note 80, at 72 (finding those with government employment backgrounds to be less likely to grant asylum).

\(^{123}\) \textit{Id.} (finding that those working for non-governmental organizations (NGOs) or private sector are more likely to grant asylum).


\(^{126}\) See Charls D. DeLorme, Jr., Carter R. Hill, and Norman J. Wood, \textit{The Determinants of Voting by the National Labor Relations Board on Unfair Labor Practice Cases}, 3 \textit{PUBLIC CHOICE} 207 (1981); Cole Taratoot & David Nixon, \textit{With Strings Attached: Statutory Delegations of Authority to the Executive Branch}, 71 \textit{PUBLIC ADMINISTRATION REVIEW} 637 -- 644. (2011) (studying NLRB decisions); Semet, \textit{supra} note 74 (same).
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If IJs are apolitical as intended, we should find no enduring differences based on the identity of the appointing President. Most asylum scholars have concluded that at least for appointees since the Clinton Administration, the party of the appointing AG has no effect on outcomes in asylum. It remains to be seen whether the same result applies to removal cases more generally.

We coded for the Presidential Administration during which each IJ was appointed. We then created a variable indicating the Presidential Administration at the time of case completion; cases completed from January 20, 2001 to January 19, 2008 were coded “Bush II Era,” from January 20, 2008 to January 19, 2017 were coded “Obama Era” and from January 20, 2018 to November 30, 2018 “Trump Era.” We analyzed the removal rate, divided across each of the three “Eras” to see whether IJs appointed from different Presidents decide cases differently.

3. Question 3: Setting Aside the Identity of the Appointing Administration, is a Given IJ More or Less Likely to Order Removal during Different Administrations?

We assessed the extent to which IJs as a whole, regardless of the Presidential Administration that hired them, were more or less likely to order removal during a particular Presidential Administration or Presidential “Era.” An IJ who served throughout different Administrations, for example, whose rates of removal varied markedly across these Administrations, would lend support for the proposition that those IJs felt pressure to issue rulings consistent with the political goals of the Administration in control at the time the decision was issued. In the study of federal courts and administrative agencies, scholars have often found that the identity of the current President can influence decisions irrespective of who appointed the judge.

Although IJs are supposed to be apolitical, there are a variety of mechanisms by which political superiors can exercise direct and indirect influence over IJs. Recently, the Trump Administration has exercised direct review over removal decisions to increase the probability that noncitizens will be detained and to limit access to asylum relief. Administrations may also seek to alter removal outcomes more indirectly, such as through implicit or explicit threats of adverse employment consequences for failing to adhere to the current Administration’s policy goals.

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127 See DOJ INVESTIGATION INTO POLITICIZED HIRING, supra note 12.
128 See supra Part ILB (discussing studies).
130 See supra notes 1-3 & accompanying text.
131 Id.
To analyze these questions, we observed how removal rates differed depending upon the Presidential Administration or Presidential “Era,” with separate analyses conducted for each of the last five appointing Presidents. Examining each cohort of those appointed by a particular President (e.g., those appointed by Clinton) shows whether removal rates differ during the Bush II, Obama and Trump Eras, which would suggest that IJs at least in part base removal decisions on the identity of the current President.

C. Description of Statistical Method

1. Methodology

Because the dependent variable—order removal versus not order removal—is dichotomous, we conducted our analysis with logistical regression, estimating the standard errors clustered by judge.\[132\]

2. Control variables

We compiled a series of control variables that might impact the choice of whether or not to remove the noncitizen, using studies of the narrower subset of asylum decisions as a starting point.\[133\] These control factors center on four groups.\[134\] The first group of variables relating to the noncitizen; the second group focuses on the judge; the third on the base city and the fourth on other institutions. We discuss each in turn.

a. Noncitizen-centered variables

Characteristics relating to the noncitizen can impact how IJs vote. Unfortunately, the EOIR dataset does not provide all the information about the noncitizen that would be required to fully assess decision making.\[135\] In a perfect world, the researcher would have access to more data on each individual migrant, including age, income, employment, family situation, length of residence in the U.S., and the like.\[136\]

\[132\] Miller et al., supra note 80, at 97 (clustering errors on IJ and metropolitan area); Fischman, supra note 78, at 31 (noting that all judges in sample would agree on results in no more than 16% of cases, indicating importance of judge effects). In alternative specifications, we included individual base city controls and in the future, we also intend to look at the issue through multilevel modeling.

\[133\] While removal cases are broader than asylum cases, because nearly half of our sample consisted of asylum cases we have reason to believe that similar variables would be relevant in the removal context as well.

\[134\] For additional details on the variables see the Appendix.

\[135\] See Miller et al., supra note 80, at 83 (noting “to date, no nongovernmental entity has been granted access to such core data…”).

\[136\] See infra Part II.C.3 (“Limitations”).
Attorney Representation

Whether the noncitizen is represented by an attorney may impact whether the noncitizen is ordered removed.\(^{137}\) Attorneys may help noncitizens better present the legal arguments of their case or they may help noncitizens weed out cases that are frivolous or that are unlikely to be granted relief under existing law.\(^{138}\) Having an attorney may also help noncitizens be situated in a broader community where they could have access to resources to aid in their case.\(^{139}\)

In an EOIR proceeding, an attorney representing a noncitizen must file a Notice of Entry of Appearance form (otherwise known as an EOIR-28).\(^{140}\) We coded the noncitizen as having an attorney if such a document was filed as of the completion date. In our dataset, 55% of the noncitizens had a lawyer representing them at their removal proceeding.

Custody Status

Noncitizens who are detained may be less likely to prevail in removal proceedings.\(^{141}\) They may have more difficulty securing access to quality legal representation and they may encounter more problems in securing access to evidence to prove their claims.\(^{142}\) EOIR codes applicants as one of three categories: never detained, currently detained (at the time of decision), and released. We collapsed the variables into a dichotomous category of detained versus never detained/released.\(^{143}\)

\[\text{See, e.g., }\text{Eagly, Shafer, & Whalley, supra note 78; Ramji-Nogales et al., supra note 82; GAO ASYLUM 2008, supra note 35, at 19, 83, 134-35 (finding that asylum applicants represented by counsel are three times more likely to prevail); GAO ASYLUM 2016, supra note 37, at 29-31 (finding that affirmative applicants were 3.1 times more likely to prevail and 1.8 times more likely to prevail for defensive applications); Chand et al., supra note 87, at 190 (finding that a 10% increase in the percent of applicants with a lawyer results in a 7% increase in the percent of asylum applications granted); Miller et al., supra note 80, at 42, 65 (those with lawyers prevail 79% compared to 58% without lawyers). Noncitizens with lawyers are also more likely to appeal their cases (50% v. 37%) and to win their appeals (30% v. 23%). Miller et al., supra note 80, at 42.}\]

\[\text{GAO ASYLUM 2008, supra note 35, at 30.}\]

\[\text{Miller et al., supra note 80, at 72.}\]

\[\text{Other scholars used this same measure. See Eagly & Shafer, supra note 76, at 15; Eagly, Shafer, & Whalley, supra note 78, at 867.}\]

\[\text{Miller et al., supra note 80, at 29, 71, 100 (detained less likely to prevail); GAO ASYLUM 2008, supra note 35, at 7-8, 32 (same).}\]

\[\text{GAO ASYLUM 2008, supra note 35, at 32.}\]

\[\text{If the EOIR record was blank we used the modal category which was “never detained.” Id., at 32, 83, 84 & tbl. 11 (showing asylum rates for “[n]ever detained” and “[e]ver detained”); Eagly, Shafer, & Whalley, supra note 78, at 861 (using modal category}\]
Language and Nationality

Wide disparities exist based on language and nationality. Certain nationalities simply have an easier time in avoiding deportation.\textsuperscript{144} For example, noncitizens from some countries such as Iraq or Cuba are granted relief at much higher rates than migrants from Mexico or Central America.\textsuperscript{145} Indeed, scholars are able to predict with 80\% accuracy the final outcome of asylum hearings based solely on the identity of the judge and the applicant’s nationality.\textsuperscript{146}

Home country conditions may affect IJ decision making. Noncitizens from countries with poor human rights records or that are less democratic may have more empathetic cases.\textsuperscript{147} In addition to political variables, those from economically undeveloped countries may pose a more sympathetic case.\textsuperscript{148} On the other hand, those who are poor may be viewed by IJs as economic migrants, and the IJ may fear that allowing them to remain would pose a financial burden.\textsuperscript{149}

As with nationality, language too can impact the IJ decision.\textsuperscript{150} Those who do not speak English may have more difficulty being able to understand the court proceeding, to be able to communicate with lawyers and the IJ, and to fill out forms.\textsuperscript{151}

\begin{itemize}
\item \textsuperscript{144} TRAC 2006, \textit{supra} note 119; Ramji-Nogales et al., \textit{supra} note 82 (noting discrepancies based on nationalities).
\item \textsuperscript{145} Chand et al., \textit{supra} note 87, at 185; TRAC 2006, \textit{supra} note 119 (80\% of El Salvadorans and Hondurans lost cases); \textit{see also} GAO \textsc{Asylum} 2008, \textit{supra} note 35, at 26-27, 86-92, 96-99 & tbls. 13-16 (with statistical controls, asylum rates exceeding 50\% for noncitizens from Albania, China, Ethiopia, Iran, Russia, Somalia, Yugoslavia yet between rates were 10-15\% for noncitizens from Mexico, El Salvador, Guatemala, Honduras, and Indonesia); GAO \textsc{Asylum} 2016, \textit{supra} note 37, at 18-21 & figs. 5 & 6 (noting grant rates by country).
\item \textsuperscript{146} Chen & Eagel, \textit{supra} note 86, at 1; Matt Dunn, Levant Sagun, Hale Sirin, & Daniel Chen. \textit{Early Predictability of Asylum Decisions}, Working Paper, at 1.
\item \textsuperscript{147} Miller et al. found that noncitizens from the least democratic countries have between 12-18\% greater chance of getting relief than those from the most democratic countries in asylum cases, and noncitizens from countries with poor human rights records have a 20-25\% increased chance of getting asylum. Miller et al., \textit{supra} note 80, at 70, 71, 100; \textit{see also} Chand et al., \textit{supra} note 87, at 185 (country conditions affect asylum rates).
\item \textsuperscript{148} Miller et al., \textit{supra} note 80, at 70, 71, 100 (finding that noncitizens from wealthy countries had a 6\% greater chance of prevailing, holding other variables at their means).
\item \textsuperscript{149} \textit{Id.} at 64, 70.
\item \textsuperscript{150} \textit{Id.} at 71 (finding that non-English speakers are 1-2\% less likely to be granted asylum in removal proceedings).
\item \textsuperscript{151} Indeed, the issue is further complicated due to the fact that many of the noncitizens speak indigenous languages, so Spanish interpreters are of little assistance. Nikhil Sonnad, \textit{Th Real Language Barrier Between Migrant Children and the Americans Detaining Them}, \textsc{Quartz}, June 23, 2018.
\end{itemize}
EOIR provides codes for both language and nationality. We then dichotomized the language variable so that those who speak English are coded 1 and those speaking any language other than English are coded 0. Individuals with no reported language were coded as the modal category of non-English. In addition, we used the Freedom House scores for noncitizens for each nationality.152 We coded a nation as “not free” if the country was “not” or “partially free.”153 We used the World Bank rankings for national Gross Domestic Product (GDP) by year and coded countries that were low or mid-low economic development to identify noncitizens coming from undeveloped countries.154

**Case Type**

We further controlled for the type of claim brought by the noncitizen: affirmative asylum, defensive asylum, and non-asylum removal cases. These cases possibly differ in the type of noncitizen in each category. A noncitizen filing for asylum (whether affirmative or defensive) generally has been in the U.S. for less than a year and must show a well-founded fear of persecution in their home countries.155 As such, the political considerations of the home country may influence how an IJ rules on asylum claims, a condition that may not be as prevalent for those who are not filing for asylum. In turn, those who affirmatively file for asylum may be viewed as more credible than those who apply for asylum defensively, *i.e.*, who raise an asylum claim only after being served with a Notice of Removal. In turn, the group of non-asylum noncitizens may be different from either of the asylum groups. Non-asylum noncitizens may be more likely to have families in the U.S., be gainfully employed in the U.S., and have resided in the U.S. for years. Some may have been brought to the U.S. as young children.

The EOIR dataset codes for both defensive and affirmative asylum cases.156 We assumed that any case not coded as an asylum case is one in

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153 Id. Other scholars have used other measures such as the Gibney score or Polity IV. Mark Gibney, A ‘Well-Founded Fear’ of Persecution, 10 _Human Rights Q._ 109 (1988); Miller et al., _supra_ note 80, at 72 (using Gibney scores). These measures should largely be interchangeable with each other.
155 See _supra_ Part I.A (describing requirements for asylum).
156 In addition, some variables had a missing variable. Where missing, we looked at the Schedule table to see if the schedule_type was filled in as “IA” (meaning individual asylum) and considered the case the modal category of affirmative asylum. See Miller et al., _supra_ note 80, at 50; see also Appendix.
which asylum has not been asserted. While overall about 20% of removal
cases are asylum cases, 55% of the cases heard on the individual calendar
consist of noncitizens pursuing asylum claims, of which 49% raise asylum
affirmatively and 51% do so defensively.

b. Judge-Specific Variables

**Gender**

Scholars have reached mixed conclusions regarding the role that an
adjudicator’s gender plays in impacting decision making.\(^{157}\) In studies
involving asylum specifically, the results have also been mixed.\(^{158}\) Female
judges may be more likely to grant relief as they may be more sympathetic to
the claims of migrants or have greater empathy with underdogs.\(^{159}\) They may
also be more conscious of eliminating bias from decision making.\(^{160}\) EOIR
press releases made it easy for us to identify each IJ’s gender. Approximately
37% of the IJ decisions were made by female judges.

**Government Employment**

An IJ’s prior employment background working for the government could
be an important predictor in their removal decisions.\(^{161}\) As discussed above,

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\(^{157}\) There is a rich literature on the role that gender plays in decision making in courts
generally. See, e.g., Gerard S. Gryski, Eleanor C. Main, and William J. Dixon, *Social
Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex
Discrimination*, 39 Western Pol. Q. 528-37 (1986); Donald Songer & Kelly Crews-Meyer,
*Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 Soc. Sci. Q. 750,
762 (2000); James J. Brudney, Sara Schiavoni, & Deborah J. Merritt, *Judicial Hostility
Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60
Ohio St. L. Rev. 1675,1766 (1999).

\(^{158}\) Chen & Eagel, *supra* note 86, at 3; GAO ASYLUM 2008, *supra* note 35, at 7, 36, 119
(male IJs 60% as likely to grant asylum as females); *but see* GAO ASYLUM 2016, *supra* note
37, at 29-31 (gender only has effect for defensive asylum cases; female judges award asylum
1.4 times higher); GAO ASYLUM 2008, *supra* note 35, at 133-34 (finding IJ gender to be of
no significance for most affirmative and defensive applications concerning Chinese and
Haitian migrants in New York, Los Angeles, or Miami).

\(^{159}\) Miller et al., *supra* note 80, at 64 (finding female judges differ from male judges in
asylum removal proceedings); Songer & Crews-Mayer, *supra* note 157, at 759 (“female
judges may be quicker to emphasize with underdogs in a variety of civil liberties issues since
these judges have either experienced or witnessed the problems involved in being a political
minority”); Ramji-Nogales et al., *supra* note 82, at 47-48 (same).

\(^{160}\) *Id.*, at 47-48.

\(^{161}\) Ramji-Nogales et al., *supra* note 82, at 47-48; Miller et al., *supra* note 80, at 37.
Instead of relying simply on a dichotomous variable, however, Miller et al. created a factor
an IJ with prior experience in the former INS, DHS, or DOJ may be more likely to order removal. In turn, those who worked at NGOs or the private sector, may be less likely to order removal. Of those with government experience, 55% are removed compared to a removal rate of 47% with no government experience.

**Judge Tenure**

IJs with more experience may decide cases differently. Over time, a judge gets to know the law and may spend more of his or her limited time analyzing the facts of the case or on assessing credibility. In the asylum context, scholars have found experience affects case results, and we see no reason why such findings would not apply in the removal context more generally.

Since we collected data on appointment dates, we measured judicial tenure by subtracting the date of the case from the appointment date.

c. Geographic Variables

**Size of Base City**

Larger, more urban base cities may be more favorable to noncitizens to the extent that they have greater resources to integrate newcomers, and may be less likely to view noncitizens as outsiders. We might find, for example, that those whose cases are heard in the largest base cities have greater access to representation than those in smaller base cities. The largest base cities are also in major U.S. cities, providing greater access to the wider immigrant community as well as psychological support from family and friends.

We created a dichotomous variable for “small base city” representing “1” if the base city was not among the ten largest. The ten largest cities were New York, Los Angeles, San Francisco, Houston, Boston, Miami, Orlando, Atlanta, Washington, and Chicago.

**Local Political and Economic Environment**

tThat combined various background characteristics, such as whether the applicant previously worked for INS/DHS, served in the military, or worked for an NGO or the private sector to create one simple variable where higher values indicating a more pro-liberal asylum bent. Id.  

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162 Miller et al., supra note 80, at 72.  
163 Id.  
164 Chand et al., supra note 87, at 192.  
165 Miller et al., supra note 80, at 72.  
166 Id.
IJs may be influenced by the broader political and economic environment of the base city in which they sit.\(^\text{167}\) Outside the immigration context, ALJs serving in politically liberal areas have been found to be more likely to grant benefits or relief than those serving in conservative areas.\(^\text{168}\) In immigration law, studies show that the ability of ICE agents to deport undocumented immigrants is enhanced in more politically conservative areas.\(^\text{169}\) These findings have carried over to the study of IJ decision making in asylum cases, with IJs being less 9% likely to grant relief in Republican-leaning counties in asylum cases.\(^\text{170}\)

Local economic conditions also may impact how IJs rule.\(^\text{171}\) Populations that express greater apprehension about the state of the economy are more supportive of restricting immigration,\(^\text{172}\) and more economically challenged communities are more likely to adopt stricter immigration measures.\(^\text{173}\) IJs serving in communities with healthier local economies and lower unemployment rates have been shown to have higher asylum grant rates.\(^\text{174}\)

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\(^{167}\) Chand et al. relied on the number of years each state’s legislative house was controlled by a Democratic majority and added the number to the years it had a Democratic governor. Chand et al., supra note 87, at 187. He found this variable significant in his analysis of asylum cases. Id. at 192.


\(^{170}\) Chand et al., supra note 87, at 190-91.

\(^{171}\) Kaiser, supra note 168, at (finding that SSA adjudicators were more likely to grant relief in poorer areas).


\(^{174}\) Miller et al., supra note 80, at 71 (finding that as national unemployment increased from 4% to 9.4%, relief decreased by 8% points in the period, 1999 onward); see also Chand et al., supra note 87, at 192 (finding that whether the IJ works at a Mexican border base city as well as whether the local community had imposed restrictive immigration policies impacted asylum grant rate).
These effects may occur because IJs “become less worried about the effects of increasing unemployment on the local workforce when it is clear that there are likely to be jobs for those admitted, particularly in industries that are not attractive to native workers.”

The composition of the local immigrant community of the IJ’s base city can also impact how the IJ rules. A large immigrant community in an area or a rapid increase in the number of immigrants living in a given area could ignite more hostile attitudes to the migrants in the given community, with noncitizens being perceived as an economic threat. States with rapid influxes of immigrants are more likely to participate in immigrant enforcement measures such as ICE’s E-Verify programs, for example. As such, there might be a “backlash” against noncitizens in places seeing a rapid increase in the foreign-born population and where immigration is a highly salient issue. A large immigrant community could likewise have the opposite effect; it may be that a diaspora of immigrants inspires greater inclusiveness and promotes greater tolerance. IJs may be particularly responsive to economic and demographic factors given their relative lack of job security. A large increase in the foreign born has been shown to influence IJs to deny asylum.

In addition, IJs in border states may differ from judges in non-border states. Local media salience of immigration issues may be greater in border communities, and border states are more likely to participate in enforcement mechanisms such as ICE’s E-Verify program. The effect could go either way; it may be that IJs serving in border counties or states are more bothered by large influxes of noncitizens; it could equally be the case that IJs living in

175 Id. at 102.
176 Chand et al., supra note 87, at 186.
177 Id.; see also Hopkins, supra note 173, at 40-42 (“sudden demographic changes generate uncertainty and attention” and can “politicalize those changes in people’s minds”); Miller et al., supra note 80, at 84 (describing “threat” hypothesis).
179 Miller et al., supra note 80, at 85; Hopkins, supra note 173, at 41-42 (describing “politicalized" place hypothesis).
180 Miller et al., supra note 80, at 84 (discussing “contact” hypothesis).
181 Id. at 85. Yet, federal district court judges may also be susceptible to local sentiment as studies of district court and state supreme court judges have found local sentiment to play a role in decision making. Id.
182 Id.
183 Chand et al., supra note 87, at 186 (finding border states judges less likely to grant asylum relief).
base cities where noncitizens are integrated into the local community are actually less likely to order removal.\textsuperscript{185}

To account for the local immigrant community, we include as a control the percentage change in the immigrant population from 1990 to 2016.\textsuperscript{186} To control for the local economy, we include a measure of the yearly unemployment rate from the Bureau of Labor Statistics by state for the impact of whether economic conditions impact decision making.\textsuperscript{187} We assessed local political conditions by relying on the dataset created by Peter Enns & Julianna Koch which provides a measurement of state democratic policy mood.\textsuperscript{188} We also coded for whether the base city is in a county that abuts the U.S.-Mexico border.

d. Other Institutional Actors

Bureaucratic agencies do not exist in a vacuum.\textsuperscript{189} Precedent, institutional constraints from other bodies of government, and political influence from actors other than the President can impact decisions as well.\textsuperscript{190} Judges may act strategically where they take positions away from their ideal points in order to achieve a more optimal result to please other political principals.\textsuperscript{191}

Studies of administrative agencies underscore the influence that Congress

\textsuperscript{185} Chand et al., \textit{supra} note 87, at 190 (finding that judges in border counties grant asylum at a rate 15% higher than judges in non-border counties).

\textsuperscript{186} Pew Research Center, \textit{available at} http://www.pewhispanic.org/2018/09/14/facts-on-u-s-immigrants-county-maps/. Specifically, for years 2000-2010, we used the percent change from 1990-2010, and for after 2010, we used the percent change from 1990-2016.

\textsuperscript{187} Board of Labor Statistics, Unemployment Rate, \textit{available at} https://data.bls.gov/timeseries/lns14000000


\textsuperscript{189} Only a few of the studies of asylum decision making have included controls for other political actors, even though such controls are standard in any analysis of politicization. \textit{See Beougher, supra} note, at 25; Idean Salehyan & Marc R. Rosenblum, \textit{International Relations, Domestic Politics, and Asylum Admissions in the United States}, 61 POL. RES. Q. 104 (2008) (finding that IJs rule differently depending if Congress is focused on humanitarian assistance or enforcement).

\textsuperscript{190} Thomas H. Hammond, & Jack H. Knott, \textit{Who Controls the Bureaucracy, Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making} 12 J. OF LAW, ECON, & ORG. (1996) (as constraints increase, the ability of bureaucrats to accentuate policy preferences decreases); Donald R. Songer, Jeffrey A. Segal, & Charles M. Cameron, \textit{The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions}. 38 AM. J. OF POL. SCI. 673 (1994).

\textsuperscript{191} Songer, Segal, & Cameron, \textit{supra} note 157, at 673.
has in informing policy with effects changing over time. Congress can exercise control though appointments to the federal courts that review removal cases, threaten budget cuts, hold hearings, or conduct reorganizations. Congressional control over agencies depends on political control of Congress. As such, it is standard in any politicization analysis to include a control for congressional ideology by using the median score of the relevant congressional oversight committee. Here those committees are the House and Senate Judiciary Committees.

Circuit courts also provide oversight over bureaucratic decision makers. Indeed, in recent months, the circuit courts have struck down a number of Trump Administration policies. Agency action can vary depending upon the ideological composition of the reviewing regional oversight court. Similar to the congressional measure, studies of politicization commonly employ the median ideology score of the relevant judicial body such as the BIA or the reviewing appellate courts.

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193 B.D. Wood, Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements, 82 AM. J. OF POL. SCI. 213 (1988). It may be that if Congressional attention focuses on enforcement, IJs will follow suit and grant less asylum while if the emphasis is on the poor human rights abuses of a particular country, then IJs will be more likely to grant asylum. See Beougher, supra note 98 at 25; Salehyan and Rosenblum, supra note 189, at 104.
194 Ideology scores are compiled from Poole and Rosenthal and are called “DW-NOMINATE” scores. See DESCRIPTION OF NOMINATE DATA (July 13, 2004), http://k7moa.com/page2a.htm [https://perma.cc/ZQX9-RRCL] (explaining types of “NOMINATE Coordinates”); Jeffrey B. Lewis, Howard Rosenthal, Adam Boch, Aaron Rudkin, & Luke Sonnet. Voteview: Congressional Roll-Call Votes Database (2019), available at https://voteview.com. Such scores are commonly used to calculate the median ideology score of the relevant congressional oversight committees as well as the median score for any relevant judicial body such as the BIA or the reviewing appellate courts. Members of Congress have their own scores calculated through congressional roll call votes.
195 In our models, we use the Senate Judiciary Committee score, with higher scores indicating a more conservative ideology.
197 See, e.g., Caroline Kelely, Adriane deVoguee, & Dan Berman, Supreme Court Upholds Block on Trump’s Asylum Ban, CNN, Dec. 22, 2018; Miriam Jordan, Federal Judge Blocks Trump’s Proclamation Targeting Some Asylum Seekers, N.Y. TIMES, Nov. 18, 2018; Dara Lind, A Federal Appeals Court Just Ruled Against Trump on DACA, VOX, Nov. 8, 2018.
198 See, e.g., Robert M. Nixon & David C. Nixon, Regional Influence over Bureaucratic Policymaking: Courts, Ideological Preferences, and the Internal Revenue Service, 55 POL. RES. Q. 907 (2002) (finding that IRS offices in more liberal areas would audit rich filers more while in conservative areas, they audited poorer people); Canes-Wrone, supra note 196, at 205 (ideology of federal courts influenced Army Corps of Engineers in granting permits for wetlands, with Congress also having an even bigger impact than judiciary).
Empirical Analysis of Immigration Adjudications

Since the Second and Ninth Circuit hear the greatest number of appeals, many of these observations lean toward a more liberal direction.

We similarly compiled scores for the median ideology of the BIA. As discussed, the BIA has been accused of being biased. In the asylum context, scholars have found that changes in the BIA influence IJ decision making, so we might expect a similar effect for all removal cases. Each member of the BIA was assigned the ideology score of the President whose Attorney General the BIA was appointed under and the median ideology score was then calculated.

e. Other Controls

As in most statistical models, our model includes controls for time since the trends in migration have varied by year. For example, there has been a strong upward trend in asylum grant rates. As such, instead of using year dummy variables, we used a time trend variable with 2001 being coded “18,” 2002 “17” and so forth, up until 2018 coded as “0.”

Patterns of migration have changed over time as well. Beginning in 2012, unaccompanied minors from Guatemala, Honduras, and El Salvador began entering the country in increasing numbers. In addition, by 2014, migrants from these three countries represented nearly half of all migrants, eclipsing the number of Mexicans migrating northward for the first time, a trend that has continued in the ensuing years. Since nationality is such a potent variable to include, we include a separate dummy variable for noncitizens coming from Mexico and Central America.

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201 See supra note 12.
202 Miller et al., supra note 80, at Ch. 5.
203 See Lewis et al., supra note 194 (citing DW-Nominate scores).
204 Miller et al., supra note 80, at 67 (noting upward trend from 1990-2010 and including count variable of number of months elapsed from beginning of dataset).
206 Chand et al., supra note 87, at 185; Preston, supra note 205, at A1; see also Mariano Castillo, Immigration: More Central Americans Apprehended than Mexicans, CNN, Dec. 19, 2014 (migrants from Guatemala, El Salvador, and Honodrus made up 49% of apprehensions at border in 2014).
3. Limitations

As with any analysis, our statistical model cannot account for all factors. The IJ’s decision in many instances requires an assessment of credibility. Yet IJs are not required to document the factors underlying their decision.\textsuperscript{207} Lack of data quality makes it impossible to measure certain variables.\textsuperscript{208} A non-asylum removal cases may involve someone who lived in the U.S. for years, yet we have no reliable data to accurately determine how long they have lived here and whether they are gainfully employed, for example.\textsuperscript{209} Similarly, for noncitizens who secure representation, we lack information on the \textit{quality} of such representation, which some scholars have found significant in the more limited asylum context.\textsuperscript{210}

One of the most notable limitations in the study is our inability to accurately assess the noncitizen’s family situation. Scholars have found that those with dependents are more likely to be granted asylum,\textsuperscript{211} and we might similarly hypothesize that regardless of whether the noncitizen has filed for asylum, the noncitizens’ family situation could be a potentially mitigating factor in any removal proceeding. Some scholars measure dependent status based on whether a “Rider” case is attached,\textsuperscript{212} but other scholars have

\textsuperscript{207} GAO ASYLUM 2008, \textit{supra} note 35, at 25 (nothing “we are not in a position [to] determine the extent to which such factors accounted for the pronounced differences that we found in the likelihood of applicants being granted asylum across immigration courts and judges.”); GAO ASYLUM 2016, \textit{supra} note 37, at 49-50 (noting that missing facts and circumstances related to the legal aspects of cases “could be legally relevant and affect an applicant’s chance of receiving asylum”).

\textsuperscript{208} Id., at 28. The GAO found for instance that applicants for asylum filing within one year of entry are between 29-42\% greater chance of getting relief. \textit{Id.} at 30-31. However, EOIR lacks quality data on the date of the alien’s entry to the U.S, making it difficult to assess this variable. \textit{Id.} at 31, 57-58.

\textsuperscript{209} While EOIR codes for “date of entry,” it is unclear whether that more accurately should reflect the date of apprehension or the earliest date that the noncitizen gets processed in the immigration adjudication system. We also lack any data on the current employment and income status of the noncitizens, a significant limitation in a statistical analysis of this type.

\textsuperscript{210} Miller et al., \textit{supra} note 80, at 72.

\textsuperscript{211} GAO ASYLUM 2008, \textit{supra} note 35, at 31 (noting that for affirmative cases, those with dependents have a 50\% greater rate of being granted asylum while those filing defensive asylum cases have an 80\% increased rate); \textit{Id.} at 83-84 & tbl. 11 (showing grant rates for dependents); GAO ASYLUM 2016, \textit{supra} note 37, at 30-31 (those with dependents are 1.7 times more likely to be granted asylum).

\textsuperscript{212} Eagly, Shafer, & Whalley noted that using the Lead-Rider sheet, along with other coding, assisted with identification of family units, along with other information. \textit{See} Eagly, Shafer, & Whalley, \textit{supra} note 78, 863-64; \textit{see also} Transactional Records Access Clearinghouse (TRAC), \textit{Women with Children—Priority Immigration Cases: About the Data} (2015), http://trac.syr.edu/immigration/reports/377/include/about_data.html [https://perma.cc/82AG-G4KX].
critiqued this methodology. In any case, whether or not a case has a “rider” affiliated with it does not indicate the noncitizen’s family status. A noncitizen in a removal proceeding could have a spouse or child already in the country, legally or otherwise; such information is completely absent from EOIR dataset. In addition, it was impossible to determine whether the noncitizen was a juvenile, which arguably would present a more sympathetic case.

Nor were we able to adequately code for whether or not the noncitizen has a criminal history. We concluded that coding for “criminal” where the noncitizen was charged under 8 U.S.C. §§ 1182(a)(2) or § 1227(a)(2)—listing crime-based grounds for inadmissibility and deportability respectively—would not reliably indicate whether the noncitizen had a criminal background. It is commonly understood that immigration prosecutors charge noncitizens not with the most serious ground for removal, but rather the ground or grounds that are easiest to prove. Thus, a noncitizen without any documentation and with a criminal record would likely only be charged as removable based on lack of documentation rather than based on the commission of a crime, which is generally more difficult to prove. The EOIR dataset further provided a column for “criminal,” but the entries for this column were incomplete as well as inconsistent with other data; for example, many entries were listed as “not criminal” even though the noncitizen was charged with a crime-based ground for removal.

In addition, variables such as whether a judge was exclusively assigned to hear juvenile cases or a particular type of case could impact the results if such assignment is not random. There may be other nonrandom differences with respect to the initial case assignment of which we are unaware that could cloud the analysis.

III. FINDINGS

Our analyses resulted in three primary findings. First, we found that recent Presidential Administrations do not exhibit different trends in the types of IJs they appoint. While the Trump Administration appointed a disproportionate number of IJs with prior experience working for INS, DHS, or DOJ, the Bush II and Obama Administrations did as well. Second, contrary to concerns that the Trump Administration has been “stacking the deck” to appoint IJs who will order more removals, our regression analysis—which controlled for over a dozen variables that might impact a decision to order removal—suggests no statistically significant difference in removal rates based on the appointing President. That is, Trump appointees are as likely to order removal as Obama appointees and Bush II appointees. Finally, our

213 See VERA INSTITUTE STUDY, supra note 37 (detailing why dependents are hard to measure given information available from EOIR)
214 GAO ASYLUM 2016, supra note 37, at 28-29.
regression analysis found that the identity of the Administration in control at the time a decision is rendered is a statistically significant predictor of removal rates. For example, holding other variables constant, Bush II appointees were 14% less likely to order removal during the Obama Administration than during the Trump Administration; they were also 12% less likely to order removal during the Bush II Administration than during the Trump Administration. These results are stunning, providing strong evidence that the identity of the current Executive-in-Chief exercises a strong influence on rates of removal in immigration courts.

A. Recent Presidents Do Not Appoint IJs With Different Employment Backgrounds

We analyzed whether different Presidents appoint IJs with different kinds of employment backgrounds. We looked at the analysis using cross tabulations, which identifies whether there is a relationship between two variables, and if so, whether the relationship is positive or negative.

Looking at these raw percentages, we find the employment backgrounds of IJs appointed during the last three presidencies to be remarkably similar, especially concerning prior employment at the former INS, DHS or other offices at DOJ. Table 1 displays the results based on percentages. Trump appointees have slightly less experience working for these agencies than Bush II or Obama appointees (70% v. 75% for Obama v. 79% for Bush II). While this finding—reflecting an overall preference for hiring IJs with prior experience working for federal agencies responsible for prosecuting noncitizens—is disturbing, this preference appears for each of the three most recent Presidencies.

We next analyzed overall government experience, including not only working for INS, DHS or DOJ, but also including those working in other federal entities, state governments, or the military. Again, appointees of the three most recent Presidents are remarkably similar. Over 95% of appointees during each Administration had prior government experience at some point in their career. Finally, we examined trends in hiring individuals with prior experience working for non-profits or in private practice, which are both more likely than government officials to defend immigrants. Approximately 53% of Obama appointees had some NGO or private practice experience.

\[\text{A dichotomous coding of experience may not be the best way to look at this variable.}
\]

An IJ who served a military career as Army JAG may be different than someone who were drafted for two years into the Vietnam War or WWII with no officer or prosecutorial experience. Similarly, an IJ who spends one or two years working for ICE at the beginning of their career may be very different than someone with a thirty year career who has had more time to acculturate to agency culture. Moreover, those who work out of EOIR Center in Arlington, Virginia or who worked for a time at EOIR Center may be different than IJs in other base cities. The present analysis does not account for any of this nuance.
compared to 44% for Trump appointees and 39% of Bush II appointees. But none of the differences between Trump, Obama, or Bush II appointees were statistically significant to a 95% confidence level, suggesting that all Administrations disproportionately hire individuals with prior government experience, and are far less likely to hire individuals with prior experience working for non-profits or in the private sector, including those that defend immigrants’ rights.

**Table 1: Cross Tabulations of Appointing President and Select Judge Employment Characteristics (Percents)**

<table>
<thead>
<tr>
<th>Employment Characteristic</th>
<th>Bush II appointees</th>
<th>Obama appointees</th>
<th>Trump appointees</th>
</tr>
</thead>
<tbody>
<tr>
<td>INS/DHS/DOJ background</td>
<td>76.47</td>
<td>76.32</td>
<td>72.18</td>
</tr>
<tr>
<td>Any government background (federal, state, local, military)</td>
<td>96.08</td>
<td>96.38</td>
<td>92.48</td>
</tr>
<tr>
<td>NGOs or private practice</td>
<td>39.22</td>
<td>53.16</td>
<td>43.61</td>
</tr>
</tbody>
</table>

*Statistically significant of at least 95% confidence

**B. The Identity of the Appointing President Does Not Affect Rates of Removal**

In this Part, we analyze the second question—whether a President can have an enduring legacy in shaping immigration outcomes after he leaves Office by appointing IJs who are more or less likely to order removal. At first blush, raw percentages without any other statistical controls suggest that IJs appointed by President Trump are more likely to order removal than IJs appointed by either of the prior two Administrations; Trump-appointed IJs have ordered removal in 66% of cases, as compared to 59% for Obama appointees, 54% for Bush II, and 50% for Clinton appointees.

These raw percentages provide only descriptive information, however; they do not control for other factors that might impact the decision to remove. In order to more accurately evaluate whether Trump appointees are more likely issue removal orders than IJs appointed by earlier presidents, we applied over a dozen other statistical controls likely to have an independent effect on the removal decision, including the nonimmigrant-specific, judge-specific, base city-related, and institutional controls described in Part II.C.1. Controlling for these other variables provides a more informed analysis on the impact of the appointing President.

Table 2 analyzes the likelihood that IJs appointed by each Presidential Administration will order removal, controlling for all of the other identified
variables. The sign and number of the “Appointing President” variable shows
the extent to which appointing President predicts an order of removal rather
than non-removal. The key independent variable studied in this Part is the
identity of the appointing President Nixon, Carter, Reagan, Bush I, Clinton,
Bush II, and Obama.

Model 2a uses Bush II appointees as a reference category. Thus, the
coefficient on the variable shows the extent to which the appointing President
predicts an order of removal as compared to the reference category of Bush
II appointees. A variable with a star indicates statistical significance to a 95%
confidence level. Model 2b uses Obama appointees as the reference category,
and Model 2c uses Trump appointees as the reference category.
### Table 2: Logit Regression Coefficients on Probability of Removal Based on Appointing President

<table>
<thead>
<tr>
<th></th>
<th>(Model 2a)</th>
<th>(Model 2b)</th>
<th>(Model 2c)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Bush II Era</td>
<td>Obama Era</td>
<td>Trump Era</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Appointing President</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Nixon App.</td>
<td>-0.006</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td></td>
<td>(0.253)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carter App.</td>
<td>-0.292</td>
<td>0.467</td>
<td>-0.736</td>
</tr>
<tr>
<td></td>
<td>(0.263)</td>
<td>(0.265)</td>
<td>(0.584)</td>
</tr>
<tr>
<td>Reagan App.</td>
<td>-0.236</td>
<td>0.0324</td>
<td>-0.774</td>
</tr>
<tr>
<td></td>
<td>(0.364)</td>
<td>(0.344)</td>
<td>(0.521)</td>
</tr>
<tr>
<td>Bush I App.</td>
<td>-0.219</td>
<td>-0.0945</td>
<td>-0.536</td>
</tr>
<tr>
<td></td>
<td>(0.481)</td>
<td>(0.400)</td>
<td>(0.339)</td>
</tr>
<tr>
<td>Clinton App.</td>
<td>-0.205</td>
<td>-0.258</td>
<td>-0.325</td>
</tr>
<tr>
<td></td>
<td>(0.635)</td>
<td>(0.548)</td>
<td>(0.220)</td>
</tr>
<tr>
<td>Bush II App.</td>
<td>--</td>
<td>-0.196</td>
<td>-0.141</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.629)</td>
<td>(0.133)</td>
</tr>
<tr>
<td>Obama App.</td>
<td>--</td>
<td>--</td>
<td>-0.130</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(0.150)</td>
</tr>
<tr>
<td>Detain</td>
<td>1.469***</td>
<td>2.058***</td>
<td>1.460***</td>
</tr>
<tr>
<td></td>
<td>(0.0757)</td>
<td>(0.0687)</td>
<td>(0.0746)</td>
</tr>
<tr>
<td>Lawyer</td>
<td>-0.973***</td>
<td>-0.569***</td>
<td>-1.124***</td>
</tr>
<tr>
<td></td>
<td>(0.0350)</td>
<td>(0.0348)</td>
<td>(0.0471)</td>
</tr>
</tbody>
</table>

| Non-Immigrant        | Yes        | Yes        | Yes        |
|                      |            |            |            |
| IJ Demographic       | Yes        | Yes        | Yes        |
|                      |            |            |            |
| Base City            | Yes        | Yes        | Yes        |
|                      |            |            |            |
| Other Institutions   | Yes        | Yes        | Yes        |
|                      |            |            |            |
| Time Trend           | Yes        | Yes        | Yes        |

| _cons                | 1.028      | 1.627      | 2.269***   |
|                      | (0.943)    | (0.853)    | (0.462)    |

| N                    | 393422     | 352096     | 95205      |

Standard errors in parentheses clustered by judge. * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$
None of the variables for appointing President are statistically significant across Models 2a through 2c. That is, we cannot conclude with 95% confidence that IJs make decisions on removal depending upon the appointing President. After controlling for over a dozen other variables, Presidents do not appear able to exercise an enduring legacy on removal rates in the immigration courts by appointing IJs. This finding is consistent with studies of the narrower subset of asylum proceedings216 concluding that the identity of the appointing President does not affect propensity to remove.

It is worth noting that the regression analyses show other variables—namely detention status, legal representation, English language, whether from Central America or a not-free country, whether the judge is female as well as the liberal political environment of the IJ’s community—as statistically significant predictors of removal in all the regressions. These finding are also consistent with other studies.217 Other variables, such as case type and increase in number of foreign born in a given base city, among others, are statistically significant during certain Eras. We discuss more about the significance of other variables in Part III.D below.

C. The Identity of the Current President Impacts Orders to Remove, Irrespective of the Identity of the Appointing President

In this next analysis, we examine whether IJs, regardless of who appointed them, are more likely to order removal when certain Presidents are in control, holding other variables constant. This analysis is more fine-grained than the preceding one because its shows the interaction between Presidential Era and Appointing President, whereas the preceding analyses included only Appointing President as the key variable of interest.218 If the President in control at the time a decision is rendered exercises power over IJs, then we might expect to see a positive and statistically significant coefficient signifying that IJs appointed by the same President vary their rates of removal based on the Presidential Era.219 Here, we use the Trump Era as the reference category. If the variable “Obama Era” is statistically significant and negative, that means that the IJ by whoever appointed that group’s judges (in Table 3b, for example, it is limited to Obama appointees), is less likely to

216 See supra Part I.B.
217 See supra Part I.B.
218 In this part of the analysis, we only included IJs if they were still hearing cases as of the start of the Trump Administration in January 2017. Even if we included all IJs, however, the main results are the same. The main results are also the same including dummy variables for each base city.
219 We could do this with an interaction but for simplicity, we set up different regressions, one for each of the last five current appointing Presidents to see whether the “Era” affects the propensity to order removal.
order removal during the Obama Era than the Trump Era.\textsuperscript{220} Similarly, if the coefficient for “Bush II Era” is negative and statistically significant, that means that judges appointed by whoever is identified in the column header during the Bush II Era (2001-2009) are less likely to order removal as compared to during the Trump Era. Positive coefficients, by contrast, that would indicate that the judge cohort was more likely to order removal during the indicated Administration than during the Trump Administration.

Model 3a-Model 3f details the figures limited to judges from the last five Administrations, starting with Trump. We find that except for some IJs appointed by earlier IJs, IJs are less likely to order removal during both the Obama and Bush II Eras than the Trump Era, controlling for other variables. Model 3a provides the coefficients for Trump appointees. Because Trump appointees did not serve during the Bush II or Obama years, we do not have any Era coefficient to analyze there. Model 3b is limited to Obama appointees across two Administrations, Obama and Trump; it has no coefficient for the Bush II Era because no Obama appointees served during the Bush II Era. As shown in Table 3, Obama appointees were 4\% less likely to order removal during the Obama Era as compared to the current Trump Era, holding other values constant.\textsuperscript{221} Model 10c shows a similar pattern for Bush II appointees; holding all other variables constant, Bush II appointees were 14\% less likely to issue a removal order during the Obama Era than during the Trump Era and 12\% less likely during the Bush II Era compared to the Trump Era—a stunning result.

Clinton judges too acted differently depending upon the current president, but they differed only during the Obama Era. As shown in Model 3d, holding other variables constant, while Clinton-appointed judges were 11\% less likely to remove during the Obama Era as compared to the Trump Era, they were 12\% less likely to remove during the Bush II Era compared to the Trump Era. Bush I appointees, identified in Model 3e, were 19\% less likely to remove

\textsuperscript{220} Trump Administration is the reference category here. As in any statistical analysis, the reference category could be switched to Obama or Bush II, but we thought Trump Administration was theoretically the most interesting.

\textsuperscript{221} These numbers are called “predicted probabilities.” To calculate them, we first assume that all variables are constant (at their same values). Then we compare what is the percentage change in removal order based solely on one change: whether the case was decided during the Obama Era versus the Trump Era or the Bush II Era versus the Trump Era. Assuming all other variables are held constant, we can say that just the simple change of switching from the Trump Era to the Obama Era would indicate a 4\% less likely chance that the noncitizen would be subject to removal. This result is statistically significant with 95\% confidence, meaning that there is a 95\% chance our value will fall within the given interval and there is a 5\% chance that it could be that value simply by chance. We do the same for the other variables. We did not have to use constant value. We could have used the median or mean or we could have set some value, in which case our percentages would change. The overall pattern, however, would be the same.
under Obama compared to the current Administration and 29% less likely under Bush II years compared to the Trump Era, holding other variables constant. However, as reflected in Model 3f, removal rates for Reagan appointees do not differ statistically under either the Obama or Bush II Eras compared to the Trump Era.

Table 3: Logit Regressions: Probability of Removal Order Based on President in Control at Time of Decision

<table>
<thead>
<tr>
<th></th>
<th>(3a)</th>
<th>(3b)</th>
<th>(3c)</th>
<th>(3d)</th>
<th>(3e)</th>
<th>(3f)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Trump appointees</td>
<td>Obama Appointees</td>
<td>Bush II Appointees</td>
<td>Clinton appointees</td>
<td>Bush appointees</td>
<td>Reagan appointees</td>
</tr>
<tr>
<td>Obama Era</td>
<td>--</td>
<td>-0.229** (0.0755)</td>
<td>-0.821*** (0.0796)</td>
<td>-0.544*** (0.0847)</td>
<td>-0.946*** (0.173)</td>
<td>-0.433 (0.244)</td>
</tr>
<tr>
<td>Bush II Era</td>
<td>--</td>
<td>--</td>
<td>-0.734*** (0.203)</td>
<td>-0.404** (0.139)</td>
<td>-1.175** (0.381)</td>
<td>-0.540 (0.408)</td>
</tr>
<tr>
<td>Detain</td>
<td>1.244*** (0.180)</td>
<td>1.657*** (0.0830)</td>
<td>1.962*** (0.0956)</td>
<td>1.790*** (0.104)</td>
<td>2.029*** (0.190)</td>
<td>1.790** (0.212)</td>
</tr>
<tr>
<td>Lawyer</td>
<td>-1.17*** (0.116)</td>
<td>-0.905*** (0.061)</td>
<td>-0.634*** (0.060)</td>
<td>-0.756*** (0.040)</td>
<td>-0.840*** (0.100)</td>
<td>-0.819*** (0.084)</td>
</tr>
<tr>
<td>Noncitizen</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>IJ Demo.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Base City</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Base City</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Institution</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Time Trend</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>_cons</td>
<td>1.814 (1.410)</td>
<td>2.653*** (0.517)</td>
<td>1.325* (0.530)</td>
<td>0.966 (0.720)</td>
<td>-3.597 (7.533)</td>
<td>3.208 (1.598)</td>
</tr>
<tr>
<td>N</td>
<td>9880</td>
<td>128090</td>
<td>162081</td>
<td>398671</td>
<td>61877</td>
<td>74674</td>
</tr>
</tbody>
</table>

Standard errors in parentheses clustered by judge. * p < 0.05, ** p < 0.01, *** p < 0.001

One should exercise caution in analyzing the results regarding earlier-appointed judges. The judges appointed by Reagan, Bush I, and Clinton included in our dataset may not be representative. By definition, they are a truncated sample because to be included in this analysis, those judges must

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222 Obama Era, then Bush II Era, each compared to Trump Era. A negative sign means less likely to remove compared to the reference category of Trump Era.

223 There were no Carter, Ford, or Nixon appointees in the relevant dataset.
still be serving as of the date of the case’s completion. For some Reagan-appointed judge, that may be a tenure in excess of forty years. Although we control for tenure, the precise mechanisms by which a given President influences IJs may depend on unaccounted-for demographic features of the judges, such as age or experience or expertise. As others have found in the asylum context, it may be that the routine nature of much of the decision making over a period of many years could mediate the more immediate impact that the current President has on the IJ.224

As in Table 2, variables such as lawyer, detained, English speakers, and those coming from Central America and Mexico are significant in all Models. We turn to discussing the significance of the other variables in Part III.D.

D. Predictive Value of Other Variables

As shown in Tables 2 and 3, some of the most substantively meaningful variables for predicting removal involve features relating to the noncitizen. Those who are detained overall are 34% more likely to be removed, holding other values constant.225 Lawyer representation is also substantively key; those with a lawyer are 13% less likely to be removed than those without representation. English-speaking respondents are also 12% more likely to prevail. Further, for all appointees except for Reagan appointees, the liberalism of the IJ’s base community is statistically significant, indicating that IJs are less likely to remove the more liberal the area; as the liberalism of the area grows by 10%, removal rates decrease by 8%.226 IJs also consistently are less likely to remove those who come from “not free” countries as measured by Freedom House; going from a free country to a not free country results in a 8% decreased likelihood of removal, holding other variables constant. Overall, female appointees are 5% less likely to remove. Across all appointees, even holding all variables constant, those from Central America are 9% more likely to be ordered removed to a statistically significant confidence level; this number is 13% for Trump appointees.

The effect that these variables have on removal has changed over time depending on the Era and the group of appointees. Interestingly, the impact of detention is less for Trump appointees than other appointees. Holding other variables constant, Trump appointees will remove a detained noncitizen at an increased rate of 20% versus a nondetained noncitizen; for Obama appointees, this number increases to 27% and it is 33% for Bush II

224 See also Chen & Eagel, supra note 86, at 1.
225 These predicted probabilities in this paragraph were calculated using a regression of the whole dataset for ease of explanation, with controls for who the Attorney General was as well as who the current President at the time was. Using the whole dataset, IJs in general are 10% less likely to remove during the Obama Era, and 9% less likely during the Bush Era compared to the Trump Era, with all other variables held constant.
226 See Chand et al., supra note 87, at 192.
appointees. The impact of detention is most intense during the Obama Era; holding other variables constant, those detained are 33% more likely to be removed; this compares to 24% in the Trump Era. By contrast, the effect of lawyer representation is less during the Obama years; holding other variables constant, those with a lawyer are 10% less likely to be removed; in the Trump Era, this figure rises to 18%.

Other variables are not consistently significant across appointees and Era. Whether the noncitizen comes from a poor country, for example, is significant only for Obama and Reagan appointees. Trump appointees differ from appointees of other Presidents in several ways. For example, Trump appointees are not more likely to order removal if they are border judges or if they are in smaller base cities, in contrast to most of the other Presidential appointees. The Trump Administration has deployed a large number of IJs to the border so that they may not yet be as integrated into the local community. The time trend variable is also significant for Bush II and Trump Eras, though the effect is in opposite directions. As the Bush II Administration marched on, the rates of removal declined, whereas with each pressing year of the Trump Administration, removals increase, holding other variables constant, a trend that will likely continue in the future.

While an exploration of asylum is beyond the scope of this Article, it is noteworthy that Trump appointees do not seem to differentiate on whether the case is an asylum case or whether it is an affirmative or defensive asylum case at all. By contrast, with the exception of Obama appointees, appointees of other Presidents are more likely to remove in defensive asylum cases than in affirmative ones. Appointees of all Presidents were not more or less likely to order removal in non-asylum cases; in other words, they all seem to treat non-asylum cases the same way as asylum cases, despite the various differences between them.

Further, in the Trump Era, some politically-charged variables reach significance. Although we do not find the appointing President to be statistically significant, removal decisions are not divorced entirely from politics or political calculations. Both Trump and Obama appointees—especially during the Trump Era—were more influenced by large influxes of the foreign-born in the base community. During the Trump Era, for instance, a 10% increase in the foreign-born results in a 1% increased probability of removal, holding other variables constant. Furthermore, during the Bush II

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227 By contrast, these variables are significant for appointees of the six most recent Presidents, but border county is not for Reagan appointees or Bush I appointees.
228 See supra Part I.A (explaining differences between asylum and non-asylum cases). Our finding that IJs do not appear to see non-asylum cases differently than asylum cases lends further credence to our use of research on asylum to help build our models.
229 See Miller et al., supra note 80, at 72.
Era and the Trump Era, but not Obama Era, IJs were less likely to order removal for those coming from poor countries suggesting that the status of the noncitizen as a potential economic migrant affects at least some IJ decision making.

With respect to the institutional variables, the circuit courts may be the most powerful overseer of IJ decision making. Bush II appointees are influenced by the ideological composition of the circuit court and the Senate, while Clinton appointees are influenced by just the Senate; none of the other institutional variables are significant for the other appointees during that Era.\(^{230}\) During both the Obama Era and the Trump Era, circuit court is significant; IJs are more likely to remove if they face a conservative circuit court, and less likely to remove if the court is liberal. In general, the circuit courts have acted as a powerful monitor of Trump Era decisions, a result that is borne out statistically here.\(^{231}\) Indeed, even considering all the other important predictors—detained, lawyer, appointing President—the circuit courts still seem to have some effect as a monitor on the work of the IJs.

\[* \quad * \quad *\]

In sum, the current President seems to exercise overriding influence in IJ decision making even controlling for other factors; the identity of the appointing President does not seem to exercise an effect on removal decisions divorced from the identity of the President at the time a decision is rendered. The next Part explores the normative implications of these findings.

### IV. Policy Implications

The findings in the previous section raise significant due process concerns, suggesting that the decision to deport a given noncitizen or allow him or her to remain in the United States may be a product of a given Administration’s political agenda rather than an independent assessment of the individual’s circumstances, testimony, or evidence. At the same time, the politicization of removal decisions underscores a fundamental tension in the very concept of administrative adjudication: the difficulty in reconciling norms of adjudicatory independence with those of democratic accountability.

To be sure, the proper allocation of power between a President’s leadership team and an agency’s career staff is subject to debate.\(^{232}\) On the

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\(^{230}\) Other variables, such as judicial tenure, government employment, and BIA score are not significant, while a small handful of variables such as unemployment rate are only significant for a small group of appointees during the recession-years of the Bush I Administration.

\(^{231}\) See supra notes 196-200 and accompanying text.

one hand, champions of presidential control argue that vesting all power in the political leadership enhances electoral accountability. At its extreme, this perspective characterizes bureaucratic resistance to such power as an anti-democratic “deep state.” On the other hand, others advocate empowering civil servants, who may bring apolitical, technocratic, or scientific expertise to bear or who may provide a bridge between administrations to ensure some degree of continuity in national policy.

In this section, we propose one avenue to recalibrate the balance between the competing goals of adjudicative independence and democratic accountability in the immigration removal context: strictly protecting the independence of trial-level IJs while at the same time formalizing the political leadership’s authority to exercise review over individual decisions and engage in rulemaking to limit the scope of IJs’ discretion for future decisions. Formal exercises of such review and rulemaking authority, however, should constitute the only means by which political leadership plays any role in an individual removal decision. Finally, Congress should repeal restrictions to judicial review over removal decisions to ensure that political actors remain within the bounds of their statutory authority, particularly where they reverse the decisions of lower level civil servants.

A. Strictly Insulate IJs from Political Controls

Congress should act to provide IJs with complete insulation from political interference in their initial decision making. This norm of adjudicative independence is deeply rooted in notions of procedural justice. Our federal legal system places a heavy premium on adjudicative independence, demonstrated by the extraordinary tenure protections provided to Article III

234 See Amanda Taub & Max Fisher, “As leaks multiply, fears of a ‘Deep State’ in America,” N.Y. TIMES, Feb. 16, 2017 (characterizing the “deep state” as the “development of an entrenched culture of conflict between the president and his own bureaucracy”).
235 See Eugene Robinson, Opinion, God Bless the “Deep State,” WASH. POST, July 18, 2018 (describing the “deep state” having “spent years—often decades—mastering the details of foreign and domestic policy” and maintaining that “with a supine Congress unwilling to play the role it is assigned by the Constitution, the deep state stand between us and the abyss”); see also Kevin M Stack, An Administrative Jurisprudence: The Rule of Law in the Administrative State, 115 COLUM. L. REV. 1985, 2013 (2015) (emphasizing central role of agencies to preserve rule-of-law value of coherence, by providing “as much coherence as possible between past commitments, reflected in the statute and the agency’s past practices, on the one hand, and current policy preferences on the other”).
236 Cf. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, The Hidden Judiciary: An Empirical Examination of Executive Branch Justice, 58 DUKE L.J. 1477, 1480 (2009) (maintaining that major issue regarding administrative law judges is not whether they are sufficiently independent, but rather whether they are sufficiently deliberative).
Scholars have long recognized the central importance of adjudicative independence in the agency context as well. In 1962, Judge Henry Friendly noted, “Everyone, including presidential activists, seems to agree that ‘the outcome of any particular adjudicatory matter is . . . as much beyond . . . [the President’s] concern . . . as the outcome of any cause pending in the courts . . . ’” Martin Redish and Lawrence Marshall later characterized such independence as “the *sine qua non* of procedural due process,” explaining: [I]f the adjudicator is himself an integral part of the governmental body on the other side of the case, then it is likely that his decision will be based on considerations other than the merits as developed by the evidence. The government would, in effect, be the judge of its own case.” Indeed, Redish and Marshall explicitly cautioned against the dangers highlighted in the preceding section, expressing concern that political actors could “use[] the possibility of removal as a tool for coercing decisions that are consistent with the agency’s wishes.”

More recently, even as many began embracing presidential control over agencies generally, administrative law scholars have continued to acknowledge the need for political independence among agency adjudicators. Kent Barnett, for example, emphasizes the heightened risk of error that results from political control over adjudicators: “a decisionmaker whose job or pay are controlled by one of the parties, has reason to favor that party.” Even Elena Kagan, who generally championed presidential control over agency actions, acknowledged that in the context of administrative adjudications, “presidential participation…, of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies.”

Justice Powell’s concurring opinion in *INS v. Chadha* further articulates the dangers of politicization in adjudicatory proceedings. That case,

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237 U.S. CONST. Art. III, sec. 1 (guaranteeing that federal judges “shall hold their office during good behavior, and shall … receive compensation, which shall not be diminished during their continuance in office.”).
238 Friendly, supra note 7, at 1300.
240 *Id.* at 499.
241 *See, e.g.*, Stack, *supra* note 235, at 1985 (“At its most basic level, the rule-of-law value of procedural fairness requires an impartial decider in adjudications.”).
242 Barnett, supra note 66.
famous for invalidating the one-house legislative veto, challenged the House of Representative’s attempt to reverse an IJ’s decision to grant relief from removal to a noncitizen.245 While the majority concluded that the one-house veto constituted an unconstitutional infringement of executive powers, Justice Powell concluded that the attempted veto constituted an unconstitutional usurpation of adjudicative powers.246 Focusing on the risk of “unchecked power,” Powell observed that “[t]he only effective constraint on Congress’ power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides the rights of specific persons, those rights are subject to the ‘tyranny of a shifting majority.’”247 While Chadha of course involved a congressional decision, the concerns Powell expressed apply equally to political actors within the executive branch, who might arbitrarily order an individual deported on political grounds.

Recognizing the importance of political independence at least among trial-level agency adjudicators, the framers of the APA imposed a series of procedural protections to ensure the integrity and impartiality of their decisions. While the APA allows the agency’s political leadership to conduct hearings,248 it contemplates that most hearings will be adjudicated in the first instance by a hearing examiner. In such cases, the APA mandates the independence of such an official by, for example, protecting him or her from control by others with prosecutorial or investigative responsibilities.249 It further prohibits hearing officers from considering ex parte evidence250 and requires decisions to be based exclusively on the record of the proceedings.251 Eventually, in recognition of the primarily adjudicative role these examiners played, they became known as Administrative Law Judges.252 The Executive branch itself further enhanced the independence of ALJs by prohibiting agencies from recruiting them directly. Instead, the Office of Personnel Management (OPM) developed the “rule of three,” under which an agency seeking to hire an ALJ was limited to choosing from among the top three names from a register of qualified applicants maintained by OPM.253 Moreover, ALJs can only be fired “for cause” as determined by the Merit

245 Id. at 924-25.
246 Id. at 965.
247 Id. at 967.
250 § 557(d).
251 § 556(e).
253 5 C.F.R. § 930.201; see also ACUS VERKUIL (1997), supra note 66.
Empirical Analysis of Immigration Adjudications

Removal proceedings are not governed by the APA, and, as explained above, they are adjudicated not by ALJs but rather by IJs who are appointed directly by the Attorney General and who enjoy no tenure protections above ordinary civil service protections. At the same time, it is worth repeating that unlike many regulatory statutes, the INA vests authority to conduct removal proceedings personally in IJs, rather than the agency more generally. This personal delegation of authority suggests that Congress contemplated granting IJs a measure of independence in decision making above and beyond other agency adjudicators.

Moreover, the weighty due process interests at stake in removal proceedings heighten the need for a politically independent adjudicator. These proceedings may determine whether a long-time resident of the United States, perhaps one in legal status and with a U.S. citizen spouse and children and other significant ties to the country—will be forced to leave his or her life here. Other proceedings may result in persecution or even death if an asylum claimant is returned to her home country.

For this reason, the Supreme Court not only recognizes that constitutional due process rights attach to removal proceedings, but it has also emphasized the importance of the individual interest at stake in deportation proceedings. In Padilla v. Kentucky, a majority of the Court, while acknowledging that removal proceedings are civil rather than criminal in nature, noted “we have long recognized that deportation is a particularly severe ‘‘‘penalty.’’” Justice Brewer’s dissent in the early case of Fong Yue Ting similarly observed “Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.” He then went on to quote James Madison for the proposition that “‘if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.’”

To secure adjudicative independence in the immigration context,

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255 Marcello v. Bonds, 349 U.S. 302, 306-308 (1955) (describing legislative history of amendment s following Wong Yang Sung decision to conclude that Congress clearly intended to reverse that decision and exempt deportation proceedings from APA requirements).
259 Id. at 741.
Congress should ensure enforcement of current civil service rules requiring that IJs be hired solely on the basis of merit rather than through political affiliation or patronage. Further, it should enact legislation to achieve a more balanced pool of IJs in terms of immigration experience, encouraging EOIR to hire IJs who have worked for non-profits or in private practice rather than limiting IJs to individuals with prior backgrounds in law enforcement generally and immigration enforcement in particular. This recommendation is consistent with a study commissioned by EOIR itself, which counseled in favor of expanding hiring pools and conducting outreach given the large proportion of IJs who had formerly worked at DHS, ICE, or other DOJ branches.260

In addition, Congress should strengthen civil service protections to ensure that IJs are not subject to adverse employment actions on the basis of their lawful exercise of discretion. We recognize that an Administration should retain a mechanism to remove IJs who demonstrate, for example, a lack of professionalism; indeed, we conclude that performance evaluations of judges are entirely appropriate. To ensure that IJs are not punished for individual or aggregate case outcomes, however, we recommend that performance evaluations be based on a peer review model in which IJs are evaluated by a panel of fellow IJs, rather than by political superiors.

We do not recommend that Congress transform IJs into ALJs. As an initial matter, it is worth noting that the current administration has sought to weaken the protections afforded to ALJs. Executive Order 13,843 excepts ALJs from the competitive service, excepting ALJs from competitive examination and competitive service selection procedures.261 The goal of this policy change is to “give agencies greater ability and discretion” in recruiting ALJ candidates. Moreover, a leaked memorandum from the Solicitor General redefines “good cause” for removal to include failure to “perform adequately or to follow agency policies, procedures, or instructions.”262 While we forcefully disagree with the effort to expand the grounds for removing agency adjudicators, we agree that EOIR should be given more discretion in hiring IJs than previously required for the recruitment of ALJs, which would have prohibited the agency from recruiting IJs with expertise in the somewhat technical area of immigration law.263

261 Executive Order 13,843, Excepting Administrative Law Judges from the Competitive Service (July 10, 2018).
262 MEMORANDUM FROM SOLICITOR GENERAL TO AGENCY GENERAL COUNSEL ON GUIDANCE ON ADMINISTRATIVE LAW JUDGES AFTER LUCIA V. SEC, available at https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf.
263 See Lubbers, supra note 252, at 73 (noting problems stemming from restrictions on hiring ALJs).
These proposals remain consistent with the recent Supreme Court decisions in *Free Enterprise Fund v. Public Company Accountability Oversight Board* and *Lucia v. SEC.* First, imposing strict restrictions on the Attorney General’s ability to remove IJs is consistent with the Court’s 2010 ruling in *Free Enterprise Fund.* In that case, the Supreme Court invalidated the limits on removing members of the Public Company Accountability Oversight Board, a body subordinate to the Securities Exchange Commission, whose members also can only be removed “for good cause.” The Court held that such dual-level tenure protections violated the President’s ability to “take care” that the laws of the United States be faithfully executed. Limiting the Attorney General’s ability to remove IJs would, by contrast, constitute only a single layer of removal protections, which the Court expressly reaffirmed. At the same time, unlike the process for ALJ appointments invalidated in *Lucia,* in the system we propose preserves the Attorney General’s ability to appoint IJs directly.

**B. Formalize Authority to Engage in Review or Rulemaking to Limit IJ Decision Making Discretion**

At the same time, we believe that the President, as head of the executive branch and delegated with responsibility to take care that the laws be faithfully executed, must be permitted to exercise some control over the decisions of IJs. Specifically, we believe that the Attorney General, serving as a proxy for the President, should be permitted to issue formal regulations and exercise formal review authority over IJ decisions. The unitary executive is premised on a theory of political accountability, suggesting that the President—and his politically appointed delegates—must be able to control agency actions to respond to electoral demands. Affording the Attorney General the power to issue regulations and exercise review over removal decisions provides ample space to allow the President to achieve his political goals and thereby remain responsive to the electorate.

The INA already grants the Attorney General authority to engage in rulemaking to limit the discretion of IJs. Such authority is consistent with the Supreme Court’s decision in *Heckler v. Campbell,* which sustained the

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266 561 U.S. at 477.
267 *Id.*
268 561 U.S. at 498.
269 *Id.* at 496.
271 See 8 U.S.C. § 1103(g)(2) (delegating to Attorney General authority to engage in rulemaking necessary to the implementation of the INA).
Social Security Administration’s authority to engage in rulemaking to preclude individual agency litigation regarding the availability of jobs that the claimant could perform in disability benefits proceedings. The Court explained, “even where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its own rulemaking authority to determine issues that do not require case-by-case consideration.”

Unlike the APA, the INA does not currently allow the agency’s political leadership to review the decisions of IJs. Such review authority is solely a creature of regulations. Nonetheless, we recommend that Congress formally authorize such power, which would allow political review over removal decisions. Such authority would help ensure uniformity in decision making and reduce the perceived and perhaps actual arbitrariness of case outcomes.

Such formal review and regulations, however, should constitute the only measure through which the agency’s political leadership can influence case outcomes. These types of actions are transparent and allow the public to attribute credit or blame to the agency’s political leadership. More subtle attempts to influence IJs during their initial consideration of a case, however, denies such accountability, preventing the public from knowing to whom to assign blame for a given decision.

Moreover, the exercise of formal review, rather than off-the-record influence, promotes norms of deliberation in decision making by creating a full record that can be assessed for review by an Article III court. The record would contain the unbiased, independent assessment of an apolitical examiner, as well as the possibly politically motivated decision of the agency’s leadership. Such a complete record would ensure that the agency benefited from at least two (if not three, if one were to include the BIA) levels of deliberation before reaching its final decision.

Indeed, these norms of transparency and deliberation appear to be the animating force behind the Supreme Court’s decision in Accardi v. Shaughnessy, which invalidated the Attorney General’s attempt to sway the BIA before it had rendered its own assessment of whether a given noncitizen should receive relief from removal. In that case, an IJ had denied the noncitizen’s application for relief from removal. While his appeal was

\[273\] Id. at 467.

\[274\] See generally Gonzales & Glen, supra note 74 (championing Attorney General’s exercise of refer-and-review authority to reverse removal decisions issued by civil service adjudicators).

\[275\] See Universal Camera Corp. v. Nat’l Labor Relations Bd., 340 U.S. 474, 493-94 (1951) (emphasizing importance of considering initial hearing examiner’s opinion in determining validity of decision by agency’s political leadership); see also generally Mark Seidenfeld, The Role of Politics in a Deliberative Model of the Administrative State, 81 GEO. WASH. L. REV. 1397 (2013).

pending before the BIA, the Attorney General allegedly circulated a list of “unsavory characters” whom he wished to deport, a list which included the respondent’s name. On appeal, the Supreme Court concluded that the Attorney General improperly violated his own regulations requiring the Board to exercise its independent judgment in such cases: “In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.”

Importantly, the Supreme Court acknowledged that the Attorney General retained the ultimate authority to reverse the decision of the BIA, likely providing cold comfort to Accardi himself. But the decision can be understood as promoting transparency by allowing the public to identify which decision maker—civil service adjudicators or politically appointed agency leadership—was responsible for the outcome. It also promotes deliberation, allowing the Attorney General to reach a conclusion only after considering the judgment of independent adjudicators.

C. Eliminate Restrictions on Judicial Review

Finally, Congress should restore judicial review over the political decisions of agency leadership to ensure they remain within the bounds of authority delegated by Congress. Currently, the INA purports to deny Article III judicial review over a large swathe of removal decisions, including those involving criminal aliens or those involving an exercise of discretion. Absent such judicial review, however, the Attorney General would appear free to pressure IJs to reach certain case outcomes, regardless of whether they are warranted by the evidence. By restoring judicial review, Congress could ensure that any interference in adjudications by the Attorney General be subject to an external check and that such interference remains within constitutional and statutory bounds.

D. The Additional Benefit of Strengthening Internal Separation of Powers

Our proposed structure—mandating truly objective and apolitical decision making at the trial level, but allowing political considerations to intervene at the appeals level—not only increases transparency and accountability, but also has the salutary effect of promoting separation of

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277 Id. at 262.
278 Id. at 267.
280 As noted supra note 64, Congress has eliminated judicial review over a broad swathe of removal decisions including those involving criminal noncitizens as well as denials of discretionary relief); cf. I.N.S. v. St. Cyr, 533 U.S. 289, 314 (2001) (construing statute to preserve judicial review for habeas petitions raising statutory or constitutional challenges).
powers norms.

The White House’s steady accretion of power over the past decades means that the Presidency today is undoubtedly the most powerful branch of the federal government. In response to this vast concentration of federal power in a single branch, much of the task of administrative law has been to recreate within the Executive branch the types of checks and balances that our constitutional framers contemplated between branches. The growing body of literature on “internal separation of powers” focuses on competition and tensions between the President’s politically appointed leadership of an agency, and the career civil service bureaucrats who staff the agencies.281 Jerry Mashaw and David Berke recently endorsed, “a real and important role for institutional separation of powers, broadly understood to include, in addition to congressional-presidential competition, both judicial defense of congressional policies embodied in statutes and the role of the career bureaucracy in shaping administration.” 282

Under our model, the decisions of civil servants would not eliminate the political leadership’s ultimate power over removal decisions, but it would discipline it, requiring a reasoned explanation for rejecting the decision of the initial adjudicator. The civil service thus imposes a check on overreach by political actors. Moreover, as explained by Gillian Metzger, the potential for disagreement within the agency can mobilize external actors, including the federal courts, Congress, and the public at large, to mediate the dispute and provide an external check on presidential overreach.283

CONCLUSION

This Article presented the first comprehensive empirical study of the extent to which immigration removal proceedings are politicized. To do so, we constructed an original dataset of over 800,000 removal decisions issued by immigration courts between January 2001 and November 2018. Our analysis found, first, that Presidential Administrations across the board—not just the Trump Administration—are far more likely to appoint IJs with


backgrounds working for the former INS, DHS, or DOJ, than individuals without those backgrounds. Second, using logistical regression to control for over a dozen variables that might impact a decision to remove, we found that Trump appointees are no more likely to order removal than IJs appointed by prior Administrations. Finally, using logistical regression to control for the same variables, we found that the identity of the Administration in control at the time a decision is rendered is a significant predictor of the likelihood that an IJ will order removal. An IJ who served during the Bush II, Obama, and Trump Administrations, for example, was far more likely to order removal during the current Administration than during previous Presidential Eras. These results provide strong evidence that the current Executive-in-Chief exercises a profound influence over removal decisions, undermining the assumption of independence among administrative adjudicators.

Although scholars debate the extent to which administrative officials should be subject to political control, we argue that at least in the context of adjudications in immigration court, such political control undermines noncitizens’ due process interests. Whether one agrees with our normative conclusion or not, however, we hope that our empirical findings will be used to inform future debates regarding the appropriate balance between political control on the one hand and adjudicative independence on the other, both within immigration courts specifically as well as across the administrative state more generally.

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APPENDIX

The data for this article is available to the public at the website for EOIR, DOJ. EOIR maintains an electronic case management system of its data. In addition to approximately fifty CSV spreadsheets of the data, EOIR also publishes a Lookup File that describes the codes used in the CSV files. Each EOIR case has a case number (labeled “idncase”) as well as a separate proceeding number that is unique to each proceeding (“idnproceeding”). Each proceeding is under the same case id but has a unique proceeding number except in certain circumstances not relevant here. TRAC researchers at Syracuse University in 2008 successfully filed a lawsuit under the Freedom of Information Act (FOIA) to force EOIR to release the data, and EOIR released these data on its website pursuant to reporting standards under the FOIA Improvement Act of 2016.

Using Stata and the statistical program “R,” we merged the various CSV files to create the current dataset. We merged the “Table A: Case” with “Table B: Proceedings” to construct the core dataset, which contains basic information concerning how the case was decided (“dec_code”), the type of case (“case_type”), the date of decision (“comp_date”), the court in which the case was heard (“base_city_code”), and the judge hearing the case (“ij_code”), as well as other information such as custody status (“custody”), lawyer representation (“E28_date”), language (“lang”), and nationality (“nat”). We then merged in additional CSV files: 1) the Appeals Table to determine whether the case was appealed to the BIA or the circuit courts; 2) the Schedule Table to determine whether the hearing was an individual

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285 Exec. Office for Immig. Rev., U.S. Dep’t of Justice, Measures to Improve the Immigration Courts and the Board of Immigration Appeals 2 n.2, available at http://trac.syr.edu/immigration/reports/210/include/08-EOIR_asylum_disparity_report.pdf [https://perma.cc/94WC-KES6]; prior to 2008, this system was called the “Automated Nationwide System for Immigration Review (ANSIR) and after, the system was updated to the “Case Access System (CASE). This change in reporting impacted our dataset since some information was not consistently coded throughout the time.

286 Unfortunately, it is not the case that the same individual will have the same case number if the proceedings type change. For example, if the applicant’s case is first heard under credible fear or reasonable fear review and then at a later point switches to a removal case, that individual will then have two caseids with however many proceedings are done in each respective case type. Immigration cases are one of nine types of cases. See supra note 42. Because in our analysis we only studied “removal” cases, it did not affect our results to not connect individuals to other case types that may have been heard previously or subsequently.


288 If a case had an appeal, except a Bond Appeal, we used the date of the last decision (“comp_date”) before the appeal.
merits hearing rather than a master calendar hearing ("cal_type" and "schedule_type"); and 3) both the Lead and Rider files to discern case ids for the cases that are Leads and Riders. After merging the data, we added new labels for some variables to make them useful for analysis and merged in further Look-Up files to obtain labels for other variables.289

We also created a separate biographical dataset concerning certain demographic characteristics of IJs. When the Attorney General appoints an IJ to the bench, EOIR typically issues a press release containing basic biographical information on the IJ. We collected these biographical sheets to create a separate dataset with this information.290 As we discuss later, we coded for the following factors: judge base city; judge appointment date; party of the appointing Attorney General; the party that the IJ registered to vote under (if available); past employment, including their past employment with the former INS, DHS, or DOJ, with federal or state governments or the military, in private practice and at NGOs. Using the three-letter code assigned to each judge ("ij_code"), we merged this dataset into our core dataset.

To assess the reliability and validity of the data, we compared the data to other composite sources of EOIR data, such as the EOIR’s annual statistical reports.291 We also compared the data for some of the variables with other researchers’ datasets, to the extent such datasets were publicly available.292

For our analysis, we restricted the dataset in a number of ways. We included only those decisions involving “removal,” “exclusion,” or “deportation” proceedings. The analysis also includes only decisions that were rendered after an individual merits proceeding; master calendar proceedings were eliminated.293 We then restricted the dataset to one

289 For instance, the core dataset simply gave a three-letter code to identify the IJ ("ij_code"). We merged in Lookup-File Judge to match those codes with the judge’s name. When the variable had less than ten categories, we wrote code in Stata to put labels on the variables.

290 See supra note 136. We were to get biographical data for most of the IJs in our dataset. There were under ten IJs who heard more than fifty cases who we were not able to obtain the requested information. However, most of these IJs were appointed prior to 2001, and many appear to no longer be serving as of 2017. As such, we approximate that we had biographical information on over 95% of the relevant IJs.

291 See, e.g., EOIR 2017 YEARBOOK, supra note 29. These “yearbooks” of summary numbers for the year are published yearly by EOIR. Id.

292 Although several scholars had conducted empirical analysis involving EOIR data, it appears only Miller published their dataset online. See, e.g., Bank Miller, Linda Camp Keith & Jennifer Holmes, Immigration Judges and U.S. Asylum Policy, available at https://doi.org/10.7910/DVN/26474, Harvard Dataverse, V2, UNF:6:B/wsNkn+1hivCQRVoE/mQ== [fileUNF. The Miller et al. dataset, however, only included affirmative and defensive asylum cases filed 1990-2010, resulting in fewer observations. Id.

293 EOIR provides inconsistent information a decision results from an individual merits hearing rather than a master calendar hearing. The variable “latest_cal_type” in the Table A:
proceeding per case, using the last decision prior to a BIA or circuit court remand, if any. We also excluded proceedings for which the dec_code was missing.\textsuperscript{294} We further excluded cases that were decided \textit{in absentia} on the assumption that these decisions generally result in removal but do not reflect the IJs independent assessment of the case.\textsuperscript{295} We further eliminated from the dataset **"Riders"** to Lead cases, on the assumption that rider cases are not decided independently from the corresponding lead case. Finally, we included only proceedings before IJs who decided at least fifty cases throughout the whole dataset.\textsuperscript{296} For the analysis regarding Question 2, we included all appointed IJs who were hearing cases at the time under study (for instance, any appointed IJ sitting during 2001 to early 2009 for the Bush Era). For the analysis regarding Question 3, we included all IJs who were sitting as of the start of the Trump Era so as to compare IJs sitting through all the Eras.

For the purposes of our statistical study, we assume randomness in the assignment of cases to judges within a given base city.\textsuperscript{297} It may be the case, however, that certain cases are not assigned randomly.

We recoded the key dependent variable, "dec_code," to make it dichotomous. Decisions to deport, exclude, remove, or grant voluntary departure were coded as "remove;" decisions to "legally admit," "relief/rescind," "terminate" or "other” relief, as well as cases coded “I,” “Q” or “J,” were coded as “not remove” (or 0 in our analysis). Missing values were excluded from the analysis.\textsuperscript{298}

We used a host of dependent variables, coded as follows:

**Appointing President:** Using the biographical data from the EOIR press releases, we coded for the Appointing President for each IJ.

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\textsuperscript{294} We eliminated approximately 300,000 cases where “dec_code” was missing but “other_comp” was identified. Because EOIR bases its yearly statistics on the “dec_code” variable, a decision coded in the “other_comp” column is not considered a decision by the IJ for statistics purposes.” TRAC 2016, \textit{supra} note 124; see also \textit{Vera Institute Study}, \textit{supra} note 230.

\textsuperscript{295} GAO ASYLUM 2008, \textit{supra} note 38. Where missing, we used the modal category of not \textit{in absentia}.

\textsuperscript{296} See \textit{supra} note 130 and accompanying text.

\textsuperscript{297} See \textit{supra} notes 135 and 231 & accompanying text.

\textsuperscript{298} Missing values commonly had an alternative code under "other_comp."
Presidential Era: Using the variable for the date of decision (“comp_date”) from Table A: Case, we coded the Presidential Era for when the case was decided as follows: Jan 20, 2001-Jan. 19, 2009 (Bush II Era), Jan. 20, 2009-Jan. 19, 2017 (Obama Era), and after Jan. 20, 2017 (Trump Era).

Detain: Table A Case contained a trichotomous coding for “custody” that was labeled “never detained,” “released” or “detained.” We coded “detained” as “1” and “never detained” or “released” as “0.” Missing values were given the modal category of “not detained.”

Lawyer Representation: Table A: Case had a coding for “E28_date,” the notice that attorneys must file if representing a noncitizen. We coded the noncitizen as having a lawyer if there was a date listed as of the hearing date. If there was no date was listed or if the date was after the hearing, we coded the variable it as 0.

English Language: Table A: Case had a coding for language (“lang”). We dichotomized the variable so that English language was 1, and any other language was 0. If language was missing we assumed the modal category of non-English.

Case Type: Using the variable, “c_asy_type,” in Table A: Case we coded cases if they were or were not asylum cases. If “c_asy_type” was labeled “E”, that signified that the case was a defensive asylum case. If it was coded “I” it was an affirmative case. We also looked at the Schedule Table under “schedule_type” and if we saw that any missing values were coded “IA,” we also coded these as asylum cases, using the modal category.

Central America/Mexico: Using the nationality code (“nat”), we coded whether the noncitizen came from Mexico or Central America.

Female Judge: Using the biographical information on IJs published on EOIR’s website, we coded judge’s gender as female (1) or male (0).

Tenure: We gathered the IJ’s appointment date from the EOIR press releases and subtracted it from the completion date of the case to get the number of years the IJ served as of the completion date of the case.

Prior Employment: Those IJs who previously worked at any point in their career for INS, DHS, or DOJ were coded in the “govt” variable.

Not Free: Freedom House provides a trichotomous coding of each country in whether it is “free” or “partially free” or “not free.”299 Countries that were “not free” were coded and then merged into the core dataset using the nationality code, “nat.”

Low GDP: Using the World Bank’s information, we coded nationalities as being of mid-low or low GDP.300 We then merged the data into the core data using both the year as well as the nationality, “nat.”

299 Freedom House, supra note 167.
300 World Bank, supra note 169.
Base City Small: For this variable, we coded a base city as “small” if it was not New York, Los Angeles, Boston, Houston, Washington, Atlanta, San Francisco, Chicago, Miami, or Orlando. These are the ten largest base cities.

Increase in Foreign Immigration: We obtained data on the increase in the foreign born by county from 1990 through 2016. We merged the Lookup file for “Base City” to obtain the city, state, and zip code for each base city. Using this information, we were able to determine, by county and by year, the increase in the foreign born in the county of each respective base city.

Liberal Mood: Using the information about each base city, we merged in, by state, the liberal policy mood score for each base city, by year.

Border County: We coded any hearing held in a county along the U.S./Mexico border. These base cities include: Chaparral, El Paso, Harlingen, Imperial, Los Fresnos, Otay Mesa, and San Diego.

Unemployment Rate: Using data from the Board of Labor Statistics, we merged in by state and by year the unemployment rates for each respective base city.

Senate Score: We gathered the name of each Senator who served on the Senate Judiciary Committee in the period under review. We then assigned a DW-Nominate score (ideology score) for each member and calculated the median score for each year. We then merged the data by year.

BIA Score: Similar to the way the Senate score was calculated, we first discovered the names of who served on the BIA during the period under review. We then assigned each a DW-Nominate based on the party of the appointing Attorney General and took the median per year. The data was merged in by year.

Circuit Score: We used the dataset created by Lee Epstein et al. and Martin Giles et al. to find out the median ideology score for each circuit per year. We then merged this information by year, with the base city indicated by the respective circuit.

Time Trend: We reverse coded time; the year 2018 was coded “0” going forward to 2001 which was coded “18.”

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301 Pew Heritage Center, supra note 201. We used percents from 1990-2010 for cases before 2010 and percents from 2010-2016 for cases 2010 and after.

302 Enns & Koch, supra note 203.


304 Lewis et al., supra note 209. For all of the ideology variables, a positive score signifies a more conservative orientation.

305 Epstein et al., supra note 215; Giles et al., supra note 215.

306 Lewis et al., supra note 209.