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Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking

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ABSTRACT

While the volume of adjudication by federal agencies far outstrips the volume of cases decided by the federal judiciary, researchers have devoted relatively little attention to agency adjudication and political control thereof. We study three mechanisms of presidential control of immigration adjudication: capacity-building, selection, and precedential rulemaking. First, consistent with work on bureaucratic capacity, the Trump administration achieved its goal of increasing removals of noncitizens through an unprecedented increase in total hiring of immigration judges (IJs). Second, contrary to expectations from the literatures on judicial behavior and bureaucratic politics, we find little evidence of partisan effects in IJ selection. Third, we demonstrate the substantial power of what we call "precedential rulemaking"—the power by the Attorney General to select cases in which to issue binding precedent. These results illustrate the importance of incorporating mechanisms of supervisory and legal control into the study of administrative courts. (*JEL* K23, K37, D73).

1. INTRODUCTION

How can (and can't) the President take control of agency adjudication when the administrative judges have formal, quasi-judicial independence? We study this question by examining the Trump administration's efforts to reengineer the immigration court system, examining three swift and dramatic changes that the administration made to the immigration courts. First, the administration hired more immigration judges (IJs), increasing the immigration courts' capacity by making an unprecedented number of appointments in a short period, increasing the number of IJs by >60% in its first three years. Second, the administration selected many IJs after making changes to the hiring process that reduced the power of career

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officials. Third, the administration made substantial use of a power that is especially strong in, albeit not unique to, the immigration context: the authority by the Attorney General to select ("certify") and reverse any opinion of the Board of Immigration Appeals (BIA), setting binding precedent for all IJs. We evaluate the effects of these three strategies and their implications for the study of political control of agencies.[1]

The Executive Office for Immigration Review (EOIR), which houses the immigration courts, offers an excellent test case for questions of quasi-judicial independence and political control. It is notable both for the size of its caseload (it decided more than 300,000 cases in 2019 [Executive Office for Immigration Review 2018: 12]) and the importance of its cases (which can deprive people "of all that makes life worth living," *Ng Fung Ho v. White*, 259 U.S. 276, 284 [1922]). Moreover, IJs, although not formally Administrative Law Judges (ALJs), conduct adjudications that closely resemble formal adjudications under the Administrative Procedure Act (APA).[2] EOIR, therefore, offers a test case for what can happen when a President is determined to take control of an adjudicative agency.

We use extensive immigration court data, along with biographical data on IJs, to test the efficacy of each of the three main methods of control employed by the Trump administration at advancing what many perceived to be its principal goal: removing more immigrants from the United States.[3] First, we find that the IJ hiring spree substantially increased removals—because more judges made more decisions, and most immigration court cases end with removal or voluntary departure decisions. Second, we find no evidence of partisan effects in the selection of judges. IJs appointed by Trump were no more likely than their colleagues appointed by other Presidents to issue removal orders. We corroborate this by showing that IJ ideal points based on campaign contributions (which can be matched) are indistinguishable between Obama and Trump appointees. Third, the Attorney General's muscular use of precedential rulemaking, an example of executive authority to issue directives to agencies (Kagan 2001: 2290), caused IJs to issue more removal orders by changing the rules that IJs applied—but only when these directives were stated in sufficiently non-discretionary terms.

Our results contribute to four literatures. First, we add to a literature on the political control of agencies, particularly of ostensibly independent agencies. Many of the foundational works concerned congressional control of agencies (e.g., Weingast and Moran 1983; McCubbins and Schwartz 1984), but a large literature now examines presidential control as well. Presidents "want a bureaucracy that they can control from the top" (Moe and Wilson 1994: 11), and they have an incentive to take control of agencies quickly to achieve a limited number of visible, short-term goals (Kriner and Reeves 2015: 159). Studies of presidential control have typically gathered cross-agency evidence on a single method of control rather than within-agency evidence comparing different mechanisms of control (Lewis (2019) offers a useful synthesis). For example, Lewis (2010) offers a comprehensive treatment of the politics of presidential appointments, finding that Presidents from both parties politicize by hiring agency personnel, and that such politicization harms agency competence (see also Lewis 2007; Krause and O'Connell 2016). By focusing on a single agency but studying multiple interventions, we offer a level of institutional detail—focusing on variation within a single

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[1] The administration also employed a fourth strategy of control, which received significant public attention: the imposition of case completion quotas. We do not evaluate that method of control here because of the lack of a credible research design for measuring its effects.

[2] Verkuil (1976: 760) develops a 10-part checklist to measure agency formality; immigration court adjudications score 10/10. As our results indicate, however, the formal legal markers of independence can coexist with varying levels of actual presidential control.

[3] We provide further detail in Section 2 on why increasing *aggregate* removals—as opposed to removal *rates*—may have been the administration's principal objective.

agency—that is rare in this literature.[4] Our findings build on and complicate those of Wood and Waterman (1991), who consider patterns in activity at seven agencies over time and find that appointments, more than budgetary control or reorganizations, were the primary lever of presidential control. Within this literature, we add to the focus on bureaucratic capacity (i.e., staffing) as a facilitator of political control (e.g., Rainey and Steinbauer 1999; Bolton et al. 2015; Drolc and Keiser 2020). In particular, we build on the insight that building bureaucratic capacity often has apparently partisan effects; backlogs have a valence. Just as understaffing at the Office of Information and Regulatory Affairs slows issuance of new rules (Bolton et al. 2015), we find that the Trump administration's IJ hiring was effective in increasing the number of removal orders issued by the immigration courts.

Second, we contribute evidence relevant to empirical and normative debates among legal scholars over the independence of administrative judges. Normatively, legal scholars disagree about whether the Constitution requires independent agency adjudicators as a matter of due process, or to the contrary, whether the Constitution requires presidential control of appointment and removal under Article II (Barnett 2019). And setting constitutional doctrine aside, legal scholars also disagree about the desirable balance between political control and quasi-judicial independence for adjudicative agencies, although most agree that some independence is desirable (e.g., Pierce 1990; Verkuil 1991; Walker and Wasserman 2019). For example, Kagan's (2001) defense of presidential control of administrative agencies did not extend to adjudication, which, she explained, raised distinct due process issues. Empirically, we contribute to the small literature on the extent of administrative judges' independence (e.g., Seabrook et al. 2012; Taratoot 2013a, 2013b; Miller et al. 2015), including a recent debate over whether the Securities and Exchange Commission's (SEC) shift to administrative adjudication led to more enforcement (see Choi and Pritchard 2017; Velikonja 2017). Our results evaluate the consequences of the lack of guarantees of independence in a context of high political polarization and a time when the President has taken steps to limit the independence of adjudicators across all administrative agencies.[5]

Third, we offer the first empirical evaluation of the effects of several key immigration policy changes under President Trump. Our study is the first to assess the effects of the Attorney General's major precedential rulemaking decisions.[6] It, therefore, fills an important gap in scholars' knowledge of the effects of the Trump administration's immigration enforcement policies.[7] We also build on existing work on the politics of the immigration courts. Kim and Semet (2019) (K&S), for instance, studied merits hearings in removal cases and found that Trump IJs were indistinguishable from Obama IJs. We build on and strengthen this finding in several key ways. One is that K&S examines only final outcomes for cases at the merits stage; because IJs themselves can influence which cases reach this stage and because differential completion speeds may introduce censorship bias, we include incomplete cases and cases that end without a merits hearing (i.e., a removal order issued at a master calendar hearing).[8]

4 As Weisberg (2013) notes, the importance of institutional granularity is especially pronounced in studies of adjudicative institutions, where each "case" involves multiple, sequential exercises of discretion.

5 Following the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which held that ALJs are inferior officers for constitutional purposes, the President issued an EO (No. 13,843) removing ALJs from the competitive service. A memorandum from the Solicitor General expanded on the EO, making non-ALJ adjudicators (such as IJs) exempt as well and loosening removal protections. See Verkuil (2020) for a description of these events and a discussion of their implications.

6 A few studies consider standard agency reversals of administrative judge decisions (Boyd and Driscoll 2013; Taratoot 2013a; Frakes and Wasserman 2018; Ho et al. 2019).

7 Cox and Rodríguez (2020: 186–88) discuss the Trump administration's efforts to exert control through supervision and precedential rulemaking, for instance, but do not provide an empirical assessment of impact.

8 In particular, (1) we incorporate into our analysis removal orders issued without an individual merits hearing, an important feature of the outcome set because IJs *select* which cases reach that merits stage—excluding the cases that IJs themselves decide to end without an individual hearing omits a measure of IJs' exercise of discretion and (2) we address censorship bias

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Another is that we add to K&S's discussion of the mechanism behind this null by providing evidence that the participation of career staffers in hiring prevents administrations from selecting ideological allies for the immigration courts. And we also estimate the effect of bureaucratic capacity (hiring more IJs) on removal orders. Our discussion of the Attorney General's power to issue precedential rules may also help explain K&S's finding that certain categories of cases are more likely to result in removals under Republican presidents, and contributes to related discussions attempting to characterize the susceptibility of adjudicators to presidential influence (Chand and Schreckhise 2020).

Finally, our results measuring the effect of key Attorney General certification decisions also add to a growing literature evaluating the effects of precedential judicial decisions on the decision-making of litigants and lower courts (e.g., Boyd and Driscoll 2013; Engstrom 2013; Hubbard 2013; Gelbach 2016). Many of these studies find small effects, if any; their task is made more complicated by the complex selection effects of litigants' strategic decisions about whether to initiate cases. Anecdotal accounts of attempts to introduce controversial guidance for agency decision-makers have suggested that similar issues might arise in administrative adjudication (Kagan 2015). With administrative data on the immigration courts' high and relatively homogeneous caseload, we are able to examine both the decisions made by IJs and those made by litigants. The resulting evaluation of precedential decisions also adds to the literature on the role of hierarchy in judicial decision-making and the types of decisions that are most influential (e.g., Carrubba and Clark 2012; Beim et al. 2014). We find that where the Attorney General issued rule-like, categorical decisions—decisions ending administrative closure and making asylum difficult to obtain for victims of gang and domestic violence—those decisions had an immediate and large effect on IJ behavior. Where, by contrast, the Attorney General heightened a standard but did little to limit IJ discretion, IJ behavior did not immediately change.

We expect these findings to apply broadly across administrative agencies. As we explain in more detail in our concluding section, the Attorney General's precedential rulemaking power has analogs in other agencies, and other mass-adjudicatory agencies are similarly subject to political control through capacity building (or attrition). Our findings on the failure of political selection, however, may remain generalizable for only a short time, as the Supreme Court increasingly appears to reject constraints on political control of the hiring and firing of adjudicators.

2. BACKGROUND

2.1 Institutional Background

The policy changes we study all occurred under Attorney General Jeff Sessions, who openly described his attempts to control immigration adjudication. Sessions' primary objective appeared to be increasing the total number of immigrants ordered removed. A memo sent to IJs shortly after Sessions took office informed IJs that "we are prioritizing the completion of cases," decried "delayed decision making," and noted that he planned to "remove recurring impediments to judicial economy and the timely administration of justice" (Sessions 2017). Likewise, in a September 2018 address to new IJs, Sessions said that "[t]he American people have spoken," and that "I do not apologize for expecting you to perform, at a high level, efficiently and effectively" (Sessions 2018). Further, in the same speech, Sessions referred explicitly to the strategies of political control that we evaluate here. He noted that with the

by including all relevant cases in the analysis—including cases that remain incomplete—and by accounting for other simultaneous changes in policy.

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administration's new hires (*selection*), "we . . .currently have the most active immigration judges in history" (*capacity*), and that his certification decisions had "restore[d] sound principles of asylum and long standing principles of immigration law" (*precedential rulemaking*) (ibid.).

On the one hand, formal legal protections are meant to ensure the decisional independence of IJs.[9] IJs, like ALJs and other civil servants, may only be fired for cause, and hiring must be nonpartisan.[10] IJs are hired under the civil service system, as part of the excepted service (Kim and Semet 2019: 591), with an associated salary schedule (Executive Office for Immigration Review 2020a).[11] And like ALJs, IJs are, by regulation, required to exercise independent judgment.[12] Finally, IJs were historically exempt from performance reviews (National Association of Immigration Judges 2017). The Office of Personnel Management (OPM) explained this exemption in 1991 as "protecting the judicial independence and integrity of the judges' decision[s]" (ibid.). In 2007, Attorney General Alberto Gonzales worked with OPM and the IJs' union to sign a collective bargaining agreement that prevented any numerical or time quotas (ibid.), but allowed for IJs to be "removed or reassigned" if they receive consistently poor performance evaluations (National Association of Immigration Judges and USDOJ, Executive Office for Immigration Review 2018).[13]

On the other hand, IJs do not have the full protections of lifetime tenure and salary protection enjoyed by Article III judges. The immigration court system formally sits within the Department of Justice (DOJ). IJs have always been hired directly by the DOJ. ALJs, by contrast, have, until recently, been hired via a competitive and strictly nonpartisan process conducted by OPM.[14]

Within this framework, we study three strategies that the Trump administration pursued to exert control over IJs.

2.1.1 Building Bureaucratic Capacity

The administration first changed the appointment process in a straightforward way: by hiring more IJs. The immigration courts' large backlog—by mid-2020, over 1.2 million cases (Transactional Records Access Clearinghouse 2020a)—means, together with the fact that most cases end with a removal order, that hiring more IJs mechanically increases the number of removal orders issued. Between January 2017 and the first quarter of 2020, the administration increased the number of IJs from 289 to 466 (Executive Office for Immigration Review 2020b). With attrition, the administration hired over 248 IJs. This volume was dramatically higher than in prior administrations for two reasons.

9 EOIR began as a division of the Immigration and Naturalization Service—an enforcement agency—and came into its name through an internal reorganization in 1983 (48 Fed. Reg. 8038 [February 25, 1983]). EOIR then became fully separate from the enforcement agency with the creation of the Department of Homeland Security in 2002 (Homeland Security Act of 2002, Pub. L. 107-296).

10 IJs are part of the excepted service, but may still be fired only for cause (Marouf 2018: 709); it is generally illegal for the DOJ to consider political views in hiring decisions under the Civil Service Reform Act (5 U.S.C. §2301(b)(2)). Congress has provided that ALJs may only be subject to adverse employment actions only for good cause (5 U.S.C. §7521; see also Barnett [2019: 1733–34]).

11 See also 8 U.S.C. §1101(b)(4); 5 C.F.R. §§6.2–6.3.

12 8 C.F.R. §1003.10(b) provides that "IJs shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases."

13 In 2017, EOIR reopened the IJ collective bargaining agreement to enable the agency to impose performance quotas (National Association of Immigration Judges 2017). Those quotas required that IJs complete 700 merits cases per fiscal year in order to obtain a satisfactory performance evaluation. We do not evaluate the effect of those quotas here, partly because their enforcement was complicated by the government shutdown, in fiscal year 2019, and the COVID-19 pandemic, in fiscal year 2020.

14 Until a recent EO (No. 13,843), OPM conducted most of the hiring process, furnishing three candidates to the agency to choose among (Barnett 2015: 1654–55); see also Administrative Conference of the United States (2019).

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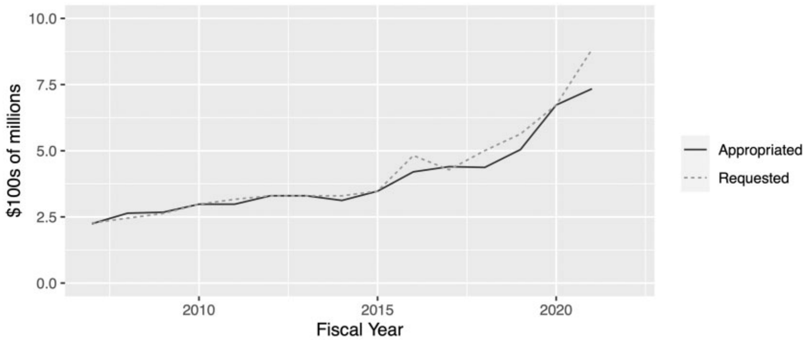

Figure 1. Presidents' Budget Requests versus Congressional Appropriations, 2007–21.
Source: DOJ budget filings.

First, the Trump administration reduced the time to hire an IJ from almost two years to around nine months[15] by eliminating a re-review stage by EOIR, introducing a one-month time limit for the first EOIR interview and a two-week time limit for the finalist panel interview stage, and allowing all appointees to begin work while a full background check was still in progress (Boente 2017). These changes mattered because prior administrations had consistently left vacant positions on the immigration courts: In early 2017, at the beginning of the Trump presidency, there were just under 50 unfilled IJ slots. Likewise, a Government Accountability Office (GAO) report in 2017 noted that "the actual number of immigration judges has consistently lagged behind authorized levels, resulting in staffing shortfalls" despite steady increases in authorized funding (Government Accountability Office 2017: 38).

Second, the Trump administration sought funds for 150 additional IJs (Department of Justice 2018). Congress appropriated an amount "equal to the budget request" with no great fanfare: the budget passed the Senate 83-16, and no Democrat on the Judiciary Committee expressed any reservations about IJ funding levels (S. Rep. No. 116-127 2019).[16] Congress' cooperation with the President's efforts to expand EOIR appears to be par for the course. Figure 1 shows Presidents' budget requests for EOIR (dashed line) and Congress' appropriations for EOIR (solid line) over the past 15 years. While there have been occasional funding gaps, Congress has funded 96.4% of Presidents' requests over this time period; over half the time, Congress has matched the budget request exactly.[17]

15 See McHenry (2018: 43:00) for a description of the new process.

16 In 2018, Congress appropriated funds for an additional 100 IJs (Explanatory Statement Submitted by Mr. Frelinghuysen, Chairman of the House Comm. on Appropriations, Regarding the House Amendment to the Senate Amendment on H.R. 1625, 164 Cong. Rec. 50, at H2045 [2018]), and in 2019, it appropriated funds for another 50 IJs (Explanatory Statement Submitted by Mrs. Lowey of N.Y., Chairwoman of the House Comm. on Appropriations, Regarding H.R. 648, Consolidated Appropriations Act, 165 Cong. Rec. 11, at H723 [H.J.Res.31 2019]).

17 During the Trump administration, the need to expand EOIR's capacity was accepted by members of both parties. For example, Zoe Lofgren, a prominent Democrat who is the chair of the Immigration and Citizenship Subcommittee of the House Judiciary Committee, said the following during a hearing on EOIR: "I want to start by saying that Congress must fully fund hiring of immigration judges, law clerks, technology, and infrastructure" (Oversight of the Executive Office for Immigration Review 2017). This is perhaps understandable, as Democrats and some pro-immigration academics have long argued that adding IJs to EOIR's complement would reduce average caseloads and therefore improve due process (Alexander 2006: 38; Legomsky 2010: 1651). But Republicans typically bargained for—and achieved—larger expansions than Democrats would have authorized (Ruger 2018). In FY19, for instance, Sen. Moran's proposed appropriations bill would have given EOIR over $100 million more than the proposal adopted by the House (S. Rep. No. 116-127 2019; H.J.Res.31 2019).

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2.1.2 Selection

In April 2017, the Office of the Deputy Attorney General proposed several changes to EOIR's hiring procedures.[18] The Trump administration changes reduced the role of career employees, requiring them to choose five unranked candidates in the first stage of the process, rather than three ranked candidates. And the new process also changed the composition of the final interview panel, removing the EOIR director from that panel and leaving the panel with two members: the deputy attorney general and a member of the Senior Executive Service chosen by the deputy attorney general (Boente 2017). The result was a process that immigration court experts called "politicized hiring" (Frausto and Tzamaras 2020). For example, Paul W. Schmidt, the former chair of the BIA, claimed that the Trump administration had "pushed the envelope furthest" when it came to "weaponiz[ing]" EOIR's "arbitrary hiring procedures" (Misra 2019).

2.1.3 Precedential Rulemaking

Like some other agency adjudication bodies, the immigration courts are subject to several levels of internal agency review. IJ decisions are first appealable to the BIA, an administrative appeals body within the EOIR. Such administrative review is typical across agencies. But immigration regulations also include a second layer of review that is somewhat less common: the Attorney General may, as a matter of discretion, take up any BIA decision and issue an opinion that supersedes the Board's (8 C.F.R. §1003.1(h)), generating binding precedent for all IJs. This power to create substantive rules in self-selected cases has given rise to considerable controversy, with debates over its normative justifiability (Menke 2020; Stevenson 2020) and whether further procedural protections are required (Trice 2010; Gonzales and Glen 2015).

The powers enjoyed by the Attorney General to self-refer and then decide precedential immigration cases are not unique. Many agency heads have the power to set binding interpretations of law and policy, which must be followed by agency adjudicators and may be enforceable in court, *outside* the context of individual case review. For example, the Office of Medicare Hearings and Appeals (OMHA) publishes a case processing manual that contains the agency's interpretations of specific regulations and statutory rules, and that document notes that "OCPM instructions are mandatory for all OMHA staff" (Department of Health and Human Services, 2018). Similar powers are enjoyed by the heads of the Social Security Administration (SSA) and the Patent and Trademark Office (PTO). The Attorney General's power to instruct IJs on how to interpret the law is thus not uncommon.

It is somewhat more unusual for that power to exist in the context of appeals from individual decisions by agency adjudicators ("agency-head review"), though elements of the Attorney General's particular combination of powers are found elsewhere. Weaver (1996: 260–65) catalogs other adjudicatory bodies in which politically appointed agency heads hold the power of direct review. In the Department of the Interior, for instance, the Secretary may review the decisions of four adjudicatory bodies, including the powerful Board of Indian

[18] In a move that was unrelated to IJ selection but that may have been an indicator of the administration's intentions, the administration also offered buyouts to members of the BIA who had been appointed by previous administrations; after none of the members accepted the offer, they were reassigned (Misra 2020). Politics has played a role in IJ appointments at least once before the current administration. In 2003, the George W. Bush White House, in a break with traditional EOIR hiring practices, began to suggest candidates for IJ positions and put in place a hiring process that directly involved the White House (Office of Professional Responsibility and Office of the Inspector General 2008: 74). Between September 2004 and December 2006, IJs were selected directly by the Office of the Attorney General (ibid., p. 76). In that process, the only candidates considered were Republican lawyers who were recommended by "White House offices that were involved in political hiring" (ibid., p. 83). This episode resulted in a report by the Office of the Inspector General rebuking those involved and concluding that the consideration of political factors violated the law (ibid., p. 115).

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Table 1. Uses of Certification Authority by Presidential Administration

President	Year Inaugurated	Precedential Decisions	Annual Rate
Reagan	1981	0	0
Bush I	1989	0	0
Clinton	1993	0	0
Bush II	2001	15	1.9
Obama	2009	4	0.5
Trump	2017	12	3

Appeals, which passes on matters such as the recognition of Tribes under federal law; unlike the Attorney General in the immigration context, the Secretary is also permitted to assume jurisdiction and step into the shoes of the Board of Indian Appeals if she is dissatisfied with a decision (ibid.: 261). The Department of Transportation's adjudicatory bodies are likewise subject to review by the sub-agency head (e.g., the Administrator of the FAA may review certification decisions directly). The power of self-referral is found in other contexts too (Trice 2010: 1768, n.13). For example, a single commissioner of the SEC may initiate review of an ALJ decision within 21 days of its issuance (Walker and Weiner 2020: 31). Even if not *unique*, however, the combination of agency-head review and self-referral power confers considerable power on the Attorney General.

In contrast to prior administrations, the Trump administration relied extensively on this power.[19] Table 1 shows how often each administration exercised this power since EOIR's creation in 1983. President George W. Bush's administration ended a two-decade norm of deference to the BIA and issued 15 precedential decisions in eight years, compared with the Trump administration's 12 in 4 years. We study three of the most prominent certification decisions by the Trump administration: those (1) making asylum less available to survivors of gang violence or domestic violence, (2) eliminating administrative closure, a method for putting deportation cases indefinitely on hold, and (3) admonishing IJs to issue fewer continuances (to speed up the process).

The impacts of these decisions are far from certain. As a general matter, bureaucratic resistance is infamous among adjudicators, and their exercise of discretion is protected under the APA or their agency's enabling act (Ames et al. 2020). That is true in the immigration context as well, where IJs are required to exercise independent judgment (8 C.F.R. §1003.10(b)), and where federal courts have for decades complained that IJs fail to implement even the "minimum standard of justice" despite repeated reversals in appeals (see *Benslimane v. Gonzales*, 430 F.3d 828 [7th Cir. 2005]). Moreover, the Attorney General's decisions varied in terms of how easily adherence could be monitored, potentially impacting their efficacy.

2.2 Data and Empirical Setting

We analyze the impact of these interventions using administrative data from EOIR, which includes all removal cases in immigration court.[20] During the period we study, a number of

[19] Interestingly, as was previously true in the immigration context, "sua sponte discretionary review is seldom used at the vast majority of agencies" where it is available (Walker and Weiner 2020: 31).

[20] In this article, we often refer to "cases." We define a case to include all the steps that follow from the issuance of the single Notice to Appear, including any changes of venue, appeals, remands, and motions to reopen. Note that immigration practitioners often refer to what we call cases as "proceedings." We avoid that term here in order to avoid confusion with a distinct database concept: EOIR's internal database often divides a single case into multiple sub-parts and calls these "proceedings." These sub-parts do not have a consistent legal definition and may refer, for example, to the phases of a case that take place in

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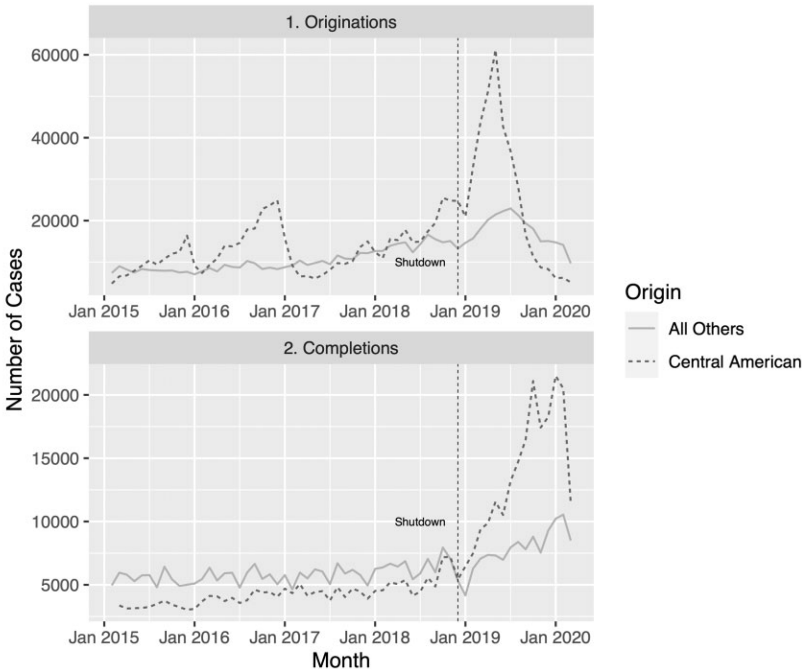

Figure 2. Number of Cases by National Origin, January 2015–March 2020.
Notes: The top panel shows cases begun in each month. A case begins when the government issues a notice to appear, which is analogous to a criminal indictment, to an immigrant whom it seeks to remove. The bottom panel shows case completions by month. A case is completed either when a respondent is finally granted or denied permission to stay in the United States, or when the case is administratively closed (as when the DOJ declines to prosecute a case). Both plots reflect three shocks: the decline in completions due to the U.S. government shutdown, indicated with the vertical dashed line; the increase in Central American cases beginning in the second half of 2018; and the decline in new cases and case completions due to Covid-19 starting in March 2020.

important trends affected the immigration courts that could confound our inferences. Figure 2 shows the number of cases filed in each month between January 2015 and March 2020.[21] Three shocks are worthy of note. First, the 2018–19 government shutdown, which lasted from December 22, 2018 until January 25, 2019, virtually stopped the adjudication of non-detained cases. Whereas EOIR had completed 5456 non-detained cases in November 2018, it completed just 224 during the 34 days of the shutdown. Second, the period we study coincides with a dramatic upswing in arrivals of asylum seekers from Central America. From fiscal year 2018 to fiscal year 2019, Border Patrol apprehensions of Central Americans at the southern border roughly quadrupled (Singer and Kandel 2019: 10). Finally, beginning in March 2020, the administration's responses to COVID-19 drastically reduced the number of new cases and completions.

These shocks might affect IJs differentially. For instance, the Central American surge might confound analyses of partisanship, since more new cases might have been assigned to

different venues. Among Trump-Era cases, 22.7% contain multiple "proceedings" in the EOIR data. For more details on the data, see the Appendix.

[21] Later data are available, but the onset of Covid-19 has significantly changed operating procedures, for example, by reducing the number of in-person hearings (McHenry 2020: 6). We limit our analysis to the period before the pandemic.

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new IJs with empty dockets, and new cases may lead, mechanically, to more deportation orders, since deportation orders can be issued early in a case (e.g., if a respondent fails to appear), whereas grants of relief take much longer, on average, because they typically require the scheduling of an individual merits hearing. We address this concern below by examining completions within the first 12 and 18 months of each case.

We supplement the EOIR case data with two kinds of biographical information on IJs. For each IJ, we used the standard press releases published by the DOJ to record the immigration court to which they were appointed, the year and month when they formally began hearing cases, and other biographical information (including the location and nature of their prior employment). In addition to analyzing the biographical data directly, we used it to match IJs appointed by Donald Trump and Barack Obama to the Database on Ideology, Money in Politics and Elections (DIME) (Bonica 2018).[22] Using exact name matching along with FEC-reported employment and location data, we identified 48 Obama IJs and 72 Trump IJs in the DIME dataset. This amounts to about one-third of each President's EOIR appointees.[23]

3. RESULTS

3.1 Building Bureaucratic Capacity: More IJs

Figure 3 shows the dramatic success of the Trump administration in hiring more IJs. As we note above, the Trump administration reduced hiring timelines from two years to nine months. The administration also convinced Congress to fund more positions for IJs, allowing it to hire more IJs more quickly than any of the past four administrations. In the first three years of his administration, President Trump hired more IJs than Presidents Clinton, Bush Jr., or Obama did over the eight years of their respective presidencies—and over eight times more IJs than George H.W. Bush appointed in his single term.

The Trump administration's hiring spree led to more case completions and therefore to more removal orders, because most cases end with removal orders. Roughly 86% of all cases begun during the Trump administration that have received a final merits decision as of this writing have ended in removal orders. So have roughly 79% of completed cases begun during the Obama administration. Because deportation orders are issued quickly and grants of relief often take years, these are almost certainly overestimates of the eventual removal rate. But these simple rates show that, given the enormous caseload facing EOIR, increasing the number of IJs available to process cases increased the number of removal orders, at least in the short term.

Figure 4 confirms this intuition. The left panel shows the average number of removal orders issued per IJ per quarter. We focus on average IJ-level productivity here merely to assess the effects of staffing on overall productivity.[24] If the Trump administration's dramatic expansion of EOIR staffing was simply shifting the same number of cases around a larger pool of staff, we might expect to see a decline in the number of removal orders issued by each IJ. But we see the opposite: the Trump-era hiring increase coincided with a great *rise* in the average number of removal orders per IJ.[25] More IJs meant more removal orders not just

22 We gratefully acknowledge Adam Bonica's assistance in gaining access to this new dataset, which provides ideal points based on FEC filings running through the 2018 election cycle.

23 Note that this match rate is quite close to the match rate of 0.374 reported in Bonica and Sen (2017) for federal ALJs.

24 We call all removal orders and grants of voluntary departure "removal orders." Voluntary departures, although formally a type of immigration relief, require the noncitizen to leave the country. Note that not all removal *orders* result in physical removal from the country; we observe only whether the IJ issues the order.

25 We do not suggest that hiring is responsible for the increase, which likely reflects the large number of arrivals at the southern border in FY 2019.

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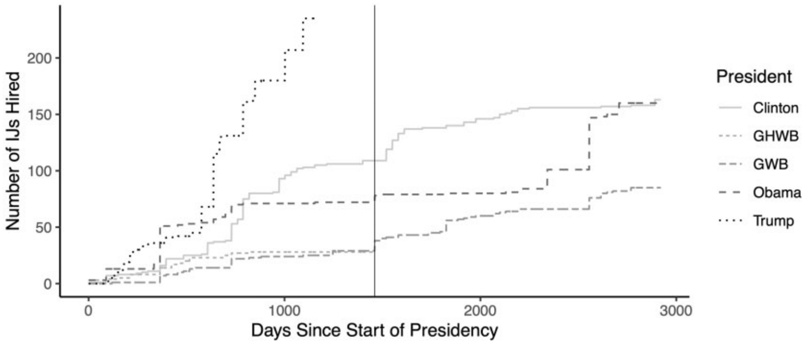

Figure 3. IJ Appointments by Presidential Administration.
Notes: Appointment dates are taken from DOJ press releases. The vertical line indicates 1491 days, which is the length of a single presidential term.

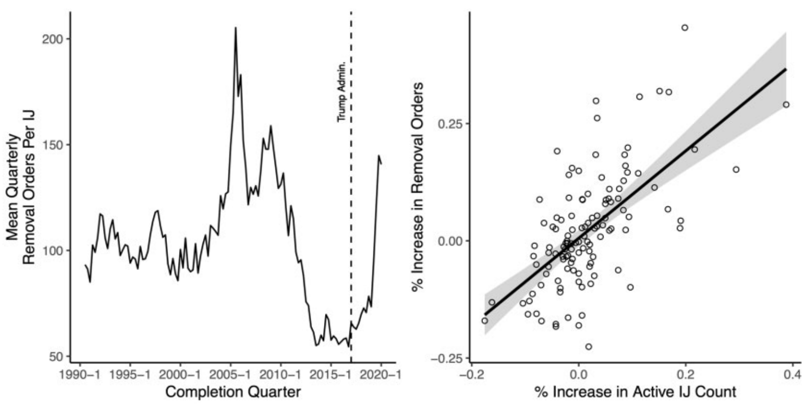

Figure 4. Caseloads over Time and Staffing Elasticity.
Notes: The left panel plots the mean number of quarterly removal orders per IJ over time, with a vertical dashed line indicating the beginning of the Trump administration. The large changes over time were likely driven by factors unrelated to immigration court policy, such as arrivals at the border and changes in arrest patterns. The large spike in 2005 may have been driven by Border Patrol apprehensions (Transactional Records Access Clearinghouse 2008), and the secular decline during the Obama administration likely partly reflected decreasing border apprehensions (Singer and Kandel 2019: 6). Removal orders include persons ordered removed *in absentia*, as well as voluntary departures. This plot shows that hiring additional IJs did not merely redistribute a fixed stock of cases, but rather increased the stock. The right panel plots the quarterly increase in "active" IJs (defined as IJs who filed at least 50 completions during the quarter) against the quarterly increase in removal orders relative to the prior quarter.

under the Trump administration, but also under previous administrations. The right panel of Figure 4 plots the change in the number of active IJs (defined as IJs who completed >50 cases in a quarter) against the total number of removal orders issued in any given quarter.[26]

[26] IJ hiring may, of course, be influenced by external circumstances—like the number of border crossings. Under the Trump administration, however, the ramp-up in hiring started well before the increase in the number of border crossings. Nor is it plausible that the administration's enforcement efforts delayed the spike in arrivals from 2017 to 2019. Instead, push factors likely explain the timing: the spike was made up overwhelmingly of Guatemalans and Hondurans, rather than Salvadorans, although numbers from the three countries had followed similar trends in the years before (Singer and Kandel 2019: 10).

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On average, a 10% staffing increase in a particular quarter is correlated with an 8.95% increase in quarterly removal orders.[27]

Journalistic accounts have described the hiring effort as one aimed at taking control[28] and Attorney General Sessions emphasized the new hiring in the same address in which he emphasized the role of precedential rulemaking in executing his agenda (Sessions 2018). Moreover, scholars and politicians have long understood fights over agency budgets and hiring as proxy wars over how much room to give the President to implement his agenda in a particular policy domain.[29] In aggressively expanding EOIR's capacity, the administration was executing a well-worn strategy.

3.2 Selection

Although more IJs meant more removal orders, we find no evidence that the Trump administration selected IJs who were more likely, on average, to issue deportation orders.[30] Further, we present suggestive evidence from the DIME database indicating that this trend may reflect Trump IJs' ideological preferences rather than unobserved bureaucratic constraints on their discretion.

Political scientists have long assumed that presidents fill vacancies with ideological allies (see, e.g., Krause and O'Connell 2016). Such ideological appointments can be the result of ideological preferences in hiring, of self-selection by job candidates, or of attrition by personnel who disagree with administration policy. The wave of new IJ positions that the Trump administration lobbied for and that Congress created, coupled with the administration's changes to the IJ hiring process discussed above, would seem to have opened the door to such ideological hiring. In addition, the Trump administration's perceived hostility to immigration might have led to self-selection among its IJ appointees, resulting in partisan effects even without express ideological hiring.[31] Finally, in a possibility that we do not evaluate here, nonrandom attrition might have changed the ideological makeup of the pre-Trump IJ corps, thus obscuring possible selection effects.

A naive examination appears to confirm this intuition. Figure 5 shows the distribution of removal order rates among IJs for each appointment cohort over the period between 2017 and June 2020. While the degree of overlap in removal order rates across cohorts is high, there are noticeable differences across cohorts. Seventy-three percent of Obama appointees have a nondetained removal order rate lower than that of the median Trump appointee and 68% have lower removal order rates among detained or released cases. Similarly, 82% of

[27] Only a small minority of removal orders issued by line IJs is ever reversed by the BIA. Roughly 7% of EOIR cases are appealed to the BIA. (See *Expanding the Size of the Board of Immigration Appeals*, 85 Fed. Reg. 18105-06 [April 1, 2020] [discussing caseloads].) Those that are appealed are an unrepresentative sample, and within that sample, perhaps 1 in 10 noncitizens receive relief at the BIA (Hausman 2016: 1195). Thus, we find it unlikely that the BIA *counteracts* these increases in removals in any substantial way. The opposite is possible, however: the Trump administration attempted to weaken this potential function of the BIA. Among other tactics, for instance, the Trump administration created six new positions on the BIA (a 35% increase) and filled them with IJs with extremely low relief rates (2.9% on average in 2019) (Chen 2020). Such tactics were possible because, as Koh (2020: 967) writes, "a core feature of the BIA is that its members are appointed by and remain accountable to the Attorney General."

[28] IJs were exempted from the Trump administration's 2017 hiring freeze (Rosenberg and Cooke 2017) and one 2019 account of the hiring effort described it this way: "In just $2\frac{1}{2}$ years, the Trump administration has put its stamp on the nation's immigration court system, appointing more than 4 in 10 judges while dramatically expanding the bench and issuing new rules that make it harder for migrants to win their cases and stay in the country" (Taxin 2019).

[29] For example, Congressional Republicans advancing a deregulatory agenda pushed for cuts to the enforcement budgets of both the IRS and the SEC during President Obama's first term. See Olemacher (2011). For a formal treatment of a closely analogous subject, see McCarty (2004).

[30] Although many perceived the administration's primary objective to have been increasing the aggregate number of removals, this section—focused as it is on the selection of harsher IJs—emphasizes individual judges' removal rates as evidence of their preferences.

[31] For a paper yielding limited evidence in support of the view that bureaucrats are "zealots" motivated by policy, as hypothesized by Gailmard and Patty (2007), see Andersen and Moynihan (2016).

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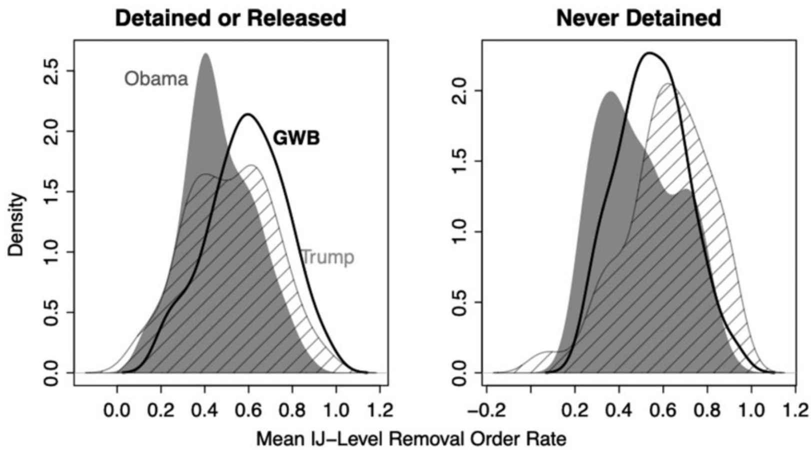

Figure 5. Distribution of Mean Removal Rates Among Bush, Obama, and Trump Appointees. *Notes*: IJ mean removal order rates, portrayed along the *x*-axis, are simple average rates across all cases completed between April 2017 and June 2020. "Detained or Released" refers to cases in which respondents were detained at *any* point during their cases. "Never Detained" means that the respondent was *never* detained.

Trump appointees have a nondetained removal rate higher than that of the median Obama IJ and 65% have higher detained removal rates.[32]

But a closer look at the data suggests that the Trump administration was in fact unable to systematically appoint ideological allies. The apparent variation between Trump, Obama, and Bush appointees is actually an artifact of the uneven distribution of presidential appointees across space and time. Due to variation in underlying case characteristics, and perhaps in regional preferences, some courts issue removal orders at consistently higher rates than others. Trump, Obama, and Bush judges serving in the same place and time are generally not statistically distinguishable.

We can begin to see this by adding time variation to the average removal rates shown in Figure 5.[33] Figure 6 plots the rates at which IJs appointed by each of the last three presidents render decisions adverse to immigrants over the past 25 years.[34] Most importantly for measuring ideology, the top panel plots the probability of entering an adverse bond decision, which means that the IJ affirmed (or made harsher) a bond determination for an incarcerated respondent. Bond decisions are uniquely well-suited to fueling inferences about judges' ideologies because they are highly discretionary and thus unlikely to be confounded by factual or organization constraints.[35] The middle panel plots the share of final removal rates for respondents who were initially detained, including those who were subsequently released on bond. The bottom panel plots the share of removal orders for persons never detained.

32 Even these apparently large differences pale in comparison to the ideological separation typical among appointees to Article III courts, as documented by, for example, Green (2019). Virtually *none* of President Trump's Article III appointees is to the left of the median Obama appointee.

33 As in Figures 4 and 5, removal orders include voluntary departures and *in absentia* removals.

34 For visual clarity, we artificially limit the degree of overlap across administrations. For instance, while trend lines for pre-Bush and Bush appointees in Figure 6 stop in the middle of the panel, IJs appointed by George W. Bush and prior presidents actually continue to serve in EOIR today. Regression analyses below retain the full complement of judges for all analyses.

35 See 8 U.S.C. §1226 (conferring upon the Attorney General power to make a "discretionary judgment" in setting bond). The DOJ has promulgated its own standards for IJs to apply, but these remain extremely broad and subjective. See, for example, *Matter of Fatahi*, 26 I&N Dec. 791, 793 (BIA 2016) ("An alien who seeks a change in custody status must establish to the satisfaction of the IJ and the Board that he is not 'a threat to national security, a danger to the community at large, likely to abscond, or otherwise a poor bail risk.'") (quoting *Matter of Guerra*, 24 I&N Dec. 37, 40 [BIA 2006]).

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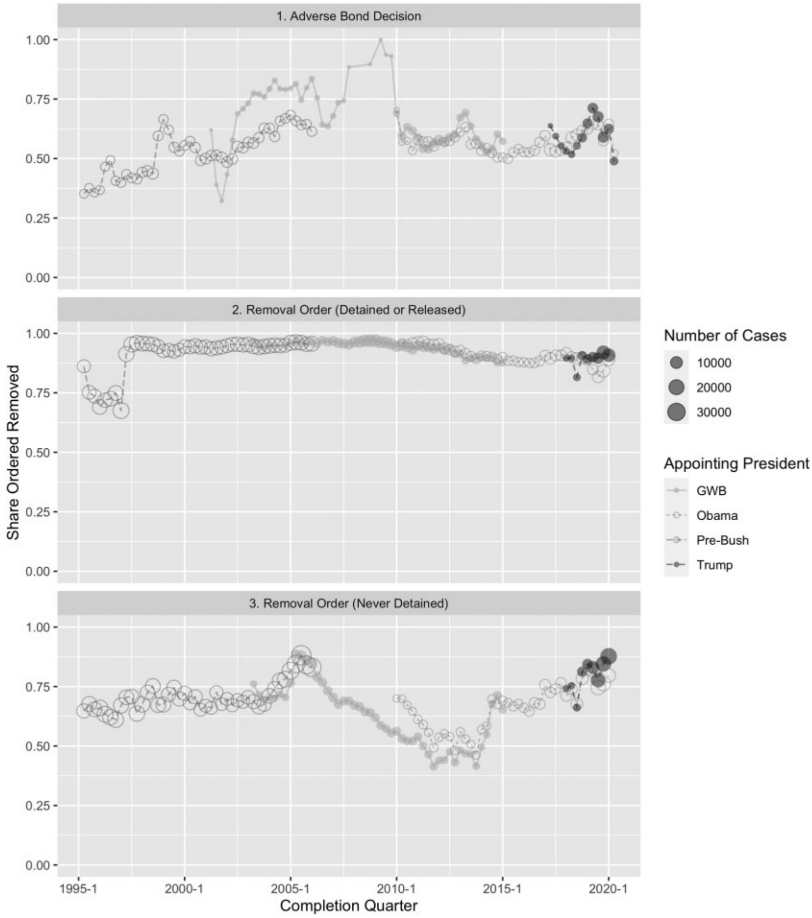

Figure 6. Immigrant-Adverse Decisions by IJs, 1995–Present, by Appointing Administration of Initial IJ.
Notes: Each point represents the share of decisions completed in every given quarter that end in an adverse decision for the respondent. For bond appeals, "adverse decision" means any decision other than to grant release on bond or reduce the bond amount set by DOJ in the first instance. Again, large secular trends likely reflect factors unrelated to immigration court policy (see Figure 2).

Figure 6 shows dramatic secular trends over time, but—with some exceptions—judges appointed by all presidents move together across these changes. In particular, Trump IJs do not deviate dramatically from the behavior of IJs appointed by previous administrations. Trump IJs' decisions on bond appear indistinguishable from those of Obama appointees. The same is true of removal decisions for non-detained respondents. The sole exception is Trump IJs' average removal order rate for detained respondents, which exceeds that of Obama IJs by about 4.1 percentage points, or half a standard deviation. As we show through our regression results, below, accounting for location eliminates these differences as well.

These visual inferences are bolstered by Wilcoxon signed-rank tests comparing the monthly removal rates of Trump and Obama IJs, which fail to reject the null hypothesis that

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removal rates come from the same distribution ($p = 0.69$ for detained/released removal orders and $p = 0.13$ for non-detained removal orders).[36]

Accounting for location *and* time, along with other case characteristics, eliminates any statistically significant differences between administrations. To test whether Trump IJs are harsher than their colleagues, we estimate a case-level linear probability model with two-way fixed effects for the location of the first hearing and for the month in which a given case originated (the month of the Notice to Appear).[37] The primary outcome of interest is whether a case ends in an adverse decision—either a denial of bond or a removal order (including in absentia removal or voluntary departure). We code a case as having been assigned to a Trump appointee if a Trump appointee was assigned to hear the first sub-part of the case.

Time censoring is a key problem in this setting: 50.3% of the roughly 1.2 million removal cases in our sample were still pending as of September 2020. Our main estimates include both complete and incomplete cases, and thus decisions to grant *relief* and pending cases are coded the same way. To allay concerns over censoring, we estimate two time-conditioned outcomes: whether an adverse decision was rendered within (1) the first 18 months of the case and (2) the first 12 months of the case. We also show results in which voluntary departures are not counted as removal orders. Finally, for each outcome, we present results that condition on the respondent's nationality and "priority status," which EOIR uses to indicate family and unaccompanied-child cases. Standard errors are clustered at the judge level.

The main results of these regressions are displayed in Figure 7. Each point in the figure corresponds to a regression coefficient on a dummy variable indicating that a case was assigned to a Trump-appointed IJ; the reference category is an Obama appointee, so the coefficient reflects the average difference in the probability of an adverse decision associated with being assigned a Trump IJ rather than an Obama IJ.

Conditioning on time *and* place eliminates the evidence that Trump-appointed IJs are harsher than IJs appointed by previous administrations. While many of the point estimates are positive, none is statistically significant at conventional levels and the confidence intervals are relatively small, suggesting that even a three-percentage-point increase in the probability of an adverse decision was unlikely. Conditional on time and place, observable differences in the behavior of Trump and Obama IJs are indistinguishable from random variation.

These results all suggest that even highly discretionary decisions made by Trump IJs were not significantly different from those made by Obama IJs. While these findings are consistent with a failure to select ideological allies, they could also result from constraints on judges' discretion—legal or factual constraints, for example—that we are unable to observe. That is, perhaps Trump IJs were in fact more conservative than Obama IJs but were unable to implement their policy preferences. To distinguish between these competing explanations, we rely on the DIME score dataset, which estimates ideal points of donors to political campaigns (Bonica 2018).[38] For each IJ appointed by Obama and Trump, we searched the DIME dataset for donors with exact name matches and compared donors' self-reported employer and

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[36] We compare removal rates for all cases adjudicated by Trump and Obama-appointed IJs, respectively, in every month since May 2017 (i.e., the average across all *cases*, not the average across all *judge rates*, since new Trump judges with low case counts are likely to exhibit extreme rates).

[37] A conditional logit specification similarly yields no evidence of harsher decisions by Trump IJs. The coefficient on Trump IJs remains close to zero and statistically insignificant for most models. In some models (e.g., those conditioning the removal outcome on completion within 12 months), the coefficient on Trump IJs is significant and *negative*. But in substantive terms these results are consistent with a null finding: the largest average partial effect is on the order of a 0.008 decrease in the probability of removal. Most importantly, in *no* case is there a significant positive coefficient on being assigned to a Trump-appointed IJ.

[38] The version of DIME we used incorporated donation activity through the 2018 mid-term elections.

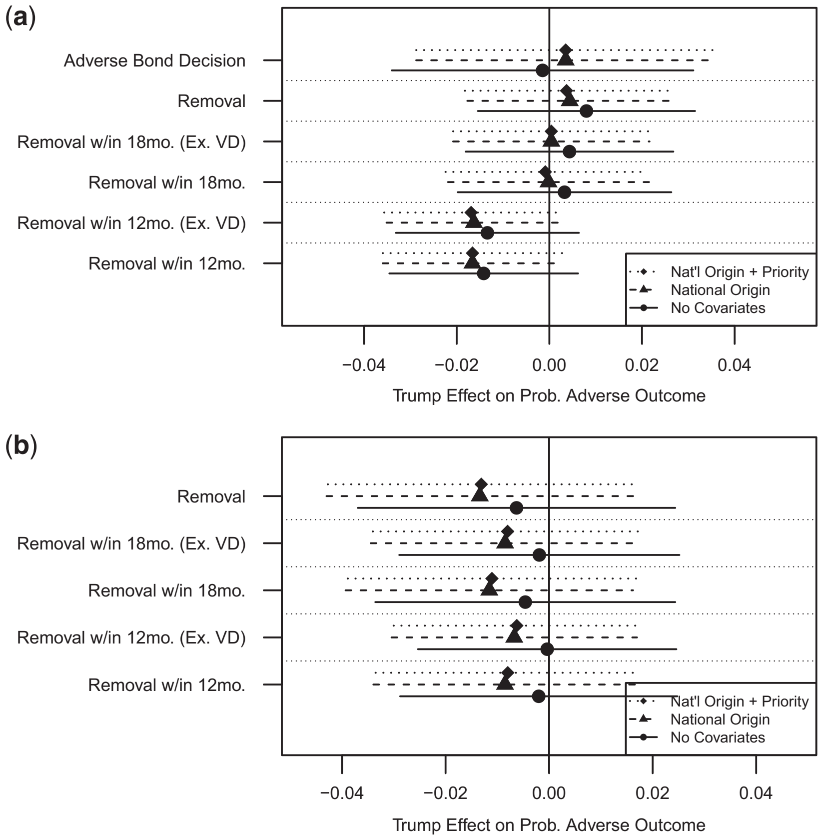

Figure 7. Regression Estimates: Two-Way Fixed Effect Linear Probability Models.
Notes: Error bars are based on standard errors clustered at the IJ level. Cases are sometimes broken into sub-parts corresponding to different phases or charges (see Section 2). Outcomes reflect the first part of a case unless marked (last). VD means "voluntary departure." Panel (a) presents estimates for detained respondents (N = 195, 881); panel (b) presents estimates for non-detained respondents (N = 859, 309).

location data with DOJ press releases to confirm each match. Using this process, we matched 48 of 186 Obama appointees and 72 of 235 Trump appointees.

The ideological distribution of matched appointees is displayed in Figure 8. The *y*-axis shows the count of IJs and the *x*-axis shows the DIME score, which ranges from −2 (most liberal) to 2 (most conservative). The dashed lines in each panel display the mean level of conservatism for each President's appointees: Obama appointees had a mean conservatism score of −0.19 and Trump appointees had a mean score of −0.42. If anything, Trump appointees appeared to be more *liberal* than Obama appointees.

Two inferential challenges present themselves with the DIME data. One is that missingness may be correlated with ideology.[39] Such missingness may, of course, also make agent selection more challenging from the administration's perspective. The other is that DIME

[39] For instance, consider that many IJs are former members of the Judge Advocate-General's Corps. Like most service members, JAGs often experience constant residential mobility; this makes them extremely difficult to match in the DIME dataset. Former JAGs are more likely to be missing and are more conservative than other IJs, on average.

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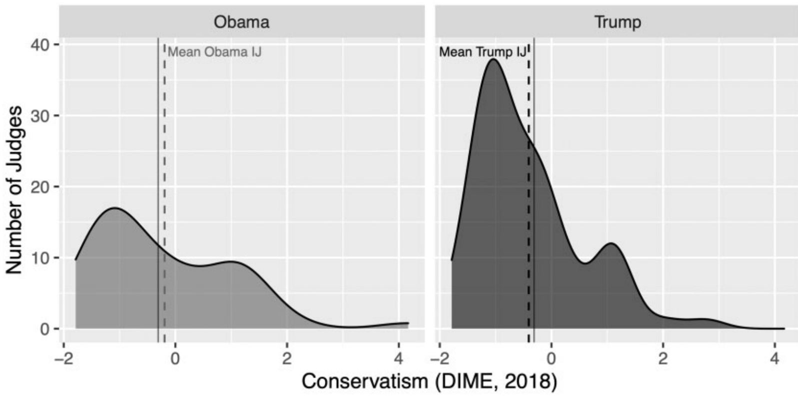

Figure 8. Ideology of Trump and Obama IJ Appointees Found in the DIME Database.
Notes: In total, 48 Obama IJs and 72 Trump IJs were matched using name, employer, and residence information. The dashed lines indicate mean conservatism scores for each set of IJs (i.e., −0.19 for Obama IJs and −0.42 for Trump IJs). The solid line indicates the mean conservatism score among all attorneys (−0.31) reported in Bonica et al. (2016).

scores may not capture dimensionality. The Spearman rank correlation of ideology of matched IJs and removal rate for completed cases is 0.26 ($p \approx 0.01$), which suggests that immigration and overall ideology are correlated. But the results shown in Figure 8 are also consistent with selecting immigration hard-liners with a variety of political ideologies.[40]

Despite these inferential challenges, the DIME data suggest that both administrations were effectively unable to select candidates according to their ideological preferences. The ideological distributions of Obama and Trump IJs are very similar to those of attorneys generally. For example, the average attorney has a DIME score of −0.31 (Bonica et al. 2016); the average Trump and Obama IJs are both about 0.1 standard deviations from that number. In other words, randomly drawing from the distribution of all attorneys might yield results that look similar to the ideological distributions portrayed in Figure 8. Even assuming pathological forms of missingness, the data suggest that both the Trump and Obama administrations appointed at least a critical mass of ideological counterparts.

What explains the Trump administration's inability to hire ideological allies to the immigration courts? One explanation is that civil servants play a relatively important role in the IJ appointment process, especially when compared with the Article III appointment process. A 2019 DOJ memo outlining the agency's process for hiring IJs provides that the initial responsibility for sorting IJ candidates into "Recommended" and "Not Recommended" groups falls to "Supervisory IJs," a group that includes IJs appointed by previous administrations (McHenry 2018). These holdover bureaucrats may not share the ideological objectives of their new principals. As Figure 8 shows, they may have competing ideological commitments or they might instead be motivated to appoint well-qualified candidates and disregard ideological cues.

This intuition is bolstered by examining the one recent period in which a President has attempted to wrest control of the appointment process from career employees. As we

40 We note that there are of course limits on using political affiliations in the selection process. In the Goodling Report (Office of Professional Responsibility and Office of the Inspector General 2008), the DOJ's Office of the Inspector General notes that "selecting candidates for career positions based on the activities or organizations with which they are affiliated can be used as a proxy for political affiliation and thus can violate CSRA's prohibition [on discrimination in employment on the basis of political affiliation]." This is of course in addition to the overall prohibition on collecting political affiliations.

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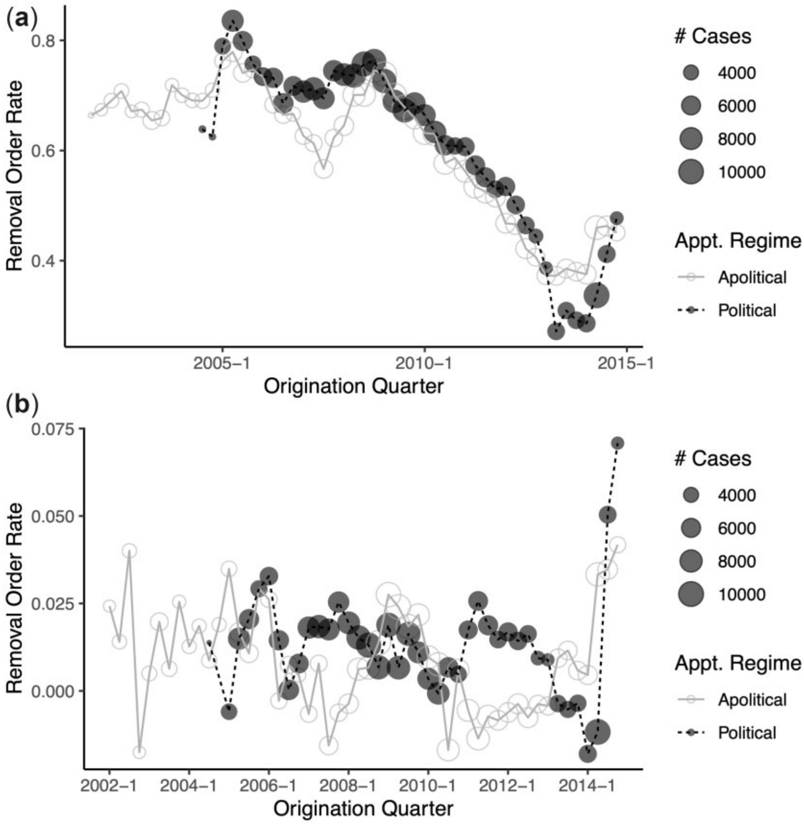

Figure 9. Differences in Removal Order Rates for Non-detained Immigrants among Bush IJ Appointees Hired under Selection Process Ordered by Career Staff (light gray) versus Political Staff (dark gray).
Notes: In panel (a), we present the raw removal rates by quarter; political appointees have higher removal rates in every quarter beginning in Q3 2004 until mid-2013. In panel (b), we present the same plot, with removal rates demeaned by hearing location and quarter. In the demeaned setup, political appointees display higher removal order rates in 26 quarters between Q2 2005 and Q2 2015; apolitical appointees have a higher removal rate in 14 quarters.

described earlier, George W. Bush's Attorney General Alberto Gonzales implemented a series of changes to the hiring process between 2004 and 2007 that virtually eliminated the role of career staff in selection.[41] Figure 9 plots the average removal rates of Bush appointees—demeaned by quarter and hearing location—hired through the politicized and apolitical processes, respectively. Figure 9 shows that appointees hired under the politicized process ordered respondents removed at slightly higher rates than IJs appointed by career staff, on average. Between 2004 and 2014, among IJs who filed at least 25 cases in a month, IJs appointed through the politicized process were 3.1 percentage points more likely to order removal than career appointees, or 0.5 percentage points after accounting for time and place.[42]

41 While the policy was not formally rescinded until 2007, hiring under the politicized policy stopped after an employment discrimination lawsuit was brought against the department in 2005. See Office of Professional Responsibility and Office of the Inspector General (2008: 112).

42 Nonparametric Wilcoxon rank-sum tests suggest that removal rates for the two groups are not drawn from the same distribution ($p \approx 0$).

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That difference persists even when accounting for time and place, though it is significant only at an 0.1 level and sensitive to specification, suggesting that even clearly politicized hiring regimes may produce only noisy returns for political principals.[43]

Local hiring may also help explain these counterintuitive results. IJs are typically drawn from the local labor market. Nearly 57% of Trump appointees had attended law school or passed the bar in the same state where they were appointed to serve as IJs. Fifty-two percent of appointees spent over half their careers in the same state in which they were appointed. And 30% had done all three (law school, bar, and practice) in-state. One might hypothesize that Presidents struggle to appoint ideological allies in regions where fewer allies live.

Evidence to verify that hypothesis is mixed. The ideologies of President Trump's appointees were highly correlated with his vote share in the states where they served, such that he was much more successful at hiring conservatives in conservative states ($\rho \approx 0.37, p \approx 0.001$)—but that is *not* true of President Obama's appointees ($\rho \approx 0.02, p \approx 0.83$). An alternative labor market hypothesis is that we should expect Presidents to hire more ideological allies from out-of-state, since those hires are presumably drawn from a larger national labor market. Indeed, when we compared the pre-appointment ideologies of Trump and Obama appointees who (a) received their JD in the same state where they were appointed and (b) received their JD elsewhere, we found that out-of-state JDs were 9 percentage points more likely to be ideological friends of the president, although this relationship was not statistically significant ($p \approx 0.3$).[44] There is only mixed evidence for labor market constraints.

Selection failed where bureaucratic capacity-building succeeded. There was no Trump effect in IJ removal rates, perhaps because the established hiring process, together with the dependence of those decisions on the local labor market, partially protected selection from political control. We note that this conclusion is not inconsistent with anecdotal evidence of harsh cohorts of Trump IJs in particular places.[45]

3.3 Precedential Rulemaking

To evaluate the effectiveness of precedential rulemaking, we examine a high-profile substantive change to asylum law (a decision nearly eliminating asylum for people fleeing gang and domestic violence) and compare its effect to the effects of two changes to immigration court procedure (decisions limiting administrative closure and continuances). We find that the precedential decisions issuing bright-line *rules* were effective at changing IJ behavior, while decisions framed in terms of *standards* failed to do so.

3.3.1 Gang and Domestic Violence

In *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the Attorney General overturned a BIA decision holding that victims of domestic violence could constitute a particular social group for the purposes of obtaining asylum.[46] In overturning that decision, the Attorney General

[43] Specifically, a model estimating removals among non-detained immigrants between FY2005 and FY2012 finds that politicized Bush appointees were about 2 percentage points more likely than non-politicized Bush appointees to order removal, even accounting for hearing location, respondent demographics, and month. But that estimate is insignificant at conventional levels ($p \approx 0.07$) and is even less precise when demographic controls are removed ($p \approx 0.12$).

[44] An earlier study of asylum cases also pointed to the role of local context, finding that county-level party vote share and the party in control of the state government were significant predictors of IJ decision-making, whereas the party of the presidential administration that appointed the IJ was not (Chand et al. 2017).

[45] An analysis in which models similar to those displayed in Figure 7 was estimated for each individual immigration court showed that Trump IJs *were* significantly harsher than Obama IJs in some courts—though in others they were significantly more lenient and in most they were not statistically distinguishable.

[46] To obtain asylum, applicants must show that they were persecuted or had "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); see also 8 U.S.C. §1158).

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declared that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum" (*Matter of A-B-*, 27 I&N Dec. 320).

We expect this change in the law to affect Central American asylum seekers in particular, since their claims often involve persecution by non-government actors; indeed, *Matter of A-B-* was widely understood as an attempt to reduce grants of asylum to Central Americans (Gottesdiener and Washington 2018; Gorman 2019). To study the effect of the decision, we begin with a simple descriptive time series, examining asylum success rates among Central American applicants. The left panel of Figure 10 shows the trend in the grant rate for Central American cases (both detained and nondetained[47]) in which the respondent filed an asylum application, by completion date of the case (including only cases with final decisions).

As expected, asylum grant rates fell suddenly after *Matter of A-B-* was decided in June 2018. In order to evaluate the descriptive trends more formally, Figure 10 also plots the posterior probability of a structural break from a Bayesian change point model (Barry and Hartigan 1993). We find strong evidence of a structural break after *Matter of A-B-*. To confirm that this discontinuity did not reflect some change in the immigration courts unrelated to *Matter of A-B-*, we show the same time series for Chinese asylum applicants (see the center panel of Figure 10), whose claims were much less likely to involve gang violence or domestic violence. We do not observe a similar discontinuity for those applicants.

Matter of A-B- might also have discouraged people from applying for asylum in the first place. The right panel of Figure 10 evaluates that possibility; we find no discontinuity in the asylum application filing rate. This lack of a discontinuity is not surprising, since many noncitizens likely were not immediately aware of *Matter of A-B-*, and even if they were aware of the decision, they might have decided to file asylum applications despite the small chance of success, since the filing of the application allows the IJ to schedule a merits hearing in the future and delays the entry of a removal order. Figure 10, therefore, suggests that *Matter of A-B-* had an effect mostly through IJ merits decisions, which means that it had the largest effect on cases initiated years before—those that remained in the system long enough to reach merits hearings. (The median length of all Central American cases with asylum applications decided in the month of *Matter of A-B-* was 930 days.)

We also investigate *how Matter of A-B-* had its effect—in particular, whether it affected lenient or harsh judges more, whether IJs appointed by Obama or Trump were more likely to be influenced by the new rule, and whether the new rule was enforced through government appeals.

Consistent with our main results on selection, we find no evidence that the effect of the decision depended on the President's selection of IJs. The left panel of Figure 11 decomposes outcomes by the President who appointed the deciding IJ. Decisions from IJs appointed by Trump look similar to those of IJs appointed by Obama.

Matter of A-B- did disproportionately affect the behavior of more lenient IJs. The middle panel of Figure 11 shows the discontinuity once again, this time separately showing IJs with high and low grant rates in the period before *Matter of A-B-* (but after January 2017). The drop is concentrated in decisions of the high-grant-rate IJs.[48]

Finally, the right panel of Figure 11 shows evidence that ICE appealed more often when IJs granted asylum to Central Americans after *Matter of A-B-*. That panel displays only grants of relief by IJs who were more lenient than average with Central American asylum cases after *Matter of A-B-* was decided; ICE appeals increased among these cases, but there is not strong

[47] The pattern is similar for nondetained cases only, although the mean grant rate is slightly higher throughout.
[48] This pattern persists within hearing locations; in the Appendix, we show IJ grant rates demeaned by hearing location.

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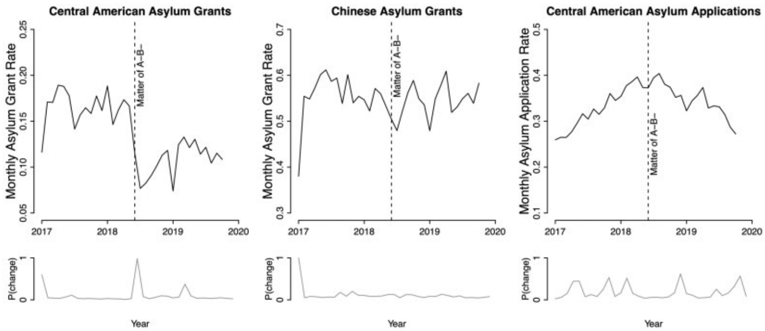

Figure 10. Asylum Before and After *Matter of A-B-*.
Notes: The left panel above shows the asylum grant rate at the case level, including all Central American immigration court cases in which the respondent filed an application for asylum, and the middle panel shows the same measure for Chinese immigration court cases. The line tracks success rates by completion month, excluding June 2018 (the month when *Matter of A-B-* was decided). The success rate measures the rate at which asylum applications were granted. In the right panel, the line shows the share of Central American cases in which the respondent had *filed* an asylum application by the time his or her case was completed, as a proportion of *all* Central American cases in which a final decision on the merits was reached during our study period. In all three panels, the bottom panel plots the probability of a structural break using a Bayesian change point model (Barry and Hartigan 1993). Note that both Central American and Chinese cases saw increased grant rates (see left and middle panels) at the beginning of the Trump administration; the number of asylum decisions overall dropped in that month, perhaps because of the change in administrations.

evidence of a structural break, and appeals remained relatively rare overall.[49] Still, the fear of reversal on appeal might have offered part of the motivation for IJs' sudden change in grant rate when *Matter of A-B-* was issued; had IJs not lowered their grant rates, they might have experienced more appeals still.[50]

In sum, we find that the Attorney General's large change in the substantive law of asylum had the intended effect, reducing grants of asylum to Central Americans, and that it mostly accomplished that change by altering the behavior of more lenient IJs, likely partly through the fear of reversal on appeal.

3.3.2 Procedural Decisions

We compare this large effect of a substantive legal change to the effects of two procedural certification decisions—one instituting a bright-line rule to abolish a method of case management (with an immediate and large impact) and the other aiming, with a vaguer standard, to reduce the use of continuances (with little immediate impact).

In *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), the Attorney General eliminated administrative closure, a mechanism used to place deportation cases indefinitely on hold. IJs had often used administrative closure when a respondent was seeking collateral relief (e.g., adjustment of status) or was eligible for a type of administrative relief (such as Deferred Action for Childhood Arrivals). And IJs used administrative closure in cases in which they decided that it would be unfair to proceed against the respondent. In *Matter of Castro-Tum* itself, the respondent—who had entered the United States unaccompanied at age 17—did not

[49] The proceeding data that allow us to identify the last completion before appeal does not indicate which type of relief the IJ granted, but these are cases in which the respondent filed an application for asylum.
[50] In addition, the new performance metrics might have heightened that fear, since they set remand rate targets, but since the metrics took effect several months after the *Matter of A-B-* decision, they are unlikely to have driven the sudden change.

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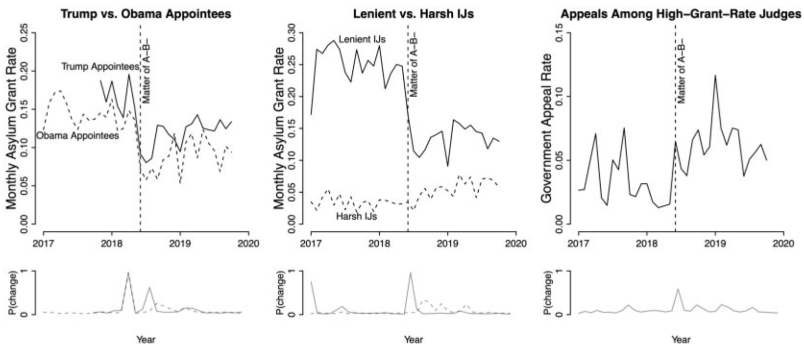

Figure 11. Decomposing the Effect of *Matter of A-B-* by Appointing President, Grant Rate, and Appeals.
Notes: The left panel shows grant rates for Central American asylum applicants over time, by appointing President (the line for Trump-appointed IJs begins later because those IJs issued relatively few decisions in the first months of the Trump administration). The middle panel shows asylum grant rates for Central American asylum applicants over time by the relative generosity of the IJ: lenient IJs are those in the top half of the distribution and harsh IJs are those in the bottom half of the distribution. The right panel shows the chance of ICE appeals of grants of asylum to Central Americans by IJs in the top half of the post-*Matter of A-B-* Central American asylum grant rate distribution. The month along the horizontal axis is the month in which the final grant of relief before appeal occurred. In all three panels, the bottom panel plots the probability of a structural break using a Bayesian change point model (Barry and Hartigan 1993).

appear at his first four hearings. At the fifth hearing, the IJ ordered the case administratively closed because he believed that the government had not sufficiently demonstrated that the respondent had notice of the hearings. The Attorney General reversed, holding not only that the IJ erred in granting administrative closure in this case, but also that IJs lack the power—ever—to grant administrative closure.

IJs stopped granting administrative closure. Figure 12 shows this sudden change. With this bright-line procedural decision, the Attorney General was successful in altering IJs' behavior. On average, administrative closures had been granted in about 5% of cases, which plummeted to 0% after *Castro-Tum*.

By contrast, in the last certification decision that we study, *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018), the Attorney General altered a broad standard governing when an IJ may grant a continuance. Generally, an IJ may grant a continuance—an adjournment to a future hearing—"for good cause shown" (8 C.F.R. §1003.29). *Matter of L-A-B-R-* held that "[t]he good-cause standard is a substantive requirement that limits the discretion of IJs and prohibits them from granting continuances for any reason or no reason at all." The decision was an attempt to limit the use of continuances by IJs, but it set no bright-line rules. *Matter of L-A-B-R-* followed close on the heels of a July 31, 2017, EOIR Operating Policies and Procedures Memorandum (OPPM)—a management intervention—with the same goal and a similar absence of bright-line rule change. That OPPM included a description of the harmful delays caused by continuances and reminded IJs that they "should not routinely or automatically grant continuances" (Executive Office for Immigration Review 2017: 3).

The middle and right panels of Figure 12 examine the effect of these two changes, showing how often continuances were issued, and how long they were; vertical lines mark the 2017 OPPM and *Matter of L-A-B-R-*. There are no discontinuities at those decisions and the figures therefore suggest that neither the OPPM nor *Matter of L-A-B-R-* had an immediate

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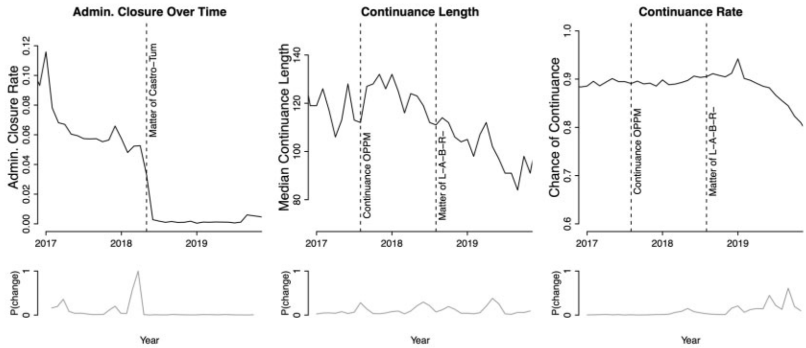

Figure 12. Procedural Changes: Rules versus Standards.
Notes: The left panel shows the proportion of all cases ending in administrative closure over time. The vertical line marks the month in which *Matter of Castro-Tum* was decided (May 2018). The fall in early 2017 likely reflects a change in ICE prosecutorial policy; ICE began more frequently opposing administrative closure at that time (Catholic Legal Immigration Network, Inc., 2018; Lanard 2018). The small bump about a year after the decision likely reflects the Fourth Circuit's abrogation of *Matter of Castro-Tum* in August 2019, which made administrative closure possible again within that circuit. The middle panel shows the median number of days, by month, from a master calendar (group) hearing to the next scheduled hearing; the right panel shows the proportion of master calendar (group) hearings, by month, that ended with the scheduling of a future hearing. Both panels include all master calendar hearings, on both the detained and nondetained dockets, and the vertical dashed lines mark the July 2017 OPPM and the August 2018 decision of *Matter of L-A-B-R-*. The spikes in continuance grants and lengths in early 2019 reflect the government shutdown at that time. Note that both the middle and right panels exclude hearings scheduled for the day after Thanksgiving, 2019; that date was used as a placeholder for many cases that were later rescheduled. In all three panels, the bottom panel plots the probability of a structural break using a Bayesian change point model (Barry and Hartigan 1993).

effect. But the frequency and length of continuances did decline in 2018 and 2019, and the OPPM and *Matter of L-A-B-R-* might have contributed to that secular decline.

4. DISCUSSION

Our results above inform long-standing questions in bureaucratic politics about how the President can control agency adjudication.

By way of summary, Table 2 displays our best estimates of the impact of the three methods of control, along with the political and resource costs an administration might expect to bear in using each method. Our estimates of the marginal *effect* of each method of control are derived from our analysis above; they can be interpreted as marginal, causal estimates, and we present 95% confidence intervals next to each estimate to reflect our uncertainty, except in our estimate of the uncertainty of the effect of *Matter of Castro-Tum*, where we provide a more conservative range of possible values. Our estimates of the *cost* of each method of control are based, with varying degrees of uncertainty, on public documentation. We provide details of our calculations in Appendices B and C. Further, as we note in the discussion below, it is important to recall that each of the methods of control described here can be thwarted to some extent by the actions of the other branches.[51] The President's power to

[51] The president can also be thwarted by actors within the executive branch, including the Attorney General. The executive may be a "they" not an "it" (Fontana 2012).

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Table 2. Comparing Methods of Presidential Control

	Marginal impact	Cost	
	Removal orders	**Resources**	**Political constraints**
Capacity building			
. . .*Appoint IJ in FY19*	348 (267, 452)	$0.8–1.5 mill.	Annual Appropriations Process
. . .*Appoint IJ in FY16*	242 (183, 300)		
Selection			
. . .*Ideological hiring*	–	Unknown	Civil Service Regs., Union
Precedential rulemaking			
. . .*A-B-*	5232 (4266, 6197)	40–400 h (≈0.2 FTE)	Judicial Review
. . .*Castro-Tum*	2868–5914		

All figures are annual. (1) *Impact estimates.* All estimates are in terms of removal orders; not every removal order results in a deportation; 95% confidence intervals are presented in parentheses, except for the estimate of the effect of *Matter of Castro-Tum*, where we use a more conservative approach, generating a range (see the Appendix for details). All effects presented here are local and marginal; long-run and aggregate effects may be different. See text for details. (2) *Cost estimates.* Resource estimates for appointments come from public budgeting documentation submitted by DOJ to Congress. Other resource estimates are best guesses; see text for details.

deploy each of these methods may depend partially on his expectation about other branches' likely responses.

Table 2 illustrates three points. First, the President's capacity to *select* ideological allies to fill bureaucratic appointments is weak in the context of immigration adjudication. Despite ample motivation to pick ideological allies, the Trump administration failed to do so consistently. The failure of ideological selection contradicts contemporaneous media accounts suggesting that selection was a key strategy of control (e.g., Levinson et al. 2021).[52]

We posit that the reason for the failure of ideological selection has to do with the involvement of career bureaucrats at early stages in the selection process, a feature of IJ appointments that George W. Bush's administration tried and failed to change. We denote this constraint on Presidential control in the rightmost column of Table 2. President Bush's efforts to select ideological allies were stymied in part because of regulations classifying IJs as "career" employees, who must be hired "without regard to political affiliation" under relevant regulations and the Civil Service Reform Act of 1978, 5 U.S.C. §2301(b)(2).[53]

If this explanation for the failure of selection is correct, then judicial intervention might unleash the President's selection power in the future. For example, the Supreme Court's recent decision in *Lucia v. SEC*, 138 S. Ct. 2044, 2051–55 (2018) prohibits giving civil servants *exclusive* control over hiring for agency adjudicators.[54] It is easy to imagine future courts going further in requiring political control over the appointment of agency adjudicators. For

52 Note that we do not address the effect of ideological selection on the BIA. Even if ideological selection at the BIA were more successful than it was at EOIR, only about 7% of EOIR cases are appealed to the BIA—though of course the BIA's power to make precedential decisions would still render that body relatively powerful. See *Expanding the Size of the Board of Immigration Appeals*, 85 Fed. Reg. 18105-06 (April 1, 2020) (discussing case loads), https://www.federalregister.gov/documents/2020/04/01/2020-06846/expanding-the-size-of-the-board-of-immigration-appeals. With that said, if the Attorney General's power of ideological selection is limited to choosing allies who can influence the rest of EOIR by creating precedents, then the mechanism of ideological selection begins to merge with the use of precedential rulemaking that we address below.

53 The so-called Goodling Report detailing the politicized hiring process contains a detailed description of the relevant legal provisions on pages 11 and 12.

54 *Lucia* arose in the different context of an independent agency. But Justice Kagan's opinion for the Court clearly held that, in the ordinary course, the appointment of administrative adjudicators may not be left entirely to politically insulated bureaucrats; the Attorney General must play at least some role.

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example, courts might require political appointees to be involved even at early stages in the selection process; or they might require that sufficiently powerful agency adjudicators be deemed "political" appointees whom the Attorney General may select on the basis of political affiliation. Such changes would, of course, make political selection easier.

Second, Table 2 shows that the Trump administration exploited a highly scalable and successful strategy for expanding removals by encouraging Congress to simply build the capacity of the immigration courts and by changing the hiring process to accomplish this faster. Our results suggest that each marginal IJ added to EOIR's complement resulted in 270–450 more removal orders in FY2019. Further, given that IJs enjoy a median tenure of 8.7 years, that expansion may last. Importantly, even hiring ideological opponents of the President advanced the overall strategic objective of increasing aggregate removals. IJs we identified as strong liberals in the DIME dataset (ideological scores of -1 or below) had an average removal rate of over 68% for completed cases.

The ideological valence of capacity-building in EOIR may seem like common sense, but it is underappreciated by many policymakers. The backlog itself is relatively beneficial for many potentially removable immigrants, who remain in the United States (although a minority would obtain relief, and therefore formal status, if the backlog were cleared). But despite both of these factors, each of which suggests that EOIR's capacity would be a threat to Biden's policy proposals, In 2021, President Biden proposed increasing EOIR's complement of IJs by a further 100 IJs (Hendricks 2021). That proposal would dramatically add to President Trump's efforts to increase removals. Several Democrats in Congress have made similar proposals.[55] In short, the ideological valence of building EOIR's capacity does not appear to have been internalized by many prominent policymakers.

To be sure, Presidents' control over capacity-building comes with constraints. Hiring costs money—around \$0.8–1.5M annually per judge, due to clerical staff, facilities, and other indirect costs. Adding budget requires Presidents to seek Congressional assent in their capacity-building plans. While we argue above that Congress has historically been quite receptive to Presidents' requests for additional appropriations for the immigration courts (see Figure 1), that could change. On the other hand, it is easier to imagine a President *reducing* the capacity of a bureaucratic agency without constraints by simply allowing retiring and departing positions to go unfilled.

Finally, our findings demonstrate the importance of agency heads' power to engage in precedential rulemaking, and the significance of how they choose to wield it. While the Attorney General's certification authority is not rulemaking under the APA, our findings show that it functions in a similar way—without the procedural constraints that often slow or stop rulemaking. The power to change the underlying substantive and procedural law had dramatic effects on how immigration courts were enlisted in the administration's enforcement efforts. But decisions expressed as rules were much more effective at changing frontline behavior than standards. In short, the study of the political control of agencies would benefit greatly from seeing the law as a mechanism of direct control.

Precedential rulemaking appears particularly effective given its political and pecuniary cost. The attempt to eliminate gang and domestic violence as a basis for asylum likely led to an additional 4300–6200 removal orders in the year after its issuance. The procedural decision eliminating administrative closures likely generated between 2900 and 5900 additional removal orders in the year after its issuance. The cost of these decisions in direct resources is

55 In hearings before the House Appropriations committee, Rep. Ed Case of Hawaii asked whether 100 additional IJs were enough. *Executive Office of Immigration Review: Hearings Before the Subcomm. on Commerce, Justice, Science and Related Agencies of the House Comm. on Appropriations*, 116th Cong. (2019–20), statement of Rep. Case at 82.

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low, requiring 20% of a full-time attorneys time to draft, and institutionally the decision is vested entirely in the Attorney General.

Like the other levers of control we describe, precedential rulemaking is not without drawbacks. In contrast to IJ staffing, precedential rulemaking may only survive the term of the Attorney General, as such decisions can be reversed going forward. Further, precedential rulemaking is vulnerable to judicial intervention. The near-desuetude of this tool of policy-making under administrations prior to George W. Bush's suggests that the political costs of precedential rulemaking may have fallen over time. Scaling is also more difficult, given the challenge of identifying legal questions susceptible to overruling. Last, the failure of *Matter of L-A-B-R-* to change continuance lengths and rates suggests that precedential decisions may only be effective at shifting behavior if they are framed in sufficiently specific terms.

5. CONCLUSION

Studies of the political control of agency action have often relied on comparisons across agencies. We, by contrast, study political control by comparing tactics within a single agency—the immigration courts under President Trump. We find surprisingly little evidence that the most-studied method of political control—selection of ideologically like-minded personnel—increased the number of removal orders issued by the immigration courts during the first three years of the Trump administration. But the administration did succeed in increasing the number of removal orders in two other ways. First, even though the behavior of the IJs appointed under President Trump was similar to the behavior of those appointed under past presidents, the large increase in the number of appointments (capacity) led directly to an increase in removal orders. Bureaucratic capacity led to a partisan effect; increased capacity meant more removal orders. And second, the Trump administration caused thousands of additional removal orders by making substantive and procedural changes to immigration law in decisions issued by the Attorney General. Where ideological hiring failed, expansion and lawmaking succeeded.

Do these lessons apply beyond the confines of EOIR? Of course, the strategic calculus associated with different levers of control is bound to differ from agency to agency. But, as a general matter, we suspect that the findings here apply most closely to other high-volume agencies. Our findings on the importance of precedential rulemaking likely apply widely across agencies, and we expect that our findings on the effect of capacity-building are most relevant for mass-adjudicatory agencies. Our findings on the failure of ideological selection may apply less broadly; the implications of those findings depend on fast-moving changes in the treatment of administrative adjudicators under federal employment law.

First, our observations on the power to issue precedential decisions, and the importance of how that power is wielded, are likely widely applicable. As we note above, a number of agencies apart from EOIR feature agency head review akin to EOIR's, in which the agency head can directly reverse adjudicators' decisions. And the judiciary is creating increasing legal pressure to maintain and expand those powers. In its recent decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), the U.S. Supreme Court proclaimed that agency head review is "the standard way to maintain political accountability and effective oversight" for informal adjudications not governed by APA (5 U.S.C.) §557(b) (slip op. at 15–16). And even where direct agency head review is missing, the power to issue equivalent guidance to adjudicators is often present anyway. For example, in *Arthrex*, the Government's briefing emphasized that the Director of the PTO has the unilateral authority to issue interpretations of law and policy that are binding on Patent and Trademark Appeal Board (PTAB) panels—despite

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lacking the power to directly review individual PTAB decisions.[56] Likewise, the Commissioner of the SSA has the power to issue "Social Security Rulings" that "do not carry the force of law" but are nonetheless "binding on all components of the SSA" including ALJs, even though the Commissioner delegates the power to supervise ALJs to the Appeals Council (see *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 [9th Cir. 2009]; see also 20 C.F.R. §402.35(b)(ii)). In short, we would expect our findings as to the relative value of precedential rulemaking for political control to be fairly widely applicable.

By contrast, the power to manipulate capacity is likely most useful in the context of mass-adjudicatory agencies. Three of the keys to the Trump administration's success in using capacity to increase removals were (1) the vast backlog of immigration cases, which linked the capacity of EOIR to total production; (2) unused funding for additional adjudicators that could be exploited via faster hiring; and (3) an acquiescent Congress. The first and third conditions apply in many high-volume adjudicatory agencies. Backlogs in such agencies are pervasive: The SSA, for example, had over 400,000 pending adjudications outstanding as of FY2020 (Office of the Inspector General, Social Security Administration 2020: 147); similar conditions exist at the Board of Veterans' Appeals (BVA), the OMHA, and other agencies handling high volumes of cases. While we could not identify other agencies which have historically maintained vacancies in adjudicatory agencies, many of the mass-adjudication agencies we address, including the SSA and the BVA, have long enjoyed essentially full funding from Congress for staffing expansion requests.[57] These facts suggest that control via capacity-building—or conversely by deliberate attrition—is a strategy that might be viable in other high-volume adjudicatory agencies, but not as much in adjudicatory agencies with very small case volumes and staffs.

Finally, the applicability of our finding as to ideological selection may be broad for now, but narrower in the future. Among the factors preventing the Trump administration from selecting ideological friends as IJs, we focused in part on legal provisions prohibiting the consideration of political ideology in hiring agency adjudicators, such as the statutory requirement that career employees be selected "without regard to political affiliation" (5 U.S.C. §2301(b)(2); see also Office of Professional Responsibility and Office of the Inspector General [2008: 11]). For much of the past several decades, these legal barriers to ideological selection have applied to administrative adjudicators throughout the Executive Branch. In fact, the barriers to ideological selection have been even *higher* in other context: ALJs, for example, were hired under competitive service rules and were subject to an extensive merit-based examination process run by the OPM. Such hiring procedures would have made ideological selection very difficult. It is no surprise, then, that the leading study of the ideological distribution of federal administrative judges—Bonica and Sen (2017: 577)—finds them to be much more liberal than Article III district and appellate judges, suggesting that recent Republican administrations faced similar constraints to those we identify here.

But the barriers to ideological selection of agency adjudicators appear to be falling quickly. First, the Trump administration attempted to remove most ALJs from the Competitive Service via Executive Order (EO) No. 13,843, which created a new OPM classification for ALJs (83 Fed. Reg. 32,755 [July 10, 2018]). The EO's principal effect was to ensure that

[56] Indeed, in its preliminary decision in *Arthrex*—later vacated and remanded on other grounds by the Supreme Court—the Federal Circuit wrote that the PTO's Director may issue binding policy on the basis of "exemplary applications of patent laws to fact patterns"; that is, the Director may issue "precedential" decisions in *hypothetical* cases. See *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1331 (Fed. Cir. 2019).

[57] See, for example, S. Rep. No. 115-269, which notes the following with respect to the BVA: "The Committee has not only fully funded the budget request for claims processing in recent years, but has provided increases *above the budget requests* for . . . addressing the increasing backlog of appeals at the Board of Veterans Appeals."

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agency heads play a larger role in ALJ selection than they have in the past, but it is unclear whether that power implies that agency heads can more explicitly account for political beliefs in making hiring decisions. For instance, neither OPM nor the courts have interpreted this EO as excepting ALJs from the provisions of 5 U.S.C. § 2302 that prohibit discrimination on the basis of political affiliation.[58] Even if the EO itself does not bring about that change, the Supreme Court's decisions in *Lucia* and *Arthrex* point to a growing judicial intolerance for civil service restrictions on the selection of agency adjudicators. If we are correct in our hypothesis about the underlying cause of the Trump administration's failure to hire ideological allies, these changes might limit the applicability of our findings to other agencies in the future.

Conflict of interest statement. D.K.H. consults occasionally for the ACLU Immigrants' Rights Project. That consulting work is unrelated to this research.

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58 EO 13,843 itself does not declare ALJs exempt from the political neutrality rule. But the EO does justify the new treatment of ALJs on the basis that ALJs often make final policy decisions, and 5 U.S.C. §2302(a)(2)(B)(ii) exempts employees whose jobs are of a "policy-determining" character. A court or agency might find that the EO deems ALJs to be "policy-determining" and thus that the Executive can consider political affiliation in hiring them.

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APPENDIX

A. DATA

Data come from the EOIR's CASE database, which is updated monthly and available for download at https://www.justice.gov/eoir/foia-library-0. The relational database contains tables tracking, among other things, scheduled hearings, applications for relief, grounds of removal and inadmissibility, appeals, and merits outcomes. Confusingly, the database refers to what immigration lawyers call a "proceeding" as a "case." In the database, the proceeding table often contains multiple rows for a single case; a new proceeding row is created whenever there is a change of venue or an appeal. A key decision in analyzing the data is therefore whether to consider the first or the last outcome in a given case.

For our analysis of appointment effects on the merits, we consider only removal, deportation, withholding-only, and exclusion case types, and we examine only the first outcome in any given case, since that is the outcome that we can be confident reflects only the decision-making of the relevant IJ. Our dependent variable is a dichotomous variable that is equal to 1 if the IJ orders removal (including removal in absentia) or grants voluntary departure within the relevant period (12 or 18 months) and zero otherwise, whether the IJ grants relief, allows a change of venue, or simply had not reached a decision within the relevant time period. We code the dependent variable this way because of the time-dependent nature of immigration proceedings: the longer they continue, the less likely that a noncitizen is to be ordered removed.

Because detained cases involve significantly different dynamics, with faster decisions and a strong incentive for the noncitizen to give up the case in order to be released from detention, we analyze those cases separately. In addition, we exclude cases from the Trump administration's return to Mexico program, which required noncitizens to return for hearings at border courts, which almost never resulted in grants of relief.

For our analysis of IJ bond decisions, we use data from the Associated Bond table. We consider a decision adverse if the IJ did not grant the noncitizen a new bond amount or (very rarely) grant release on recognizance.

For our analysis of the effect of *Matter of A-B-*, our outcome variable is whether an asylum application was granted; where a case included more than one application, we consider only the last application. We consider cases Central American if the respondent was a national of Honduras, El Salvador, Guatemala, or Nicaragua. For our analysis of the effect of *Matter of Castro-Tum*, we consider only the latest merits outcome in a given case—in particular, whether that outcome was administrative closure. For our analysis of continuance probability and length, finally, we use the schedule table from the database and calculate the average continuance length from each hearing to the next, as well as the probability that such a later hearing will be scheduled.

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We make available a replication archive with the cleaned data and complete code to replicate all figures at the following address: https://www.dropbox.com/sh/0o2g2cistragd4e/AAAob1Pewe4HZOgU6osTdEjZa?dl=0.

We now describe how we arrived at each estimate, emphasizing that we do not observe cost directly.

B. PRECEDENTIAL RULEMAKING

B.1 Matter of A-B-

In order to estimate the number of additional removal orders caused by the Attorney General's decision in *Matter of A-B-*, we estimate a simple interrupted time-series model:

$$Y_t = \beta_0 + \beta_1 T + \beta_2 X_t + \beta_3 X_t * T + \epsilon_t, \tag{B1}$$

where Y_t is the asylum win rate for completed cases, t is the time in days, T is a running time variable (in days), and X_t is an indicator variable for whether a case was decided before or after *Matter of A-B-* was announced. We use data for 180 days on either side of the decision and omit the day that *Matter of A-B-* was announced because, on that day, we have no way of knowing whether an asylum decision was made before or after the announcement. β_2 is an estimate of the shift in levels caused by *Matter of A-B-*, and β_3 is an estimate of the change in trend, but we do not draw inferences from the estimated change in trend for two reasons. First, we expect *Matter of A-B-* to produce a change in level rather than trend, since it caused a discrete change in the law. Second, an estimated change in the trend is more likely to be driven by other events.

Table B1 shows results. We use the estimated change in levels, and the associated confidence interval, to produce the estimates of removal orders caused by *Matter of A-B-* in Table 2. (Specifically, Table B1 also suggests that *Matter of A-B-* might have caused the trend in the asylum grant rate to shift upward. Given the rapidly changing enforcement environment during this period, which we have described elsewhere, we do not draw the inference that *Matter of A-B-* caused that trend change.)

We then arrive at our estimate of the marginal effect of *A-B-* on removal orders by multiplying the local average treatment effect derived above by the total number of cases in which noncitizens applied for asylum in the six months after the decision (and doubling that number to produce an annual estimate).

To be more confident that these results are not an artifact of other patterns across time and/or immigration courts, we estimate (see Table B2) the effect of *Matter of A-B-* in a panel regression framework, with hearing location and week-fixed effects (again considering the six months

Table B1. ITS Estimate: Effect of Matter of A-B- on Asylum Decisions

	(1)
Time (Days)	0.0000384
	[−0.0000533, 0.000130]
Post-Matter of A-B-	-0.0669^{***}
	[−0.0793, −0.0546]
Time * Post-Matter of A-B-	0.000276^{***}
	[0.000154, 0.000397]
N	70,730

95% confidence intervals in brackets.
$^{*}p < 0.05$, $^{**}p < 0.01$, $^{***}p < 0.001$.

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Table B2. Panel Estimates: Effect of Matter of A-B- on Asylum Decisions

	(1) Specification 1	(2) Specification 2	(3) Specification 3
Treatment (Specification 1)	-0.274^{***} [−0.288, −0.259]		
Treatment (Specification 2)		-0.196^{***} [−0.205, −0.187]	
Treatment (Specification 3)			-0.216^{***} [−0.224, −0.208]
N	38,922	58,958	70,743

95% confidence intervals in brackets.
$^{*}p < 0.05$, $^{**}p < 0.01$, $^{***}p < 0.001$.

before and after the decision). We specify the treatment and control groups in three alternative ways that reflect our uncertainty about the implications of the decision for noncitizens of different nationalities. The implications of the decision, while relatively clear for Central American and Chinese applicants, are less clear for applicants of other nationalities. In the first specification, Central American applicants make up the treatment group and Chinese applicants make up the control group. In the second specification, Central American applicants still make up the treatment group, but the control includes applicants from all countries except Mexico. In the third specification, the treatment group includes both Central American and Mexican applicants, and the control group includes all other applicants. These panel regressions imply an even larger effect of *Matter of A-B-* than the simple figures in the main text, ranging from about a 19 to 27 percentage point reduction in the chance of being granted asylum.

Finally, we also include an alternative measure of IJ leniency. In the main text above, we examine the effect of *Matter of A-B-* on IJs with pre-*A-B-* grant rates in the top and bottom halves of the overall distribution. Here, we show the same patterns for IJs' grant rates, demeaned by hearing location—that is, we subtract the hearing location grant rate from each IJ's grant rate. Panel (a) of Figure B1 shows the effect of *A-B-* for IJs in the top and bottom halves of the (demeaned) distribution and Panel (b) shows the same pattern for IJs in the top and bottom quartiles of the distribution.

B.2 Matter of Castro-Tum

Estimating reasonable bounds on the number of additional removal orders caused by *Matter of Castro-Tum* is challenging because it is unclear how many of the cases granted administrative closure before *Castro-Tum* would have resulted in removal orders if they had been heard on the merits. We use two strategies to create estimated numbers of removal orders; the resulting range is approximate.

Our first strategy is to exploit recalendared cases, that is, cases that previously ended in administrative closure but were later reopened and heard on the merits. Any administratively closed case can be reopened and recalendared at any time, but as a practical matter many remain closed permanently. About 49% of cases that received administrative closure between 2000 and 2017 remained closed as of July 2020 (Transactional Records Access Clearinghouse 2020b). If we make the strong assumption that the decision to recalendar a closed case is unrelated to the probability of a removal order, then we can use recalendared cases to estimate the share of all administratively closed cases that would have resulted in removal orders if they had been heard on the merits. And if we make the further assumption that the share of cases receiving administrative closure would have remained constant but for *Matter of Castro-Tum*, we can derive an estimate for the causal effect of *Castro-Tum* on removals from the share of recalendared cases that end with removal orders in the six months after *Matter of Castro-Tum*.

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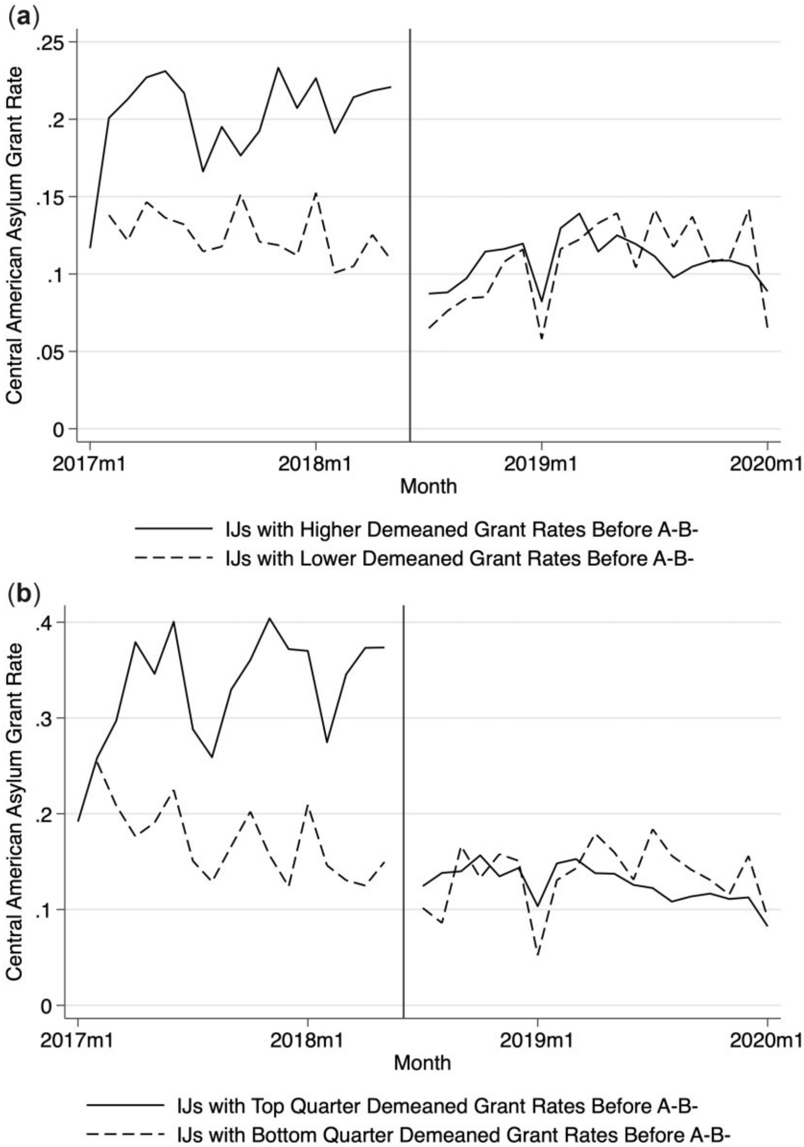

Figure B1. Decomposing the Effect of *Matter of A-B-* by Grant Rate.
Notes: Panel (a) shows asylum grant rates for Central American asylum applicants over time by the relative generosity of the IJ (demeaned by hearing location): lenient IJs are those in the top half of the distribution and harsh IJs are those in the bottom half of the distribution. Panel (b) shows the same grant rates, except that it only includes the top quartile and bottom quartile of IJs (by demeaned grant rate). The month along the horizontal axis is the month in which the final grant of relief before appeal occurred.

To weaken the strong assumption that recalendared cases are representative of all administratively closed cases, we produce two estimates using different samples from the six months following *Castro-Tum*. One includes only recalendared cases in which a merits decision had been reached as of January 2020; the other also includes pending cases (as of January 2020).

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Table B3. Removal Order Rates in Recalendared Cases, June–November 2018

	Mean	N	95% CI
Completed	0.517	4485	[0.503, 0.532]
Completed and pending	0.268	6834	[0.258, 0.279]

The rationale here is that we don't know whether cases that would have ended in administrative closure are similar to completed recalendared cases, with some decision reached, or whether IJs who were inclined to administratively close would often succeed in putting off a decision instead, leaving some pending. For completed recalendared cases, the removal order rate was about 52%; including pending cases, the removal order rate was 27%. For our range in Table 2, we use the lower bound of the 95% confidence interval of the lower estimate and the upper bound of the 95% confidence interval of the higher estimate shown in Table B3, multiplied by the actual number of administrative closures in the six months before; in Table B3, we multiply this range by two for an annualized estimate of *Matter of Castro-Tum* (5559*.258 = 1434, 5559*.532 = 2957). To be clear, the range itself continues to rely on strong assumptions. The most important of these assumptions is that the removals that resulted from *Castro-Tum* would not have happened anyway later on when those cases were recalendared. That assumption is false; in fact, many of those cases would no doubt have been recalendared. Given that the average time to recalendaring is over three years (Transactional Records Access Clearinghouse 2020b), however, we treat these as preventing removal orders at least in the near term. But we hasten to add that this solution is imperfect, and we therefore also employ a second approach.

The second approach to estimating the number of additional removal orders caused by *Matter of Castro-Tum* uses exact matching to identify cases in the six month window after *Matter of Castro-Tum* that are similar to cases that were administratively closed in the prior six months. We can then observe the outcomes of the matched cases to estimate the counterfactual removal rate for administratively closed cases. To implement this strategy, we took the sample of 5559 cases that received administrative closures in the six months preceding the Attorney General's decision. For each of those cases, we found the cases that arose in the six months after the Attorney General's decision and that exactly matched the treated case on 11 categorical criteria, including nationality, immigration court, IJ, and the like. Among the matched cases, 2596 ended in removals; we therefore infer that *Castro-Tum* resulted in an additional 5192 annual removals. This estimate falls within the range above.

B.3 Duration and Cost

How long would these effects last? It is important to note that the estimates generated via the methods just described are "local" treatment effects; we define "local" as six months. But there are good substantive reasons to doubt that the effect of legal changes is constant over time. After all, changes in the law shift litigants' substantive expectations of their chances of success and therefore the selection of cases subject to immigration adjudication in the first place (Priest and Klein 1984). Over the long run, then, the effect of *any* change in substantive law on the harshness of judgments produced by EOIR should revert to zero. We think it is logical to expect smoothly declining treatment effects. It is important to note, however, that a President employing precedential rulemaking could not count on a treatment effect lasting longer than his term; any substantive change generated by the use of precedential rulemaking can be summarily reversed by a subsequent administration.

Finally, the cost of using precedential rulemaking is unclear, though it is probably very low. In Table 2, we display the cost of the human resources required to identify suitable cases for review and then brief and write opinions. We derive our estimate from requests for attorney's

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fees in immigration cases filed under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412, which we see as a rough proxy for the amount of time needed for a DOJ attorney to brief and write an opinion. We identified several immigration cases in which EAJA fees were awarded; in the shortest, the attorney claimed to have worked approximately 40 h[59] and in the longest a team of attorneys worked over 200 h.[60] Assuming that additional clerical resources would be required in addition to attorney time, we conservatively double the top end of this range to arrive at a maximum full-time equivalent (FTE) cost of 400 h.

It is unclear whether these resource expenditures are *experienced* as costs by the strategic actors under analysis. The Attorney General does not require additional appropriations to direct his employees to find and review EOIR cases. This makes precedential rulemaking rather unlike the other methods of control we analyze in this article: the resources needed to use the Attorney General's precedential rulemaking are a "funded mandate."

C. BUREAUCRATIC CAPACITY

To estimate the effect of appointing a marginal IJ on removal orders, we return to the estimates of elasticity presented in Figure 4. We frame the relationship between appointments and removal orders in terms of elasticity both because of the visual evidence that this framework captures the relationship and for the substantive reason that, given the finite backlog, we should expect that every additional IJ hired has a slightly smaller effect on removal orders than the last. Although the agency is currently suffering from an extraordinary backlog, if the budget for new hires were infinite, eventually the number of IJs would reach the point that adding a replacement judge would produce zero additional removal orders.

Because we frame the appointment effect in terms of elasticities, the effect of a marginal hire depends on the base number of IJs and removal orders. As Figure 4 shows, our best estimate of the elasticity of removal orders in IJ appointments is roughly 0.895, meaning that every 10% increase in the complement of IJs is correlated with an 8.95% increase in removal orders (95% confidence interval [CI]: 6.79–11.12%). In FY19, there were 465 IJs and 205,471 removal orders.[61] A single marginal hire in FY19 represents a 0.2% increase over this staffing level, which translates to a 0.17% increase in removal orders on average (95% CI: 0.13–0.22%)—about 348 removal orders (267, 452) given that year's case volume. By contrast, in FY16, there were only 289 active IJs in service, such that a marginal hire increased the staffing complement by 0.3%—producing a 0.26% increase in removal orders on average (0.2%, 0.33%). Given that there were just 90,321 removal orders in FY16, we estimate that a marginal IJ would have produced an additional 242 removal orders that year (183, 300). We emphasize again that, by design, the estimated marginal impact of each additional IJ will be *lower* than that of the previous IJ hired.

In contrast to the exercise of precedential rulemaking, hiring IJs is both more politically costly and more durable. Adding to the IJ complement requires legislative action, meaning that the President must persuade Congress to appropriate funding. And the funding requirement is significant. In its budget request for FY19, the DOJ claimed that the cost of a single new IJ was $1.5 million, after factoring in the clerical staff and physical infrastructure required to support the judge's work (S. Rep. No. 116–127 2019). An OIG audit report on IJ hiring suggests that

[59] Order Granting Plaintiff's Motion for Attorney's Fees, 85 F. Supp. 3d 1241 (W.D. Wash 2015), https://drive.google.com/file/d/1eW2GaLl405C2fr1TVhJrwFRUXD04qijd/view?usp=sharing. This is in line with the number of hours courts have awarded for routine social security cases; federal district courts in New York, for example, have cited a range of 20–40 h as the normal amount of time required to litigate a routine social security disability case. See *Cruz v. Apfel*, 48 F. Supp. 2d 226, 231 (E.D.N.Y. 1999).

[60] Pet'r's Verified Mot. for Attorneys' Fees and Incorporated Mem. of Law, Petitioner v. Marc J. Moore, et al. (S.D. Fla 2014), https://www.aclufl.org/sites/default/files/wp-content/uploads/2015/11/EAJA-Fees-Motion-With-Exhibits-Final_Redacted_0.pdf. Again, this is in line with the number of hours claimed in complex appeals in other practice areas. See *Garden State Auto Park Pontiac GMC Truck, Inc. v. Elec. Data Sys. Corp.*, 31 F. Supp. 2d 378, 385 (D.N.J. 1998) (finding reasonable a claim for 241 h on a complex appeal in an ordinary commercial contract case).

[61] See Department of Justice (2020).

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this may be an overestimate: Ultimately, Congress appropriated $85 million for EOIR to hire 105 IJs, which works out to about $800,000 per judge (Office of the Inspector General, Department of Justice 2020). Either way, scaling up an adjudicative agency requires money from Congress.

D. EVIDENCE ON THE LINK BETWEEN EXPANDED CAPACITY AND REMOVAL RATES

In the text above, we argue that capacity building was a strategy used by the Trump administration to increase the aggregate number of removals. But one might object that capacity building was supported by Democrats too. For example, three different bills introduced by prominent Democrats like Sen. Dianne Feinstein,[62] Sen. Jeff Merkeley,[63] and Rep. Grace Meng[64] during the Trump administration included provisions requiring the Attorney General to hire more IJs. Given that Democrats supported hiring more IJs, is it wrong to frame capacity building as a scheme by the Trump administration to deport more immigrants?

For Democrats, the primary justifications for supporting the expansion of EOIR were (a) the claim that more capacity would allow IJs to provide each immigrant with more thorough consideration, ultimately increasing relief rates for immigrants placed in removal proceedings,[65] or (b) straightforward appeals to the idea that the backlog itself was a problem.[66] Obviously, to the extent that Democrats simply shared President Trump's objective of processing more cases and generating more removals, their decision to accede to the administration's capacity-building efforts is simple enough to understand and is consistent with our story. On the other hand, if adding IJs resulted in higher relief rates—or if Democrats believed that it would—then perhaps capacity building was less a conservative coup than a mixed bag, with some benefits and some costs to immigrants.

The evidence linking relief rates with workload is quite thin. For one, there is no credible identification strategy for estimating the causal effect of marginal increases in workload on removals. And different modeling approaches result in different answers to the basic question of whether increased workload is correlated with reduced relief rates. Even the most aggressive interpretation of the data would make IJ hiring a bad deal for immigration-friendly Democrats. The maximum plausible effect of reducing workload on relief rates would still be swamped by the number of individuals removed. Thus, the argument would have to be based on a policy goal to maximize relief rates *conditional* on the initiation of removal proceedings. Because this goal seems implausible, policymakers may have a mistaken perception of the consequences of expanding EOIR's capacity.

The basic challenge with verifying the oft-repeated claim that reductions in workload will improve the consideration given to individual cases is that workload is highly endogenous to case characteristics. As Figure 2 shows, for example, the dramatic spike in case originations that occurred between January 2019 and January 2020 was composed almost entirely of Central American claimants whose cases likely share factual and legal features. Because we are not aware of any plausibly exogenous treatment modifying judges' workload in recent years, a

62 See Protecting Families and Improving Immigration Procedures Act, S.1733, 116th Cong. (2019).

63 See Stop Cruelty to Migrant Children Act, S.2113, 116th Cong. (2019).

64 Stop Cruelty to Migrant Children Act, H.R. 3918, 116th Cong. (2019)

65 For example, in a hearing on immigration courts, some Democrats argued that the backlog of cases harmed EOIR's capacity to provide due process for immigrants (Oversight of the Executive Office for Immigration Review 2017). Likewise, a *Washington Post* story (Miroff and Sacchetti 2019) quoted immigrant rights advocate and law professor Kari Hong for the proposition that clients with long-pending cases would benefit from clearing the immigration court backlog, and in particular by hiring more IJs.

66 Often these two themes are mixed in Democrats' rhetoric. See, for example, the Biden White House's latest proposal for hiring additional immigration court judges, which includes the proposal to hire 100 more IJs under the heading of "Implementing Orderly and Fair Processing of Asylum Applications," and which justifies the need to hire more IJs by the need to "[r]educe[] immigration court backlogs" (Exec. Office of the President 2021).

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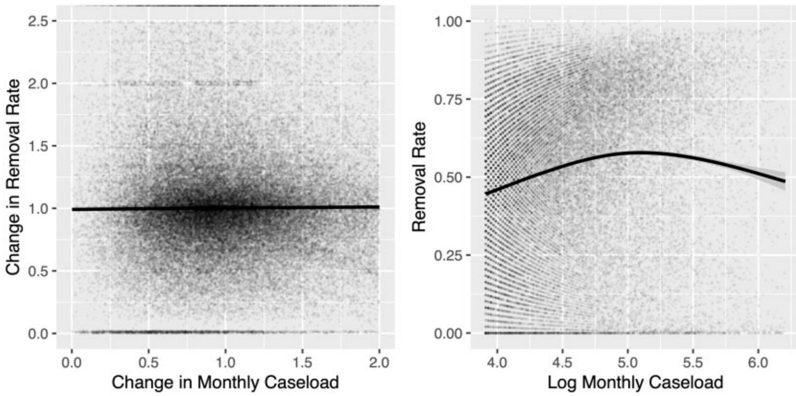

Figure D1. The Descriptive Relationship between Workload and Leniency for Non-detained Cases. *Notes*: Each point represents an IJ-month pair, where the month is defined by the *origination* of a case; in both panels, the black line is a LOESS line. In the left panel, the x-axis corresponds to the month-to-month *change* in the number of originating cases; the y-axis corresponds to the month-to-month *change* in the share of cases ending in removal. In the right panel, the x-axis shows the log of the number of cases assigned in a given month; the y-axis shows the removal rate for those cases.

Table D1. Workload and Leniency

	Dependent variable: Share removed	
	(1)	(2)
Number of cases	0.0004***	
	(0.00004)	
Log number of cases		0.031***
		(0.004)
Observations	129,187	129,355
R^2	0.565	0.529

Both models include fixed effects for month, hearing location, and IJ, as well as the share of cases originating in Central and South America. Standard errors are clustered at the IJ level.
$^{*}p < 0.1$; $^{**}p < 0.05$; $^{***}p < 0.01$

credible empirical estimate of the link between quantity and decisional outcomes is difficult to obtain.

Nonetheless, we try here to obtain a "best possible" estimate of the correlation between these quantities. Figure D1 shows the descriptive relationship between workload and removal rates in two ways. The right panel displays the raw relationship between the number of cases originated in a month and the share of those cases ultimately ending in removal. The left panel places this relationship in terms of month-over-month changes. In accord with Democrats' stated beliefs, both panels suggest that there is a *positive* relationship between removal probability and workload—but it is modest and perhaps non-monotonic. Assignment to an IJ who has received 50 cases (about the 65th percentile) corresponds to a mean removal rate of 0.48; assignment to an IJ with 10 times as many new cases corresponds to a mean removal probability of 0.54. Meanwhile, assignment to an IJ receiving *half* as many cases as in the previous month—roughly the twentieth percentile of work changes—is correlated with reduction in removal probability of <0.05.

Moving to a regression framework does not change this basic picture. Table D1 shows the output of two regression models estimating the correlation between monthly workload and

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removal rates, conditional on IJ, a global-fixed effect for the month in question, and case shares originating from Central and South America, with standard errors clustered at the IJ level. In both models, moving from an IJ at the 25th percentile of caseloads to one at the 75th percentile corresponds to an increased removal probability of about 0.03.

Once again, we emphasize that we do not view these quantities as causally identified, as we note above: Higher caseloads often correlate with influxes of cases with similar facts, to name just one reason for skepticism.

Crucially, however, *even if* these quantities *did* represent a causal relationship between workload and leniency, the case for increasing EOIR's capacity would still look thin. In total, 164,390 individuals were ordered removed by EOIR in FY19; if halving the average IJ's caseload resulted in the expected 0.05 decrease in removal probability, then 8219 of them would have obtained relief. Given that there were 540 IJs in 2019, however, and that the average IJ ordered 330 people removed, doubling EOIR's complement of IJs would add nearly 100,000 more removals than it would avoid. In short, if the supply of cases is elastic in the number of IJs, then even the most aggressive, causal interpretation of the figures above still suggests that hiring more IJs leads to more removal orders.

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