An Empirical Study of Political Control over Immigration Adjudication

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Immigration 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 (IJs), the administrative officials charged with adjudicating whether a given noncitizen will be deported from the United States, may be influenced by the presidential administration's political preferences.

We constructed an original dataset of over 830,000 removal proceedings decided between January 2001 and June 2019 after individual merits hearings. First, we found that every presidential administration—not just the current one—disproportionately appointed IJs with backgrounds in the former Immigration and Naturalization Service, the Department of Homeland Security, or the Department of Justice—agencies responsible for prosecuting noncitizens.

Second, using logistic regression to control for more than a dozen variables that might impact a decision to order removal, we found that the identity of the administration that appointed an IJ is not a statistically significant predictor of the likelihood of an IJ ordering removal. That is, after controlling for other variables, we did not find that Trump-appointed judges were any more likely to order removal than appointees of other Presidents.

Finally, we found that the presidential administration in control at the time of the decision is a statistically significant predictor of removal rates in certain circumstances. For example, IJs who were appointed by President George W. Bush (Bush II) were more likely to order removal during the Trump presidency than during prior administrations. Specifically, when all other variables were held constant, Bush II-appointed IJs were 22% less likely to order removal during the Obama presidency than during the Trump presidency and 22% less likely to order removal during the Bush II presidency than during the Trump presidency. These results suggest that a sitting President may exert some measure of direct or indirect influence over IJs' removal decisions, undermining the assumption of administrative adjudicators' independence.

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INTRODUCTION

Immigration 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 Mexico[3] have been fixtures in major media outlets. Far less attention, however, has been paid to the Trump Administration's efforts to alter adjudicative outcomes in immigration courts.[4] Pursuant to statute, a noncitizen within the United States typically is entitled to an adjudicative hearing before he or she can be forced to leave the country.[5] These proceedings do not occur before federal judges, however. These hearings do not even occur before administrative law judges (ALJs), who enjoy a degree of statutory protection from political interference.[6] Rather, they are presided over by administrative officials known as immigration judges (IJs). Although such civil servants are understood to exercise "independent judgment" in deciding cases,[7] they are part of the Executive Branch

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1. *See, e.g.*, Charlie Savage, *Presidents Have Declared Dozens of Emergencies, but None Like Trump's*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/trump-presidency-national-emergency.html.

2. *See, e.g.*, Vivian Salama, *Trump Defends Separating Families at the Border*, WALL ST. J. (Oct. 13, 2018, 8:23 PM), https://www.wsj.com/articles/trump-defends-separating-families-at-the-border-1539464658.

3. *See, e.g.*, Sarah Kinosian & Kevin Sieff, *Entire Families of Asylum Seekers Are Being Returned to Mexico, Leaving Them in Limbo*, WASH. POST (Feb. 15, 2019, 4:34 PM), https://www.washingtonpost.com/world/entire-families-of-asylum-seekers-are-being-returned-to-mexico-leaving-them-in-limbo/2019/02/15/4079bb00-30ab-11e9-8781-763619f12cb4_story.html.

4. *But see* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 5–6, 22–25, 29 (2018) (documenting various mechanisms through which President Donald Trump's former Attorney General Jeff Sessions sought to increase the number of removal orders and minimize grants of relief from removal within immigration courts); Priscilla Alvarez, *Jeff Sessions Is Quietly Transforming the Nation's Immigration Courts*, ATLANTIC (Oct. 17, 2018), https://www.theatlantic.com/politics/archive/2018/10/jeff-sessions-carrying-out-trumps-immigration-agenda/573151/; Tal Kopan, *Immigration Judge Removed from Cases After Perceived Criticism of Sessions*, CNN (Aug. 8, 2018, 5:49 PM), https://www.cnn.com/2018/08/08/politics/immigration-judges-justice-department-grievance/index.html [https://perma.cc/8SAM-2MM3] (reporting that dozens of cases were assigned away from a judge who had granted temporary relief to a juvenile who failed to appear in court and noting that Judge Ashley Tabaddor, the President of the National Association of Immigration Judges, characterized this decision as "direct interference with a judge's decisional independence"); Liz Robbins, *In Immigration Courts, It Is Judges vs. the Justice Department*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/nyregion/nyc-immigration-judges-courts.html (noting immigration judges' concern that the political leadership's changes in the name of speeding up case processing are in fact "an attempt to control their decision-making" and "an attempt to turn judges from neutral arbiters into law enforcement agents enacting Trump administration policies").

5. An alien physically within the United States typically is entitled to a removal proceeding before an immigration judge (IJ). 8 U.S.C. § 1229a (2012). Certain aliens, however, may be subject to expedited removal, in which removal is ordered by an enforcement officer without hearing. *Id.* § 1225(b) (allowing expedited removal for arriving aliens lacking proper documentation or who commit fraud, as well as other aliens lacking proper documentation or who committed fraud upon designation by the Attorney General); *id.* § 1225(c) (allowing expedited rather than formal removal proceedings for aliens deemed to be national security threats); *id.* § 1228(b) (allowing truncated removal procedures for aliens who lack legal permanent resident status and who are convicted of aggravated felonies). Absent an expression of a fear of persecution, which triggers a credible fear finding reviewable by an IJ, 8 C.F.R. § 235.3(b)(4) (2019), individuals in expedited proceedings do not appear before an IJ and study of these proceedings is thus beyond the scope of this Article.

6. *See generally* KENT BARNETT ET AL., ADMIN. CONFERENCE OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL (2018) (comparing tenure protections of ALJs and other agency adjudicators).

7. 8 C.F.R. § 1003.10(d)(ii).

and are explicitly subordinate to the politically appointed Attorney General and, in turn, the President. Historically, scholars have assumed that administrative adjudicators such as IJs are insulated from political influence.[8] Indeed, due process arguably requires judges to be independent.[9] Yet different presidential administrations have nonetheless sought to influence agency adjudications, both within the immigration context as well as in other agency contexts.

We use the terms "political control" and "politicization" to refer to efforts by an administration's political appointees to influence the decisions of adjudicatory officials. These efforts may be direct, such as when an agency head engages in rulemaking or issues a formal opinion exercising interpretive authority over the legal standards governing cases. Or, they may be indirect, such as when politically appointed superiors in the Executive Branch threaten the job security of adjudicators viewed as too lenient or too restrictive toward noncitizens. Both direct and indirect forms encroach on the independence of purportedly apolitical adjudicators.

The Trump Administration has taken a particularly aggressive approach to reshaping immigration courts, which the President has publicly and repeatedly denigrated.[10] The Administration has engaged in an unprecedented recruitment

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8. *See, e.g.*, Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1300 (1962) ("Everyone, including the 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 . . . .'" (alteration in original) (footnote omitted)); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2362–63 (2001) (celebrating presidential control over agencies but conceding that in the context of administrative adjudication, "presidential participation . . . , of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies"); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013) (asserting existence of a "network of tacit unwritten conventions" protecting agency adjudications from political interference).

9. *See, e.g.*, Kent H. Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 519 (2019) (discussing the due process interest in impartiality); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 385–403 (2006); Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1679 (2000); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456–57, 477 (1986); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 136 (2017); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 149–50 (2019).

10. *See, e.g.*, Katie Rogers & Sheryl Gay Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights*, N.Y. TIMES (June 24, 2018), https://www.nytimes.com/2018/06/24/us/ politics/trump-immigration-judges-due-process.html (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 Advocates Depriving Undocumented Immigrants of Due-Process Rights*, WASH. POST (June 25, 2018), https://www.washingtonpost.com/powerpost/trump-advocates-depriving-undocumented-immigrants-of-due-process-rights/2018/06/24/dfa45d36-77bd-11e8-93cc-6d3beccdd7a3_story.html (quoting Trump as stating: "I don't want judges. I want border security. I don't want to try people. I don't want people coming in."); Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 AM), https://twitter.com/ realdonaldtrump/status/1010900865602019329?lang=en [https://perma.cc/ZVH5-2WAB] ("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.").

effort, hiring nearly 130 new IJs between January 2017 and September 2018 and increasing the total number of IJs by 30%.[11] At the start of October 2019, there were 442 IJs serving across the United States, the most in its history.[12] According to our analysis, as of January 2020, the Trump Administration appointed 237 IJs in just three years, a quantity greater than the number of IJs that Obama appointed during the entire eight years of his presidency. Mainstream media outlets have reported concerns that these hires might have been made on the basis of party affiliation or ideology.[13] At least one IJ has been removed from participation in dozens of cases because of his lenient rulings toward noncitizens.[14] The Trump Administration has also imposed strict time quotas for the completion of cases[15]—a measure that almost always disadvantages noncitizens, who bear the burden of showing that they should receive a favorable exercise of discretionary relief from removal.[16] Former Attorney General Jeff Sessions repeatedly casted doubt on the credibility of certain types of claims and claimants while reminding

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11. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, EOIR Announces Largest Ever Immigration Judge Investiture (Sept. 28, 2018), https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture [https://perma.cc/Q967-VWJJ].

12. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019 (Oct. 10, 2019), https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019 [https://perma.cc/3ZB7-H6R9].

13. *See, e.g.*, Tal Kopan, *Immigration Judge Applicant Says Trump Administration Blocked Her over Politics*, CNN (June 21, 2018, 10:40 AM), https://www.cnn.com/2018/06/21/politics/immigration-judge-applicant-says-trump-administration-blocked-her-over-politics/index.html [https://perma.cc/SS45-HPEW] (detailing the experience of a particular applicant). The Trump Administration is not the first to be accused of recruiting IJs on the basis of ideology or even patronage. In 2008, the Inspector General for the Department of Justice (DOJ) found that under President George W. Bush (Bush II), the White House circumvented the normal hiring process of the Executive Office for Immigration Review (EOIR) by screening candidates on the basis of political affiliation in violation of both DOJ policy and federal law. *See* OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 135, 137 (2008) [hereinafter DOJ INVESTIGATION INTO POLITICIZED HIRING], https://oig.justice.gov/special/s0807/final.pdf [https://perma.cc/L44T-C599]; *see also* Legomsky, *supra* note 9, at 372–79 (detailing incursions into immigration court independence during the Bush II Administration).

14. Jeff Gammage, *Immigration Judges File Grievance Over Justice Dept.'s Removal of Philly Jurist Who Delayed Man's Deportation*, PHILA. INQUIRER (Aug. 8, 2018, 12:30 PM), https://www.inquirer.com/philly/news/immigration-judges-association-grievance-philadelphia-steven-morley-removal-deportation-case-20180808.html (describing removal of IJ Steven Morley and subsequent grievance filed on his behalf by the National Association of Immigration Judges).

15. *See* Memorandum from James R. McHenry, Dir., Exec. Office for Immigration Review, U.S. Dep't of Justice, to All of Judges, Exec. Office for Immigration Review, U.S. Dep't of Justice (Mar. 30, 2018), http://www.abajournal.com/images/main_images/from_Asso_Press_-_03-30-2018_McHenry_-_IJ_Performance_Metrics_.pdf [https://perma.cc/YC7M-UF75] (imposing time quotas for adjudication of removal cases).

16. *See* Kim, *supra* note 4, at 32; *see also* Letter from House and Senate Democrats to Jeff Sessions, U.S. Att'y Gen. (Apr. 17, 2018), [https://perma.cc/8TVB-QH94] (criticizing the time quotas and asserting that "[a]ssembly line justice is no justice at all").

IJs that they served at his pleasure.[17] At the same time, he limited IJs' ability to grant relief in the form of asylum,[18] eliminated their ability to grant temporary relief to aliens in the form of administrative closures,[19] and diminished their control over their dockets by instituting a high standard for issuing continuances.[20] In his tenure to date, the current Attorney General, William Barr, has taken a similar tack. For example, he strictly limited asylum for those whose fear of persecution is based on the persecution of a family member.[21]

This Article presents the first empirical assessment of the extent to which politically appointed superiors in the Executive Branch may influence the outcomes of immigrants' removal proceedings. A study of the role of politics in 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 removal or voluntary departure of 111,060 noncitizens from the United States.[22] These proceedings affect not only the individual noncitizens who are forced to leave the country, but also their family members, friends, employers, and entire communities. Indeed, removal proceedings may have an even greater impact than the 2017 figures suggest, given that an estimated 10.5 million unauthorized immigrants residing in the United States are at risk of deportation.[23] The extent to which political actors, rather than independent adjudicators, influence these removal decisions may have a significant impact on the composition of our polity.

Moreover, our findings on immigration courts provide a lens through which to consider the potential for political influence in adjudications across the administrative state more generally.[24] Agency adjudications are responsible for a wide swath of government decisionmaking, including determinations of disability payments, the issuance of broadcast licenses, the resolution of labor disputes, the approval or denial of corporate mergers, the finding of violations of environmental

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17. *See* Jeff Sessions, U.S. Att'y Gen., Remarks to the Executive Office for Immigration Review Legal Training Program, Washington, D.C. (June 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal [https://perma.cc/GZK3-RK27].

18. *See In re* A-B-, 27 I. & N. Dec. 316, 316 (Att'y Gen. 2018).

19. *See In re* Castro-Tum, 27 I. & N. Dec. 271, 271, 282 (Att'y Gen. 2018), *overruled by* Romero v. Barr, 937 F.3d 282, 292–97 (4th Cir. 2019).

20. *See In re* L-A-B-R-, 27 I. & N. Dec. 405, 405 (Att'y Gen. 2018).

21. *See In re* L-E-A-, 27 I. & N. Dec. 581, 581, 596 (Att'y Gen. 2019).

22. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK: FISCAL YEAR 2017, at 13 tbl.4, 14 fig.7 (2018) [hereinafter EOIR 2017 YEARBOOK], https://www.justice.gov/eoir/page/file/1107056/download [https://perma.cc/HHM2-T84M].

23. *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RES. CTR. (June 12, 2019), https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/ [https://perma.cc/98QG-9EG7].

24. *See* Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 195 (2018) (describing relationship between career civil servants and political appointees within federal agencies responsible for national security issues); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1895–96, 1912 (2015) (setting forth constitutional theory for the proper relationship between career civil servants and the President and his political appointees).

and civil rights laws, and countless other decisions that affect American life. Of course, agencies are not cut from the same cloth, and they do not have identical procedures for adjudicating cases.[25] Yet an assessment of the immigration-court system may help identify the mechanisms most effective for protecting the independence of adjudications and those that render such proceedings most vulnerable to political interference.

After all, immigration courts are not the only administrative courts potentially vulnerable to politicization. Even ALJs, who enjoy far greater tenure protections than other types of agency adjudicators, such as IJs, may be susceptible.[26] In October 2018, the *Washington Post* reported that the Trump Administration politicized the recruitment of adjudicators for the Board of Veterans' Appeals, rejecting half of the chairwoman's ALJ picks after requiring them to disclose their party affiliations and political leanings.[27] In 2014, the *Wall Street Journal* published a front-page article suggesting that ALJs within the Securities and Exchange Commission (SEC) were systematically biased in favor of the government.[28] In the early 1990s, a survey of administrative law judges found that 33% of ALJs within the Social Security Administration (SSA) identified threats to their independence as a problem; more than 25% reported that they felt pressured to reach different decisions; and 42% said they occasionally or frequently were asked to do things against their better judgment.[29]

To analyze the role of political actors on immigration removal decisions, we used data provided on the Department of Justice's (DOJ) website to construct an original dataset of over 830,000 decisions rendered between January 2001 and June 2019 after individual merits hearings in removal cases, spanning the three most recent presidential administrations or "eras." These cases include not only

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25. *See generally* MICHAEL ASIMOW, ADMIN. CONFERENCE OF THE U.S., EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2016), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf [https://perma.cc/AP8U-BB9L] (providing a survey of various administrative hearings).

26. *See generally* BARNETT ET AL., *supra* note 6 (comparing tenure protections for ALJs and different types of non-ALJ adjudicators).

27. Lisa Rein, *'I've Never Seen These Positions Politicized': White House Rejection of Veterans Judges Raises Concerns of Partisanship*, WASH. POST (Oct. 23, 2018, 10:32 AM), https://www.washingtonpost.com/politics/ive-never-seen-these-positions-politicized-white-house-rejection-of-veterans-judges-raises-concerns-of-partisanship/2018/10/23/f488046a-ce51-11e8-920f-dd52e1ae4570_story.html.

28. Jean Eaglesham, *SEC Is Steering More Trials to Judges It Appoints*, WALL ST. J. (Oct. 21, 2014, 9:40 AM), https://www.wsj.com/articles/sec-is-steering-more-trials-to-judges-it-appoints-1413849590 (reporting that government win rates in cases heard before agency adjudicators are far higher than cases heard before Article III federal judges); *see also* Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1, 32 (2017) (finding that the Securities and Exchange Commission (SEC) diverted weaker cases to ALJs rather than to federal court, suggesting that ALJs were more likely to rule in favor of the SEC than were federal courts). *But see* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 362 (2017) (rejecting the *Wall Street Journal*'s conclusion that the SEC was more likely to win when it brings cases before agency adjudicators).

29. *See* Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 278–79 (1994).

those in which noncitizens subject to removal sought asylum,[30] but also those involving applications for other forms of relief from removal,[31] including removal cases involving noncitizens with lawful immigration status.[32]

First, we examined trends in the employment backgrounds of IJs appointed by each presidential administration to assess whether Presidents "stack the deck" with IJs of certain employment backgrounds who might be more or less likely to order removal. Using data reported in DOJ press releases and other sources, we found that all three administrations—those of George W. Bush (Bush II), Barack Obama, and Donald Trump—disproportionately hired IJs with backgrounds in the former Immigration and Naturalization Service (INS), the Department of Homeland Security (DHS), and departments within the DOJ—entities responsible for prosecuting noncitizens. Moreover, over 90% of IJs from each administration had government work experience (federal government, state and local governments, and the military). That is, through October 2019, the Trump Administration was no more likely to hire former INS, DHS, or DOJ employees than were the prior two administrations.

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 logistic regression to control for over a dozen variables that might impact a decision to order removal, we found that the identity of the appointing administration is not a statistically significant predictor of the likelihood of ordering removal. That is, after controlling for other variables, we did not find that Trump appointees were more likely to order removal than were appointees of any other President.

Finally, using logistic regression and controlling for the same variables, we examined the influence that a sitting President might exercise over IJs' decisions, regardless of which administration appointed the IJ. Here, we found

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30. Individuals seeking asylum must establish a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (2012); *see also id.* § 1158(b)(1)(B) (requiring asylum applicants to establish they are refugees within the meaning of § 1101(a)(42)(A)). Asylum claims filed by individuals who are apprehended at the border or who file affirmatively (rather than subsequent to the issuance of a removal order) are heard in the first instance by an asylum officer within the United States Citizenship and Immigration Services agency. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 12 (2008) [hereinafter GAO ASYLUM 2008], [https://perma.cc/AY7J-FD5T]. Analysis of the exercise of political influence over asylum officers is beyond the scope of this Article.

31. *See, e.g.*, 8 U.S.C. § 1229b (granting the Attorney General discretionary power to "cancel removal" of aliens who meet certain statutory criteria); *id.* § 1182(h) (granting the Attorney General discretionary power to waive crime-based removability in certain circumstances); *id.* § 1182(a)(9)(B)(v) (granting the Attorney General discretionary power to provide relief to certain unlawfully present aliens based on their relationship to a U.S. citizen or lawfully present alien).

32. Noncitizens with lawful immigration status nonetheless may become removable if, for example, they engage in certain types of criminal activity, 8 U.S.C. § 1227(a)(2), fail to register changes of address, *id.* § 1227(a)(3)(A), or become public charges within five years of entry, *id.* § 1227(a)(5), among other reasons.

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, controlling for other variables. For example, when all other variables were held constant, Bush II appointees were 22% less likely to order removal during the Obama Era than during the Trump Era and 22% less likely to order removal during the Bush II Era compared to the Trump Era. Given the limitations of the data and potential selection effects, no study of this type could establish causality. Nonetheless, our analysis shows that even after controlling for over a dozen theoretically important variables that would otherwise impact removal decisions, there are statistically significant differences in removal rates across presidential administrations— findings that call into question the independence of administrative adjudicators. Decisions to deport individuals might not be solely the result of apolitical assessments of individual hearing records.

This finding is troubling to the extent it reveals that IJ decisions may be influenced by political considerations as well as by legal ones. Yet some may also view it 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. We offer one approach for how to strike this balance, but it is our hope that the findings of this study provide a much-needed empirical foundation for these debates.

This Article proceeds as follows: Part I provides background on immigration courts and explains the adjudicatory process for removal proceedings. It then summarizes the existing literature on the politicization of agency adjudications. Part II describes 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 Part 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 the DHS, exercise discretion to initiate

"removal proceedings"[33] against the individual[34] and, if proceedings are initiated, to determine whether the individual should be detained pending such proceedings.[35] ICE initiates removal proceedings by sending to the noncitizen's last known address a "Notice to Appear," which informs the individual of the charges of removal, as well as the date, time, and place to appear before an IJ.[36]

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33. This Article uses the term "removal proceedings" to refer to the formal hearings to forcibly remove an individual from the United States. Our usage includes not only cases coded in the DOJ database as "removal" proceedings, but also those coded as "deportation" and "exclusion" proceedings. 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 April 1997, both types of proceedings are generically referred to as "removal" proceedings. *See* 1 NAT'L LAWYERS GUILD, IMMIGRATION LAW & DEFENSE § 7:74 (2019); *see also* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589. Removal proceedings constituted over 98% of cases heard in immigration court according to our dataset. Consistent with the federal government classifications, we excluded from our definition a small subset of immigration-court cases that otherwise involve a noncitizen's ability to remain in the United States. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 118 (2016) [hereinafter EOIR IMMIGRATION COURT PRACTICE MANUAL], https://www.justice. gov/eoir/file/1205666/download [https://perma.cc/63EG-DWJR]. This subset, constituting less than 2% of immigration-court cases, included: (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 (2019); (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," 8 U.S.C. § 1231(b)(3) (2012), a more stringent criterion than the standard for asylum and which, under international law, are precluded from being repatriated; (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, 8 C.F.R. § 253.1(f); (5) claimed status review cases in which the individual claims United States citizenship status, 8 C.F.R. § 1235.3(b)(5); 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, Pub. L. No. 105-100, § 203, 111 Stat. 2160, 2196–2200 (1997) (as contained in the District of Columbia Appropriations Act of 1998). *See also* EOIR IMMIGRATION COURT PRACTICE MANUAL, *supra*, at 118–33. Rescission, departure control, and DD appeal cases were also excluded. *See infra* Appendix and note 306.

34. ICE officials exercise prosecutorial discretion in initiating removal proceedings. Political appointees have sought to control such exercises of prosecutorial discretion. During the Obama Administration, for example, the Director of ICE, John Morton, issued a memorandum directing all ICE officials to prioritize for removal "[a]liens who pose a danger to national security or a risk to public safety," while emphasizing that "[p]articular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens." Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to All ICE Emps., *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011), https://www.ice.gov/doclib/news/releases/2011/ 110302washingtondc.pdf [https://perma.cc/VX9P-G7DH]. The Trump Administration, by contrast, has effectively disposed of such priorities, directing officials to enforce immigration laws "against all removable aliens." Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017). Study of political control over the exercise of prosecutorial discretion by ICE enforcement officers is beyond the scope of this Article.

35. 8 C.F.R. § 236.1.

36. 8 U.S.C. § 1229. In the past, Notices to Appear routinely lacked this basic information. *See* Pereira v. Sessions, 138 S. Ct. 2105, 2111 (2018) (noting that the DHS, "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").

Upon receiving the Notice, the noncitizen typically appears before an IJ for the first time as part of a large group of noncitizen respondents in a master calendar hearing.[37] The noncitizen is normally randomly assigned to an IJ from the immigration court with jurisdiction over the place where the noncitizen is located or his or her last known address.[38] During this hearing, the IJ reviews the Notice to Appear and offers information about low-cost legal services available to the applicant.[39] A noncitizen who contests the grounds for removal or seeks relief from removal is then scheduled for a subsequent individual merits hearing,[40] which includes many of the procedural protections associated with traditional trials, such as witness testimony, cross-examinations, and exhibits.[41] The noncitizen may be represented by an attorney in removal proceedings without cost to the government,[42] except in extremely limited circumstances.[43] After the IJ issues a decision, the noncitizen may file a motion to reopen or for reconsideration.[44]

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37. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 2 (2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download [https://perma.cc/7SUJ-95YM]; EOIR IMMIGRATION COURT PRACTICE MANUAL, *supra* note 33, at 73–87; *see also* GAO ASYLUM 2008, *supra* note 30, at 14–15, 14 fig.1.

38. *See* OFFICE OF THE CHIEF IMMIGRATION JUDGE, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, UNIFORM DOCKETING SYSTEM MANUAL III-1 (2013), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/07/DocketManual_12_2013.pdf [https://perma.cc/L4G4-7UQ9] (noting that "cases are assigned to each Immigration Judge's Master Calendar on a random rotational basis"); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 17 (2006), https://trac.syr.edu/immigration/library/P1067.pdf [https://perma.cc/4P3A-JSW5] ("Within each immigration court, newly filed cases are generally assigned to immigration judges through an automated process; however, some flexibility exists."); JAYA RAMJI-NOGALES ET AL., REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 33 (2009) ("An asylum case is assigned to the immigration court that has jurisdiction over the geographic region in which the asylum seeker resides. The administrators in each immigration court assign cases to immigration judges to distribute the workload evenly among them . . . ." (footnote omitted)).

39. In 2003, the Executive Office of Immigration Review (EOIR) instituted a "Legal Orientation Program" (LOP) to provide legal education programs for detained noncitizens who are in removal proceedings. *See* GAO ASYLUM 2008, *supra* note 30, at 19; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-72, ASYLUM: VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES 11–13 (2016) [hereinafter GAO ASYLUM 2016], https://www.gao.gov/products/gao-17-72 [https://perma.cc/CK8L-86PY]. 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 ET AL., VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at iv, 63–65 (2008), https://www.vera.org/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy_downloads/LOP_evalution_updated_5-20-08.pdf [https://perma.cc/U2JD-WGT4].

40. *See* EOIR IMMIGRATION COURT PRACTICE MANUAL, *supra* note 33, at 86. A noncitizen who does not appear at all is subject to removal in absentia. *See* 8 U.S.C. § 1229a(b)(5)(A).

41. *See* 8 U.S.C. § 1229a (setting forth procedural requirements for removal hearings).

42. *See id.* § 1229a(b)(4)(A).

43. *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1052, 1055 (C.D. Cal. 2010) (finding a noncitizen with mental impairments to be entitled to government-provided counsel during removal proceedings).

44. *See* 8 C.F.R. § 1003.23(b) (2019).

The noncitizen and the government may also appeal to the Board of Immigration Appeals (BIA), an administrative appellate body.[45] In some circumstances, the BIA decision may then be appealed to the federal courts of appeals.[46] The decision is also subject to the Attorney General's personal review.[47]

Figure 1 describes this process.

Figure 1: Immigration-Court Procedures[48]
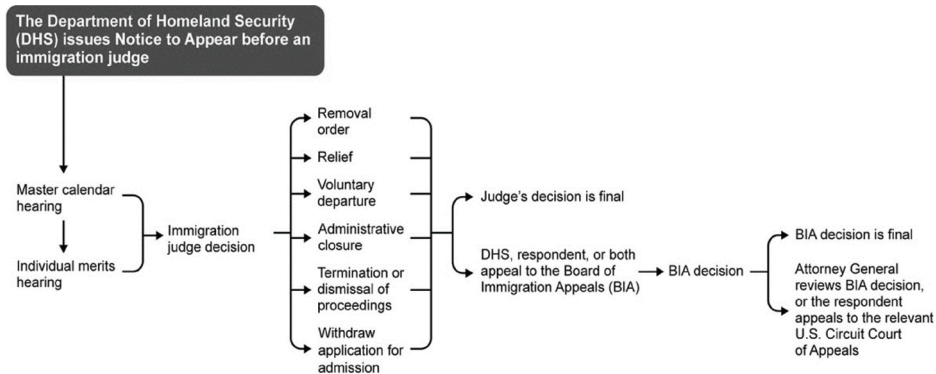
Source: GAO analysis of Executive Office for Immigration Review and Department of Homeland Security information. | GAO-17-438

IJs are career attorneys appointed by the Attorney General under Schedule A of the excepted service and are housed in the DOJ's Executive Office for Immigration Review (EOIR).[49] They must meet certain minimal qualifications, such as having a law degree and being admitted to a state bar.[50] These civil servants are responsible for determining whether a noncitizen falls within the grounds

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45. *See id.* § 1003.38(a).

46. *See* 8 U.S.C. § 1252(a)(2) (listing matters not subject to judicial review).

47. *See* 8 C.F.R. § 1003.1(h).

48. GOV'T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 16 fig.4 (2017) [hereinafter GAO, 2017 IMMIGRATION COURTS REPORT], https://www.gao.gov/products/gao-17-438?source=ra [https://perma.cc/XQ7B-3NH5].

49. *See* 8 U.S.C. § 1101(b)(4) (defining "immigration judge" as "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review"); 5 C.F.R. § 6.2 (2019) (defining Schedule A roles as "[p]ositions other than those of a confidential or policy-determining character"). Under 5 C.F.R § 6.3(a), the head of an agency (here, the Attorney General, who heads the DOJ) "may fill excepted positions by . . . appoint[ing] persons without civil service eligibility or competitive status."

50. To be an IJ, the applicant must have a law degree and be authorized to practice law in the U.S.; be a U.S. citizen; and have a minimum of seven years of post-bar legal experience. *See* GAO ASYLUM 2008, *supra* note 30, at 17 & n.23. In terms of other qualifications, the DOJ will look for experience in at least three of the following areas: "substantial litigation experience . . . ; knowledge of immigration laws and procedure; experience handling complex legal issues; experience conducting administrative hearings; or knowledge of judicial practices and procedures." *Id.* Those appointed as IJs receive some minimal training. *Id.* at 18–19.

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.[51] 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.[52]

Even when a noncitizen does not contest removal, an IJ exercises 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,[53] or instead grant voluntary departure, which requires the noncitizen to leave the United States immediately at his or her own expense but avoids the bar to reentry associated with a formal removal order.[54]

In addition, an IJ often determines whether the noncitizen will be detained pending removal proceedings. For noncitizens charged on certain grounds for removal, Congress requires that the noncitizen be mandatorily detained pending removal proceedings.[55] A noncitizen exempt from such mandatory detention may still be detained at the discretion of ICE officials,[56] but is entitled to a bond redetermination hearing before an IJ once a removal proceeding has commenced.[57]

At an individual merits hearing, an IJ determines whether the individual falls within the category for removal listed in the charging document.[58] Removability, however, is often uncontested, and the bulk of proceedings are devoted to adjudicating an application for relief from removal. It is here that an IJ's discretion is 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 IJ whether to grant such relief to allow an otherwise removable noncitizen to remain in the United States.[59]

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51. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. Rev. 933, 957, 958 fig.5 (2015) (describing the two stages of immigration removal).

52. *See supra* note 34 and accompanying text.

53. *See* 8 U.S.C. § 1182(a)(9)(A).

54. *See id.* § 1229c; *see also* 8 C.F.R. § 1240.11(b) (2019) ("The alien may apply to the immigration judge for voluntary departure in lieu of removal pursuant to section 240B of the Act . . . ."). Those who are granted voluntary departure are subject to penalties if they fail to depart within the specified time. *See* 8 U.S.C. § 1229c(d).

55. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); *id.* § 1226(c); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018) (rejecting the argument that noncitizens in long-term mandatory detention are statutorily entitled to a bond hearing); Demore v. Kim, 538 U.S. 510, 513 (2003) (sustaining mandatory detention provisions against a due process challenge).

56. *See* 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(b).

57. *See* 8 C.F.R. §§ 236.1(d), 1003.19; *see also* Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & Soc'y Rev. 117 (2016) (providing an excellent empirical analysis of variance in bond determinations by IJs); Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 Duke L.J. (forthcoming 2020) (analyzing politicization in bond proceedings); EOIR Immigration Court Practice Manual, *supra* note 33, at 145–50 (describing the bond process).

58. *See* 8 U.S.C. § 1229a(a).

59. Two forms of relief from removal are mandatory rather than discretionary: withholding of removal and deferral of removal under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16(c), 1208.17(a); *see also* Exec. Office for Immigration Review, U.S. Dep't of Justice, Asylum and Withholding of Removal Relief: Convention Against Torture Protections: Relief and

For example, an IJ may permit a removable noncitizen to remain in the United States if he or 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."[60] The asylum case may appear on the immigration court's docket after either an asylum officer has rejected an affirmative application or a noncitizen files a defensive application once ICE has already served a Notice to Appear.[61] In both cases, even if the statutory requirements are satisfied, the decision of whether to grant or deny asylum remains discretionary.[62]

IJs likewise possess discretion to grant waivers for certain categories of removability as long as the noncitizen meets certain statutory prerequisites, such as extreme hardship to a qualifying U.S. citizen or lawful resident family member if the noncitizen is deported.[63] IJs may grant an unlimited number of cancellations of removal to longtime legal permanent residents if the statutory prerequisites are met.[64] Even undocumented noncitizens are eligible to apply for a limited number of discretionary cancellations of removal, which would grant them legal permanent resident status upon satisfying certain statutory requirements.[65] For decades, IJs have also exercised discretion to grant relief in the form of administrative closure, which removes the case from the court's active docket,[66] or to enter a continuance if the noncitizen is likely to qualify for legal status sometime in the

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PROTECTIONS BASED ON FEAR OF PERSECUTION OR TORTURE 7–8 (2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf [https://perma.cc/J9WE-J9DD].

60. 8 U.S.C. § 1101(a)(42); *id*. § 1158(b)(1)(B)(i). Asylum cases constitute a growing segment of the immigration courts' dockets. From fiscal year 2013 to fiscal year 2017, defensive asylum claims jumped 423%, while affirmative claims increased 12%. *See* EOIR 2017 YEARBOOK, *supra* note 22, at 24 fig.17; *see also* GAO ASYLUM 2016, *supra* note 39, at 15–16, 16 fig.3 (illustrating graphically increases in defensive asylum claims between 2010 and 2014).

61. A noncitizen may apply for asylum affirmatively by filing a petition to the DHS's U.S. Immigration and Citizenship Services office within one year of entry. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS, *supra* note 59, at 3. The noncitizen will then be interviewed in a non-adversarial setting by trained asylum officers. *Id*. If the asylum officer denies the petition, it is referred to the immigration courts. *See id*. By contrast, defensive asylum applications are made after removal proceedings have already commenced. *See id*. at 4. In this posture, asylum constitutes an application for relief from removal. *Id*.

62. 8 U.S.C. § 1158(b)(1)(A) (providing that the Secretary of Homeland Security or Attorney General "may" grant asylum when an applicant satisfies statutory requirements).

63. *See, e.g*., *id*. § 1182(a)(9)(B)(v) (authorizing waiver for certain unlawfully present aliens); *id*. § 1182(h) (authorizing waiver for certain crimes); *id*. § 1227(a)(1)(E)(iii) (authorizing waiver for certain alien smugglers); *id*. § 1227(a)(1)(H) (authorizing waiver for certain aliens inadmissible at the time of admission); *id*. § 1227(a)(7) (authorizing waiver for certain victims of domestic violence).

64. *See id*. § 1229b(a).

65. *See id*. § 1229b(b).

66. *But see In re* Castro-Tum, 27 I. & N. Dec. 271, 272 (Att'y Gen. 2018) (denying judges the power to grant administrative closure unless specifically provided for by regulation or settlement agreement), *overruled by* Romero v. Barr, 937 F.3d 282, 292–97 (4th Cir. 2019).

future.[67] From fiscal year 2013 to fiscal year 2017, between 25% and 35% of cases each year resulted in outcomes other than removal or voluntary departure.[68]

Removal proceedings are not governed by the Administrative Procedure Act (APA),[69] but they provide many of the same procedural protections, including opportunities for noncitizens to be represented by private counsel, present oral or written testimony, and cross-examine the evidence against them.[70] In addition, the Immigration and Naturalization Act (INA) requires that removal decisions "shall be based only on the evidence produced at the hearing,"[71] suggesting that IJs should rely only on their own independent assessments of the record in determining decisions rather than be influenced by political considerations.[72]

At the same time, the INA and its implementing regulations limit the IJs' independence in several ways. Until President Trump issued Executive Order 13,483 in July 2018,[73] ALJs under the APA could not be recruited directly by the agency.[74] IJs, by contrast, have always been appointed directly by the Attorney General.[75] Moreover, IJs lack the statutory protections against removal from their positions extended to ALJs.[76] However, the DOJ's Inspector General concluded in a 2008 investigation into instances of politicized IJ hiring that civil service laws, as well as DOJ policy, require IJ employment decisions to be made "solely on the basis of relative ability, knowledge, and skills," and preclude the Attorney

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67. *But see In re* L-A-B-R-, 27 I. & N. Dec. 405, 405–06 (Att'y Gen. 2018) (severely restricting authority to continue cases, particularly where continuance sought to allow noncitizen to pursue alternative relief).

68. EOIR 2017 YEARBOOK, *supra* note 22, at 14 fig.7. The number of administrative closures is likely to fall because of changes former Attorney General Jeff Sessions made that significantly limit IJs' ability to terminate or administratively close cases. *See supra* notes 19–20 and accompanying text.

69. Marcello v. Bonds, 349 U.S. 302, 306–10 (1955) (concluding that Congress intended to reverse an earlier Supreme Court decision and exempt deportation proceedings from APA requirements); *see also* 5 U.S.C. §§ 551–559 (2012) (codifying the APA).

70. 8 U.S.C. § 1229a(b)(4).

71. *Id*. §1229a(c)(1)(A).

72. The implementing regulations further guarantee IJs' independence, providing that "[i]n deciding the 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(a) (2019).

73. Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018) (excepting ALJs from the competitive service).

74. ALJs were historically appointed exclusively on the basis of merit through the Office of Personnel Management (OPM), which rank-ordered a list of qualified ALJ candidates. *See* ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 92-7: THE FEDERAL ADMINISTRATIVE JUDICIARY 5 (1992), https://www.acus.gov/recommendation/federal-administrative-judiciary [https://perma.cc/YSW7-NGNS]. The agency was then limited to selecting from among the top three candidates on the OPM registry. *Id*. Executive Order 13, 843 eliminated that practice. *See* Jeffrey S. Lubbers, *The Regulatory Accountability Act Loses Steam but the Trump Executive Order on ALJ Selection Upturned 71 Years of Practice*, 94 CHI.-KENT L. REV. 741, 747 (2019); *see also* Kent Barnett, *Raiding the OPM Den: The New Method of ALJ Hiring*, 36 YALE J. ON REG.: NOTICE & COMMENT (July 11, 2018), https://yalejreg.com/nc/raiding-the-opm-den-the-new-method-of-alj-hiring-by-kent-barnett/ [https://perma.cc/DPM8-4HDV] (suggesting benefits and drawbacks of the new appointment practice).

75. *See* 8 U.S.C. § 1101(b)(4).

76. *See generally* BARNETT ET AL., *supra* note 6 (comparing tenure protections for IJs to those for other types of administrative adjudicators).

General from taking adverse employment actions against IJs on the basis of politics.[77]

The Attorney General, through regulations, has chipped away at some of the decisional independence statutorily vested in IJs. The INA provides that removal decisions by IJs are subject to review exclusively in the federal courts of appeals.[78] The Attorney General promulgated regulations in 1958, however, creating an interim administrative appeal body known as the Board of Immigration Appeals to review decisions of IJs.[79] Even more consequential for purposes of this Article, regulations provide that instead of appealing BIA decisions to the courts of appeals, the politically appointed Attorney General may refer BIA cases to him- or herself for review.[80] In these ways, implementing regulations have altered the mechanisms for review over IJs' decisions.

This Article focuses on the potential for political control over the initial decisions of IJs. As stated earlier, we use the terms "political control" and "politicization" to refer to actions by an agency's political leadership to influence the decisions of agency adjudicators. Analysis of political control over ICE prosecutors or the BIA is beyond the scope of this Article. Formal exercises of political control over trial-level IJs include changing relevant legal standards through rulemaking and the Attorney General's exercising of the self-referral mechanism. Informal exercises of political influence include, for example, an administration attempting to recruit adjudicators with the expectation that those adjudicators will issue decisions consistent with the administration's political agenda. Or it might encompass the use of explicit or implicit threats of adverse employment actions—for example, removal, reassignment, or denial of a promotion to become an assistant chief immigration judge—to persuade adjudicators to issue judgements promoting the administration's goals. Such efforts to influence adjudicative outcomes at the trial level are more troublesome than formal exercises of

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77. DOJ INVESTIGATION INTO POLITICIZED HIRING, *supra* note 13, at 12–15 (quoting 5 U.S.C. § 2301 (b)(1) (2012)).

78. *See* 8 U.S.C. § 1252(a)(5).

79. *See* 8 C.F.R. § 1003.1 (2019).

80. *See id.* § 1003.1(h). For scholarship examining the Attorney General's exercise of review over BIA removal decisions, see generally Shah, *supra* note 9 (critizing exercises of the Attorney General's power to review BIA decisions in removal proceedings), and 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, for example, Christina L. Boyd & Amanda Driscoll, *Adjudicatory Oversight and Judicial Decision Making in Executive Branch Agencies*, 41 AM. POL. RES. 569 (2013) (examining the Secretary of Agriculture's exercise of authority to review decisions issued by ALJs within the agency), and Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical 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 of ALJ decisions). For a fascinating analysis of an agency in which the political leadership has a limited role in exercising final review authority over adjudications, see Walker & Wasserman, *supra* note 9 (analyzing the authority of the U.S. Patent and Trademark Office).

rulemaking or review authority because they are less transparent and typically evade judicial review.

Although 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 little systematic study of the impact of these institutional structures in the context of immigration removal proceedings, as detailed in the next section.

B. EXISTING SCHOLARSHIP ON POLITICAL CONTROL OVER TRIAL-LEVEL AGENCY ADJUDICATORS

IJs have long been criticized for apparent arbitrariness.[81] This section describes the existing literature related to political control over administrative adjudication. First, it explains how scholars have examined the various factors that impact decisions to grant or deny asylum to noncitizens. Second, it describes the handful of studies that have examined factors that influence outcomes in immigration removal proceedings more generally. Finally, it details how administrative law scholarship outside the immigration context has evaluated the extent to which agency adjudicators as a whole may be subject to political influence.

Most of the literature examining immigration courts has focused narrowly on decisions to grant or deny asylum.[82] But asylum cases constitute only a modest, albeit growing, subset of removal cases filed in immigration courts.[83] Also, asylum studies emphasize variables that, although important in a decision to grant asylum, may be less important in non-asylum cases—for example, the extent to which a noncitizen's home country has a documented practice of persecuting certain groups.[84] Moreover, asylum removal cases tend to differ from non-asylum removal cases because the latter typically involve noncitizens with more extensive ties to the United States, including longtime U.S. residents and even legal permanent residents.[85] Analyses of decisionmaking within the asylum context thus may not apply in the same way to the larger universe of immigration removal proceedings.

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81. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 829–30 (7th Cir. 2005) (Posner, J.) (concluding that immigration-court adjudication "has fallen below the minimum standards of legal justice"); LENNI B. BENSON & RUSSELL R. WHEELER, ADMIN. CONFERENCE OF THE U.S., ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 23 (2012), https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf [https://perma.cc/3Y5T-9Z8F] (discussing critiques of IJs); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1639 (2010) (arguing that criticisms of the immigration-court system are "well founded").

82. *See infra* notes 86–103 and accompanying text.

83. *See* EOIR 2017 YEARBOOK, *supra* note 22, at 24 fig.17 (noting that defensive asylum claims are up 423% from fiscal year 2013 to fiscal year 2017).

84. *See, e.g.*, BANKS MILLER ET AL., IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 100 (2014) (finding the human rights conditions of a noncitizen's home country were a statistically significant predictor of asylum grant rates).

85. 8 U.S.C. § 1158(a)(2)(B) (2012) limits asylum eligibility to noncitizens who apply for such relief within one year of entry into the United States. Other forms of relief from removal do not contain such a limitation. *See supra* notes 63–65 and accompanying text.

Several of the asylum-limited studies suggest that immigration adjudicators may not be susceptible to political influence. In the earliest of these studies, undertaken during the first few years of the Bush II presidency, Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag measured disparities in asylum grant rates during a four-year period from 2000 through August 2004.[86] Using a bivariate analysis (which did not control for other factors), they found that the political party of the presidential administration that appointed the IJ had no statistically significant relationship to the grant of asylum,[87] although they did find that other factors—namely the judge's gender and prior employment history, among other variables—were statistically significant.[88]

More recent scholarship on asylum claimants similarly concluded that the political party of the appointing President (and Attorney General) has little to no relationship with IJ decisions. Using a machine learning model, Daniel Chen and Jess Eagel analyzed close to 500,000 asylum decisions from 1981 through 2013—controlling for over 137 "features"—and found that the party of the appointing Attorney General contributed to a mere 0.002% of the model's total importance in granting asylum.[89] To the contrary, they discovered that the most important predictors for asylum decisions were "trend" features, such as the judge's average grant rate, the average grant rate for the applicant's particular nationality, and the grant rate for the judge's previous five adjudications.[90] 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 between fiscal years 2009 and 2014, when controlling for over twenty variables.[91] Instead, among other findings, they found that IJs sitting in border counties, those deciding cases in counties with better economic conditions, and those hearing cases where the noncitizen was represented by an attorney were more likely to grant asylum.[92] They also found that IJs were less likely to grant asylum in Republican-controlled areas, and when sitting in states that participated in restrictive federal immigration programs or had more strict immigration policies.[93] IJs with more experience and judges hearing greater numbers of cases from El Salvador, Guatemala, and Honduras also granted asylum at lower rates.[94]

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86. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 339–49, 394 (2007).

87. *Id*. at 339 n.71.

88. *Id*. at 342–49.

89. Daniel L. Chen & Jess Eagel, *Can Machine Learning Help Predict the Outcome of Asylum Adjudications?* 1, 6 tbl.3 (Proceedings of the Ass'n for Computing Mach. Conference on Artificial Intelligence & the Law, Working Paper, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815876 [https://perma.cc/4JW9-AE4R].

90. *Id*. at 6 tbl.3. Trend factors contributed 49% of the model's total importance. *Id*.

91. Daniel E. Chand et al., *The Dynamics of State and Local Contexts and Immigration Asylum Hearing Decisions*, 2017 J. PUB. ADMIN. RES. & THEORY 182, 188–89, 188 fig.1, 193 tbl.5.

92. *Id*. at 189–90, 193 tbl. 5.

93. *Id*.

94. *Id*. at 189, 193 tbl.5.

The Government Accountability Office (GAO) undertook two statistical analyses of EOIR data to understand the factors that predict asylum decisions.[95] The first of these two studies[96] found the party of the appointing President to be of no statistical significance in predicting grant rates for either affirmative or defensive asylum petitions in the immigration courts.[97] The second study, conducted in 2016, reached similar results for defensive asylum applications.[98] But for affirmative asylum claims, they found that judges appointed by earlier administrations (George H.W. Bush (Bush I), Ronald Reagan, Jimmy Carter, Richard Nixon, and Lyndon Johnson) were more likely to grant asylum than those appointed by later ones (Obama, Bush II, and Bill Clinton), controlling for other variables.[99]

A book-length study by Banks Miller, Linda Keith, and Jennifer Holmes, which focused primarily on IJ employment background and state and local variables, found that IJs were more likely to grant asylum during Democratic administrations than during Republican ones.[100] When they controlled for variables related to the noncitizen, the IJ, and the political and economic environment of the court, they found that IJs were 7% more likely to grant asylum when the

95. Because the EOIR lacked the technical capacity to conduct a large-scale statistical study of its workings, it commissioned the GAO to do two analyses in 2008 and 2016 of factors that predict asylum grant rates. *See* GAO ASYLUM 2008, *supra* note 30 (noting on its "Highlights" page that the 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"); GAO ASYLUM 2016, *supra* note 39. The EOIR itself conducted two studies of asylum grant rates. In 2006, the Office of the Chief Immigration Judge performed a study of grant rates from fiscal years 2001–2006, which it updated in June 2008. *See* GAO ASYLUM 2008, *supra* note 30, at 41. In these studies, the EOIR accounted for whether the noncitizens were detained as well as whether they appeared for a merits hearing. *Id.* at 43. These analyses did not control for factors such as the noncitizens' nationality, judge gender, or experience, or other common statistical controls. *Id.*

96. In 2008 the GAO analyzed 198,000 asylum cases over a 12.5-year period from October 1994 through April 2007. GAO ASYLUM 2008, *supra* note 30, at 4. The study involved noncitizens from the top twenty asylum-producing countries and the nineteen immigration courts hearing the greatest number of asylum cases. *Id.* Eight years later, it performed a second study, which analyzed 595,795 cases filed between fiscal year 1995 and fiscal year 2014. GAO ASYLUM 2016, *supra* note 39, at 4.

97. GAO ASYLUM 2008, *supra* note 30, at 120 tbl.19, 121 tbl.20, 123–24. However, in a more restrictive analysis of Haitian and Chinese migrants in New York, Los Angeles, and Miami, the GAO found that Chinese affirmative applicants in New York were twice as likely to be granted asylum by judges appointed during Republican administrations, whereas defensive applicants were three times more likely. *Id.* at 124.

98. GAO ASYLUM 2016, *supra* note 39, 62 tbl.10, 63 tbl.11. In the 2016 study, the GAO eliminated certain variables such as judge race and ethnicity, veteran status, and employment history, among other variables, that were "labor-intensive" to gather and not statistically significant in their earlier analysis. *Id.* at 30 n.39. This later study held the following variables constant: the noncitizen's nationality, the noncitizen's language, whether the noncitizen was represented by counsel, whether the noncitizen had dependents, whether the noncitizen sought asylum within one year of entry into the United States, whether the noncitizen had ever been detained (defensive asylum only), the judge's gender, the judge's years of experience, the presidential administration under which the judge was appointed, the circuit court, the base city court, and the judge's asylum caseload. *Id.* at 33 n.47, 59 tbl.8, 60 tbl.9, 62 tbl.10, 63 tbl.11.

99. *Id.* at 32, 59 tbl.8, 60 tbl.9.

100. MILLER ET AL., *supra* note 84, at 100.

Attorney General at the time of the decision was a Democrat than if the Attorney General was a Republican.[101] This part of the study examined over 100,000 asylum decisions from 2005 through 2010.[102] Another empirical study using EOIR data found that a change to Republican control actually resulted in an increase in asylum grant rates for liberal and moderate judges, and a decrease in grant rates for conservative judges.[103]

As indicated above, the majority of immigration-court cases do not involve asylum claimants, and studies limited to the grant or denial of asylum may not apply in the same way to the broader universe of removal decisions. The handful of studies that moved beyond asylum decisions examined other factors that might influence case outcomes, but none sought to analyze the role of Executive Branch political actors specifically.[104] For example, Ingrid Eagly and Steven Shafer analyzed a dataset of over 1.2 million removal proceedings to measure the effect that representation by counsel had on the likelihood of a noncitizen's removal.[105] Emily Ryo examined a sample of cases using a different database to measure the impact of a number of variables, such as attorney

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101. *Id.* at 99 tbl.4.2, 100. The study controlled for the political party of the Attorney General. *Id.* at 71–72. However, Miller and coauthors focused their analysis on whether IJ ideology impacted decisionmaking. *See id.* at 36. They had a unique way of measuring ideological preference. Using factor analysis, they collected information on each IJ's prior employment background to come up with a measure of ideology. *See id.* at 37–38. Specifically, they created a factor based on the IJ's prior employment at the INS, DHS, or EOIR, prosecutorial experience, experience working at an NGO or immigration-related NGO, military experience, work as an academic, private practice experience, other judicial work and corporate experience. *Id.* at 38, 39 tbl.2.4. They found that those who had INS, DHS, or EOIR experience, or other prosecutorial or military experience, had more conservative views toward asylum, whereas those who previously worked at an NGO or in academia were more liberal. *Id.* at 38; *see also* Linda Camp Keith et al., *Explaining the Divergence in Asylum Grant Rates Among Immigration Judges: An Attitudinal and Cognitive Approach*, 35 L. & POL'Y 261, 278–80, 279 fig.1 (2013) (finding that liberal IJs were more likely to grant asylum than their conservative counterparts).

102. MILLER ET AL., *supra* note 84, at 97, 99 tbl.4.2.

103. *See* Mark Richard Beougher, Who Controls Immigration Judges?: Towards a Multi-Institutional Model of Administration Judge Behavior 149–50, 149 tbl.17 (Dec. 2016) (Ph.D dissertation, Western Michigan University), https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=3466&context=dissertations [https://perma.cc/67AE-TKKP] (finding that as presidential ideology grew more conservative, liberal and moderate judges were 1.2% and 3.5%, respectively, more likely to grant asylum, while conservative judges were 2.2% less likely); *see also id.* at 84, 86 tbl.2, 89–90 (finding overall less than 1% increase in asylum grant rate with changing presidential ideology).

104. *See, e.g.*, Eagly, *supra* note 51, at 937–38, 937 n.19 (conducting empirical study of removal proceedings and finding that "detained televideo cases were more likely to result in deportation" than detained in-person cases, but "there was no statistically significant difference in grant rates for relief and voluntary departure applications across televideo and in-person detained cases"); Ingrid Eagly & Steven Shafer, *Measuring* In Absentia *Removal in Immigration Court*, 168 U. PA. L. REV. (forthcoming 2020) (analyzing in absentia removal); Emily Ryo, *Predicting Danger in Immigration Courts*, 44 L. & SOC. INQUIRY 227, 245–48 (2019) (examining whether respondent's nationality, attorney representation, and criminal history impacted bond decisions); Dane Thorley & Joshua Mitts, *Trial by Skype: A Causality-Oriented Replication Exploring the Use of Remote Video Adjudication in Immigration Removal Proceedings*, 59 INT'L REV. L. & ECON. 82, 82 (2019) (replicating Eagly's analysis and finding similar results regarding the role of video in removal proceedings).

105. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 6, 9 (2015) (finding that noncitizens represented by counsel and seeking relief are 5.5 times more likely to obtain such relief than similarly situated noncitizens without counsel).

representation and prior criminal history, on an IJ's decision to release a noncitizen from detention.[106] More recently, Mica Rosenberg, Reade Levinson, and Ryan McNeill of the Reuters news organization analyzed over 370,000 removal cases over a ten-year period up to 2017.[107] Using a multilevel model and controlling for many other variables, they found that IJs who previously served as ICE prosecutors were 23% more likely to order removal and that female judges, as well as judges with more experience, granted relief more frequently than did male judges and those with less judicial experience.[108] Like all other studies, they also found a great deal of disparity based on the noncitizen's country of origin.[109]

Outside of the immigration context, administrative law 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 political independence that is not extended to ordinary administrative judges such as IJs.[110] Findings on ALJs' susceptibility to political control are mixed. In one study evaluating the behavior of ALJs at 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.[111] Similarly, Urska Velikonja found no evidence that ALJs within the SEC were biased in favor of the enforcement agency,[112] although Stephen Choi and A.C. Prichard

106. Ryo, *supra* note 57, at 118–19. Ryo did not analyze the EOIR dataset but rather created a unique dataset based on a sample of long-term detainees held in facilities within the Central District of California in 2013 and 2014. *Id.* The variables included detainee background variables such as race and language; the number of years the noncitizen lived in the United States and their address; attorney representation; whether they had a U.S. citizen or legal permanent resident spouse or child; employment history over the previous six months prior to detention; current legal status; whether they were previously deported; criminal and obstruction of justice history; and whether the case was pending before the Ninth Circuit. *Id.* at 130–31.

107. Mica Rosenberg et al., *Special Report: They Fled Danger for a High-Stakes Bet on U.S. Immigration Courts*, REUTERS (Oct. 17, 2017, 9:02 AM), https://www.reuters.com/article/us-immigration-asylum-specialreport/special-report-they-fled-danger-for-a-high-stakes-bet-on-u-s-immigration-courts-idUSKBN1CM1UG [https://perma.cc/H8RE-3ZFP]. The Reuters study had as its dependent variable whether the IJ granted relief, and excluded cases that were terminated or administratively closed, in absentia cases, and those in which the noncitizen was detained. *Id.* Half of the cases concerned asylum, with the remaining cases involving requests for cancellations of removal and other forms of relief. *Id.*

108. *Id.*

109. *Id.*

110. *See supra* notes 73–80 and accompanying text. The vast majority of adjudicative officials within federal agencies do not enjoy ALJ protections. A recent study commissioned by the Administrative Conference of the United States examined the differing rules for hiring, evaluating, and removing non-ALJs across the federal administrative state. *See generally* BARNETT ET AL., *supra* note 6.

111. Cole D. Taratoot & Robert M. Howard, *The Labor of Judging: Examining Administrative Law Judge Decisions*, 39 AM. POL. RES. 832, 834 (2011) (focusing on the extent to which ALJ decisions conformed to the attitudinal model of judging, in which the ALJs' personal policy preferences correlate closely with decisional outcomes).

112. Velikonja, *supra* note 28, at 321.

discovered that ALJs may favor SEC positions more than federal judges do.[113] Because both the NLRB and the SEC are independent executive agencies, the nature of political control may differ from that of a cabinet-level agency like the DOJ. In another study, which focused on the fair housing context, Nicholas Seabrook, Eric Wilk, and Charles Lamb found that the party of the current President had no statistically significant relationship with an ALJ's likelihood of ruling in favor of a claimant.[114] This study, however, found that while 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.[115]

In an empirical study using data from a 1992 Administrative Conference of the United States (ACUS) survey of ALJs, Charles Koch Jr. found that agency adjudicators—including both ALJs and non-ALJs—felt subject to political pressures.[116] Koch found that among the non-ALJs surveyed, some of whom were responsible for immigration adjudications, 28% reported that threats to their independence was occasionally or frequently a problem.[117] Two percent reported pressures to reach different decisions to be a frequent problem.[118] About one quarter reported that they were asked to do things against their better judgment occasionally or frequently.[119]

In sum, a sizable body of scholarship has examined the potential for political influence over decisions to grant or deny asylum, but those studies may not be generalizable to other types of immigration-court proceedings. The few studies that do look at removal proceedings more generally do not focus on evaluating political influence. Finally, administrative law scholarship outside the immigration context has focused primarily on ALJs, who enjoy stronger protections from political interference than do other types of agency adjudicators, such as IJs. Our study is thus the first to focus on analyzing potential political influence over IJs' decisions to order noncitizens removed from the United States.

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113. Choi & Prichard, *supra* note 28, at 31–32 (finding that the SEC diverted weaker cases to ALJs rather than to federal court, suggesting that ALJs were in fact more likely to rule in favor of the SEC than federal courts).

114. Nicholas R. Seabrook et al., *Administrative Law Judges in Fair Housing Enforcement: Attitudes, Case Facts, and Political Control*, 94 SOC. SCI. Q. 362, 363, 373 (2013) (conducting empirical assessment of voting patterns among the eight ALJs assigned to fair housing cases).

115. *Id.* at 373.

116. *See* Koch Jr., *supra* note 29, at 278.

117. *Id.*

118. *Id.*

119. *Id.* at 279. Surprisingly, non-ALJs reported far fewer concerns about political pressure than did ALJs. *Id.* at 278. Among ALJs within the Social Security Administration, for example, 33% identified threats to their independence as a problem, 26% reported feeling pressure to reach different decisions, and 42% reported being asked to do things against their better judgment. *Id.* at 279. Importantly, self-reporting mechanisms are necessarily limited, as trial-level decisionmakers may not be aware of their biases. Moreover, these figures do not show whether the decisionmakers resisted such pressures.

II. DESIGN OF THE EMPIRICAL STUDY

In this Part, we first describe how we created the dataset. We then move to describing our methodology, setting forth the various independent variables for which we controlled. Finally, we define the statistical questions for our analyses.

A. CONSTRUCTION OF THE IMMIGRATION REMOVAL DATASET

To conduct our analyses, we constructed an original dataset of removal decisions from January 2001 through June 2019. The EOIR posts records of every removal proceeding filed in immigration courts since 1951.[120] These records include approximately 6.5 million pending or completed cases with more than 8.6 million unique proceedings from 1951 through June 2019. Removal proceedings comprised over 98% of case types in the EOIR dataset.[121]

We 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.[122] By eliminating cases that never proceeded past the initial master calendar hearing, we excluded cases in which noncitizens apparently conceded the grounds for removal and declined to seek or failed to follow through with applications for relief from removal (although they may have sought voluntary departure).[123]

Second, for each case, we included only the first substantive merits decision issued by the IJ.[124] Many cases have multiple proceedings; an IJ may be asked to rule on a bond determination or venue change, which is considered a separate proceeding from the substantive question of removal. Even after ruling on the merits, the IJ may render what the EOIR refers to as a "subsequent case," where the IJ reopens or reconsiders the case, or the case is remanded after appeal.[125] For

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120. *See Frequently Requested Agency Records*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/frequently-requested-agency-records [https://perma.cc/B2DS-HTT2] (last visited Dec. 28, 2019). For more information about the dataset, see the Appendix.

121. We defined removal proceedings to include cases coded as removal, deportation, or exclusion proceedings. *See supra* note 33. We omitted other case types. *Id*.; *see infra* Appendix and note 306.

122. *See infra* Appendix (explaining analysis of individual merits cases).

123. *See supra* notes 37–41 and accompanying text.

124. As defined by the EOIR, the first substantive decision is the first decision issued by the IJ that reaches a case's merits, excluding decisions on change of venue, other transfer, or administrative closure of the case. *See infra* Appendix; *see also* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2013 STATISTICS YEARBOOK, Glossary of Terms 7 (2014) [hereinafter EOIR 2013 YEARBOOK], https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf [https://perma.cc/2G8J-S7AS] (defining "[i]nitial [c]ase" as "[t]he proceeding that begins when the Department of Homeland Security files a charging document with an immigration court and ends when an immigration judge renders a determination"). Other scholars have also used the first case on the merits. *See, e.g.*, Eagly & Shafer, *supra* note 104 (manuscript at 9 n.31) (presenting "initial immigration judge decision" as a "term of art that refers to the first merits decision by the immigration judge"); GAO ASYLUM 2008, *supra* note 30, at 65 (using first substantive case and eliminating cases decided after appeals); GAO ASYLUM 2016, *supra* note 39, at 48 (same); Thorley & Mitts, *supra* note 104, at 90 (including only a case's first proceeding in their replication analysis). We considered administrative closures to be substantive decisions. *See infra* Appendix.

125. EOIR 2013 YEARBOOK, *supra* note 124, at Glossary of Terms 11 (defining "[s]ubsequent [c]ase" as a "proceeding that begins when: 1) the immigration judge grants a motion to reopen,

simplicity, we omitted procedural, custodial, and subsequent cases and counted only the first merits decision.

Third, we eliminated from the dataset those decisions rendered in absentia[126] on the grounds that such decisions are likely to result in removal and less likely to reflect a judge's independent exercise of discretion.[127]

Fourth, we eliminated rider cases. The EOIR dataset identifies some cases as "lead" or "rider" cases, which are assigned to family members who are in removal proceedings together.[128] We deleted all rider cases on the assumption that the decisions in those cases were not independent from the decisions in the corresponding lead case.[129]

Fifth, like other studies, we excluded decisions from 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 small numbers of cases."[130] As reflected in Figure 2, IJs are usually assigned to hear cases in one primary base city, although IJs may occasionally transfer to another base city or serve as visitors or be jointly appointed at another base city. The cases typically are randomly assigned to IJs within a given base city.[131] We included in our analysis decisions by visiting judges who sat outside their primary court, but we excluded decisions by individuals designated as visitors who had not been appointed as IJs and by IJs who heard cases before their formal date of appointment.

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reconsider, or recalendar; or 2) the Board of Immigration Appeals issues a decision to remand and ends when the immigration judge renders a determination").

126. *See* 8 U.S.C. § 1229a(b)(5)(A) (2012) (allowing removal of aliens who fail to appear at their removal hearings). The EOIR defines an "[i]n [a]bsentia [o]rder" as "[a]n order issued when an immigration judge determines that a removable alien received the required notice about their removal hearing and failed to appear." EOIR 2013 YEARBOOK, *supra* note 124, at Glossary of Terms 7. For the government to prevail in in absentia cases, it must present "clear, unequivocal, and convincing evidence" to show that the noncitizen is removable. 8 C.F.R. § 1003.26 (2019).

127. *See, e.g.*, Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 218 (2017) (noting that a noncitizen's failure to appear is an "automatic loss for the noncitizen"). For more on in absentia removal, see generally Eagly & Shafer, *supra* note 104.

128. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, LEAD AND RIDER ENHANCEMENTS: REFERENCE GUIDE 1 (2010), http://libguides.law.ucla.edu/ld.php?content_id=38118600 [https://perma.cc/5LZK-5U4Q]; *see also* GAO ASYLUM 2008, *supra* note 30, at 65 (selecting only lead cases); GAO ASYLUM 2016, *supra* note 39, at 48 (same).

129. In statistics, violation of the assumption that cases are independent could result in biased estimates.

130. GAO ASYLUM 2008, *supra* note 30, at 22 n.30 (eliminating IJs who heard fewer than fifty affirmative and fifty defensive asylum cases, as well as IJs hearing cases in immigration courts other than their primary court). Other studies used a higher threshold. *See, e.g.*, GAO ASYLUM 2016, *supra* note 39, at 3–4, 48–49 (analyzing countries with a minimum of eight hundred affirmative and eight hundred defensive asylum applications and judges who completed a minimum of fifty defensive and fifty affirmative cases); *Asylum Disparities Persist, Regardless of Court Location and Nationality*, TRAC: IMMIGRATION (Sept. 24, 2007), https://trac.syr.edu/immigration/reports/183/ [https://perma.cc/625V-MGPZ] (analyzing data from IJs who had decided at least one hundred asylum cases).

131. *See supra* note 38.

Figure 2: Map of IJ Base Cities, 2017[132]

Source: Executive Office for Immigration Review information on immigration court and office locations; MapInfo (map). | GAO-17-438
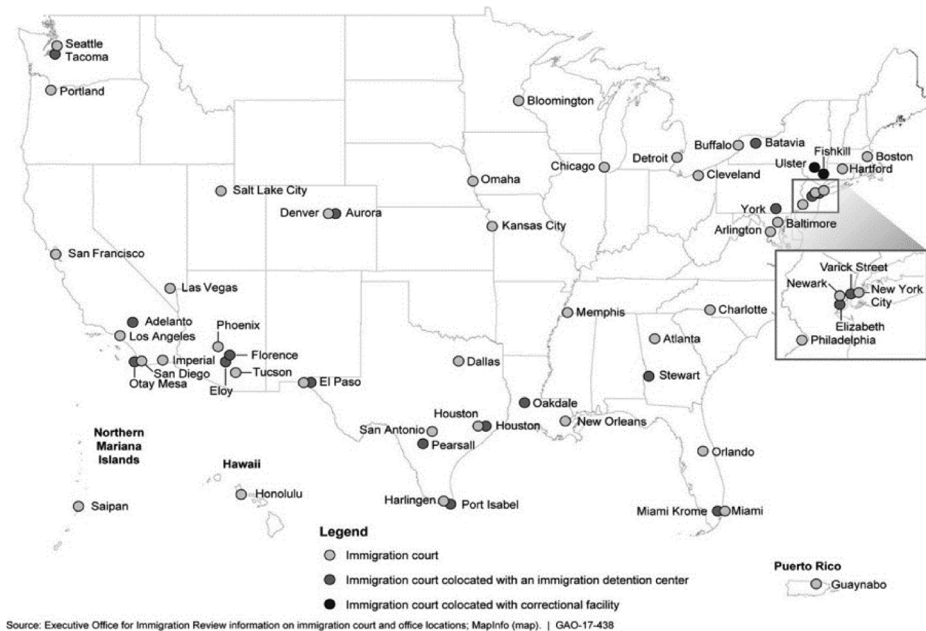
We defined the universe of cases based on the disposition of the case—that is, whether the individual was removed from the country or required to leave after a grant of voluntary departure on the one hand, or non-removal on the other.[133] For our purposes, orders of removal included orders to remove, orders to deport, and orders to exclude, as well as voluntary departures, which require the noncitizen to leave the country.[134] Cases we coded as "not removed" included those in which the noncitizen was admitted, relief was granted, the case was administratively closed, or the case was terminated or suspended.

We also coded each IJ's work history primarily based on EOIR press releases for whether they previously worked for the former INS, DHS, or DOJ; whether they worked for any government entity, including the federal government, state or local governments, or the military; and whether they worked at nongovernmental

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132. GAO, 2017 IMMIGRATION COURTS REPORT, *supra* note 48, at 11 fig.2.

133. We coded the variable as "1" (indicating removal) if the decision ("dec_code") was labeled as "Remove," "Deport," "Exclude," or "Voluntary Departure." We coded the variable as "0" (indicating non-removal) if the case was coded as "Admit," "Relief," "Terminated," or "Final Grant of EOIR 42B/ Suspension," or if the "other_comp" variable was coded as "Administrative Closure." We eliminated cases coded as "Prosecutorial Discretion—Terminated" or "Other" as well as cases in which the venue was changed or transferred, jurisdiction transferred to the BIA, or any case with an "other_comp" code that was not coded as "Administrative Closure." *See infra* Appendix and note 307.

134. The EOIR similarly defines voluntary departure as a "form of removal, and not a type of relief." EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2015 STATISTICS YEARBOOK O1 (2016), https://www.justice.gov/eoir/page/file/fysb15/download [https://perma.cc/8EHH-5VYC].

organizations (NGOs), or in the private sector.[135] We then coded for a series of additional control variables, as described in section II.C, based on factors that scholars found relevant in other studies of immigration courts.

<div align="center">B. QUESTIONS PRESENTED</div>

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 immigration enforcement—may be more likely to issue an order of removal.[136] Likewise, they may assume that those with experience working at NGOs, which are more likely to defend noncitizens, may be less likely to order removal.[137]

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

Chief Justice John Roberts recently asserted, "We don't work as Democrats or Republicans."[138] 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.[139] This assumption has carried over to the administrative state; scholars analyzing decisions of the NLRB, have ascribed to the judge the political party of the appointing President, often finding it one of the most important factors influencing decisionmaking.[140]

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135. If the information was not in the DOJ press releases (on file with authors), we also collected some of this information from TRAC's IJ reports. *See Immigration Judge Reports—Asylum*, TRAC: IMMIGRATION, https://trac.syr.edu/immigration/reports/judgereports/ [https://perma.cc/8XJC-Y9LV] (last visited Dec. 28, 2019). We had all press releases for most IJs appointed since 2000. Other studies of this data used similar sources. *See, e.g.*, GAO ASYLUM 2008, *supra* note 30, at 66–67. If neither the EOIR press releases nor TRAC provided information, we relied on Google searches and were able to obtain some information from obituaries, law firm websites, and the like.

136. *See* MILLER ET AL., *supra* note 84, at 99 tbl.4.2 (finding those with government employment backgrounds to be less likely to grant asylum).

137. *Id*. at 38 (finding that those who worked for NGOs or in the private sector were more likely to grant asylum).

138. Adam Liptak, *John Roberts, Leader of Supreme Court's Conservative Majority, Fights Perception that It Is Partisan*, N.Y. TIMES (Dec. 23, 2018) https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html.

139. *See, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 147–48 (2006) (finding political party of the appointing President to be a statistically significant variable); Susan K. Snyder & Barry R. Weingast, *The American System of Shared Powers: The President, Congress, and the NLRB*, 16 J.L., ECON., & ORG. 269, 295 (2000) (finding that the process of confirming NLRB members provides ways to influence agency behavior); Donald R. Songer & Martha Humphries Ginn, *Assessing the Impact of Presidential and Home State Influences on Judicial Decisionmaking in the United States Courts of Appeals*, 55 POL. RES. Q. 299, 321 (2002) (finding that "judicial voting behavior does reflect the political preferences of appointing Presidents").

140. *See* Charles D. DeLorme, Jr. et al., *The Determinants of Voting by the National Labor Relations Board on Unfair Labor Practice Cases:1955–1975*, 37 PUB. CHOICE 207, 216 (1981) ("[P]olitical

IJs in the immigration arena are career bureaucrats and understood to be apolit-ical.[141] If IJs are apolitical as intended, we should find no enduring differences based on the identity of the appointing President. Many asylum scholars have concluded that, at least for appointees since the Clinton Administration, the party of the appointing Attorney General had little effect on outcomes in asylum cases.[142] 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. To analyze whether one administration's appointees were more or less likely to order removal than another administration's appointees during the same time interval, we created a variable indicating the presidential admin-istration at the time of case completion. Cases completed from January 20, 2001 through January 19, 2009 were coded "Bush II Era"; from January 20, 2009 through January 19, 2017 were coded "Obama Era"; and from January 20, 2017 through June 30, 2019 "Trump Era." We analyzed the removal rate, divided across each of the three "eras" to see whether IJs appointed by different Presidents decided cases within the same time frame 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 then shifted our focus from the identity of the President *at the time of appointment* to the identity of the President *at the time of decision*. That is, we assessed the extent to which IJs as a whole were more or less likely to order re-moval during a particular presidential administration or presidential era. An IJ who served throughout different administrations, for example, might exhibit higher removal rates during one presidential era compared to another. Such dis-parities 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.

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 been direct in its efforts to increase the number of removals—for example, by limiting the availability of asylum relief,[143] restricting judges' ability to grant continuances,[144] and eliminating judges' authority

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variables such as the party of the administration appointing the NLRB member and the member's own political party had an influence on the odds of voting [pro labor]."); Semet, *supra* note 80, at 227 (finding the "partisan ideology of the Board" to be one of the "most important factors motiving the Board's decisions").

141. *See supra* note 49 and accompanying text.

142. *See supra* Section I.B (discussing studies).

143. *See In re* A-B-, 27 I. & N. Dec. 316, 320 (Att'y Gen. 2018) (holding that asylum claims based on domestic or gang violence typically do not satisfy requirements for asylum based membership in a particular social group).

144. *See In re* L-A-B-R-, 27 I. & N. Dec. 405, 406 (Att'y Gen. 2018) (significantly limiting the availability of continuances).

to administratively close cases.[145] 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.

To analyze these questions, we observed how a given judge's removal rates differed across presidential eras. For example, we evaluated whether Bush II appointees exhibited higher or lower removal rates, controlling for other factors, during the Trump Era than during the Obama or Bush II Eras. In other words, all else constant, does a Bush II appointee differ in his or her decisionmaking during different presidential eras? Such findings would suggest that IJ decisionmaking may be influenced by the identity of the current President.

C. DESCRIPTION OF STATISTICAL METHOD

1. Methodology

Because the dependent variable—removal versus non-removal—is dichotomous, we conducted our analysis with logistic regression. Consistent with other studies of judicial decisionmaking, we clustered standard errors by judge, given that each IJ decides multiple cases, which may not be independent of each other.[146]

2. Control Variables

We compiled a series of control variables that might impact the choice of whether to remove a noncitizen, using studies of the narrower subset of asylum decisions as a starting point. These control factors center on four groups.[147] The first group of variables relates to the noncitizen; the second group focuses on the judge; the third relates to geographic variables; and the fourth focuses on other institutions. We discuss each in turn.

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145. *See In re* Castro-Tum, 27 I. & N. Dec. 271, 272 (Att'y Gen. 2018) (holding that IJs and the BIA "may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action"), *overruled by* Romero v. Barr, 937 F.3d 282, 292–97 (4th Cir. 2019).

146. *See, e.g.*, MILLER ET AL., *supra* note 84, at 97 (clustering standard errors by judge). Any analysis must account for the possibility that the outcome of interest could be correlated among groups. For example, in his or her decisionmaking, the same IJ may be more similar to himself or herself than to another IJ. Failure to properly account for the lack of independence in the data could result in improper standard errors and mistakes in inference of statistical significance. Clustering by judge is standard in analyzing judicial outcomes. *See, e.g.*, *id.* (clustering errors on IJ and metropolitan area); Joshua B. Fischman, *Measuring Inconsistency, Indeterminacy, and Error in Adjudication*, 16 AM. L. & ECON. REV. 40, 74–75 (2014) (noting that all judges in the sample would agree on results in no more than 18% of cases, indicating the importance of judge effects). In alternative specifications, we also used a multilevel mixed-effects model, with the judge-level variable as a random effect. Likelihood ratio tests indicated that the multilevel model was the better approach, but because the results on our main variables of interest were similar, for purposes of this analysis, we present the results of the logistic regression here for simplicity. We also obtained the same key results clustering by base city instead of by judge.

147. For additional details on the variables, see *infra* Appendix.

a. Noncitizen Variables.

Characteristics relating to the noncitizen can impact how IJs decide cases. Unfortunately, the EOIR dataset does not provide all the information about the noncitizen that would be required to fully assess decisionmaking.[148] In a perfect world, the researcher would have access to more data on each individual noncitizen, including age, income, employment, family situation, length of residence in the United States, and the like.[149] The EOIR does, however, provide information on the following important metrics: attorney representation, custody status, nationality, language, and asylum case type.

i. Attorney Representation.

Whether the noncitizen is represented by an attorney has been shown to impact whether the noncitizen will be ordered removed.[150] Attorneys may help noncitizens better present the legal arguments of their case or they may screen for cases that they perceive as more winnable, resulting in a selection effect.[151]

In an EOIR proceeding, an attorney representing a noncitizen must file a Notice of Entry of Appearance form (otherwise known as an EOIR-28).[152] We coded the noncitizen as having an attorney if such a document was filed as of the case completion date or, where the form was filed later, whether there was an attorney code listed.[153] About 83% of the decisions in our dataset involved noncitizens who were represented by an attorney.[154]

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148. *See* MILLER ET AL., *supra* note 84, at 83 (noting that "[t]o date, no nongovernmental entity has been granted access to these types of core data").

149. *See infra* Section II.C.3 (discussing limitations on access to data).

150. *See, e.g.*, MILLER ET AL., *supra* note 84, at 42 (finding that 79% of those without representation were denied relief, whereas only 58% of those with representation were denied); Chand et al., *supra* note 91, at 189 (finding in a statistical model analyzing judge-level characteristics that a 10% increase in the percent of applicants with an attorney resulted in a 7% increase in the percent of asylum applications granted); Eagly & Shafer, *supra* note 105, at 49 ("Depending on custody status, representation was associated with a nineteen to forty-three percentage point boost in rate of case success."); Ramji-Nogales et al., *supra* note 86, at 340 ("Represented asylum seekers were granted asylum at a rate of 45.6%, almost three times as high as the 16.3% grant rate for those without legal counsel."); GAO ASYLUM 2008, *supra* note 30, at 30, 83, 124–25, 125 tbl.21 (finding that asylum applicants represented by counsel were, in some cases, at least three times more likely to prevail). Noncitizens with lawyers were also more likely to appeal their cases (50% versus 37%) and to win their appeals (30% versus 23%). MILLER ET AL., *supra* note 84, at 42.

151. GAO ASYLUM 2008, *supra* note 30, at 30 (noting that "attorneys can make better decisions about the viability of a case").

152. 8 C.F.R. § 1003.17(a) (2019). Scholars typically use the EOIR-28 date to determine a noncitizen's representation status. *See* Eagly & Shafer, *supra* note 105, at 15 (defining an individual as represented if the EOIR-28 form was on file at the time of the case completion date, and if filed late, if an attorney code appeared in the hearing data); Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 817, 867 (2018) (same); SIULC ET AL., *supra* note 39, at 59 n.76, 85 n.84 (relying on EOIR-28 data to determine representation status). Although we refer to "attorneys" here, some noncitizens are represented by accredited non-attorneys certified to appear in immigration court. 8 C.F.R. § 292.2(a).

153. *See infra* Appendix.

154. All forthcoming values are based on the approximately 830,000 case dataset truncated as described in the Appendix.

ii. *Custody Status.*

Noncitizens who are detained have been shown to be less likely to prevail in immigration-court proceedings.[155] Detainees may have more difficulty securing access to quality legal representation and may encounter more problems in securing access to evidence to prove their claims.[156] The EOIR codes applicants as one of three categories: never detained, currently detained (at the time of decision), and previously detained but released. We collapsed the variables into a dichotomous category of detained versus never detained or previously detained but released.[157] Approximately 23% of noncitizens in our dataset were detained.

iii. *Nationality and Language.*

Wide disparities in removal rates exist based on nationality and language. Scholars have found that certain nationalities simply have an easier time avoiding removal orders.[158] For example, noncitizens from Iraq and Cuba are granted asylum relief at much higher rates than noncitizens from Mexico and Central America.[159] Indeed, scholars can predict with 80% accuracy the final outcome of asylum hearings based solely on the identity of the judge and the applicant's nationality.[160]

Home country conditions may affect IJ decisionmaking. Noncitizens from countries with poor human rights records or that are less democratic may

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155. MILLER ET AL., *supra* note 84, at 29, 71, 100 (finding detained noncitizens less likely to prevail); GAO ASYLUM 2008, *supra* note 30, at 7–8, 32 (finding noncitizens "who had ever been detained were only two-thirds as likely to be granted asylum as those who had not been detained").

156. GAO ASYLUM 2008, *supra* note 30, at 32.

157. If the EOIR record was blank, we used the median category, which was not detained. Custody status was based on the status as of the date of case completion of the first merits proceeding. *See infra* Appendix.

158. *See, e.g.*, *Asylum Disparities Persist, Regardless of Court Location and Nationality*, TRAC: IMMIGRATION, *supra* note 130 (finding, for example, that Chinese applicants were significantly more likely to be granted asylum than Haitian and Colombian applicants); Ramji-Nogales et al., *supra* note 86, at 361 fig.45 (noting asylum grant rate discrepancies based on nationalities between 2001 and 2002).

159. Chand et al., *supra* note 91, at 189, 191 tbl.3 (finding, with statistical controls, that IJs were less likely to grant asylum to noncitizens from El Salvador, Guatemala, and Honduras); *see also Immigration Judges*, TRAC: IMMIGRATION (July 31, 2006), https://trac.syr.edu/immigration/reports/160/ [https://perma.cc/4MCN-TLX5] (finding 80% of applicants from El Salvador, Mexico, and Haiti were denied asylum between fiscal years 2000 and 2005); GAO ASYLUM 2008, *supra* note 30, at 26–27, 86 tbl.12, 95 tbl.13, 96 tbl.14 (finding, with statistical controls, that affirmative asylum grant rates exceeded 50% for noncitizens from Albania, China, Ethiopia, Iran, Russia, Somalia, and Yugoslavia, but were below 10% for noncitizens from El Salvador, Guatemala, Honduras, and Mexico); GAO ASYLUM 2016, *supra* note 39, at 18–19, 20 fig.5, 21, 22 fig.6 (describing grant rates by country and finding that affirmative asylum grant rates fell below 5% for El Salvador, Mexico, Nicaragua, Guatemala, and Honduras).

160. *See* Matt Dunn et al., *Early Predictability of Asylum Decisions* 1 (Proceedings of the Ass'n for Computing Mach. Conference on Artificial Intelligence & the Law, Working Paper, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816191 [https://perma.cc/SUA7-HMMQ] (predicting with 80% accuracy the outcomes of asylum cases based on judge characteristics and the noncitizen's country of origin); *see also* Chen & Eagel, *supra* note 89, at 1, 3 fig.1 (using machine learning to predict with 82% accuracy the final outcome of asylum hearings based primarily on analyses of trends in the IJs' grant rates).

have more empathetic cases.[161] In addition to political variables, those from economically undeveloped countries may pose a more sympathetic case.[162] 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 could pose a financial burden.[163]

Patterns of migration have changed over time as well. Beginning in 2012, unaccompanied minors from El Salvador, Guatemala, and Honduras began entering the country in increasing numbers.[164] In addition, by 2014, noncitizens from these three countries represented nearly half of all noncitizens apprehended at the Southern Border, eclipsing the number of Mexicans migrating northward for the first time,[165] a trend that has continued in the ensuing years.

We used Freedom House scores to categorize noncitizens based on the human rights record of their home country.[166] We coded a nation as "not free" if Freedom House designated the country as "not free."[167] We used the World Bank rankings for national gross domestic product (GDP) by year and coded countries that the World Bank deemed to have "low" or "mid-low" economic development to identify noncitizens coming from less-developed countries.[168] Approximately 25% of the noncitizens hailed from countries deemed not free, whereas 59% arrived from countries with a low or mid-low GDP. We also included a separate

161. Noncitizens from the most democratic regimes had a 12–18% lower chance of getting asylum relief than those from the least democratic regimes, and noncitizens from countries with poor human rights records had a 20–25% increased chance of getting asylum. MILLER ET AL., *supra* note 84, at 70, 100 (noting that "[a]s the human rights conditions in a country become more repressive . . . relief becomes more likely"); *see also* Chand et al., *supra* note 91, at 185 (explaining that country conditions affected asylum grant rates).

162. *See* MILLER ET AL., *supra* note 84, at 64.

163. *Id.* at 64, 71 (finding that IJs were 6% more likely to grant asylum to applicants coming from the most developed versus the least developed nations).

164. Julia Preston, *Hoping for Asylum, Migrants Strain U.S. Border*, N.Y. TIMES (Apr. 10, 2014), https://www.nytimes.com/2014/04/11/us/poverty-and-violence-push-new-wave-of-migrants-toward-us.html; *Representation for Unaccompanied Children in Immigration Court*, TRAC: IMMIGRATION (Nov. 25, 2014), http://trac.syr.edu/immigration/reports/371 [https://perma.cc/6KUS-SEJ6].

165. *See* Chand et al., *supra* note 91, at 185; Preston, *supra* note 164; *see also* Mariano Castillo, *Immigration: More Central Americans Apprehended than Mexicans*, CNN (Dec. 19, 2014, 6:47 PM), https://www.cnn.com/2014/12/19/us/dhs-immigration-statistics-2014/index.html [https://perma.cc/KDT6-5PMK] (noting noncitizens from El Salvador, Guatemala, and Honduras made up 49% of apprehensions at the United States-Mexico border in 2014).

166. *Freedom in the World: Country and Territory Rankings and Statuses:1973–2019*, FREEDOM HOUSE, https://freedomhouse.org/report-types/freedom-world [https://perma.cc/38EZ-2LJL] (last visited Jan. 22, 2020).

167. *Id.* (indicating every country's "Freedom Status"). Other scholars have used different measures, such as the Gibney five-point score of state-based political regression or Polity IV's eleven-point scale for an institutionalized measure of democracy. *See, e.g.*, Mark Gibney, *A "Well-Founded Fear" of Persecution*, 10 HUM. RTS. Q. 109, 115 (1988) (describing five levels of a "political terror" scale); MILLER ET AL., *supra* note 84, at 62–63 (using Gibney scores); Keith et al., *supra* note 101, at 274 (explaining Gibney and Polity IV scores).

168. *GDP Per Capita*, WORLD BANK, https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries [https://perma.cc/D32M-LPUR] (last visited Jan. 22, 2020).

dummy variable for noncitizens coming from Mexico and Central America, as 45% of the noncitizens in our dataset hailed from these areas.

As with nationality, language can also impact an IJ's decision.[169] Those who do not speak English may have more difficulty understanding the court proceeding, communicating with lawyers and the IJ, and filling out forms.[170] We dichotomized the language variable so that those who spoke English were coded "1" and those recorded as speaking any language other than English were coded "0." Individuals with no reported language were coded as the median category of "non-English." About 20% of noncitizens in our data-set were coded as English speakers.

iv. Asylum Case Type.

We further controlled for whether the noncitizen applied for asylum. Respondents who raise asylum claims may differ from non-asylum noncitizens in important respects. Noncitizens filing for asylum (whether affirmatively or defensively) usually have been in the United States for less than one year and must show a well-founded fear of persecution in their home country.[171] 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 do not seek asylum. At the same time, noncitizens who do not seek asylum at all may differ from either affirmative or defensive asylum claimants because they may be more likely to have families in the United States, be gainfully employed, and have resided in the country for years. Further, some of these noncitizens may have been brought to the United States as young children.[172] We assumed that any case not coded as an asylum case is one in which asylum has not been claimed. In our dataset, 58% of the cases heard on the individual calendar consisted of noncitizens pursuing asylum claims.

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169. MILLER ET AL., *supra* note 84, at 71 (finding that non-English speakers were about 2–3% less likely to be granted asylum in removal proceedings); *see also* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 450–51, 505–15 (1992) (explaining language issues in pursuing asylum claims, such as poor quality foreign language interpretation for applicants and credibility accorded to the asylum seeker's testimony).

170. Indeed, the issue is further complicated due to many noncitizens speaking indigenous languages, rendering Spanish interpreters of little assistance. *See* Nikhil Sonnad, *The Real Language Barrier Between Migrant Children and the Americans Detaining Them*, QUARTZ (June 23, 2018), https://qz.com/1312256/many-migrant-children-arriving-in-the-us-dont-speak-spanish/ [https://perma.cc/GS3T-S7X8]. Interpreters are required when necessary, though they do not need to be certified. 8 C.F.R. § 1003.42(c) (2019); *see also* Eagly et al., *supra* note 152, at 822–24, 823 nn.189 & 192 (noting issues with language in immigration courts, including that the EOIR does not require interpreters to be formally certified).

171. *See supra* Section I.A (describing requirements for asylum).

172. *See supra* note 85 and accompanying text.

b. Judge-Specific Variables.

Existing scholarship suggests that certain variables related to the adjudicator may impact his or her decision to order removal. These variables include the judge's gender, prior employment, and time on the bench.

i. Gender.

Scholars have reached mixed conclusions regarding the impact of an adjudicator's gender on his or her decisionmaking.[173] In the asylum context, the results have also been mixed.[174] Female judges are arguably more likely to grant relief because of prior experiences that may make them more sympathetic to the claims of noncitizens or those who have suffered adversity.[175] They also may be more conscious of bias in decisionmaking.[176] Approximately 37% of IJ decisions in our dataset were made by female judges.

ii. Prior Employment in Government or at NGOs.

Prior employment background working for the government could be an important predictor of an IJ's removal decisions.[177] As discussed above, an IJ with prior experience in the former INS, DHS, or DOJ—agencies that play a role in immigration enforcement—may be more likely than those without such a background to order removal.[178] By contrast, those who worked at NGOs—a context more closely associated with the defense of noncitizens— may be less likely to order removal.[179] Approximately 64% of the IJs hearing

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173. There is a rich literature on the role that gender plays in decisionmaking in courts. *See, e.g.*, James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1756 (1999) (finding female Republican judicial appointees were more likely to support a union than were male Republican judicial appointees, but finding no gender gap among Democratic judicial appointees); Donald R. Songer & Kelly A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750, 759 (2000) (finding a gender gap among Democratic judges but not Republican judges).

174. GAO ASYLUM 2008, *supra* note 30, at 7, 36, 119 (finding male IJs were 60% as likely to grant asylum as were female IJs); MILLER ET AL., *supra* note 84, at 190 (finding "female IJs somewhat more likely than male judges to grant some form of relief"); Chen & Eagel, *supra* note 89, at 3 (finding female IJs had a higher asylum grant rate than did male IJs). *But see* GAO ASYLUM 2008, *supra* note 30, at 123–24 (finding IJ gender to be of no significance for many asylum cases); GAO ASYLUM 2016, *supra* note 39, at 33 (finding female IJs granted asylum more frequently than male IJs did in defensive cases, but finding no gender gap in grant rate for affirmative cases); Chand et al., *supra* note 91, at 192, 193 tbl.5 (failing to find in regression controlling for over twenty variables that female IJs differed significantly from male IJs in granting asylum).

175. Ramji-Nogales et al., *supra* note 86, at 343–46 (suggesting that female IJs were more likely than male IJs to have experienced sex discrimination, which may make them "more sympathetic to stories of persecution"); Songer & Crews-Meyer, *supra* note 173, at 759 ("Female judges may be quicker to empathize 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.").

176. Ramji-Nogales et al., *supra* note 86, at 344.

177. MILLER ET AL., *supra* note 84, at 37–38; Ramji-Nogales et al., *supra* note 86, at 345–49.

178. MILLER ET AL., *supra* note 84, at 38.

179. *Id.*

cases in our dataset had former INS, DHS, or DOJ experience, whereas 15% had NGO experience.

iii. Judge Tenure.

In the asylum context, scholars have found that the length of time the judge has been on the bench affects case results,[180] and we see no reason why such findings would not apply in the removal context more generally. 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 assessing credibility. We measured judicial tenure by subtracting the date of the case from the date on which the IJ was appointed to the bench. The mean tenure for IJs deciding cases in our dataset was ten years.

c. Geographic Variables.

Our third set of control factors relate to the locality where the IJ is based.[181] We examined the base city as well as its political and economic environment.

i. Base City.

The base city refers to the city in which the IJ who hears the case is based. Scholars have found that removal proceedings in larger urban cities were more favorable to noncitizens seeking relief. Larger cities may provide greater resources to integrate newcomers, including access to attorney representation, and may be less likely to view noncitizens as outsiders.[182] We coded a dummy variable for the ten largest base city areas hearing cases.[183] Approximately 57% of cases were decided in one of the ten largest base city areas. We also controlled for whether the base city where the case was heard was located near the Southern Border.[184] About 8% of cases in our dataset were determined at base cities near the Southern Border. Additionally, we controlled for the IJ's home base city.

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180. *See, e.g.*, Chand et al., *supra* note 91, at 192, 193 tbl.5 (describing "the judge's tenure on the bench" as "the only individual-level variable that seemed to offer explanatory power" and finding that IJs with more experience were less likely to grant asylum).

181. Scholars and the GAO have long documented the wide disparity in decisions by base city. *See, e.g.*, Eagly & Shafer, *supra* note 104, at 50–51, 52 fig.5 (describing in absentia removal rate disparities by base city); Ramji-Nogales et al., *supra* note 86, at 372–76 (noting widespread disparity in aslyum grant rate by region).

182. *See* MILLER ET AL., *supra* note 84, at 104–05.

183. These cities/areas were Chicago, Eloy/Florence/Tucson, Harlingen/Port Isabel, Houston/Conroe, Los Angeles/Lancaster, Miami/Krone, New York/Varick, San Antonio/Pearsall, San Diego/Imperial/Otay Mesa, and San Francisco.

184. *See* Keith et al., *supra* note 101, at 275 (noting "the possibility that the applicant pool in states with border points of entry may vary from that of other states"); Chand et al., *supra* note 91, at 194 (finding border county IJs were more likely to grant asylum relief).

ii. Local Political and Economic Environment.

IJs may be influenced by the broader political and economic environment of the base city where they are appointed.[185] Outside the immigration context, scholars have found that ALJs serving in politically liberal areas were more likely to grant benefits or relief than those serving in conservative areas.[186] In the immigration context, studies show that politically conservative areas exhibited higher deportation rates.[187] More specifically, scholars found that IJs were 9% less likely to grant relief in Republican-leaning counties than in Democrat-leaning ones in asylum cases.[188]

Local economic conditions may also impact how IJs rule.[189] Poorer communities may support restrictionist immigration policies and favor stricter enforcement.[190] Asylum scholars have shown that IJs serving in communities with stronger local economies and lower unemployment rates were more likely to grant asylum relief than other IJs.[191]

The presence of a large immigrant population may also impact removal rates, although the direction of such impact is not clear.[192] Areas with a large immigrant population, or a rapidly growing immigrant population, may exhibit a backlash toward noncitizens.[193] At the same time, the presence of a large immigrant

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185. Chand et al. quantified the political environment by averaging the number of years that a Democratic majority controlled each state's legislative house and adding that number to the years the state had a Democratic governor for 2009 through 2014. Chand et al., *supra* note 91, at 187. They found that IJs sitting in areas with greater Republican control were less likely to grant asylum. *Id.* at 190–91, 193 tbl.5.

186. *See, e.g.*, Lael R. Keiser, *State Bureaucratic Discretion and the Administration of Social Welfare Programs: The Case of Social Security Disability*, 9 J. PUB. ADMIN. RES. & THEORY 87, 100 (1999) (finding that SSA adjudicators granted relief more frequently in states with more Democrats among their legislators than in states with more Republicans); Joe Soss et al., *Setting the Terms of Relief: Explaining State Policy Choices in the Devolution Revolution*, 45 AM. J. POL. SCI. 378, 385 (2001) (finding a link between a state's political ideology and whether state welfare agencies granted benefits).

187. *See, e.g.*, Daniel E. Chand & William D. Schreckhise, *Secure Communities and Community Values: Local Context and Discretionary Immigration Law Enforcement*, 41 J. ETHNIC & MIGRATION STUD. 1621, 1633–35 (2015) (finding that Republican-leaning jurisdictions deported more noncitizens).

188. Chand et al., *supra* note 91, at 190–91.

189. *See id.* at 193 tbl.5 (finding county-level economic factors to be predictive of granting asylum).

190. *See* Daniel J. Hopkins, *Politicized Places: Explaining Where and When Immigrants Provoke Local Opposition*, 104 AM. POL. SCI. REV. 40, 54 (2010) ("Communities that saw relative declines in household income . . . were more likely to consider anti-immigrant proposals . . . .").

191. *See* MILLER ET AL., *supra* note 84, at 71 (finding that as national unemployment increased from 4% to 9.4%, grants of relief decreased by 8% between 1999 and the early 2010s); Chand et al., *supra* note 91, at 193 tbl.5 (finding statistically significant increases in asylum grant rates in counties with improved economic conditions).

192. *See* Chand et al., *supra* note 91, at 192–93 (finding decreased asylum grant rates).

193. *Id.* at 186; *see also* MILLER ET AL., *supra* note 84, at 84 (describing the "threat" hypothesis, which "posits that threats to cultural identity or economic threats drive perceptions about immigrants"); Hopkins, *supra* note 190, at 40–41 (describing the "politicized places" hypothesis and noting that "[s]udden demographic changes generate uncertainty and attention" and "can politicize those changes in people's minds"); Benjamin J. Newman et al., *Immigration Crackdown in the American Workplace: Explaining Variation in E-Verify Policy Adoption Across the U.S. States*, 12 ST. POL. & POL'Y Q. 160, 175 (2012) (showing that states with rapid growth in the foreign-born population were more likely to participate in immigration enforcement programs such as E-Verify).

community may inspire greater inclusiveness and promote greater tolerance.[194] A large increase in the foreign-born population has been shown to influence IJs to grant asylum.[195]

To control for local political conditions, we relied on the dataset created by Devin Caughey and Christopher Warshaw measuring state policy mood, matching scores based on the IJ's home base city and year.[196] To control for the local economy of the IJ's home base city, we relied on monthly unemployment rates from the Bureau of Labor Statistics.[197] To account for the local immigrant community of the IJ's home base city, we included as a control the percentage change in the foreign-born population.[198] The mean home base city was politically moderate, with an unemployment rate of 6.0%, and an 18.7% increase in the foreign-born population.

d. Other Institutional Actors.

Bureaucratic agencies do not exist in a vacuum.[199] Precedent, institutional constraints, and other governmental actors may each impact a

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194. *See* MILLER ET AL., *supra* note 84, at 84 (discussing the "contact" hypothesis, which "posits that meaningful contact with immigrants promotes tolerance").

195. *Id*. at 191.

196. Devin Caughey & Christopher Warshaw, *Replication Data for: Policy Preferences and Policy Change: Dynamic Responsiveness in the American States*, *1936–2014*, HARV. DATAVERSE (2017), https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/K3QWZW [https://perma.cc/FCA9-K3DT]; *see also* Devin Caughey & Christopher Warshaw, *Policy Preferences and Policy Change: Dynamic Responsiveness in the American States, 1936–2014*, 112 AM. POL. SCI. REV. 249, 254–255 (2018). Two scores are calculated based on social and economic liberalism; states that were more liberal had higher scores. *Id*. at 254. Recently, Caughey and Warshaw updated the scores through 2019, and also created a single, unidimensional state policy ideal point score based on an expanded analysis of social and economic policies. We used this score (on file with authors) in our analysis. Other scholars have relied on presidential vote share or partisan control of the state legislature or the governor's office. *See, e.g*., Chand et al., *supra* note 91, at 187, 193 tbl.5. In alternative specifications, we used Democratic presidential vote share as a proxy and came to similar results.

197. *Labor Force Statistics from the Current Population Survey, 1990–2019*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STAT., https://data.bls.gov/timeseries/LNS14000000 [https://perma.cc/AA85-S2BW] (last visited Jan. 27, 2020) (documenting the monthly seasonally adjusted unemployment rate since 1990 by metropolitan area).

198. *Total and Immigrant Percentages by State: Percent Change over Time*, MIGRATION POLICY INST., MIGRATION DATA HUB, https://www.migrationpolicy.org/programs/data-hub/us-immigration-trends [https://perma.cc/MR6A-GA2S] (last visited Jan. 27, 2020). The Migration Policy Institute tabulated its data from the United States Census and the 2010 and 2017 American Community Surveys. *See* Jynnah Radford & Luis Noe-Bustamante, *Facts on U.S. Immigrants, 2017*, PEW RES. CTR. (June 3, 2019), http://www.pewhispanic.org/2018/09/14/facts-on-u-s-immigrants-county-maps/ [https://perma.cc/2V23-BTYC]. Specifically, for years 2001 through 2009, we used the percent change from 2000 to 2010, and for 2010 and after, we used the percent change from 2010 to 2016.

199. Only a few studies of asylum decisionmaking have included controls for other political non-executive actors, even though such controls are standard in any analysis of politicization. *See* Beougher, *supra* note 103, at 70–71 (controlling for influence of Congress and courts); Idean Salehyan & Marc R. Rosenblum, *International Relations, Domestic Politics, and Asylum Admissions in the United States*, 61 POL. RES. Q. 104, 115 (2008) (finding that IJs ruled differently depending on whether Congress was focused on humanitarian assistance or enforcement).

decision to order removal.[200]

Studies of administrative agencies underscore Congress's role in informing agency policy, with effects changing over time.[201] Congress can exercise control by approving (or denying) appointments to the federal courts that review removal cases, threatening budget cuts, holding hearings, and conducting reorganizations of agencies.[202] 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.[203] Here, those committees are the House and Senate Judiciary Committees.[204] The mean Senate Judiciary score leaned conservative.

Federal courts also provide oversight over bureaucratic decisionmakers.[205] Agency action can vary by region depending on the ideological composition of the reviewing court.[206] Similar to the congressional measure, studies of

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200. *See* Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L., ECON., & ORG. 119, 147 (1996) (finding that as constraints increased, the ability of bureaucrats to accentuate policy preferences decreased); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 693 (1994) (finding federal courts of appeals judges were responsive to the risk of reversal).

201. *See, e.g.*, Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166–67 (1984) (studying congressional oversight of Executive Branch agencies' implementation of legislation).

202. *See, e.g.*, B. Dan Wood, *Principals, Bureaucrats, and Responsiveness in Clean Air Enforcements*, 82 AM. POL. SCI. REV. 213, 228 (1988) (noting the importance of Congress's "power of the purse" in assisting President Reagan to effectuate change in an administrative agency).

203. Ideology scores are called "DW-NOMINATE" scores. *See* Keith T. Poole & Howard Rosenthal, *Description of NOMINATE Data*, K7MOA (July 13, 2004), [https://perma.cc/ZQX9-RRCL] (explaining types of DW-NOMINATE scores); Jeffrey B. Lewis et al., *Realtime NOMINATE Ideology and Related Data*, VOTEVIEW, https://voteview.com/data [https://perma.cc/78EE-5T5E] (last visited Dec. 28, 2019). Such scores are commonly used to calculate the median ideology score of the relevant congressional oversight committees as well as the median score for administrative judicial bodies. Members of Congress have their own scores calculated through congressional roll call votes.

204. In our models, we used the Senate Judiciary Committee score, with higher scores indicating a more conservative ideology. We did not include scores for the House Judiciary Committee because their similarity to the scores for the Senate Judiciary Committee could result in multicollinearity in our statistical analysis, resulting in improper inferences of statistical significance.

205. *See, e.g.*, Snyder & Weingast, *supra* note 139, at 299 ("[A] large percentage of NLRB decisions go to the U.S. Court of Appeals for court enforcement or review.").

206. *See, e.g.*, Brandice Canes-Wrone, *Bureaucratic Decisions and the Composition of the Lower Courts*, 47 AM. J. POL. SCI. 205, 210–212 (2003) (finding that "the more liberal are the lower courts in which agency decisions may be challenged, the less likely is the [Army Corps of Engineers] to issue a [wetlands] permit," and noting that congressional ideology has less of an impact than does judicial ideology); Robert M. Howard & David C. Nixon, *Regional Court Influence over Bureaucratic Policymaking: Courts, Ideological Preferences, and the Internal Revenue Service*, 55 POL. RES. Q. 907, 918 (2002) (finding that Internal Revenue Service offices in regions with more liberal appellate judges

politicization commonly employ the median ideology score of the relevant federal circuit court of appeals that would hear the case if appealed.[207] Because the U.S. Courts of Appeals for the Second and Ninth Circuits hear the greatest number of immigration appeals,[208] many of these observations lean toward a more liberal direction.[209] The mean court of appeals score leaned in a liberal direction.

Asylum scholars have found that changes in the BIA's composition influences the propensity of the noncitizen to appeal,[210] and we might similarly expect that the mean liberalism of the BIA could affect how IJs decide cases as well. Indeed, the role of the BIA and its own susceptibility to politicization warrants a study in its own right; such a study is not, however, within the scope of the present project. To control for changes in the BIA's ideological composition, we calculated scores for the median ideology of the BIA based on the President whose Attorney General appointed each member of the BIA at a given time.[211] The mean BIA score leaned liberal.

e. Other Controls.

As in most statistical models, our model includes controls for time because migration trends have varied by year.[212] For example, there has been a strong upward trend in migration rates.[213] We included a time trend variable for the elapsed time dated backward from 2019 to control for confounding effects that may accrue over time in removal rates.[214]

Table 1 lists the variables and descriptive statistics.

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audited rich filers more frequently, whereas in regions with more conservative appellate judges they audited poorer individuals more frequently).

207. *See* Lee Epstein et al., *The Judicial Common Space*, 23 J.L., Econ., & Org. 303, 310–12 (2007); Micheal W. Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 Pol. Res. Q. 623, 631 (2001); *see also Lee Epstein: Research*, Wash. U. St. Louis, http://epstein.wustl.edu/research/JCS.html [https://perma.cc/5Z7K-RVJN] (last visited Dec. 28, 2019) (providing data for *The Judicial Common Space*).

208. GAO Asylum 2008, *supra* note 30, at 6.

209. The Second and Ninth Circuits have some of the highest (meaning more liberal) ideology scores in the Epstein and Giles databases. *See, e.g.*, Epstein et. al, *supra* note 207, at 312.

210. *See* Miller et al., *supra* note 84, at 130–31, 130 tbl.5.2 (finding that noncitizens were less likely to appeal as mean BIA liberalism increased).

211. *See* Lewis et al., *supra* note 203 (providing DW-NOMINATE score data).

212. *See, e.g.*, *supra* notes 164–65 and accompanying text (noting recent increase in number of noncitizens from Central America).

213. *Id.*

214. Because part of the purpose of our analysis is to analyze how decisions change at specific points in time, it would be superfluous to use year-fixed effects because our variable capturing presidential eras already controls for years.

TABLE 1: DESVCRIPTIVE STATISTICS OF SELECT VARIABLES

Variable	Median	Mean	Std. Dev.	Min.	Max.
Removal Decision	0	0.49	0.50	0	1
Trump Era	0	0.15	0.36	0	1
Obama Era	0	0.42	0.49	0	1
Bush II Era	0	0.43	0.50	0	1
Trump Appointees	0	0.03	0.16	0	1
Obama Appointees	0	0.18	0.38	0	1
Bush II Appointees	0	0.20	0.40	0	1
Clinton Appointees	0	0.45	0.50	0	1
Bush I Appointees	0	0.07	0.26	0	1
Reagan Appointees	0	0.08	0.27	0	1
Attorney	1	0.83	0.38	0	1
Detain	0	0.23	0.42	0	1
Not Free	0	0.25	0.43	0	1
Low GDP	1	0.59	0.49	0	1
Mexico/Central America	0	0.45	0.50	0	1
English	0	0.20	0.40	0	1
Asylum Case	1	0.58	0.49	0	1
Judge Gender	0	0.37	0.48	0	1
Govt. Experience	1	0.64	0.48	0	1
NGO Experience	0	0.15	0.36	0	1
Judge Tenure	9	10.32	7.14	0	36
Large Base City	1	0.57	0.49	0	1
Border Base City	0	0.08	0.28	0	1
Home Base City[215]	0	—	—	0	1
Policy Mood	1.40	0.82	1.54	-2.04	3.36
Unemployment Rate	5.40	5.97	2.14	2.80	16.40
Foreign-Born Increase	14.27	18.70	14.94	1.34	81.75
Senate Judiciary	0.03	0.08	0.16	-0.07	0.38
Court of Appeals	-0.22	-0.04	0.31	-0.34	0.53
BIA	-0.35	-0.18	0.38	-0.44	0.69
Time Trend	9	9.11	5.37	0	18

3. Limitations

As with any analysis, our statistical model cannot account for all factors. IJs are not required to document the factors underlying their decisions, and the EOIR

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215. Home base city includes separate dummy variables for each home IJ base city. Some smaller base cities in nearby geographic areas were collapsed into larger ones (for example, LaSalle was collapsed into Oakdale, and Los Angeles Detention was collapsed into Los Angeles, among others).

does not reliably document many of the other variables that might impact decisions.[216] For example, although longtime lawful U.S. residence likely improves the probability of being granted relief because of the significant ties to and possible family members within the country, the EOIR does not consistently or accurately track such data.[217] Although the EOIR tracks whether a respondent is represented by counsel, it does not provide indicia for the *quality* of representation, a factor that scholars have found significant.[218] Nor are we able to control for potential endogeneity because lawyers may self-select clients whose cases are more winnable.[219] In addition, there are simply too few immigration lawyers in some locations.[220]

One notable limitation in our study is our inability to accurately assess noncitizens' family situations.[221] Scholars have found that noncitizens with dependents were more likely to be granted asylum,[222] and we might expect this factor to be generalizable to all removal cases. We were able to identify and control for dependent status in cases designated as a lead case or rider case, but those designations only apply to families who are in removal proceedings together. They would not apply where, for example, the respondent has dependents who are U.S. citizens.

Nor were we able to adequately code for whether a noncitizen has a criminal history. The EOIR dataset provided a column for "criminal," but the entries for this column were incomplete and inconsistent with other data.

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216. GAO ASYLUM 2008, *supra* note 30, at 25–26 (noting that the EOIR was "not in a position [to] determine the extent to which such factors accounted for the pronounced differences that [it] found in the likelihood of applicants being granted asylum across immigration courts and judges"); GAO ASYLUM 2016, *supra* note 39, at 50–51 (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").

217. GAO ASYLUM 2008, *supra* note 30, at 28. The EOIR lacks quality data on the date of an alien's entry to the United States, making it difficult to assess this variable. *Id*. at 31 n.34, 57–58.

218. MILLER ET AL., *supra* note 84, at 198 (noting that the quality of representation may increase an applicant's odds of being granted asylum, but finding no evidence of such selection effects in asylum cases).

219. *See* D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2188–96 (2012) (analyzing the methodological challenges of studying the impact that representation has on case outcomes).

220. For instance, some locations, such as Lumpkin, Georgia, had no practicing immigration attorneys in the city between 2007 and 2012, despite the Lumpkin court hearing more than 42,000 removal cases during that time frame. *See* Eagly & Shafer, *supra* note 105, at 42. Similarly, Oakdale, Louisiana, had only four immigration attorneys in the city during that time period, even though the Oakdale court heard over 43,000 removal cases. *Id*. Meanwhile, other locations like New York City, Los Angeles, and Miami have thousands of immigration attorneys. *Id*. at 43 tbl.2.

221. *See* SIULC ET AL., *supra* note 39, at 79–80 (noting difficulties in accounting for juveniles in EOIR data).

222. *See* GAO ASYLUM 2008, *supra* note 30, at 31 (noting that noncitizens with dependents filing affirmative and defensive asylum cases were 50% and 80% more likely to be granted asylum, respectively); *id*. at 84 tbl.11 (showing grant rates for noncitizens with and without dependents); GAO ASYLUM 2016, *supra* note 39, at 31 (finding that noncitizens with dependents were 1.7 times more likely to be granted asylum).

For example, many entries were listed as not criminal even though the noncitizen was charged with a crime-based ground for removal. 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 trial attorneys—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 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 more difficult to prove.

Nor were we able to isolate shifts in decisionmaking based on a change in presidential administration rather than some other time trend. Changes in immigration-court outcomes may be caused by factors for which we were unable to control, such as shifts in migration patterns or changes in the decisionmaking of ICE prosecutors. Presidential administrations differed over time on which types of aliens to prioritize for prosecution; the Obama Administration prioritized individuals with criminal backgrounds, whereas the Trump Administration has been far broader in its priorities.[223] The inability to adequately control for these case-selection effects significantly limits this analysis. It may be that the types of cases filed in immigration court differ through time, which could alter case outcomes even if immigration judges were entirely independent from their political superiors in the administration.

In addition, variables such as whether a judge was exclusively assigned to hear juvenile cases or detention cases could impact the results.[224] There may be nonrandom differences with respect to the initial case assignment of which we are unaware that could cloud the analysis. We also did not include a variable concerning caseload because we already controlled for base city, the assumption being that IJs in similar base cities would have similar caseloads. Certain procedural aspects may be unique to particular immigration courts, such as the availability of videoconferencing, for which we were unable to control reliably.[225] All of these nonrandom factors could impact the analysis.

223. *See supra* note 34 (discussing changes in enforcement priorities between the Obama and Trump Administrations).

224. GAO ASYLUM 2016, *supra* note 39, at 30.

225. *See, e.g.*, Eagly, *supra* note 51, at 937–38, 937 nn.19–20, 966 fig.10 (noting the significance of videoconferencing on case outcomes in 2011 and 2012); Thorley & Mitts, *supra* note 104, at 91 (same). We could not reliably measure videoconferencing ability given the long timespan of our study. Videoconferencing was not readily in use during the earlier part of this study. *See* Eagly, *supra* note 51, at 1001.

For these reasons, we do not, nor could anyone, seek to establish a causal link between changes in political leadership and case outcomes. Rather, our more modest goal is to identify whether IJs issue more removal orders during some presidential administrations than during others, controlling for the theoretically important variables that could be coded reliably. Given selection effects and the inability to adequately code for certain variables that could be important to the removal decision, this study represents the best estimate to date of the influence of presidential politics on IJ decisionmaking. In addition, since we limited our study to only IJs who decided at least fifty cases, we would have excluded many decisions of recent Trump appointees. A full view of how Trump-appointed judges may differ from non-Trump appointed ones can only be reliably completed in a few years once there are more decisions by Trump appointees to analyze.

III. FINDINGS

Our analyses resulted in three primary findings. First, we found that recent presidential administrations exhibit similar trends in the types of IJs they appointed. All three recent administrations appointed a disproportionate number of IJs with prior experience working for the former INS, DHS, or DOJ. 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, we did not find that Trump appointees are statistically different in ordering removal as compared to Obama, Bush II, Clinton, Bush I, or Reagan appointees—at least with respect to the time frame of the study. Finally, our 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 22% less likely to order removal during the Obama Era than during the Trump Era and 22% less likely to order removal under Bush II than under Trump. These results suggest that the identity of the *current* President may be able to influence rates of removal in immigration courts.

A. RECENT PRESIDENTS APPOINT IJS WITH SIMILAR EMPLOYMENT BACKGROUNDS

We analyzed whether different Presidents appointed IJs with different kinds of employment backgrounds. We conducted our analysis using cross tabulations, which identify whether there is a bivariate relationship between two variables, and if so, whether the relationship is positive or negative. This analysis does not control for other variables.

Looking at these raw percentages, we found the employment backgrounds of IJs appointed during the last three presidencies to be similar, especially

concerning prior employment at the former INS, DHS, or other offices within the DOJ. Table 2 displays the results based on percentages reflecting appointments through October 2019. Surprisingly, Trump appointees had less experience working for these agencies than did Obama or Bush II appointees (69% versus 77% for Obama and 78% for Bush II).[226]

We next analyzed IJs' overall government experience, including not only employment by the former INS, DHS, or DOJ, but also including employment in other federal entities, state and local governments, or the military. Again, appointees of the three most recent Presidents were similar. Over 90% of appointees during each administration had prior government experience, whether at the federal, state, or local level, or military experience, at some point in their careers. Although the Obama Administration appointed more IJs with experience working in NGOs, the differences are not statistically significant. Approximately 14% of Obama appointees had at least one year of NGO experience at some point in their career compared to 8% for Bush II appointees and 9% for Trump appointees. By contrast, about 18% of Clinton appointees were former NGO staffers. The difference in appointment of NGO staffers between the two most recent Democratic Presidents and the two most recent Republican Presidents is statistically significant (16% overall for Clinton/Obama versus 9% for Bush II/Trump).

TABLE 2: CROSS TABULATIONS OF APPOINTING PRESIDENT AND SELECT JUDGE EMPLOYMENT CHARACTERISTICS (PERCENT)

	Trump Appointees	Obama Appointees	Bush II Appointees
Former INS/DHS/DOJ Background	69	77	78
Any Government Background	92	96	97
NGO Background	9	14	8

None are statistically significant at 95% confidence.

B. THE IDENTITY OF THE APPOINTING PRESIDENT DOES NOT AFFECT RATES OF REMOVAL

In this section, 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 statistical controls suggest that IJs appointed by President Trump were more likely to order removal than IJs appointed by either of the prior two presidential administrations. Trump-

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226. A dichotomous coding of experience may not be the best way to look at this variable. An IJ who served a military career as an Army Judge Advocate General may be different than someone who was drafted for two years into the Vietnam War with no officer or prosecutorial experience. Similarly, an IJ who worked for ICE at the beginning of his or her career for a few years may be different than an IJ who had a thirty-year career at ICE, which would have provided more time to acculturate to agency culture. Likewise, those who worked out of EOIR Headquarters in Arlington, Virginia, or who worked for a time at Headquarters may be different than IJs in other base cities. The present analysis does not account for this nuance.

appointed IJs ordered removal in 67% of their cases, as compared to 53% for Obama appointees and 50% for Bush II appointees—results that are statistically significant at 95% confidence.

These raw percentages provide only descriptive information, however; they do not control for other factors that might impact the decision to order removal. In order to more accurately evaluate whether Trump appointees were more likely to issue removal orders than IJs appointed by earlier Presidents, we used over a dozen control variables likely to impact the removal decision, including the noncitizen-specific, judge-specific, geographic-related, and institutional controls described in section II.C.2. Controlling for these other variables provides a more informed analysis of the appointing President's impact.

Table 3 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 the appointing President predicts an order of removal rather than non-removal. The key independent variable studied in this section is the appointing President's identity—Reagan, Bush I, Clinton, Bush II, and Obama.[227] The coefficients are presented in terms of logit odds, with positive numbers indicating that removal is more likely, and negative numbers indicating that removal is less likely.

Model 3a uses Trump appointees during the Trump Era as a reference category. Thus, the coefficients for the variables (here, the coefficients for each of the Presidents) shows whether the appointees of a given President were more (if the coefficient is positive) or less (if the coefficient is negative) likely to order removal than the reference category. For example, in the first row of Table 3, Model 3a shows that when controlling for other variables, Reagan appointees were less likely (because it is negative) to order removal during the Trump Era than were Trump appointees during the same time interval. However, the coefficient for the Reagan appointee variable is not marked by stars, which indicates that the results are not statistically significant. The same is true when comparing Trump appointees to the appointees of other Presidents. Model 3b uses Obama appointees during the Obama Era as the reference category, and Model 3c uses Bush II appointees during the Bush II Era as the reference category.

Importantly, none of the variables for appointing President is statistically significant across Models 3a–3c. That is, we cannot conclude with 95% confidence that IJs appointed by different Presidents had different removal rates. After controlling for over a dozen other variables, we did not find that removal rates differed according to the identity of the appointing administration. This finding is consistent with studies on the narrower subset of asylum proceedings that conclude that the identity of the appointing President did not affect propensity to order removal.[228]

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227. We eliminated the few thousand decisions made by Carter, Ford, and Nixon appointees.

228. *See supra* Section I.B.

TABLE 3: LOGIT COEFFICIENTS ON PROBABILITY OF REMOVAL BASED ON
APPOINTING PRESIDENT, BY PRESIDENTIAL ERA

	Model 3a	Model 3b	Model 3c
	Trump Era	Obama Era	Bush II Era
Reagan App.	-0.654 (0.554)	0.187 (0.537)	-0.124 (0.314)
Bush I App.	-0.614 (0.529)	0.052 (0.425)	-0.156 (0.259)
Clinton App.	-0.529 (0.349)	-0.070 (0.289)	-0.133 (0.153)
Bush II App.	-0.199 (0.224)	-0.096 (0.112)	—
Obama App.	-0.192 (0.111)	—	—
Attorney	-1.025[***] (0.051)	-1.147[***] (0.039)	-0.373[***] (0.035)
Detain	1.092[***] (0.070)	1.110[***] (0.064)	1.098[***] (0.065)
Noncitizen	Yes	Yes	Yes
IJ Demo.	Yes	Yes	Yes
Geographic	Yes	Yes	Yes
Institutions	Yes	Yes	Yes
Time Trend	Yes	Yes	Yes
Constant	2.300[***] (0.546)	0.473 (0.476)	-1.542[***] (0.463)
Number	126,510	344,010	356,612

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

It is worth noting that the regression analyses show other variables—namely attorney representation, detention status, origin from a not free country, Mexican or Central American nationality, English language capability, and asylum case type—as statistically significant predictors of removal in every regression. Other variables, such as whether the noncitizen came from a poor country and the local unemployment rate, are statistically significant during certain eras but not others. These findings are also consistent with other studies.[229] We discuss the significance of other variables in greater detail in section III.D below.

229. *See supra* Section II.B.

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 analyzes in separate regressions whether appointees of a given President render different decisions during different eras. If the President in control at the time a decision is rendered exercises power over IJs, then we might expect to see a statistically significant coefficient signifying that IJs appointed by the same President vary their rates of removal based on the presidential era.[230] Here, we used the Trump Era as the reference category. For example, if the variable "Obama Era" is negative and statistically significant, it means that the IJs appointed by a particular presidential administration were less likely to order removal during the Obama Era than during the Trump Era.[231] Similarly, if the coefficient for "Bush II Era" is negative and statistically significant, it means that judges appointed by whoever is identified in the column header during the Bush II Era were less likely to order removal as compared to during the Trump Era. Thus, looking at Model 4c in the third column of Table 4, the first row indicates that Bush II appointees were less likely to order removal during the Obama Era than during the reference category of the Trump Era. Similarly, the second row in Model 4c shows that Bush II appointees were also less likely to order removal during the Bush II Era than during the Trump Era.

Models 4a–4f detail the figures limited to judges from the last five presidential administrations, ending with the Trump Administration. We found that overall IJs were less likely to order removal during both the Obama and Bush II Eras than during the Trump Era, controlling for other variables. Model 4a provides the coefficients for Trump appointees. Because Trump appointees did not serve during the Bush II or Obama years, we do not have any Presidential Era coefficient to analyze there. Model 4b is limited to Obama appointees across only the Obama and Trump Administrations; it has no coefficient for the Bush II Era because no Obama appointees served during the Bush II Era.

Calculating predicted probabilities based on the figures displayed in Table 4, we found that Obama appointees were 13% less likely to order removal during the Obama Era as compared to the current Trump Era, holding other values constant.[232]

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230. We could do this with an interaction, but for simplicity, we set up different regressions, one for each of the last five appointing Presidents to see whether the era affects the propensity to order removal.

231. "Trump Era" was the reference category here. As in any statistical analysis, the reference category could be switched to "Obama Era" or "Bush II Era," but we thought "Trump Era" was theoretically the most interesting.

232. These numbers are called predicted probabilities. To calculate them, we first assumed that all variables are constant (at their same values). Then we compare 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 during the Bush II Era versus the Trump Era. Assuming all other variables are held constant, we can conclude that the change of switching from the Trump Era to the Obama Era indicated a 13% decrease in probability that the noncitizen would be removed. This result is statistically significant with 95% confidence, meaning that there is a 95% chance our value will fall within the given interval (the coefficients in Table 4 plus or minus two times the standard error), and there is a 5% chance that it could be that value simply by chance.

Model 4c exhibits a similar pattern for Bush II appointees; holding all other variables constant, the predicted probabilities for the data displayed in Model 4c show that Bush II appointees were 22% less likely to issue a removal order during the Obama Era than during the Trump Era and 22% less likely during the Bush II Era compared to the Trump Era.

Judges appointed by earlier administrations exhibited similar patterns, particularly with respect to differences between the Trump Era and the Obama Era. Predicted probabilities for the coefficients in Model 4d indicate that, holding other variables constant, Clinton-appointed judges were 15% less likely to order removal during the Obama Era than during the Trump Era and 5% less likely to order removal during the Bush II Era than during the Trump Era, though the later result is only significant at 90% confidence. Bush I appointees, identified in Model 4e, were 23% less likely to order removal during the Obama Era as compared to during the Trump Era and 13% less during the Bush II Era than during the Trump Era. As reflected in Model 4f, removal rates for Reagan appointees differed 15% between the Obama Era as compared to the Trump Era and 16% between the Bush II Era and the Trump Era, with the later result being significant at only 90% confidence.

TABLE 4: LOGIT COEFFICIENTS OF REMOVAL ORDER BASED ON PRESIDENT IN CONTROL AT TIME OF DECISION, BY APPOINTING PRESIDENT

	Model 4a Trump App.	Model 4b Obama App.	Model 4c Bush II App.	Model 4d Clinton App.	Model 4e Bush I App.	Model 4f Reagan App.
Obama Era	—	-0.695*** (0.087)	-1.156*** (0.099)	-0.726*** (0.093)	-1.218*** (0.132)	-0.764* (0.309)
Bush II Era	—	—	-1.178*** (0.185)	-0.259 (0.148)	-0.681** (0.259)	-0.795 (0.478)
Attorney	-1.212*** (0.106)	-1.126*** (0.055)	-0.981*** (0.073)	-0.582*** (0.048)	-0.432*** (0.131)	-0.664*** (0.134)
Detain	0.865*** (0.161)	0.934*** (0.081)	1.211*** (0.099)	1.128*** (0.080)	1.329*** (0.184)	0.971*** (0.191)
Noncitizen	Yes	Yes	Yes	Yes	Yes	Yes
IJ Demo.	Yes	Yes	Yes	Yes	Yes	Yes
Geographic	Yes	Yes	Yes	Yes	Yes	Yes
Institutions	Yes	Yes	Yes	Yes	Yes	Yes
Time Trend	Yes	Yes	Yes	Yes	Yes	Yes
Constant	2.082 (2.607)	1.790*** (0.521)	1.078* (0.548)	-1.199* (0.563)	-3.013 (1.866)	4.876** (1.680)
Number	23,026	144,771	161,477	374,430	59,081	64,346

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

Indeed, the rates of removal we observed during the Trump Era may understate the actual effect of the politics of the presidential administration. First, the effect of politicization observed during the Trump Era may be artificially deflated because of the impact of the Supreme Court's decision in *Pereira v. Sessions*, handed down in June 2018.[233] That case concerned the routine practice of DHS omitting the date, time, or place of removal hearings when issuing a noncitizen respondent with a Notice to Appear before the immigration court.[234] The Court concluded that the absence of such information failed to provide adequate notice of removal proceedings under the INA.[235] News reports indicate that as many as 9,000 removal cases were terminated in the ten weeks following the *Pereira* decision.[236] The BIA ruled in August 2018, however, that by providing subsequent notice that contained the requisite information, the government cured any prior defects in the original Notice to Appear.[237] Absent the *Pereira* decision, or had the DHS included the requisite information in its Notices to Appear, rates of removal during the Trump Era likely would have been higher, at least during the summer of 2018.

One should exercise caution in analyzing the results regarding earlier-appointed judges.[238] The judges appointed by Presidents Reagan, Bush I, and Clinton included in our dataset may not be representative. By definition, they are a truncated sample because some may have been IJs for over twenty years. IJs with such experience may differ from those who only have served for two or three 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, experience, expertise, or even the political era in which they spent the majority of their career.[239] As others have found in the asylum context, it may be that the routine nature of much of the decisionmaking over a period of many years could mediate the more immediate impact that the current President has on the IJ, a finding that our results partly support.[240]

As in Table 3, variables such as whether the noncitizen was represented by an attorney, was detained, hailed from a country not deemed free by Freedom House

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233. 138 S. Ct. 2105 (2018).

234. *Id.* at 2111.

235. *Id.* at 2110.

236. *See* Reade Levinson & Kristina Cooke, *U.S. Courts Abruptly Tossed 9,000 Deportation Cases. Here's Why*, REUTERS (Oct. 17, 2018, 7:06 AM), https://www.reuters.com/article/us-usa-immigration-terminations/u-s-courts-abruptly-tossed-9000-deportation-cases-heres-why-idUSKCN1MR1HK [https://perma.cc/E359-KWTQ].

237. *In re* Bermudez-Cota, 27 I. & N. Dec. 441, 447 (B.I.A. 2018).

238. We eliminated appointees by Presidents prior to President Reagan in this analysis.

239. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1311–12, 1348 (2018) (finding in a survey that older and younger judges had different opinions about *Chevron* deference, due in part to changes in training in statutory interpretation in law schools).

240. *See also* Chen & Eagel, *supra* note 89, at 1. In addition, a majority of the decisions made by Bush I and Reagan appointees in our dataset were made during the Bush II Era, resulting in a smaller sample of Bush I and Reagan appointees during the Obama and Trump Eras.

rankings, came from Mexico or Central America, spoke English, or sought asy-
lum are significant in all models. Certain base cities had higher removal rates. We
turn to discussing the significance of the other variables in section III.D.

D. PREDICTIVE VALUE OF OTHER VARIABLES

As shown in Tables 3 and 4, some of the most substantively meaningful varia-
bles for predicting removal involve features relating to the noncitizen. Across all
the regression models in Tables 3 and 4, noncitizens who had an attorney, hailed
from not free countries, or spoke English were significantly less likely to be
removed, while those who were marked as detained, hailed from Mexico or
Central America, or had filed asylum applications consistently had higher rates of
removal than noncitizens without those characteristics.[241]

Table 3 shows the results broken down by era. As a representative example to
indicate the magnitude of the effect for some of the most substantively meaning-
ful variables, we highlight data from decisions made by all appointees during the
Trump Era from 2017 to 2019 (Model 3a). Noncitizens represented by an attor-
ney were 17% less likely to be removed than those without representation,
whereas detained noncitizens in removal proceedings were 19% more likely to be
removed, holding other values constant.[242] English-speaking respondents were
9% less likely to be removed, whereas IJs were 21% less likely to order removed
those who come from "not free" countries as measured by Freedom House com-
pared to those hailing from countries labeled as "free" or "partially free." Across
all appointees, holding all variables constant, those from Mexico or Central
America were 15% more likely to be ordered removed. Moreover, appointees of
all Presidents were 15% more likely to order removal for asylum cases than for
non-asylum cases.

IJ-related variables are also statistically significant in Table 3. Although an IJ's
prior employment and tenure were not significant, female IJs were less likely to
order removal during all eras. The political and economic environment also
affected decisionmaking across the studied eras. During both the Trump and
Bush II Eras, noncitizens from poor countries were less likely to be removed. In
the Bush II Era, removal rates increased when unemployment increased while the
opposite was true in the Trump Era. In the Trump Era, removal was more likely
in border areas than at non-border areas.

241. In addition to the key independent variable of presidential era, some of the other variables
—"attorney," "detain," "not free," "Mexico/Central America," "English," and "asylum case"—are always
significant no matter the specification. Results vary on some of the other independent variables using a
multilevel model versus using clustered standard errors. Because the Article focuses on the impact of
presidential appointment and era, we discuss these other predictive values only to show statistical
significance based on the logit analysis presented. Our analysis is not intended to provide a full picture of the
statistical significance of these other variables.

242. These variables are statistically significant across all regressions; the exact number for the
predicted probability differs in each regression, although the numbers are in the same ballpark. The
impact of representation is somewhat lessened because so many noncitizens in individual hearings have
attorneys. The impact of representation might be greater if the analysis extended to analysis of cases on
the master calendar.

Institutional variables are also statistically significant. During the Obama Era, the increased conservatism of the Senate Judiciary Committee resulted in fewer removals, whereas the opposite was true during the Bush II Era.[243] During the Obama and Bush II Eras, removals increased when facing conservative courts of appeal. Moreover, the heightened conservatism of the BIA during all three eras was associated with a lower removal rate. In addition, cases decided in the earlier years of the Trump Administration resulted in fewer removal orders than did cases decided in later years. For the Obama and Bush II Eras, this trend was in the opposite direction, with removal rates decreasing over the course of their presidencies.

Table 4 examines the data broken down by which President appointed the IJ. Female IJs appointed by Presidents Trump, Obama, Bush II, and Reagan were less likely to order removal, whereas female IJs appointed by Bush I were more likely. In addition, across appointees in Table 4, some politically charged variables reach statistical significance, suggesting that removal decisions are not divorced entirely from politics or political calculations.[244] Obama appointees ordered removal less if appointed in liberal home cities, while Clinton appointees had lower removal rates when there was an increase in the foreign-born population in the IJ's home base city. Trump appointees ordered removal less frequently in cases involving individuals arriving from poor countries, suggesting that the status of the noncitizen as a potential economic migrant affects at least some IJ decisionmaking. In particular, although removal rates were higher for those hailing from Mexico or Central America for all appointees, noncitizens from those regions fared particularly poorly in front of Trump appointees; holding other values constant, a noncitizen from Mexico or Central America had a 18% greater chance of being removed before a Trump appointee than they would if they were from Africa, Europe, South America, or another region of the world. Overall, IJs appointed by Bush II and Bush I were less likely to order removal in one of the ten largest base cities than in ones that were smaller. Both Clinton and Bush I appointees were more likely to order removal in areas with higher unemployment, while Trump appointees were less likely. Reagan appointees ordered removal less with increased tenure, while Bush I appointees with government experience were more likely to order removal, while those with NGO experience were less likely.

For other appointees, institutional considerations affected decisionmaking. The Senate Judiciary Committee variable is negatively statistically significant for Obama and Bush I appointees, suggesting that removal rates declined when the Senate grew more conservative. Bush II and Reagan appointees ordered removal more frequently when they faced reversal from a conservative circuit court. Clinton appointees ordered removal more when facing a conservative BIA. The

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243. During the Trump Era, Senate scores dropped out due to multicollinearity since the Senate has not changed partisan control.

244. *See* MILLER ET AL., *supra* note 84, at 72.

time trend variable is positively statistically significant for Bush II and Clinton appointees.

* * *

In sum, we have three major findings. First, it appears that all presidential administrations, not just the current one, disproportionately appointed IJs with backgrounds in immigration enforcement. The desire to hire individuals with immigration expertise is entirely understandable, and those with enforcement backgrounds may be easier to identify and recruit than those with experience in immigration defense. Nonetheless, this pattern at least theoretically may result in a bench more inclined to deport noncitizens than to allow them to remain.

Second, overall, IJs' decisions do not discernably differ based on which President appointed them. For example, Obama appointees as a whole were no more or less likely to order removal than were Trump appointees, holding other variables constant. This finding suggests that, for the most part, at least through the date of this study, once appointed, IJs do not feel beholden to the political preferences of the President or Attorney General who appointed them, a salutary finding in support of adjudicative independence.

Third, and most discomfiting, IJs may be susceptible to influence by political actors in control of the presidential administration at the time a decision is rendered. In other words, IJs as a whole—regardless of who appointed them—were more likely to order removal during the Trump Administration than they were during the Obama or Bush II Administrations, respectively, controlling for other variables. It may be that the Trump Administration's political leadership has altered case outcomes through arguably legitimate means, such as formal exercises of interpretive authority. Or, it may have done so through less legitimate means, such as threatening the job security of IJs who are viewed as too sympathetic to immigrants. The precise mechanisms for these changes in decisionmaking remain unknown. Limitations to the data preclude any definitive statement of causality. Changes in case outcomes through time could be attributable, at least in part, to changes in migration patterns or changes in the types of cases that ICE prosecutors file. Nonetheless, after controlling for over a dozen other variables that might influence case outcomes, the data indicate that IJs decided cases differently during different presidential eras. The next Part explores the normative implications of these findings.

IV. POLICY IMPLICATIONS

This Part explores the normative implications of our findings and sets forth a proposal to limit, but not eliminate, political control over immigration adjudications. Assuming that immigration courts remain housed within the DOJ, our approach encompasses three primary reforms. First, it would strictly protect the independence of trial-level IJs. Second, it would formalize 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, would constitute the *only*

means by which political leadership could play any role in an individual removal decision. Third and finally, it would require Congress to repeal restrictions to judicial review over removal decisions to ensure that political actors remain within the bounds of their statutory authority, particularly when they reverse the decisions of lower-level civil servants. In our view, political interference is permissible, but only to the extent that it is transparent and subject to review by both the public and the federal courts.

The findings in the previous Part suggest 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. These findings underscore 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.[245] On the one hand, champions of presidential control argue that vesting all power in the political leadership enhances electoral accountability and uniformity.[246] At its extreme, this perspective characterizes bureaucratic resistance to such power as an anti-democratic "deep state."[247] 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.[248] Moreover, when an individual's family relationships, livelihood, or even life may be at stake, due process norms impose a heavy weight in favor of independence.

One possibility for recalibrating the balance between the competing goals of adjudicative independence and democratic accountability is to transfer all

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245. *See* Margaret H. Taylor, Refugee Roulette *in an Administrative Law Context: The* Déjà vu *of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 481 (2007) (discussing the "tension between the oversight that promotes consistency and accuracy and the decisional independence of agency adjudicators").

246. *Cf*. Kagan, *supra* note 8, at 2331–32 (explaining that "[p]residential administration promotes accountability" by "enhanc[ing] transparency" and by "establish[ing] an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former").

247. *See* Amanda Taub & Max Fisher, *As Leaks Multiply, Fears of a 'Deep State' in America*, N.Y. TIMES (Feb. 16, 2017), https://www.nytimes.com/2017/02/16/world/americas/deep-state-leaks-trump. html (characterizing the "deep state" as the development of "an entrenched culture of conflict between the President and his own bureaucracy").

248. *See* Eugene Robinson, *God Bless the 'Deep State*,' WASH. POST (July 18, 2018, 3:34 PM), https://www.washingtonpost.com/opinions/god-bless-the-deep-state/2018/07/19/de36bd00-8b8a-11e8-85ae-511bc1146b0b_story.html (describing the "deep state" as having "spent years—often decades—mastering the details of foreign and domestic policy" and maintaining that "[w]ith a supine Congress unwilling to play the role it is assigned by the Constitution, the deep state stands 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 the central role of agencies to preserve the 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" (footnote omitted)).

removal proceedings into a new Article I court, as many scholars and advocates have proposed.[249] The political feasibility, as well as the constitutional, budgetary, and logistical implications of such system-wide reform are beyond the scope of this Article. We set forth here a more modest approach for balancing respondents' weighty due process interests and rule of law norms, on the one hand, against the desire for electoral accountability and uniformity, on the other. This approach can be generalized to agency adjudications across the administrative state.

Our proposed structure—mandating truly objective and apolitical decision-making at the trial level, but allowing political considerations to intervene at the appellate level—not only increases transparency and accountability, but also has the salutary effect of promoting separation of 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.[250] 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.[251] 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

249. *See, e.g.*, AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 15 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [https://perma.cc/7GVT-BY72] (endorsing creation of Article I court to handle removal adjudication); AM. IMMIGRATION LAWYERS ASS'N, STATEMENT OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION: SUBMITTED TO THE SENATE JUDICIARY SUBCOMMITTEE ON BORDER SECURITY AND IMMIGRATION HEARING ON "STRENGTHENING AND REFORMING AMERICA'S IMMIGRATION COURT SYSTEM" 1–2 (2018), https://www.aila.org/advo-media/aila-correspondence/2018/aila-statement-on-strengthening-and-reforming [https://perma.cc/7EMZ-NW85] (same); Jill Family, *Injecting Independence and Proportionality into Immigration Adjudication, in* AM. CONSTITUTION SOC'Y, RETHINKING ADMIN LAW: FROM APA TO Z 45, 49 (2019), https://www.acslaw.org/wp-content/uploads/2019/06/Rethinking-Admin-Law-From-APA-to-Z.pdf [https://perma.cc/9TM9-PVWH] (same); NAT'L ASS'N OF IMMIGRATION JUDGES, AN ARTICLE I IMMIGRATION COURT—WHY NOW IS THE TIME TO ACT: A SUMMARY OF SALIENT FACTS AND ARGUMENTS (2016), https://www.naij-usa.org/images/uploads/publications/Article_I_-_summary-of-salient-facts-and-argumentsOct-2016-FINAL_1.pdf [https://perma.cc/V3VZ-YF2U] (describing an Article I immigration court as "the only enduring solution" to problems with the current court system); *Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N, http://www.fedbar.org/Advocacy/Issues-Agendas/Article-1-Immigration-Court.aspx [https://perma.cc/3C98-4U99] (last visited Dec. 28, 2019) (proposing model legislation to create an Article I immigration court).

250. *See, e.g.*, Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 1 (1994) ("The hallmark of modern U.S. government is presidential leadership.").

251. *See, e.g.*, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006) ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions."); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009) (describing internal separation of powers mechanisms and their effectiveness within the Executive Branch).

staff the agencies.[252] As Jerry Mashaw and David Berke argue, there is "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."[253]

Under our model, the decisions of civil servants would not eliminate the political leadership's ultimate power over removal decisions, but would discipline and expose it, requiring a reasoned explanation for rejecting the decision of the initial adjudicator. Political actors would retain the ability to shape general policy, achieve uniformity, and even dictate particular case outcomes, but could do so only through transparent mechanisms that are subject to judicial review. Political goals could not be achieved, for example, by threatening the job security of adjudicators or other forms of pressure that might occur outside of the public eye. This approach would allow the Attorney General to promote policies that may be odious to many, but the rulemaking process would provide the public an opportunity to participate, and formal review authority would ensure transparency and deliberation. In any case, we propose that such political control should only be granted on the condition that such review itself be subject to judicial checks.

The civil service would impose a check, but not a veto, on the decisions of political actors. As explained by Gillian Metzger, civil servants would be empowered to 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.[254]

A. STRICTLY INSULATE IJS FROM POLITICAL CONTROLS

Congress should act to provide IJs with complete insulation from political interference in their initial decisionmaking.[255] This norm of adjudicative

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252. *See generally* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (exploring the President's power within the administrative state and suggesting steps to improve White House involvement in agency decisionmaking); Ingber, *supra* note 24 (describing how agency bureaucracies play an important role in checking presidential power); Katyal, *supra* note 251 (proposing mechanisms to create checks and balances within the Executive Branch); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011) (showing how administrative law distributes power among actors within agencies); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (providing an account of the development of lawmaking processes within administrative agencies); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015) (reframing administrative law through the lens of separation of powers among agency leaders, civil servants, and civil society).

253. Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 551–52 (2018).

254. *See* Metzger, *supra* note 251, at 425–26.

255. *Cf.* Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1480 (2009) (maintaining that a significant issue regarding administrative law judges is not whether they are sufficiently independent, but rather whether they are sufficiently deliberative).

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 judges.[256]

Scholars also have long recognized the central importance of adjudicative independence in the agency context. In 1962, Judge Henry Friendly noted, "Everyone, including the 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 . . . .'"[257] 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.[258]

Indeed, Redish and Marshall explicitly cautioned against the dangers highlighted in the preceding Part, 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."[259]

More recently, even as many began embracing presidential control over agencies, administrative law scholars have continued to acknowledge the need for political independence among agency adjudicators.[260] 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."[261] Even Elena Kagan, who as an academic 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."[262]

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256. *See* U.S. CONST. art. III, § 1 (guaranteeing that federal judges "shall hold their Offices during good Behaviour, and shall . . . receive . . . Compensation, which shall not be diminished during their Continuance in Office").

257. Friendly, *supra* note 8, at 1300 (footnote omitted).

258. Redish & Marshall, *supra* note 9, at 477.

259. *Id.* at 499.

260. *See, e.g.*, Stack, *supra* note 248, at 2015 ("At a most basic level, the rule-of-law value of procedural fairness requires an impartial decider in adjudications.").

261. Barnett, *supra* note 9, at 526; *see also* INS v. Chadha, 462 U.S. 919, 966 (1983) (Powell, J., concurring in judgment) (arguing that political actors should not be involved in adjudications because when they "decide[] rights of specific persons, those rights are subject to 'the tyranny of a shifting majority'").

262. Kagan, *supra* note 8, at 2363. It is worth noting that scholarly opposition to the politicization of agency adjudications is not uniform. *See generally* James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191 (2006) (arguing that although agency adjudicators should be "impartial," they need not be politically "independent").

Although the APA does not govern removal proceedings,[263] it is worth noting the importance the framers of that statute—a grand structural reform designed to transform virtually all federal agencies—attached to adjudicative independence. Even though the APA allows an agency's political leadership to conduct hearings,[264] it contemplates that most hearings will be adjudicated in the first instance by a trial-level hearing examiner, now known as an administrative law judge (ALJ).[265] In such cases, the APA protects these officials from control by those with prosecutorial or investigative responsibilities.[266] It prohibits these adjudicators from considering ex parte evidence,[267] and it requires decisions to be based exclusively on the record of the proceedings.[268] Congress further protects the independence of ALJs by exempting them from performance reviews[269] and providing that they can be removed only "for good cause" as "determined by the Merit Systems Protection Board."[270] Moreover, until President Trump issued Executive Order 13,843 in response to the Supreme Court's decision in *Lucia v. SEC*,[271] the Executive Branch itself ensured that ALJs were appointed on an apolitical basis, delegating to the Office of Personnel Management (OPM) authority to maintain a registry of rank-ordered qualified applicants and limiting the agency to hiring from among the top three candidates on the registry.[272]

As explained above, IJs do not enjoy the protections afforded to ALJs.[273] The INA explicitly delegates to the Attorney General the authority to appoint IJs[274] and provides no tenure protections beyond those afforded under ordinary civil service laws.[275] Yet the weighty due process interests at stake in removal proceedings counsel for at least as much independence as that which is guaranteed

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263. *See* Marcello v. Bonds, 349 U.S. 302, 306–10 (1955) (concluding that Congress intended to reverse an earlier Supreme Court decision and exempt deportation proceedings from APA requirements).

264. 5 U.S.C. § 556(b) (2012).

265. *Id.*; *see* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 69 (1996) (describing the name change from "hearing examiners" to "administrative law judges").

266. *See* 5 U.S.C. § 554(d).

267. *Id.*

268. *Id.* § 556(e).

269. *Id.* § 4301(2)(D); *see also* Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589, 603–07 (1993) (proposing a method to evaluate ALJs' performances).

270. 5 U.S.C. § 7521(a).

271. 138 S. Ct. 2044, 2049 (2018) (holding that SEC ALJs are "Officers of the United States" subject to the Appointments Clause).

272. *See* 5 C.F.R. § 930.201(e) (2019); *see also* ADMIN. CONFERENCE OF THE U.S., *supra* note 74, at 5.

273. *See supra* notes 74–81 and accompanying text.

274. 8 U.S.C. § 1101(b)(4) (2012).

275. *See* BARNETT ET AL., *supra* note 6, at 60–61; DOJ INVESTIGATION INTO POLITICIZED HIRING, *supra* note 13, at 137 (recognizing that IJs "are career positions protected by the civil service laws").

under the APA.[276] Ordering a noncitizen removed may determine whether a long-time resident of the United States—perhaps one with legal status who has a U.S. citizen spouse and children and other significant ties to the country—will be forced to leave his or her life here. Some of these proceedings may result in persecution or even death if an asylum claimant is returned to his or her home country. Indeed, the Supreme Court has noted it has "long recognized that deportation is a particularly severe 'penalty.'"[277]

To enhance adjudicative independence in the immigration context, Congress should strengthen current civil service rules to ensure that IJs are hired solely on the basis of merit rather than for their political affiliation or patronage. One improvement in this regard would be to legislate meritocratic qualifications for service, such as a minimum of seven years as an attorney and two years of immigration-related practice experience. Further, Congress should enact legislation to achieve a more balanced pool of IJs in terms of immigration experience, encouraging the EOIR to hire IJs who have worked for non-profits or in private practice rather than limiting IJs to individuals with backgrounds in law enforcement generally and immigration enforcement in particular. This recommendation is consistent with a study commissioned by the EOIR itself, which counseled in favor of expanding hiring pools and conducting outreach given the large proportion of IJs who had formerly worked at the former INS, DHS, or DOJ branches.[278]

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.[279] 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.[280]

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276. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (extending procedural due process protections to alien already ordered deported); Landon v. Plasencia, 459 U.S. 21, 32 (1982) (recognizing noncitizens within the United States are entitled to due process protections prior to removal).

277. Padilla v. Kentucky, 559 U.S. 356, 365 (2010); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 740–41 (1893) (Brewer, J., dissenting) (stating that "[e]very 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," and 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").

278. BOOZ ALLEN HAMILTON, EXEC. OFFICE OF IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, LEGAL CASE STUDY: *SUMMARY REPORT* 20–21 (2017).

279. *Cf.* Memorandum from Solicitor Gen., U.S. Dep't of Justice, to Agency Gen. Counsels, U.S. Dep't of Justice, *Re: Guidance on Administrative Law Judges After* Lucia v. SEC *(S. Ct.)* 9 (n.d.), [https://perma.cc/VC52-E8E8] (proposing broad definition of "good cause" warranting the removal of ALJs).

280. *See* Lubbers, *supra* note 269, at 600–01, 627; *see also* ADMIN. CONFERENCE OF THE U.S., *supra* note 74, at 9 (recommending that Chief ALJs receive and investigate complaints of prejudice against ALJs).

B. FORMALIZE AUTHORITY TO ENGAGE IN REVIEW OR RULEMAKING TO LIMIT IJ DECISIONMAKING DISCRETION

At the same time, we believe that the President, as head of the Executive Branch and who is delegated with responsibility to take care that the laws be faithfully executed, should be permitted to exercise some control over the decisions of IJs. Specifically, we believe that the Attorney General, as a proxy for the President and the head of the agency that houses IJs, should be permitted to promulgate regulations through notice-and-comment rulemaking and exercise formal adjudicatory review over IJ decisions after they have been reviewed by the BIA. The theory of 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.[281] Affording the Attorney General the power to promulgate regulations and exercise adjudicatory review over removal decisions provides ample space to allow the President to achieve his political goals and thereby remain responsive to the electorate.[282]

The INA already grants the Attorney General authority to engage in rulemaking to limit the discretion of IJs.[283] Such authority is consistent with the Supreme Court's decision in *Heckler v. Campbell*, which sustained the SSA's promulgation of a rule to narrow the set of facts subject to individual adjudication.[284] Congress, moreover, should legislatively provide the DOJ with authority to review the decisions of trial-level adjudicators after the BIA has reviewed them. Currently, such review authority is solely a creature of regulations.[285] In doing so, however, Congress should ensure that such adjudicatory review promotes norms of fairness, deliberation, and transparency, allowing the exercise of such review only after adequate notice to the respondent and the public through publication in the Federal Register, an opportunity by the respondent and the public to submit comments or briefs, a written reasoned decision, and a right to appeal to the federal courts.

This review authority could enhance uniformity and deliberation in decisionmaking and reduce perceived and perhaps actual arbitrariness of case outcomes.[286] The record would contain the unbiased, independent assessment of an apolitical examiner (an IJ), the BIA, and the possibly politically

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281. *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–4 (2008).

282. *See* Kim, *supra* note 4, at 42 ("[T]he independence of adjudicators need not displace political oversight.").

283. *See* 8 U.S.C. § 1103(g)(2) (2012) (delegating to the Attorney General authority to engage in rulemaking necessary to the implementation of the INA).

284. 461 U.S. 458, 467 (1983).

285. *See* 8 C.F.R. § 1003.1(h) (2019); *see generally* Gonzales & Glen, *supra* note 80 (championing Attorney General's exercise of refer-and-review authority to reverse removal decisions issued by civil service adjudicators).

286. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 493–94 (1951) (emphasizing the importance of considering the initial hearing examiner's opinion in determining the validity of a decision by agency's political leadership); *see generally* Mark Seidenfeld, *The Role of Politics in a*

motivated decision of the agency's leadership (the Attorney General). Such a complete record would ensure that the agency benefited from three levels of review before reaching its final decision. These types of actions are transparent and allow the public to attribute credit or blame to the agency's political leadership as appropriate.[287]

Although the current regulations do not require these elements, the Attorney General traditionally has honored many of them. For example, in *In re A-B-*, in which the Attorney General limited asylum eligibility for victims of violence not directly sponsored by a state government, including victims of domestic and gang violence, advance notice was provided (though not in the Federal Register), the public was invited to submit amicus briefs, and a written decision was issued.[288] Although we conclude that the substance of the decision ultimately violates the statutory text of the INA and is contrary to Congress's intent in defining who qualifies as a "refugee" for purposes of obtaining asylum,[289] it is worth noting the Administration's adherence to at least some procedural safeguards.

In *In re E-F-H-L-*, by contrast, in which the Attorney General exercised the refer-and-review authority to vacate a BIA decision holding that applicants for asylum are, as a matter of right, entitled to an evidentiary hearing, the Attorney General provided no advance notice to either the noncitizen respondent or the public, much less any opportunity for briefing.[290] The absence of such procedural protections invites arbitrary and poorly reasoned decisionmaking.

The promulgation of notice-and-comment rulemaking and formal exercises of adjudicatory review as described above should constitute the *only* measure

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Deliberative Model of the Administrative State, 81 GEO. WASH. L. REV. 1397 (2013) (proposing mechanisms for incorporating political oversight on agency deliberations).

287. 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. 347 U.S. 260, 266–67 (1954). In that case, an IJ had denied the noncitizen's application for relief from removal. *Id*. at 263. While his appeal was 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. *Id*. at 262. On appeal, the Supreme Court concluded that the Attorney General improperly violated his own regulations that required the Board to exercise its independent judgment in such cases. *Id*. at 266–67. 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. *Id*. at 268. But the decision can be understood as promoting transparency by allowing the public to identify which decisionmaker—a civil service adjudicator or a member of the politically appointed agency leadership—was responsible for the outcome. *See id*. It also promotes deliberation, allowing the Attorney General to reach a conclusion only after considering the judgment of independent adjudicators. *See id*.

288. *See* 27 I. & N. Dec. 316, 320, 323 (Att'y Gen. 2018).

289. *See* Grace v. Whitaker, 344 F. Supp. 3d 96, 126 (D.D.C. 2018) (recognizing as contrary to Congress's intent the general rule in *In re A-B-*, which "effectively bars . . . claims based on certain categories of persecutors . . . or claims related to certain kinds of violence").

290. *See* 27 I. & N. Dec. 226, 226 (Att'y Gen. 2018).

through which the agency's political leadership can influence case outcomes.[291] Subtler attempts to influence IJs during their initial consideration of a case, however, deny such accountability, preventing the public from knowing to whom to assign blame for a given decision. Reported actions by former Attorney General Jeff Sessions to transfer dozens of cases away from an IJ after he granted a continuance to a juvenile respondent ordered removed in absentia violates these limitations.[292]

Additionally, the Attorney General's exercise of policymaking authority must be limited where the noncitizen's due process concerns are at stake, such as when a policy change would compromise the noncitizen's ability to meaningfully present his or her case or obtain counsel.[293] Moreover, neither the President nor the Attorney General may perform an end-run around removal proceedings altogether[294] by, for example, resolving cases through expedited removal proceedings, when such cases should proceed in immigration courts.[295]

C. ELIMINATE RESTRICTIONS ON JUDICIAL REVIEW

Finally, Congress should grant the agency rulemaking and review authority only on the condition that such exercises of power be subject to plenary judicial review. Congress must restore judicial review over the political decisions of agency leadership to ensure they remain within the bounds of congressionally delegated authority and due process requirements.[296] Currently, the INA purports to deny Article III judicial review to a large swath of removal decisions, including those involving criminal aliens or an exercise of administrative discretion.[297] Absent such judicial review, however, the Attorney General would appear free to

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291. *See generally* Kim, *supra* note 4 (describing the Trump Administration's efforts to interfere in immigration-court adjudication).

292. *See* Kopan, *supra* note 4.

293. *Cf.* Memorandum from James R. McHenry, *supra* note 15 (imposing time quotas for adjudication of removal cases); Memorandum from Att'y Gen., U.S. Dep't of Justice, to the Exec. Office for Immigration Review, U.S. Dep't of Justice (Dec. 5, 2017), https://www.justice.gov/eoir/file/1041196/download [https://perma.cc/7YUQ-B4YN] (emphasizing the importance of timeliness for IJs making immigration decisions).

294. *See, e.g.*, Colby Itkowitz, *Trump: Congress Needs to 'Get Rid of the Whole Asylum System,'* WASH. POST (Apr. 5, 2019, 4:54 PM), https://www.washingtonpost.com/politics/trump-congress-needs-to-get-rid-of-the-whole-asylum-system/2019/04/05/700eac1a-57a5-11e9-8ef3-fbd41a2ce4d5_story.html (quoting President Trump proposing to get rid of immigration judges).

295. Under the INA, certain classes of noncitizens are not entitled to formal removal proceedings. *See supra* note 5 and accompanying text. The Executive Branch may expand the class of noncitizens who may be subject to expedited removal by formal designation to those who have been in the United States for up to two years. 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012). The DHS has made such designations. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409 (July 23, 2019).

296. *See* Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1995–98 (2000) (emphasizing the importance of judicial review over removal decisions to preserve rule of law norms).

297. *See* 8 U.S.C. § 1252(a)(2) (2012) (listing matters not subject to judicial review); *cf.* INS v. St. Cyr, 533 U.S. 289, 314 (2001) (construing the INA to preserve judicial review for habeas petitions raising statutory or constitutional challenges).

render removal decisions regardless of whether they are warranted by the evidence or solely because they involve a politically unpopular group. 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.

CONCLUSION

This Article presented the first comprehensive empirical study of the extent to which immigration removal proceedings are politicized. We constructed an original dataset of approximately 830,000 individual merits removal decisions issued by immigration courts between January 2001 and June 2019. Our analysis found, first, that presidential administrations across the board—not just the Trump Administration—were far more likely to appoint IJs with backgrounds working for agencies responsible for immigration enforcement, including the former INS, DHS, or DOJ, than individuals without those backgrounds. Second, using logistic regression to control for over a dozen variables that might impact a decision to order removal, we did not find that the IJs appointed by different Presidents differed in their proclivity to order removal. Finally, using logistic regression to control for the same variables, we found that the identity of the administration in control at the time a decision was rendered is a statistically 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 generally more likely to order removal during the Trump Administration than during previous presidential eras. These results suggest that the sitting President is able to influence removal decisions, calling into question the assumption of independence among administrative adjudicators.

Although scholars debate the extent to which administrative officials should be subject to political control, we conclude that, at least in the context of adjudications in immigration court, such political control undermines noncitizens' due process interests. Regardless of whether one agrees with our normative conclusion, we hope that our empirical findings will inform future debates regarding the appropriate balance between political control and adjudicative independence, both within immigration courts specifically and across the administrative state more generally.

APPENDIX

The data for this Article are available to the public on the EOIR's website.[298] The EOIR maintains an electronic case-management system of its data.[299] The EOIR also publishes various "Lookup Files" that describe the codes used in its electronic files. Each EOIR case has a case number (labeled "idncase") with potentially multiple proceeding numbers ("idnproceeding") and multiple hearings ("idnschedule"). We used data through June 2019, constituting approximately 8.6 million immigration proceedings with a substantive or procedural decision.[300]

Using Stata, we merged the various CSV files to create the current dataset. We merged "A_TblCase" (Case Table) with "B_TblProceeding" (Proceeding Table) to construct the core dataset, which contains basic information concerning how the case was decided ("dec_code" or, for administrative closures, "other_comp"), the type of case ("case_type" from the Case Table), 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 nationality ("nat"), language ("lang"), and custody status ("custody"). We then merged in additional CSV files, including: (1) the "[T]bl_RepsAssigned" file (Attorney Table) to assess whether the noncitizen was represented by counsel, (2) the "[T]bl_[S]chedule" file (Schedule Table) to determine hearing-level information, (3) the "[T]bl_[L]ead/[R]ider" file (Lead/Rider Table) to discern case IDs for the cases that were leads and riders, (4) the "A_TblCaseIdentifier" file (Case Identifier Table) to identify whether removal was stipulated; and (5) the "[T]bl_Court_Appln" file (Applications Table) to identify whether the noncitizen filed an asylum application.[301]

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298. *See Frequently Requested Agency Records*, *supra* note 120. TRAC researchers at Syracuse University in 2008 successfully filed a lawsuit under the Freedom of Information Act (FOIA) to force the EOIR to release the data, and the EOIR published these data on its website pursuant to reporting standards under the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016). *See id.*

299. Prior to 2007, this system was called the "Automated Nationwide System for Immigration Review" (ANSIR) and after, the system was updated to the "Case Access System" (CASE). *See* OFFICE OF THE CHIEF IMMIGRATION JUDGE, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS 2 n.2 (n.d.), https://trac.syr.edu/immigration/reports/210/include/08-EOIR_asylum_disparity_report.pdf [https://perma.cc/94WC-KES6]; *see* SIULC ET AL., *supra* note 39, at 74–75 (describing the shift from ANSIR to CASE). This change in reporting impacted our dataset because some information was not consistently coded throughout the period. In addition, TRAC has noted significant discrepancies in the data EOIR releases to the public. *See Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy*, TRAC: IMMIGRATION (Oct. 31, 2019), https://trac.syr.edu/immigration/reports/580/ [https://perma.cc/CGL5-GCPX]. The EOIR has responded that it has no duty under FOIA to "certify" the accuracy of its records. *Id.* By necessity, our analysis is limited to the extent any information provided by the EOIR is incomplete or inaccurate. We relied on the files released from July 2019 through December 2019 to complete this analysis.

300. The EOIR updates the data approximately every one or two months. For a collection of EOIR internal memoranda, see Ingrid V. Eagly et al., *Detaining Families: Asylum Adjudication in Family Detention -- Online Appendix: EOIR Documents*, UCLA SCH. LAW, http://libguides.law.ucla.edu/detainingfamilies [https://perma.cc/Y4Q4-GV79] (last updated Dec. 11, 2019, 7:02 PM).

301. Although we did not use them in this analysis, we also merged in "[T]bl_CustodyHistory," "[T]bl_JuvenileHistory," "[T]blAppeal," and "D_TblAssociatedBond."

We also created a separate biographical dataset identifying certain demographic characteristics for each IJ. When the Attorney General appoints an IJ to the bench, the EOIR typically issues a press release containing the IJ's basic biographical information.[302] As we discuss below, we coded for the following factors: judge base city; judge appointment date; party of the appointing Attorney General; and past employment with the former INS, DHS, or DOJ, with federal, state, or local governments, the military, in private practice, and at NGOs. We merged this biographical dataset into our core dataset. Further, we merged in eight other datasets to add additional control variables as described in section II.C.2.

To assess the reliability and validity of the data,[303] we compared the data to other composite sources of EOIR data, such as the EOIR's annual statistical reports.[304] We also compared the data for some of the variables with other researchers' datasets, to the extent such datasets were publicly available.[305]

For our analysis, we restricted the dataset in a number of ways.

By Date: Because we focus primarily on cases rendered since the President Bush II Administration, we deleted cases completed prior to January 20, 2001, the date of Bush II's first inauguration.

By Case and Decision Type: We included only those decisions involving removal, exclusion, or deportation proceedings, deleting about 2% of cases that were of other types.[306] We coded our key dependent variable as follows: "1" (indicating removal) if the decision code was to remove, exclude, deport, or grant voluntary departure,[307] and "0" (indicating not removal) if the decision code indicated that relief from removal was granted, the case was terminated, the case was

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302. *See supra* note 135.

303. The EOIR data exhibited some inconsistencies. For example, the EOIR sometimes retroactively updates its data for already-concluded proceedings. *See* Thorley & Mitts, *supra* note 104, at 86. As a consequence, uploading the dataset at different times could result in slightly different variations in the coding and case counts. *See id.*

304. The EOIR annually publishes summary statistics in its "yearbooks." *See, e.g.*, EOIR 2017 YEARBOOK, *supra* note 22. However, most of these data do not separate cases on the master calendar from those on the individual calendar. To the extent there was any inconsistency, our analysis is exclusively based on the information presented in the EOIR database.

305. Although several scholars have conducted empirical analyses using EOIR data, the only published dataset online appears to be Miller et al., *Immigration Judges and U.S. Asylum Policy, Version 2.0*, HARV. DATAVERSE (2015), https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/26474 [https://perma.cc/M3H7-5WFM]. The dataset, however, only included affirmative and defensive asylum cases filed between 1990 and 2010. *See id.*

306. This variable was defined by "case_type" in the Case Table. *See EOIR Case Data Code Key*, U.S. DEP'T OF JUSTICE (2019), https://www.justice.gov/eoir/page/file/eoir-case-data-code-key/download [https://perma.cc/6G3S-PHDD]. All cases labeled "AOC" ("Asylum Only Case"), "CDR" ("Continued Detention Review"), "CFR" ("Credible Fear Review"), "CSR" ("Claimed Status Review"), "DCC" ("Departure Control"), "DDC" ("DD Appeal"), "NAC" ("NACARA Adjustment" (for the Nicaraguan Adjustment and Central American Relief Act)), "REC" ("Rescission"), "RFR" ("Reasonable Fear Review"), and "WHO" ("Withholding Only") were eliminated. *Id.* at 102.

307. We relied on several variables to determine the decision type. Removed cases were coded in "dec_code" as "X" ("Remove"), "E" ("Exclude"), "D" ("Deport"), or "V" ("Voluntary Departure"); in "case_type" with "RMV" ("Removal")," "EXC" ("Exclusion"), or "DEP" ("Deportation"); and in "dec_kind" as "C" (indicating "Court," as opposed to "O," signifying DHS). *Id.* at 97–101. The case was coded as not removed if the "dec_code" was "A" ("Admit"), "R" ("Relief"), "T" ("Terminated"), or "Q"

suspended, or the case was administratively closed. We excluded cases with other codes or where the decision code was missing.[308]

By Type of Calendar: The analysis also includes only decisions that were rendered after an individual merits proceeding; master calendar proceedings or other calendar proceedings were then eliminated.[309] We then restricted the dataset to one proceeding per case, using the first substantive decision on the merits completed after January 19, 2001.[310] We also excluded proceedings for which the decision code was missing, which typically means the cases are still pending, or where other pertinent information, such as the base city, IJ, or date, was missing.[311]

("Final Grant of EOIR 42B/SUSP"), and "dec_kind" was "C", or "other_comp" was "A" ("Administrative Closure") and "dec_kind" was "O." *Id.*

308. Cases with "dec_code" coded as "I" ("Prosecutorial Discretion—Terminated"), "J" ("Jurisdiction Transferred to the BIA"), or "O" ("Other") were eliminated; those coded as "other_comp" and "A" ("Administrative Closing—Other"), "B" ("Administrative [C]losing—Failure to Appear"), "C" ("Change of Venue"), "F" ("Failure to Prosecute ("DHS [C]ases [O]nly")), "H" ("Haitian"), "J" ("Jurisdiction Transferred to the BIA"), "O" ("Other Administrative Completion"), "P" ("Temporary Protected Status"), "T" ("Transfer"), "X" ("Z[ero] B[ond]"), and "Y" ("Prosecutorial Discretion— Admin[istrative] Clos[ure]") were also eliminated. *Id.* Contrary to some scholars who analyze the decision as a two-stage process, *see, e.g.*, Eagly, *supra* note 51, at 957, we opted to include all cases that were designated by the EOIR as either decisions or administrative closures, similar to the approach taken by Thorley & Mitts, *supra* note 104, at 90.

309. *See* EOIR IMMIGRATION COURT PRACTICE MANUAL, *supra* note 33, at 73–89 (defining and describing master calendar hearings and individual calendar hearings). We also merged in the Schedule Table and used the calendar type ("cal_type") of the latest proceeding sorted by hearing date ("adj_date"), time start ("adj_time_start"), and time stop ("adj_time_stop"), and limited to removal hearing ("rec_type" coded as "X"). If the calendar type was missing, we looked to the schedule type ("schedule_type") to see if the case was of an individual schedule type ("II," "IA," "ID," or "IR") for removal cases. We excluded from the analysis individual cases coded as custody cases ("CY"). There were some proceedings that did not have a comparable match in the Schedule Table so we looked at the coding for "latest_cal_type" in the Case Table to account for a few thousand more individual cases. If schedule information remained missing, we assumed that the case was the median category of being a master calendar case. EOIR data is not clear on identifying whether a case is an individual merits case because there are a large number of cases that did not have a "schedule_type" listed, particularly cases before 2010 so our analysis represents the best attempt at identifying these cases.

310. For instance, if in proceeding #1 venue was changed (signified by "other_comp" being "C" or "V" with "dec_code" missing), and if proceeding #2 had a substantive decision, we eliminated proceeding #1 and counted proceeding #2 only. If proceeding #1 was "administrative closure," and proceeding #2 was "remove," we used the first administrative closure case and eliminated the second. Some cases had multiple substantive decisions, spanning over ten years. If the court made a merits decision prior to January 20, 2001, we eliminated any subsequent merits decision from the analysis.

311. The EOIR bases its yearly statistics on the "dec_code" variable, and a decision in which "other_comp" is identified as "administrative closure" is not considered a decision by the IJ for the EOIR's statistics purposes. *See Latest Data From Immigration Courts Show Decline in Asylum Disparity*, TRAC: IMMIGRATION (June 22, 2009), https://trac.syr.edu/immigration/reports/209/ [https:// perma.cc/A7VZ-PAPD] (noting that the EOIR leaves it up to IJs to record decisions as denials or "other completion" and noting that IJs can make their records look less extreme by altering record keeping practices); *see also* SIULC ET AL., *supra* note 39, at 86 (describing decisions the EOIR labels as "other completion"). However, because our analysis focuses on the decision to order removal, a grant of administrative closure effectively ends the noncitizen's immediate exposure to a removal order, at least for the time being. IJs making decisions as of May 17, 2018 no longer had the option of granting administrative closure. *See In re* Castro-Tum, 27 I. & N. Dec. 271, 272 (Att'y Gen. 2018), *overruled by* Romero v. Barr, 937 F.3d 282, 292–97 (4th Cir. 2019).

Stipulated Removals: In addition, our analysis excluded stipulated removals.[312] Although over 99% of these would have been eliminated because they are entered at a master calendar hearing, we eliminated the additional stipulated removal cases that were decided on the individual calendar during this time frame. Individuals who enter a stipulated removal are formally removed and subject to the multi-year bars on subsequent reentry.[313] Individuals nonetheless may be incentivized to enter such stipulations and waive further proceedings when they are in detention pending resolution of the removal case.[314]

Decided in Absentia: We excluded any proceeding that was decided in absentia between January 20, 2001 and June 30, 2019 on the assumption that these decisions result in removal but may not reflect the IJ's individualized assessment of the case.[315]

"Rider" Cases: We further eliminated from the dataset riders to lead cases,[316] operating under the assumption that rider cases are not decided independently from the corresponding lead case.

Inactive and Visiting Judges: We included only proceedings before IJs who decided at least fifty cases in the truncated dataset.[317] In addition, we eliminated decisions by judges for whom we were unable to obtain biographical information or appointment date or where the EOIR data did not contain a code for an appointed IJ.[318] We also eliminated decisions of IJs who decided cases before their appointment date.

For the purposes of our statistical study, we assume randomness in the assignment of cases to judges within a given base city.[319]

We recoded the key dependent variable, "dec_code," to make it dichotomous. Decisions to remove, deport, exclude, or grant voluntary departure were coded as "remove" (or "1" in our analysis); decisions to admit, grant relief, terminate, or

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312. Stipulated removals were calculated from the Case Identifier Table.

313. *See* 8 U.S.C. § 1182(a)(9) (2012).

314. *See* Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 109 (2019) (citing studies suggesting that "detention may deter . . . individuals who are in detention from pursuing valid claims of relief from removal because they cannot withstand the pain of detention").

315. Where missing, we used the median category of "not in absentia." We also excluded subsequent cases if the first substantive case on the merits was decided in absentia. For an excellent analysis of in absentia cases, see generally Eagly & Shafer, *supra* note 104 (analyzing in absentia cases).

316. *See supra* notes 128 and accompanying text. Our statistical assumptions depends on assuming that the cases are independent. Failure to properly account for rider cases could bias the statistical results.

317. Specifically, we calculated the fifty cases based on the total number of removal cases the IJ decided on the merits in the truncated dataset.

318. We approximate that we had biographical information for over 95% of the relevant IJs hearing cases during the time under study. Most of the IJs for whom we were missing information were those appointed prior to the early 1990s. For these judges, we were able to deduce appointment date and home city by looking at the data. We then assigned the median value of having government experience and having no NGO experience to this small group of IJs. Many of these IJs ended up being eliminated anyway because they heard fewer than fifty cases in our time frame. We also eliminated all cases where we lacked relevant information or because the IJs were appointed by Presidents before Reagan.

319. *See supra* note 38 and accompanying text.

suspend as well as to administratively close a case were coded as "not remove" (or "0" in our analysis).[320]

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

Appointing President: Using the biographical data from the EOIR press releases as well as other sources of information, we coded for the appointing President for each IJ.

Presidential Era: Using the variable for the date of decision ("comp_date") from the Proceeding Table, we coded the presidential era for when the case was decided as follows: January 20, 2001 through January 19, 2009 (Bush II Era), January 20, 2009 through January 19, 2017 (Obama Era), and January 20, 2017 through June 30, 2019 (Trump Era).

Attorney Representation: The Attorney Table has a coding for "E_28_date," representing the notice that attorneys must file if representing a noncitizen.[321] We coded the noncitizen as having a lawyer if there was a date listed on or before the date of case completion. If there was a late-filed form, we looked to see if there was an attorney code in the Schedule Table that matched the indicated hearing.

Detain: The Case and Proceeding Tables contained a trichotomous coding for custody status that was labeled "never detain," "release," or "detain."[322] We coded "detain" as "1" and "never detain" or "release" as "0."[323] Missing values were given the median category of not being detained.[324]

Not Free: Freedom House provides a trichotomous coding of each country as "free," "partly free," or "not free."[325] Countries that were deemed "not free" were coded as "1," with "free" or "partly free" countries coded "0." This data was then merged into the core dataset by nationality and year. Noncitizens who had no nationality listed or who came from a country not ranked by Freedom House were coded the median category of being "free" or "partly free."

Low GDP: Using the World Bank's information, we coded the noncitizen's country of origin as being "mid-low" or "low" GDP (coded "1"), or "mid-high" or "high" (coded "0").[326] We then merged the GDP coding into the core dataset by nationality and year. Noncitizens who did not have a nationality listed or who came from a country not included in the World Bank rankings were coded as the median category of "low GDP."

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320. *See supra* note 133.

321. The Attorney Table has a code for "E_28_date," reflecting the dates that the EOIR-28 form was filed. This information often conflicted with the "E_28_date" given in the Case Table. Because the EOIR data dictionary instructs the user to analyze the Attorney Table for this variable, we did that. Many cases had multiple "E_28_date[s]," so our comparison was based on the earliest filed. If the "E_28_date" was after the date of the case's completion, we looked to the "eoirattorneyid" variable in the Schedule Table to see if that was filled in before the case completion date, and if it was, we counted the noncitizen as represented.

322. *See EOIR Case Data Code Key*, *supra* note 306, at 96.

323. In alternative specifications, we coded "release" as "detain" and came to similar results.

324. In the EOIR's recordkeeping, "N" ("never detain") is the default value.

325. *Freedom in the World: Country and Territory Rankings and Statuses:1973-2019*, *supra* note 166.

326. *GDP Per Capita*, *supra* note 168.

Mexico/Central America: Using the nationality code ("nat"), we coded whether the noncitizen came from Mexico or Central America. If information was missing, we assumed the median category of not being from Mexico or Central America.

English Language: The Case and Proceeding Tables 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 median category of non-English if we could not otherwise obtain language from the Schedule Table.

Asylum Case Type: We determined whether the case involved an asylum claim by looking at the Applications Table to analyze by date which applications the noncitizen filed. If the noncitizen filed applications for asylum ("ASYL") and/or asylum withholding ("ASYW"), we counted it as an asylum case.[327]

Female Judge: Using the biographical information on IJs published on the EOIR's website and other sources, we coded a judge's gender as "1" for female or "0" for male. If gender could not be discerned, we assumed that the IJ was a male, the median category.

Prior Government Employment: Those IJs who previously worked at any point in their career for the former INS, DHS, or DOJ were coded in the "govt" variable. If the information was missing, we coded the IJ with the median result of having government experience.

Prior NGO Employment: Those IJs who previously worked at an NGO were coded in the "ngo" variable. If employment data was missing, we coded the IJ the median category of not having NGO experience.

Judge Tenure: We gathered the IJ's appointment data from the EOIR press releases and other sources and subtracted it from the completion date of the case to get the number of years the IJ served.

Large Base City: The ten largest base cities in which cases were heard was coded as a dummy variable.[328]

Border Areas: We coded for whether the case was heard at a base city along the Southern Border. These base cities include: El Paso, Eloy, Florence, Harlingen, Imperial, Otay Mesa, Otero, Port Isabel, San Diego, and Tuscon.

Home Base City: Each IJ's home base city was coded as a dummy variable.

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327. In alternative specifications, we also analyzed the "c_asy_type" variable from the Case Table. 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. Because this variable was not required to be filled in, we are unsure how accurate it is; sometimes it conflicts with the analysis of asylum status based on the Application Table. Regardless, the main results of the study were robust to both ways of coding asylum application status. In addition, due to some issues identified by TRAC in the September 2019 release, we also looked to the December 2019 version of the Applications Table to identify relevant asylum cases. In alternative specifications, we also looked back at the Applications Table from prior releases.

328. See *supra* note 183 for a list of large base cities.

Policy Mood: We merged in, by IJ home base state and year, the policy mood ideal point estimates for each state created by Devin Caughey and Christopher Warshaw.[329]

Unemployment Rate: Using data from the Bureau of Labor Statistics, we merged in by IJ home base city and by date the monthly seasonally adjusted unemployment rates broken down by metropolitan area.[330]

Increase in Rate of Foreign Immigration: We obtained data about the increase in the foreign-born population by state from 2000 through 2016.[331] We then merged in this data by state of the IJ's home base city and year.

Senate Judiciary Committee 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 for each congressional session and calculated the median score for each year.[332]

Court of Appeals Score: We used the datasets created by Lee Epstein et al. and Martin Giles et al. to find the median ideology score for each federal circuit court by year.[333] We merged this information into the dataset by the circuit court for the base city hearing the case and year.[334]

BIA Score: Similar to the way the Senate score was calculated, we first discovered the names of the BIA members during the period under review. We then assigned each a DW-NOMINATE based on the score for the President who appointed the Attorney General who, in turn, appointed the BIA member, and used the median score for the year.[335]

Time Trend: We controlled for time-varying changes using a trend variable reverse-coded starting with 2019 as "0" and working backwards.

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329. Caughey & Warshaw, *Replication Data*, *supra* note 196. We used Caughey and Warshaw's new state policy ideal points updated through 2019 (on file with authors) to control for the policy mood of the IJ's appointed base state. Except for a few states, policy liberalism is fairly stable across states during this time frame (that is, California is always more liberal than West Virginia). *See* Caughey & Warshaw, *Policy Preferences and Policy Change*, *supra* note 196, at 255. We came to similar results using Caughey and Warshaw's separate social policy and economic liberalism scores. We also came to similar results substituting in Democratic presidential vote share of the IJ's home base city. *See Data*, MIT ELECTION LAB, https://electionlab.mit.edu/data [https://perma.cc/UHX2-JXAP] (last visited Dec. 30, 2019) (showing Democratic presidential vote share data).

330. *Labor Force Statistics from the Current Population Survey, 1990–2019*, *supra* note 197.

331. *Total and Immigrant Percentages by State: Percent Change over Time*, *supra* note 198. We used percentages from 2000 to 2010 for cases before 2010 and percentages from 2010 to 2016 for cases that took place during and after 2010 through 2019.

332. *See* Lewis et al., *supra* note 203. For all of the ideology variables, a positive score signifies a more conservative orientation.

333. *See* sources cited in *supra* note 207.

334. For example, if the base city was Los Angeles, and the year was 2009, we used the score for the U.S. Court of Appeals for the Ninth Circuit for 2009.

335. *See supra* note 207.