

THE PUBLIC ADMINISTRATION OF JUSTICE

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ABSTRACT

Adjudicatory agencies decide who receives social-welfare benefits, which inventions deserve patents, and which immigrants get to remain in the United States. Scholars have argued that agency adjudication lacks sufficient structural and procedural protections to ensure unbiased decision-making. Yet these critiques miss a key problem with agency adjudication: the lack of adjudicatory capacity. This Article argues that low-capacity agencies cannot satisfy the Due Process Clause's demand for accurate decision-making. To produce accurate decisions, adjudicatory agencies need sufficient levels of capacity: (1) material resources, (2) expert adjudicators, and (3) support staff. When agencies lack these resources, their adjudicators rely on various coping mechanisms to manage their workloads. They shorten hearings, make assumptions about respondents' claims based on appearance, or take other steps to reduce the cognitive burdens associated with a high workload. Yet these coping mechanisms introduce errors into the decision-making process. Often, these errors are not random and, instead, bias against one party to the dispute.

This Article uses the Immigration Courts as a case study of this phenomenon. The Executive Office of Immigration Review (EOIR)—the agency charged with adjudicating the removal of noncitizens from the United States—suffers from severe understaffing and has amassed a backlog of over 1.7 million cases. Analyzing over 1.5 million removal proceedings and 32,000 personnel records, this Article uses causal and statistical methods to examine the effect that one element of adjudicatory capacity (i.e., law clerks) has on outcomes in the Immigration Courts. This analysis finds that providing an Immigration Judge with one law clerk decreases the likelihood of removal by 5.2 percentage points and

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increases the likelihood of an asylum grant by 4.4 percentage points. These effects are significant and exceed the effect sizes of other known contributors to bias, such as the IJ's prior employment and appointing president.

Why do adjudicatory agencies, like EOIR, appear starved for resources? This Article argues that neither Congress nor the president have sufficient electoral incentives to invest in these agencies. As a result, adjudicatory agencies will continue to make systematic errors without intervention. However, the Due Process Clause demands accurate systems of agency adjudication. If Congress and the president will not uphold their duty to build capacity within these agencies, then courts must reform administrative-law doctrine to promote due process. By reimagining the law of agency adjudication from a public-administration perspective, courts can provide agencies with the flexibility they need to manage their workloads while protecting the due-process rights of the respondents who appear before agency adjudicators.

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*The pressure to complete cases made me less patient and less able to uphold the constitutional protections required to properly adjudicate cases.*¹

– Immigration Judge Ilyce Shugall

Since the late Nineteenth Century,² Congress has delegated authority to federal agencies to resolve disputes between individuals and the government in adjudicatory proceedings. Federal judges do not preside over these proceedings. Instead, agency adjudicators collect evidence, hear arguments, and issue decisions in these cases. Agency adjudication is prolific.³ By one estimate, adjudicatory agencies conduct nine times more hearings than the federal courts.⁴ All fifteen executive departments and many independent agencies adjudicate administrative disputes.⁵ Agency adjudication touches on a wide range of policy issues, including whether an investment company misleads consumers about its products,⁶ whether a sick child is entitled to disability benefits,⁷ and whether a noncitizen must return to a country where they face persecution.⁸ As a result, these adjudicatory agencies have become a fundamental component of the United States justice system.

From the standpoint of due process, the ideal system of agency adjudication achieves accurate results using the most efficient and thorough procedures possible.⁹ Presented with the same legal arguments and evidence, two adjudicators

¹ Ilyce Shugall, *Op-Ed: Why I Resigned as an Immigration Judge*, L.A. TIMES (Aug. 4, 2019), <https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies>.

² See JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* ch. 14 (2017) (surveying adjudication at the end of the Nineteenth Century).

³ See Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 DUKE L.J. 1687, 1687–88 (2020).

⁴ See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1479 (2009).

⁵ See JENNIFER L. SELIN & DAVID E. LEWIS, *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* 117–118 (2d ed. 2018) (listing agencies with statutory authorization to conduct adjudication and those that employ administrative law judges); Kent H. Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 116–22 (2019) (surveying which agencies conduct oral hearings); Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 393–94 (2021) (listing examples of adjudication).

⁶ See *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018).

⁷ See *Nash v. Bowen*, 882 F.2d 1291 (8th Cir. 1989).

⁸ See *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

⁹ See Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1964); Martin J. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455,

should arrive at similar outcomes that reflect the “truth” contained within the administrative record.¹⁰ Yet all judges—whether federal, state, or administrative—face extrajudicial pressures that interfere with the accuracy of their decisions.¹¹ Scholars generally attribute these inaccuracies to societal biases against certain groups, the demographics of the adjudicator, or the political and economic environment. Accordingly, they recommend procedural and structural reforms to encourage judicial independence, improve adjudicator decision-making, and eliminate disparate impacts on certain groups.

Formal procedures alone cannot guarantee accuracy. Implementing these procedures requires adjudicators to possess a threshold level of adjudicatory capacity. Adjudicatory capacity describes the resources, such as hearing offices and support staff, that adjudicators need to manage their caseloads and conduct a thorough review of the administrative record. This Article draws on public-administration theory to explain why an absence of capacity increases errors in adjudication. Like other civil servants,¹² agency adjudicators confront massive workloads but receive insufficient resources. Organizational pressures, such as performance metrics and political oversight, encourage adjudicators to prioritize the quantity of dispositions over the quality of those dispositions. Without sufficient capacity to manage their workloads, adjudicators develop coping mechanisms that allow them to decide cases faster but diminish the thoroughness with which they review the administrative record. They may conduct shorter hearings, arrive at hearings unprepared, or forego statutorily required procedures. Alternatively, they may make assumptions about the individual’s case based on their physical appearance, nationality, or presentation in the courtroom. Instead of introducing random error, these coping mechanisms tend to bias results in favor of a particular

494–503 (1986); Edward L. Rubin, *Due Process and the Administrative State*, 72 COLUM. L. REV. 1044, 1046 (1984).

¹⁰ At the margins, different judicial philosophies may tilt case decisions in one direction or another. Yet even appellate judges agree on the application of law in the vast majority of decisions. See Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 105 (2009). So long as judges are guided by law, evidence, and precedent, disagreements at the trial-level should be even rarer.

¹¹ See, e.g., Christina L. Boyd, Lee Epstein, Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. OF POL. SCI. 389 (2010) (finding that gender impacts decision-making in sex-discrimination cases); Maya Sen, *Is Justice Really Blind? Race and Appellate Review in U.S. Courts*, 44 J. OF LEG. STUDS. 187 (2011) (finding that racial biases affect the review of decisions made by Black judges); Moses Shayo and Asaf Zussman, *Judicial Ingroup Bias in the Shadow of Terrorism*, 126 Q. J. OF ECON. 1447 (finding evidence of ingroup bias in Israeli courts); Christina L. Boyd, Kent H. Barnett, and Christopher J. Walker, *Administrative Law’s Political Dynamics*, 71 VAND. L. REV. 1463 (2018) (examining the relationship between political ideology and *Chevron*); Amy Semet, *An Empirical Examination of Agency Statutory Interpretation*, 103 MINN. L. REV. 2255 (2019).

¹² MICHAEL LIPSKY, STREET-LEVEL BUREAUCRATS 29 (2010).

party or policy direction. Accordingly, the absence of adjudicatory capacity raises normative concerns about the accuracy and impartiality of agency adjudication.

Nowhere is the problem of administration more evident than the Executive Office of Immigration Review (EOIR, pronounced “Eeyore”)—the bureau within the Department of Justice that administers the United States Immigration Courts. The Immigration Judges (IJs) of EOIR adjudicate whether a noncitizen charged with violating immigration laws may remain in the United States. As of April 2022, EOIR faces a backlog of over 1.78 million cases, but only has sufficient capacity to complete about 400,000 cases per year.¹³ Continual neglect by Congress and the president has left EOIR underfunded and understaffed. Although EOIR rests firmly in the executive branch, presidents have shown minimal interest in managing the agency, choosing instead to focus on more salient forms of immigration policy.¹⁴ President Trump’s public complaints illustrate this disinterest: “I don’t want judges. I want border security.”¹⁵ Yet the neglect of EOIR has severe consequences for the many respondents who face persecution or torture if returned to their home countries.¹⁶ Reflecting on the current administrative problems within EOIR, one IJ states, “In essence, we’re doing death penalty cases in a traffic court setting.”¹⁷

Critics across the ideological spectrum have assailed the Immigration Courts as bankrupt, ineffective, and unfair.¹⁸ Anecdotal evidence suggests that the

¹³ See *Immigration Court Backlog Tool*, TRAC (Apr. 2022), https://trac.syr.edu/phptools/immigration/court_backlog.

¹⁴ See generally ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2020) (describing presidential administration of the U.S. immigration system).

¹⁵ See Philip Rucker and David Weigel, *Trump Advocates Depriving Undocumented Immigrants of Due-Process Rights*, WASH. POST. (June 25, 2018), https://www.washingtonpost.com/powerpost/trump-advocates-depriving-undocumented-immigrants-of-due-process-rights/2018/06/24/dfa45d36-77bd-11e8-93cc-6d3becdd7a3_story.html.

¹⁶ Aliens who appear in removal proceedings are called “respondents.”

¹⁷ See @LastWeekTonight, “Immigration Courts: Last Week Tonight with John Oliver (HBO),” YOUTUBE (Apr. 2, 2018), <https://www.youtube.com/watch?v=9fB0GBwJ2QA>.

¹⁸ See Jill E. Family, *Immigration Adjudication Bankruptcy*, 21 J. OF CON. L. 1025, 1026 (2019); Jill E. Family, *Immigration Law and Administrative Law Adversaries*, 32 GEO. IMMIGR. L. REV. 99, 99–103 (2018) (acknowledging that immigration advocates often have overlapping interests with skeptics of the administrative state); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1226 (2021) (arguing against the application of *Chevron* deference to immigration adjudication on account of due-process concerns); David J. Bier, *Reforming the Immigration System: A Brief Outline*, CATO (Nov. 11, 2020), <https://www.cato.org/study/reforming-immigration-system-brief-outline> (advocating for an independent immigration court); Caroline Simon, *Lofgren Bill Would Move Immigration Courts Outside DOJ*, ROLL CALL (Feb. 3, 2022), <https://rollcall.com/2022/02/03/lofgren-bill-would-move-immigration-courts-outside-doj/> (quoting Rep. Zoe Lofgren (D-CA) as saying, “Our immigration court system will never be effective as long as it is housed under the Department of Justice. After decades of political whiplash, resulting from the ever-changing

absence of capacity within EOIR has caused IJs to rely on procedural shortcuts and heuristics to manage their caseloads. IJs neglect statutorily-required procedures, shorten hearings, and encourage respondents to forgo applications for relief.¹⁹ At times, IJs decide cases using stereotypes rather than the evidence submitted in the administrative record. Occasionally, IJs express on the record that “all young men from El Salvador are here to work” or that they “don’t believe any Chinese asylum claims.”²⁰ Empirical studies reveal disparities in removal-proceeding outcomes caused by IJ characteristics,²¹ the political and economic environment,²² and the ways in which IJs conduct proceedings.²³ But existing studies fail to address how the lack of administrative capacity may exacerbate inaccuracy and bias in removal proceedings.

Empirical testing of the relationship between adjudicatory capacity, process, and outcomes in removal proceedings has been hindered by the absence of suitable measures for capacity. Using personnel records attained from the Office of Personnel Management, this study examines the importance of law clerks to

policies and priorities of the governing Administrations, it is clear that the system is ineffective, inflexible, and far too often, unfair.”).

¹⁹ *Id.* at 21.

²⁰ SOUTHERN POVERTY LAW CENTER, THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 12 (2021) [hereinafter SPLC, ATTORNEY GENERAL’S JUDGES].

²¹ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-940, U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 62–63 (2008) (appointing president) [hereinafter GAO ASYLUM 2008]; Daniel E. Chand, William Schreckhis, and Marianne Bowers, *The Dynamics of State and Local Contexts and Immigration Asylum Hearing Decisions*, 27 J. PUB. ADMIN. RES. & THEORY 182, 188–89 (2017) (experience); Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 628 (2020) (gender); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 376 (2007) (prior employment and gender); Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigration Detention*, 69 DUKE L.J. 1855, 1881 (2020) (appoint president); Mica Rosenberg, Reade Levinson, and Ryan McNeill, *Special Report: They Fled Danger for a High-Stakes Bet on U.S. Immigration Courts*, REUTERS (Oct. 17, 2017), (prior employment, gender, and judicial experience), <https://www.reuters.com/article/us-immigration-asylum-specialreport-idUSKBN1CM1UG>.

²² See Kim & Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21; Kim & Semet, *Presidential Ideology and Immigration Detention*, *supra* note 21, at 1881 (sitting president);

²³ See Chand, Schreckhis, and Bowers, *supra* note 21, at 188–89 (counsel); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015) (use of videohearings); Ingrid V. Eagly & Steven Schafer, *A National Study of Access to Counsel in Immigration Court*, 165 U. PA. L. REV. 1, 6 (2015) (counsel); David Hausman & Jayashri Skrikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1824, 1834–40 (2016) (continuance lengths); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC’Y REV. 117 118–119 (counsel).

ensuring fair hearings in removal proceedings. The average IJ spends 36 hours per week hearing cases, leaving only four hours to prepare for hearings, review evidence, and draft written decision.²⁴ Law clerks provide indispensable support for IJs by reviewing the administrative record, conducting legal research, and recommending to IJs whether the respondent should receive relief.²⁵ The work performed by a law clerk may prevent an IJ from overlooking key evidence in the administrative record. Yet most IJs do not have a dedicated law clerk and, instead, pool support staff with other IJs in the same court. The mismanagement of EOIR's personnel has prevented the agency from assigning law clerks to the IJs in the greatest need of additional capacity.²⁶

This Article uses causal and statistical methods to make two empirical contributions to our understanding of adjudication within EOIR. The first two analyses examine whether IJs with more law clerks are less likely to remove respondents and more likely to grant requests for asylum. Using over 1.6 million removal proceedings decided between 2004 and 2022, a multivariate model finds that respondents appearing before an IJ with one law clerk are 5.2 percentage points less likely to be removed from the United States and 4.4 percentage points more likely to receive asylum. These effects are even higher along the Southern Border, where respondents who appear before an IJ with one law clerk are 8.9 percentage points less likely to be removed from the United States and 14.7 percentage points more likely to be granted asylum. The third analysis exploits the introduction of new performance metrics during the Trump Administration to examine whether increased organizational pressures cause adjudicators to take procedural shortcuts. Using a regression-discontinuity design, this analysis finds that IJs shortened hearings following the implementation of the new performance metrics, but that hearings conducted by IJs with more law clerks were less impacted. Moreover, these models suggest that the presence of a law clerk has a greater effect on outcomes than other sources of bias, such as the appointing administration or whether the IJ previously worked for an immigration-enforcement agency.

Why do adjudicatory agencies, such as EOIR, suffer from perpetual deficiencies in capacity? This Article contends that Congress and the president lack electoral incentives to build capacity within adjudicatory agencies. These agencies

²⁴ See Executive Office of Immigration Review, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law 111 CONG. (June 17, 2020) (statement of Dana Leigh Marks), <https://www.govinfo.gov/content/pkg/CHRG-111hhrg56955/html/CHRG-111hhrg56955.htm> [hereinafter EOIR June 2020 Hearing].

²⁵ NAT'L ASS'N OF IMMIGRATION JUDGES, THE IMMIGRATION COURT: IN CRISIS AND IN NEED OF REFORM 2 (Aug. 2019), https://www.naij-usa.org/images/uploads/publications/Immigration_Court_in_Crisis_and_in_Need_of_Reform.pdf [hereinafter NAIJC, IN NEED OF REFORM].

²⁶ *Id.*

provide few traceable benefits to elected officials' constituents and, therefore, elected officials have few reasons to invest in these agencies.²⁷ By the time government failures make these agencies salient to the public, insurmountable backlogs prevent the agency from overcoming these management problems. Political pressure builds within the agency as Congress and the president demand better performance. Politicization of agency adjudication encourages career civil servants to exit government service at higher rates, further diminishing the capacity of the agency.²⁸ Trapped in a cycle of neglect and politicization, adjudicatory agencies rarely have the capacity or independence they need to administer justice. While investments in these agencies would increase accuracy, neither Congress nor the president appears poised to make these investments.

These findings strengthen the case for incorporating adjudicatory capacity into modern theories of the Due Process Clause. The case study of EOIR demonstrates that the absence of adjudicatory capacity increases the likelihood that an adjudicatory agency erroneously deprives an individual of life, liberty, or property. Accordingly, the Due Process Clause demands that Congress and the president make meaningful external investments in the capacity of these adjudicatory agencies. If neither Congress nor the president will voluntarily uphold their duty to build capacity, then courts must reimagine the doctrines that govern adjudicatory agencies. The Article considers two paths forward: First, courts should uphold procedural rules that manage the agency's resources while protecting the due-process rights of parties appearing before the agency. Second, courts should increase the scrutiny with which they review the agency's administrative record for signs of a defective hearing. At the same time, the Article warns that efforts to impose more formal procedures on these agencies may exacerbate the problems caused by maladministration.²⁹

Reimagined through the lens of public administration, agency adjudication can promote accuracy and efficiency while protecting normative values of due process. The findings and arguments here respond to alarms raised by both defenders and skeptics of the administrative state. Defenders of the administrative state warn that deconstruction threatens to diminish the efficacy of government

²⁷ See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 47 (1990); see generally SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011) (describing how the vast majority of the public does not understand how it benefits from the programs provided by the administrative state).

²⁸ See Mark Richardson, *Politicization and Expertise: Exit, Effort, and Investment*, 81 J. OF POL. 878 (2019) (surveying civil servants about their likelihood to leave government service).

²⁹ See Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) (describing the "fetishization" of procedure in the administrative-law literature).

work.³⁰ Skeptics worry that agency adjudication fails to promote procedural fairness and creates worse substantive outcomes than the federal courts.³¹ The results speak to both concerns.³² While proposals to increase the independence of adjudicatory agencies offer a promising solution to some of the problems with agency adjudication, these proposals complement effective management rather than substitute for the need for greater investments. The Article concludes by arguing that an accurate system of agency adjudication needs *proactive* rather than reactive management to prevent future failures like those observed in EOIR.

I. ADJUDICATORY CAPACITY AND ACCURACY

Agency adjudication involves the resolution of a dispute by a federal agency.³³ Adjudicatory proceedings may occur informally, such as when the Department of State reviews an application for a passport or when the Fish and Wildlife Service selects a winning artist for its annual duck stamp competition.³⁴ Other adjudications take place in a formal, trial-like setting. An agency adjudicator—often an Administrative Law Judge (ALJ) or an Administrative Judge (AJ)³⁵—hears motions, collects evidence from competing parties, and issues a ruling. These trial-like proceedings emerge in contexts where an erroneous

³⁰ See generally David E. Lewis, *Deconstructing the Administrative State*, 81 J. OF POL. 767 (2019); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

³¹ See Aaron L. Nielson, *Confessions of an ‘Anti-Administrativist’*, 131 HARV. L. REV. FORUM 1 (2017) (“The truth is that the administrative state is not ‘under siege’ because some sinister cabal has started singing from old hymnals. Instead, it is because administrative law can be *better* as a matter of procedural fairness, substantive outcomes, and compliance with statutory and constitutional law.”).

³² Family, *Immigration Allies*, *supra* note 18.

³³ Although I use the term “dispute,” adjudication under the Administrative Procedure Act (APA) covers a broad range of agency action. As Emily Bremer describes, “The APA divides all agency action into two principal forms: rulemaking and adjudication. Each form of agency action is defined by reference to what it produces: adjudications produce orders; rulemakings produce rules. The statute separately defines these two products. An ‘[o]rder’ is ‘the whole or a part of a final disposition, whether affirmative, negative, injunction, or declaratory in form, of an agency in a matter *other than rulemaking* but including licensing.’ The inclusion of the phrase ‘other than rule making’ makes adjudication a catch-all category all agency actions that are *not* rulemaking.” Bremer, *supra* note 5, at 384.

³⁴ See *Id.* at 393–94 (listing adjudicatory activities); see also @LastWeekTonight, “Duck Stamps: Last Week Tonight with John Oliver (HBO)”, YOUTUBE (Sep. 29, 2021), <https://www.youtube.com/watch?v=bl-ABuxeWrE>.

³⁵ See Barnett & Wheeler, *supra* note 5 (describing differences between ALJs and non-ALJs); see also Todd Phillips and Connor Raso, *Debates Over Agency Judges Should Focus on Functions, Not Job Titles*, BROOKINGS (Nov. 17, 2020) (arguing that scholars pay too much attention to adjudicator titles), <https://www.brookings.edu/research/debates-over-agency-judges-should-focus-on-functions-not-job-titles>.

outcome poses a grave threat to the respondent, including removal proceedings in the Executive Office of Immigration Review (EOIR), appeals from the denial of welfare benefits in the Social Security Administration, and appeals from the denial of veteran benefits in the Board of Veteran Affairs.³⁶

Accuracy is a substantive ideal for any system of adjudication.³⁷ Mashaw defines “accuracy” as “the correspondence of the substantive outcome of an adjudication with the true facts of the claimant’s situation and with an appropriate application of the relevant legal rules to those facts.”³⁸ Supreme Court precedent examining the government’s obligations under the Due Process Clause emphasizes the need for adjudicatory agencies to achieve accurate results at a systemic level.³⁹ Under the Court’s precedent, “procedural due process rules are shaped by the risk of error inherent in the truth finding process *as applied to the generality of cases*, not the rare exceptions.”⁴⁰ Achieving accuracy requires each adjudicator to conduct a thorough review of the record and arrive at an outcome based on the facts presented and the applicable law. Although an objective understanding of the “truth” is desirable, it is rarely attainable in contested adjudications. Adjudicators must weigh contradictory evidence and, therefore, whether an adjudication results in an accurate outcome depends on the soundness of the adjudicator’s judgment and the thoroughness of their review.⁴¹

Yet adjudicatory agencies must balance the demand for accuracy against other normative considerations, such as efficiency. Agency adjudicators confront massive caseloads, and the pursuit of flawless decision-making hinders the ability of adjudicators to complete cases. Individuals appearing before adjudicatory

³⁶ See David Ames, Cassandra Handan-Nader, Daniel E. Ho, and David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 9–20 (2020) (surveying these agencies).

³⁷ See Cramton, *supra* note 9, at 112 (“The first consideration, *accuracy*, serves as a reminder that the ascertainment of truth, or more realistically, as close an approximation of reality as human frailty permits, is the major goal of most contested proceedings.”); Jerry L. Mashaw, *Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 774 (1974) (“‘Accuracy’ is thus the substantive ideal; approachable but never fully attainable.”).

³⁸ Jerry L. Mashaw, *Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy Fairness and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 774 (1974) (“‘Accuracy’ is thus the substantive ideal; approachable but never fully attainable.”).

³⁹ See Ames et al., *supra* note 36, at 20–25 (describing the Supreme Court’s precedent and its relationship to accuracy); Jason Parkin, *Due Process Disaggregation*, 90 NOTRE DAME L. REV. 283, 292–98 (2014); *see also* Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

⁴⁰ Mathews, 424 U.S. at 344 (emphasis added).

⁴¹ Mashaw, *supra* note 36, at 774 (“For example, the apparently simple determination of a claimant’s age for purposes of Social Security retirement”).

agencies have an interest in the expeditious completion of their cases. For example, delays in the immigration context may result in an individual—sometimes even a United States citizen⁴²—remaining in detention longer than necessary. Likewise, delays in termination hearings prevent eligible welfare recipients from receiving the aid needed to afford rent, food, and medication.⁴³ Contrasting the value of accuracy against efficiency, Cramton states, “The work of the world must go on, and endless nit-picking, while it may produce a more nearly ideal solution, imposes huge costs and impairs other important values.”⁴⁴

Whether agency adjudication promotes accuracy and efficiency depends on the management and capacity of the agencies performing these adjudications.⁴⁵ Agency adjudicators need a threshold level of resources to implement the formal procedures that govern the hearing process. Hearing offices provide adjudicators with the space they need to hear claims, testimony, and evidence. Support staff supplements the adjudicator’s own review of the record to ensure that their decision comports with the facts of the case. When adjudicators lack capacity, they resort to coping mechanisms to increase case completions. Although these coping mechanisms expedite proceedings, they increase the likelihood that the adjudicator fails to consider a key piece of evidence.

A. *Administrative Capacity*

Adjudicatory capacity describes the resources—the space, equipment, expertise, and support staff—needed for an adjudicator to dispense with cases in an accurate and efficient manner. High-capacity adjudicatory agencies exhibit (1) well-equipped hearing offices, (2) expert adjudicators, and (3) dedicated support staff. Collectively, these resources allow adjudicators to maintain manageable

⁴² See Cassandra B. Robertson & Irina D. Manta, *Litigating Citizenship*, 73 VAND. L. REV. 757, 773–775 (2020) (describing instances of where this has happened).

⁴³ Compare *Goldberg v. Kelly*, 397 U.S. 254, 264 (“[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits”), with *Mathews v. Eldridge*, 424 U.S. 319, 342 (“Still, the disabled worker’s need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family before the subsistence level.”).

⁴⁴ Cramton, *supra* note 9, at 112.

⁴⁵ See JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 161 (1983) (identifying a right to “good administration”); Mashaw, *supra* note 36 (“Due process in the social welfare context therefore requires redefinition to include management processes which will tend to assure the accuracy of claims adjudications.”); see also Ames et al., *supra* note 36 (“A due process balancing test from the 1970s will not defuse the crisis of decisional quality agencies face as they buckle under the strain of large caseloads. Internal administrative law, properly shaped by external oversight and intervention, still might.”).

workloads by ensuring they have sufficient time to consider the administrative record and arrive at an accurate decision.

1. Hearing Offices and Material Resources

Adjudicators need a variety of tangible items to conduct fair hearings. They need offices—often courtrooms—from which to hear the parties' arguments, question witnesses, and perform other procedures associated with an oral hearing. For agencies that serve large, geographically dispersed populations, such as EOIR or the Social Security Administration, the agency may need offices distributed across the United States. Agencies with smaller workloads and well-resourced respondents, such as the Patent Trial and Appeal Board, may thrive with fewer offices. Beyond the physical space to conduct hearings, adjudicators need basic office amenities and technologies like furniture, computers, and filing systems to organize case records for easy retrieval.⁴⁶

This criterion may seem trivial. However, some adjudicatory agencies exhibit staggering deficiencies in their material resources. For the past decade, the Government Accountability Office has raised concerns about the data systems of adjudicatory agencies. Despite efforts to build an electronic case management system since 2001,⁴⁷ EOIR did not have a fully electronic system until February 2022.⁴⁸ As workloads climbed, staff stacked boxes of paper filings, preventing IJs from easily locating relevant files. Inefficient procurement policies prevented IJs from purchasing filing cabinets to improve organization.⁴⁹ At the Board of Veteran Appeals, the mishandling of files led staff to shred documents needed to process claims.⁵⁰

⁴⁶ See GAO MEDICARE, *supra* note at 42 (noting how poor data systems contribute to inefficiencies for Medicare hearings).

⁴⁷ See GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 43, GAO-17-438 (2017), <https://www.gao.gov/assets/gao-17-438.pdf> [hereinafter GAO, EOIR BACKLOG]; GOVERNMENT ACCOUNTABILITY OFFICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORT NEEDS IMPROVEMENT, GAO-06-771 (Aug. 2006), <https://www.gao.gov/assets/a251156.html>.

⁴⁸ See *Featured Issue: E-Filing with EOIR Now Mandatory*, AM. IMM. LAWYERS ASS'N (Feb. 17, 2022), <https://www.aila.org/advo-media/issues/all/featured-issue-e-filing-eoir-becomes-mandatory>.

⁴⁹ Tal Kopan, *Exclusive: Outgoing SF Immigration Judge Blasts Courts as 'Soul-Crushing,' Too Close to Ice*, SF CHRONICLE (May 17, 2021), <https://www.sfchronicle.com/politics/article/Exclusive-Outgoing-SF-immigration-judge-blasts-16183235.php> 1/12.

⁵⁰ See Document Tampering and Mishandling at the U.S. Department of Veterans Affairs, Joint Hearing before the Subcommittee on Disability Assistance and Memorial Affairs and the Subcommittee on Oversight and Investigations of the Committee on Veterans' Affairs, 111th

The lack of available courtrooms affects the fairness and efficiency of adjudicatory proceedings. In recent years, agencies have substituted courtrooms for videoconference hearings. Yet studies have found that respondents who appear in videoconference hearings are less likely to take advantage of their procedural rights⁵¹ and that some respondents lack computers capable of engaging in videoconferencing.⁵² Additionally, adjudicators describe suffering fatigue from videoconference hearings.⁵³ In one survey, over half of IJs interviewed reported having changed their “assessment of a respondent’s credibility . . . after holding a subsequent in-person hearing.”⁵⁴ In some cases, federal courts have reversed agency decisions for violations of the Due Process Clause when the hearing has prevented one party from reviewing evidence in the record or when the videoconference makes “it difficult for a factfinder . . . to make credibility determinations and gauge demeanor.”⁵⁵ The need to shift away from in-person hearings to videoconference hearings stems from a lack of either physical space to conduct hearings or enough adjudicators in the offices with the greatest workloads.

The want of resources may also introduce bias into adjudicatory agencies that rely on filing fees for funding. For example, the U.S. Patent and Trademark Office (PTO) does not receive regular appropriations from Congress and, instead, funds itself with user fees.⁵⁶ Frakes and Wasserman find evidence that the switch from appropriations to user-fee funding caused the PTO to issue more patents because the agency needed the issuance fees.⁵⁷ Accordingly, deficiencies in

Congress (Mar. 3, 2009), <https://www.govinfo.gov/content/pkg/CHRG-111hhrg48418/html/CHRG-111hhrg48418.htm>.

⁵¹ See Eagly, *supra* note 23.

⁵² See FREDRIC I. LEDERER & THE CTR. FOR LEGAL AND COURT TECH., ANALYSIS OF ADMINISTRATIVE AGENCY ADJUDICATORY HEARING USE OF REMOTE APPEARANCES AND VIRTUAL HEARINGS 16 (2021), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3081&context=facpubs>.

⁵³ *Id.* at 11.

⁵⁴ See GAO, EOIR BACKLOG, *supra* note 47; see also Frank M. Walsh and Edward M. Wash, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 259 (finding that asylum applicants appearing in videoconference hearings are twice as likely to have their applications denied).

⁵⁵ *Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002); see also *Rapheal v. Mukasey*, 533 F.3d 521 (7th Cir. 2008) (reversing removal proceeding where respondent was unable to review a Record of Sworn Statement during the video conference); *Vilchez v. Holder*, 682 F.3d 1195, 1199–1200 (“Whether a particular video-conference hearing violates due process must be determined on a case-by-case basis, depending on the degree of interference with the full and fair presentation of petitioner’s case caused by the video conference, and on the degree of prejudice suffered by the petitioner.”).

⁵⁶ See Michael Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical assessment of the PTO’s Granting Patterns*, 66 VAND. L. REV. 67, 77–78 (2013).

⁵⁷ *Id.* at 91–118.

material resources create adverse incentives for adjudicators to reach decisions that favor a certain party to the adjudication.

2. Adjudicators

To prevent workloads from exceeding manageable levels, agencies must employ a sufficient number of expert adjudicators to conduct hearings and issue decisions. As the U.S. Commission on Immigration Reform acknowledged in its 1997 proposal to reform EOIR, “[N]o system can work effectively if the personnel who form the base of the decisional pyramid are insufficient in number or deficient in skills and integrity to do the job.”⁵⁸ The appropriate number of adjudicators depends on the agency’s workload and the speed at which adjudicators must render their decisions. The absence of a sufficient number of adjudicators plagues many agencies and causes the workloads of individual adjudicators to rise.⁵⁹ Even when an agency is authorized to hire more adjudicators, inefficient hiring processes and hiring freezes can prevent it from filling these positions.⁶⁰ Additionally, White House involvement can further stymie the hiring of adjudicators by increasing the procedures needed to vet and hire a candidate.⁶¹

Agency adjudicators must possess a certain level of expertise because they make decisions in complex and niche fields of law. Surveys find that most administrative judges require a law degree, years of legal practice, and substantive knowledge related to the agency’s jurisdiction.⁶² Absent expertise, the cost of

⁵⁸ UNITED STATES COMMISSION ON IMMIGRATION REFORM, REPORT TO CONGRESS 179 (1997).

⁵⁹ GOVERNMENT ACCOUNTABILITY OFFICE, SOCIAL SECURITY DISABILITY: PROCESS NEEDED TO REVIEW PRODUCTIVITY EXPECTATIONS FOR ADMINISTRATIVE LAW JUDGES 25, GAO-21-341 (2021), <https://www.gao.gov/assets/gao-21-341.pdf> [hereinafter GAO SOCIAL SECURITY].

⁶⁰ See GAO, EOIR BACKLOG, *supra* note 47, at 37–40.

⁶¹ See DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 96–100 (July 28, 2008), <https://www.justice.gov/opr/page/file/1206586/download> [hereinafter INVESTIGATION OF POLITICIZED HIRING]. The most extreme instances of understaffing involve agencies that rely on the presidential-appointments process to hire adjudicators. See Nicholas R. Bednar and David E. Lewis, *Presidential Investments in the Administrative State* (Manuscript, Vanderbilt University, 2022). For example, the Merit Systems Protection Board (MSPB) adjudicates whether a federal employee has been unlawfully removed from their position. Delays in the appointment and confirmation of MSPB adjudicators cost the agency its quorum for over five years. Similar problems emerged in the National Labor Relations Board during the Obama Administration. *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) (overturning decisions of the NLRB due to the unconstitutional appointment of its members).

⁶² Barnett and Wheeler, *supra* note 5, at 69 (finding that 52% of administrative judge positions require some level of subject-matter expertise); UNITED STATES PATENT AND TRADEMARK OFFICE, PTAB BROCHURE, (last visited May 9, 2022) (requiring PTAB adjudicators to have scientific, linguistic, or political knowledge), https://www.uspto.gov/sites/default/files/documents/ptab_brochure_v2_4_10_14.pdf

attaining the information necessary to make a decision may lead adjudicators to rely on unreliable but easily accessible sources.⁶³ In a variety of contexts, federal courts have reprimanded agency adjudicators for relying on Wikipedia instead of more trusted sources of information.⁶⁴ Reviewing the Department of Health and Human Services' use of Wikipedia and WebMD articles, the Court of Federal Claims stated, "reliance on these web materials involved an extraordinary risk that cannot be squared with . . . the principles of fundamental fairness."⁶⁵ Overreliance on these sources occurs because adjudicators lack the time to consult the administrative record, call experts to testify, or conduct independent, legal research.

3. Support Staff

Adjudicators need support staff who can assist with the management of cases. Support staff schedule hearings, file paperwork, and interpret foreign languages, among other administrative and ministerial tasks.⁶⁶ Without sufficient support staff, adjudicators must devote their time to ministerial work instead of examining evidence, conducting hearings, and writing decisions.⁶⁷

Support staff rarely have adequate substitutes. Some work, such as preparing hearing transcripts or filing records, can be performed by emerging technologies. However, technological solutions may introduce errors into the administrative record.⁶⁸ Other staff have no technological substitute. For example, law clerks play an essential role in adjudicatory agencies by examining the administrative record, conducting legal research, and drafting orders.⁶⁹ The clerk's

⁶³ LIPSKY, *supra* note 12, at 29 ("Decision makers typically are constrained by the costs of obtaining information relative to their resources, by their capacity to absorb information, and by the unavailability of information."); Neil C. Thompson, et al., *Trial by Internet: A Randomized Field Experiment on Wikipedia's Influence on Judges' Legal Reasoning*, in THE CAMBRIDGE HANDBOOK OF EXPERIMENTAL JURISPRUDENCE (Kevin Tobia ed., Forthcoming 2022).

⁶⁴ See *Badasa v. Mukasey*, 540 F.3d 909 (8th Cir. 2008) (EOIR); *Lofton-Sallard v. Wilkie*, No. 18-3624, 2020 WL 559301, at *1 (Veterans Claims 2020) (Board of Veterans Appeals); *Bing Shun Li v. Holder*, 400 Fed. Appx. 854 (5th Cir. 2010) (EOIR); *Kole v. Astrue*, 2010 WL 1338092, at *7 fn. 3(D. Idaho 2010) ("At this point, it must be noted that, in support of his brief, Respondent cites to Wikipedia . . . As an attorney representing the United States, Mr. Rodrigues should know that citations to such unreliable sources only serve to undermine his reliability as counsel."); *Singh v. Holder*, 720 F.3d 635, 643–44 (2013).

⁶⁵ See *Campbell ex rel. Campbell v. Secretary of Health and Human Services*, 69 Fed. Cl. 775, 781 (2006).

⁶⁶ See GAO SOCIAL SECURITY, *supra* note 59, at 32–33.

⁶⁷ See Aditya Dasgupta & Devesh Kapur, *The Political Economy of Bureaucratic Overload: Evidence from Rural Development Officials in India*, 114 AM. POL. SCI. REV. 1316, 1325 (2020).

⁶⁸ See NAIJC, IN NEED OF REFORM, *supra* note 25 (describing problems with EOIR's transcription software).

⁶⁹ See, e.g., NAIJ, IN NEED OF REFORM, *supra* note, at 2; "PTAB Judicial Law Clerk Program," U.S. PATENT & TRADEMARK OFFICE (last visited July 16, 2022), <https://www.uspto.gov/patents/patent->

review of the record ensures that adjudicators do not overlook key evidence when making decisions.

The absence of dedicated support staff limits the ability of adjudicators to complete their workloads.⁷⁰ In the Social Security Administration, a fifth of Administrative Law Judges report that the use of pooled support staff has a “great” impact on their ability to meet performance expectations.⁷¹ The absence of interpreters in EOIR has constrained the ability of IJs to conduct regular hearings.⁷² As workloads climb, support staff face similar burdens as adjudicators and may provide these adjudicators with sloppy or incomplete work.⁷³ Therefore, efficient management requires the agency to employ a sufficient number of support staff and to assure these support staff are assigned to the adjudicators in the greatest need of assistance.

B. A Framework of Capacity and Adjudicatory Error

Public administration studies the ways in which management and workloads impact the implementation of policies.⁷⁴ Most civil servants have high workloads relative to their available resources, preventing them from fulfilling their statutory responsibilities.⁷⁵ As a result, civil servants develop coping mechanisms to manage their workloads and complete tasks in the timeframe allotted by their managers.⁷⁶ However, these coping mechanisms depress the quality of public services provided by the administrative state. As the previous section demonstrates, these workload pressures also emerge in adjudicatory agencies. Drawing from the public-administration literature, this Section develops a general framework of the relationship between adjudicatory capacity and adjudicator decision-making.

Adjudicators face competing demands that shape the thoroughness with which they review the record in an individual case. On the one hand, adjudicators have a sincere interest in administering justice and ensuring respondents receive

trial-and-appeal-board/ptab-judicial-law-clerk-program (“Specifically, our law clerks typically review the arguments and evidence of record, analyze pertinent legal and technical issues, and recommend to the PTAB judges how to resolve various issues. PTAB judicial law clerks also attend case conferences, observe oral arguments, and complete a variety of writing assignments, such as bench memoranda, opinions, orders, and summaries of prior art and technology.”)

⁷⁰ See, e.g., NAIJ, IN NEED FOR REFORM, *supra* note at 2 (“Today, that same judge has a pending case load of 5,000 cases and is expected to share the singular clerk assigned to her.”).

⁷¹ See GAO SOCIAL SECURITY, *supra* note 59, at 26–32.

⁷² See Shugall, *supra* note 1.

⁷³ *Id.*

⁷⁴ See generally LIPSKY, *supra* note 63 (providing a broad theory of how workload impacts policy implementation); Dasgupta & Kapur, *supra* note 67 (finding that under-resourced bureaucrats are worse at implementing rural development programs).

⁷⁵ LIPSKY, *supra* note 63, at 29.

⁷⁶ *Id.* at 141.

adequate due process.⁷⁷ Adjudicators—most of whom are lawyers⁷⁸—forego more lucrative opportunities in the private sector to serve the public.⁷⁹ They believe themselves bound by professional norms of impartiality and judicial decorum.⁸⁰ On the other hand, these adjudicators also want to advance their careers.⁸¹ Agency management uses case-completion rates as the primary metric for performance evaluations.⁸² When performance is measured in terms of task completion, adjudicators replace quality with quantity because they want to attain satisfactory ratings and advance their careers.⁸³ The tension between delivering quality services to the public and satisfying the expectations of political leaders and agency management causes adjudicators to favor expeditious case completion over accurate decisions. Capacity determines whether adjudicators have the resources they need to satisfy performance metrics while also providing each case the thorough consideration it deserves.

Burdensome workloads further encourage adjudicators to prioritize case completions.⁸⁴ When adjudicators lack sufficient capacity relative to their workloads, the thoroughness with which they review the administrative record declines.⁸⁵ For example, ALJs within the Social Security Administration report that

⁷⁷ LIPSKY, *supra* note 12, at 105; *see also* Christoph Engel & Lilia Zhurakhovska, *You Are in Charge: Experimentally Testing the Motivating Power of Holding a Judicial Office*, 46 J. OF LEGAL STUDIES 1, 2 (2017) (“Judges do not behave (plainly) selfishly simply because they have been assigned a public office. The majority of them live up to the expectations that go with holding the office.”). *But see* RICHARD POSNER, *HOW JUDGES THINK* 19–56 (2010) (describing nine competing theories of judicial decision-making).

⁷⁸ *See* Barnett & Wheeler, *supra* note 5, at 1702–1703 (describing the legal expertise of administrative law judges).

⁷⁹ *See* James L. Perry & Lois Recascino Wise, *The Motivational Bases of Public Service* 50 PUB. ADMIN. REV. 368, 370–71 (1990) (theorizing about the basis of public-service motivation).

⁸⁰ POSNER, *supra* note 77, at 60–62.

⁸¹ *See* ANTHONY DOWNS, *INSIDE BUREAUCRACY* 92 (1967); MANUEL P. TEODORO, *BUREAUCRATIC AMBITION: CAREERS, MOTIVES, AND THE INNOVATIVE ADMINISTRATOR* 11–13 (2011).

⁸² *See* Barnett & Wheeler, *supra* note 5, at 57 (reporting that 63% of administrative-judge positions require a law degree); GAO SOCIAL SECURITY, *supra* note 59, at 39.

⁸³ Evelyn Z. Brodtkin, *Bureaucracy Redux: Management Reformism and the Welfare State*, 17 J. OF PUB. ADMIN. RESEARCH & THEORY 1, 7 (2007) (quotation marks omitted); GAO SOCIAL SECURITY, *supra* note 59, at 42.

⁸⁴ *See* GAO MEDICARE, *supra* note ___, at 38 (reporting that the number of incoming Medicare appeals was three times higher than the numbers of appeals completed by Administrative Law Judges); GAO, *EOIR BACKLOG*, *supra* note 47, at 84 (“the immigration court system would likely have a large caseload regardless of how it is structured.”); *The Continuing Impact of the Pandemic on Immigration Court Case Completions*, TRAC (Feb. 11, 2022), <https://trac.syr.edu/immigration/reports/677>.

⁸⁵ *See* Christoph Engel & Keren Weinshall, *Manna from Heaven for Judges: Judges’ Reaction to a Quasi-Random Reduction in Caseload*, 17 J. OF EMPIRICAL LEGAL. STUDS. 722 (2020) (finding causal evidence that judges in Israeli courts with reduced caseloads invested more resources into

“it can take hours to review large case files, which reduces the time available for reviewing other cases.”⁸⁶ Adjudicators cannot easily increase their capacity without external investments from agency management, Congress, or the president. Instead, adjudicators develop coping mechanisms that allow for faster case completion. Two predominant coping mechanisms emerge in the adjudicatory context: procedural shortcuts and heuristics.

Procedural shortcuts describe actions taken to shorten the time it takes to complete the average proceeding.⁸⁷ These shortcuts may diverge from the formal procedures endorsed by the agency and its governing statutes.⁸⁸ Adjudicators may not spend as much time reviewing motions, applications, or evidence before a hearing. They may schedule more hearings than manageable in a single day, increasing the likelihood that they miss key arguments and evidence.⁸⁹ Procedural shortcuts decrease the likelihood that an adjudicator arrives at the correct outcome by decreasing the amount of time the adjudicator spends considering the case.

At times, procedural shortcuts cause adjudicators to violate the statutory requirements that Congress has enacted to protect due process. For example, the Secretary of Veterans Affairs has a statutory duty to make “reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claim.”⁹⁰ Staff within the Department of Veterans Affairs help veterans gather their military and medical records.⁹¹ Yet the agency has suffered from significant backlogs and attrition of employees.⁹² In *Bohlander v. Wilkie*, the Court of Appeals for Veterans Claims reversed the decision of the Board of Veteran Appeals for finding a claimant ineligible for benefits, because the claimant submitted a Wikipedia article

resolving each case); Carolin Schütze and Håkan Johansson, “The Importance of Discretion for Welfare Services to Minorities: Examining Workload and Anti-Immigration Attitudes.” 79 AUSTRALIAN J. OF PUB. ADMIN. 426 (2020) (reporting that civil servants find it “more difficult to handle/provide service for clients with a foreign background” when they have high workloads).

⁸⁶ GAO SOCIAL SECURITY, *supra* note 59, 27–28

⁸⁷ See GAO SOCIAL SECURITY, *supra* note 59, at 42 (describing ALJs as “cutting corners”).

⁸⁸ See LIPSKY, *supra* note 63, at 84–85; Bettina von Helversen & Jorg Rieskamp, *Predicting Sentencing for Low-Level Crimes: Comparing Models of Human Judgment*, 15 J. EXPERIMENTAL PSYCH. APPL. 375 (2009) (finding that judges disregard many sentencing factors).

⁸⁹ See GAO SOCIAL SECURITY, *supra* note 59, at 42–43.

⁹⁰ 38 U.S.C. § 5103A(a)(1) (2018).

⁹¹ GOVERNMENT ACCOUNTABILITY OFFICE, VA DISABILITY BENEFITS: ACTIONS NEEDED TO BETTER MANAGE APPEALS WORKLOAD RISKS, PERFORMANCE, AND INFORMATION TECHNOLOGY 3 (July 31, 2021), <https://www.gao.gov/assets/gao-21-105305.pdf>.

⁹² See *VA Appeals Program: Examining the State of Modernization Efforts*, Hearing before the House Committee on Veterans’ Affairs, 117th Congress (July 13, 2021) (statement of Representative Elaine Luria).

describing the military unit's activities rather than official service records.⁹³ The court held that the Board obviously had access to the claimant's service records and, therefore, the Secretary violated his statutory obligation to assist the claimant in attaining those records.⁹⁴

Heuristics describe the mental shortcuts or “rules of thumb” that individuals use to make decisions.⁹⁵ Common heuristics include stereotypes, in which an individual judges the personality, behavior, or past experiences of another individual based on their objective traits. Although heuristics are an unavoidable element of complex decision-making, they are prone to error.⁹⁶ Adjudicators may assume the likely outcome of a case based on the respondent's appearance, economic status, or demeanor in court.⁹⁷ During the hearing, adjudicators internalize evidence that confirms their prior expectations and ignore evidence that contradicts those priors.⁹⁸ Overburdened adjudicators rely on heuristics even when they have a great level of expertise and experience.⁹⁹ As a result, heuristics increase the likelihood that an adjudicator makes a decision based on extrajudicial considerations rather than the presented evidence.¹⁰⁰

⁹³ See *Bohlander v. Wilkie*, No. 19-6534, 2020 WL 5808385 (Court of Appeals for Veterans Claims 2020).

⁹⁴ *Bohlander* at *4.

⁹⁵ See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44, 44 (2003); see also Amos Tversky & Daniel Kahneman, *Judgement Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

⁹⁶ DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011). Not all heuristics are bad. In the asylum context, the fact that an individual comes from a certain group within a certain country may be legally sufficient for an IJ to approve their claim without a thorough reading of the documentary evidence. See, e.g., *Hassan v. Gonzales*, 484 F.3d 513, (8th Cir. 2007) (finding that “Somalia females” is a cognizable group for purposes of asylum).

⁹⁷ See Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMGR. L. J. 207, 244–45 (2012); See Jeffrey J. Rachlinski, Chris Guthrie, and Andrew J. Wistrich, *Heuristics and Biases in Bankruptcy Judges*, 163 J. OF INST. & THEORETICAL ECON. 167, 183 (finding that Republican bankruptcy judges favor creditors).

⁹⁸ Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 CT. REV. 114, 115 (2013); Eric Rassin, Anieta Eerland & Ilse Kujipers, *Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 231 (2010).

⁹⁹ See Jeffrey J. Rachlinski, Chris Guthrie, and Andrew J. Wistrich, *Heuristics and Biases in Bankruptcy Judges*, 163 J. OF INST. & THEORETICAL ECON. 167, 168 (examining the role of heuristics and expertise in bankruptcy courts).

¹⁰⁰ See Hillary A. Sale, *Judging Heuristics*, 35 UC DAVIS L. REV. 903, 906 (2001) (describing the use of heuristics in securities-fraud cases).

The most hazardous heuristics rely on stereotypes about racial, ethnic, religious, or other groups. For example, in *Todorovic v. Attorney General*,¹⁰¹ the Eleventh Circuit reversed the decision of an IJ who found that the respondent was not credibly gay because “he b[ore] no effeminate traits or any other trait that would mark him as a homosexual” while in the courtroom.¹⁰² The IJ concluded that the respondent was not “overtly gay” despite evidence that the respondent had been sodomized by police officers, arrested with his activist boyfriend, and beaten to the point of being unable to walk while at a gay bar. While the IJ’s decision may have reflected internal prejudice, it may also reflect a failure to carefully consider the evidence in the record.

Reliance on procedural shortcuts and heuristics decreases the thoroughness with which adjudicators review the administrative record. As the thoroughness of review declines, the likelihood of error increases because adjudicators are more likely to overlook key evidence.

In theory, adjudicators may make random errors. In some cases, adjudicators may award relief to undeserving individuals and, in other cases, they may deny relief to otherwise deserving individuals. More likely, coping mechanisms penalize the party with the greater burden of proof. These parties have the greater evidentiary burden and, therefore, when adjudicators fail to thoroughly consider the record, these parties suffer the most. For example, performance metrics in the PTO encourage examiners to grant patent applications because, otherwise, examiners must assemble a case to rebut the presumption of patentability.¹⁰³ In the case of patents, coping mechanisms bias outcomes in favor of patent applicants. In the federal courts, overworked judges award greater deference to government agencies.¹⁰⁴ In other cases, the bias may penalize respondents applying for benefits or relief from the government.

To prevent overreliance on these coping mechanisms, adjudicatory agencies must provide sufficient levels of capacity to their adjudicators. Adjudicators with less capacity must rely on these coping mechanisms more often to manage their workloads and, therefore, the lack of capacity threatens the accuracy of their decisions. Empirically, we should expect the following:

1. As workloads and organizational pressures increase, adjudicators increase their reliance on coping mechanisms. All else equal,

¹⁰¹ See *Todorovic*, 621 F.3d at 1326.

¹⁰² *Id.* at 1326.

¹⁰³ Michael D. Frakes & Melissa F. Wasserman, *Is the Time Allocated to Review Patent Applications Inducing Examiners to Grant Invalid Patents? Evidence from Microlevel Application Data*, 99 REV. OF ECON. & STATS. 550, 552–557 (2017)

¹⁰⁴ See Berg I. Huang, *Lighthened Scrutiny*, 124 HARV. L. REV. 1109, 1122–24 (2011).

adjudicators with higher levels of capacity are less likely to rely on these coping mechanisms.

2. All else equal, adjudicators with higher levels of capacity make different decisions than adjudicators with lower levels of capacity.

For the most part, the reliance on procedural shortcuts and heuristics does not result from malice. Most adjudicators want to provide a fair and unbiased appraisal of each case. Yet too frequently adjudicators are denied the resources they need to perform their jobs. Overworked and understaffed, adjudicators commit small and frequent violations because they do not have the time or energy to comply with performance metrics and statutory obligations in a way that protects individual rights. In some situations, these coping mechanisms may improve efficiency in the adjudicatory process without harming either the public or respondents. In other cases, however, these coping mechanisms bias outcomes against either the government or the respondent, leaving some respondents without the relief or benefits to which they are entitled.

II. CASE STUDY: THE ADMINISTRATION OF THE IMMIGRATION COURTS

This Article uses the Immigration Courts of the Executive Office of Immigration Review (EOIR) as a case study to test the relationship between adjudicatory capacity and accuracy. It focuses on a single element of capacity within the Immigration Courts: the provision of law clerks to Immigration Judges (IJs). Significant cross-sectional and temporal variation exists in the number of law clerks provided to IJs. While some IJs have two dedicated law clerks, the vast majority of IJs share their law clerk with at least one other IJ. Law clerks are an appropriate indicator of the distribution of capacity within EOIR because they provide invaluable support to IJs. According to the testimony of one IJ,

Immigration Judges spend on average 36 hours a week on the bench. That leaves us with 4 hours a week to read the material submitted to us in cases, to read new legal developments, to read the parties' briefs, as well as changes in country conditions. If we had sufficient judicial law clerks to be able to help summarize, organize, draft proposed decisions, help us wade through some of the complexities of the law, [it would be a tremendous improvement].¹⁰⁵

¹⁰⁵ See EOIR June 2020 Hearing, *supra* note 24 (statement of Dana Leigh Marks).

Indeed, EOIR has consistently raised concerns about its inability to attain a one-to-one ratio of law clerks to IJs in its budget requests.

Inaccuracies carry grave consequences for the respondents in removal proceedings. In the words of one IJ, “They are death penalty cases. If an immigration judge makes a wrong call on somebody’s asylum application, we have sentenced that person potentially to death.”¹⁰⁶ There are significant reasons to believe that adjudicatory capacity affects IJ decision-making. In a 2007 speech, Judge Bea of the Ninth Circuit lamented,

Of course, [Immigration Judges] don't have time to review all the documents in the record ... I think we would see fewer appeals if Immigration Judges were given the resources necessary to do a detailed, thorough, thoughtful job in the first place.¹⁰⁷

Similar statements from IJs reflect concerns that the lack of capacity prevents a thorough review of the record and results in errors. One IJ recollects, “They come down a belt, you’ve got a big stamp, you stamp them on the forehead that says ‘deport,’ and away they go. The problem is you don’t have time to grant relief and have a hearing . . . There’s no due process. There is no judging.”¹⁰⁸

To be clear, an “accurate” decision does not mean that the IJ issues a decision that favors the respondent. An accurate decision faithfully applies the law to the facts in the administrative record. An inaccurate decision also occurs when an IJ grants asylum to an applicant who faces no risk of persecution if removed from the United States. Increases in asylum grants by IJs faced with low capacity would also signify an adjudicatory system plagued by inaccuracy. However, as this Section suggests, the coping mechanisms employed by IJs tend to bias against the respondent.

This Section provides an overview of the EOIR case study. It describes removal proceedings and the empirical literature on disparities in those proceedings. It then uses new data attained from the Office of Personnel Management (OPM) to survey variation in support staff within EOIR. It concludes

¹⁰⁶ See *Immigration Reform and the Reorganization of Homeland Defense*, Hearing before the Subcommittee on Immigration of the Committee on the Judiciary United States Senate, 107th Congress (June 26, 2002) (statement of Dana Marks).

¹⁰⁷ *Improving the Immigration Courts: Efforts to Hire More Judges Falls Short*, TRAC (July 28, 2008), <https://trac.syr.edu/immigration/reports/189>; see also *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (arguing that removal proceedings have fallen below the “minimum standards of justice.”).

¹⁰⁸ *Id.* at 21.

with a set of empirical predictions about the relationship between capacity, process, and outcomes.

A. *A Survey of Immigration Adjudication*

The Due Process Clause of the Fifth Amendment guarantees individuals in removal proceedings a right to a hearing.¹⁰⁹ Congress has delegated the administration of these hearings to the IJs within EOIR.¹¹⁰ Once removed, respondents cannot easily return to the United States.¹¹¹ Therefore, attaining accurate results in removal proceedings is essential to protecting the life and liberty of individuals within the immigration system.¹¹²

Removal proceedings begin when the Department of Homeland Security (DHS) issues a Notice to Appear¹¹³ to a noncitizen they believe entered the United States without inspection,¹¹⁴ overstayed their visa,¹¹⁵ violated the terms of their admission,¹¹⁶ or committed any other violation of the Immigration and Nationality Act (INA).¹¹⁷ During the course of the removal proceedings, DHS prosecutes the case on behalf of the United States government.

¹⁰⁹ Compare *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings”), with *Dep’t of Homeland Security v. Thuraissigiam*, 140 S.Ct. 1959, 1982 (2020) (holding that the Due Process Clause does not apply to credible fear interviews conducted at the border); *Kerry v. Din*, 135 S.Ct. 2128 (2015) (holding that the Government does not deny a U.S. citizen of a constitutionally protected interest by denying a spouse entry to the United States). See generally Kendall Coffey, *The Due Process Right to seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL’Y REV. 303 (2001) (surveying due-process protections as they relate to asylum).

¹¹⁰ For an in-depth treatment of immigration law and removal proceedings, see generally IRA KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK, 17TH ED. (2020). Removal” was formally known as “deportation.” Since April 1997, the Immigration and Nationality Act has referred to “deportation” as “removal.” See EXECUTIVE OFFICE OF IMMIGRATION REVIEW, EOIR POLICY MANUAL Ch. 7.2(a)(1), <https://www.justice.gov/eoir/eoir-policy-manual/7/2>. This Article uses the term interchangeably.

¹¹¹ See 8 U.S.C. § 1182(a)(9)(C)(i)(I) (2022) (describing statutory bars to reentry).

¹¹² See *Immigration Reform and the Reorganization of Homeland Defense*, *supra* note 106.

¹¹³ See 8 U.S.C. § 1229(a) (describing the Notice to Appear); 8 C.F.R. § 239.1 (providing authority to issue the Notice to Appear); 8 C.F.R. § 1003.14(a) (vesting jurisdiction in IJs to adjudicate the charges in the Notice to Appear).

¹¹⁴ See 8 U.S.C. § 1182(a)(6)(A)(i).

¹¹⁵ See 8 U.S.C. § 1227(a)(1)(C)(i).

¹¹⁶ See 8 U.S.C. § 237(a)(1)(B).

¹¹⁷ See, e.g., 8 U.S.C. § 1182(a)(1)(A)(i) (inadmissibility due to communicable disease); 8 U.S.C. § 1182(a)(2) (inadmissibility due to criminal conduct); 8 U.S.C. § 1182(a)(4)(A) (2022) (inadmissibility due to likelihood of becoming a public charge); 8 U.S.C. § 1182(a)(9)(A)(i) (2022) (inadmissibility for those previously removed).

The IJ conducts a master calendar hearing to advise the respondent of their rights, take pleadings, and schedule any additional hearings.¹¹⁸ If proceeding *pro se*, the IJ advises the respondent of their right to representation and provides them with a list of low-cost attorneys in the area.¹¹⁹ As removal proceedings are civil disputes, respondents do not enjoy a right to government-provided representation and, therefore, many respondents proceed without representation.¹²⁰ To expedite the proceedings, IJs often conduct master calendar hearings in large groups, spending only a few minutes on each case.¹²¹

At the individual-merits hearing, the IJ collects evidence, questions the respondent, and listens to the legal arguments about the removability of the respondent and their eligibility for relief.¹²² The majority of respondents concede removability and, therefore, this hearing focuses on applications for relief, such as asylum or cancellation of removal. The respondent carries the burden to establish their eligibility for relief from removal. During the hearing, the IJ must assess the credibility of the respondent and determine whether their statements are plausible and internally consistent.¹²³ Following the hearing, the IJ issues a decision on both the issues of removability and relief.

IJs retain significant discretion in these proceedings. The INA provides that a reviewing court must accept the IJ's "administrative findings" as "conclusive unless any reasonable adjudicator would be compelled to conclude the contrary."¹²⁴ The Supreme Court has held that "so long as the record contains contrary evidence of a kind and quality that a reasonable factfinder could find sufficient, a reviewing court may not overturn the agency's factual determination."¹²⁵ Moreover, IJs receive significant deference for their credibility determinations. Again, the

¹¹⁸ See EOIR POLICY MANUAL Ch. 4.15, <https://www.justice.gov/eoir/eoir-policy-manual/4/15>. If the respondent does not appear at the hearing, then the IJ may order them removed *in absentia*. See Eagly & Shafer, *supra* note 23 (finding that 88% of all immigrants appeared at all schedule hearings from 2008 to 2018).

¹¹⁹ *Id.*

¹²⁰ See Fong Yue Ting v. United States, 149 U.S. 698 (1893) (holding deportation hearings are civil proceedings); Peter L. Markowitz, *Deportation Is Different*, 13 J. OF CON. L. 5 (2011) (describing the complexity of categorizing removal proceedings as civil or criminal proceedings).

¹²¹ See David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1199 (2016).

¹²² See 8 U.S.C. 1229a(b)(1) (2022) ("The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence."); 8 C.F.R. § 1003.14(b) (providing IJs with sole jurisdiction over asylum applications for noncitizens in removal proceedings).

¹²³ See 8 U.S.C. § 240(c)(4)(C).

¹²⁴ 8 U.S.C. § 1252(b)(4)(B).

¹²⁵ See *Garland v. Ming Dai*, 141 S. Ct. 1669, 1677 (2021) (quotation omitted).

Supreme Court has held that the IJ retains the discretion to review the witness's credibility. "It does not matter whether the agency accepts all, none, or some of the alien's testimony; its reasonable findings may not be disturbed."¹²⁶ While this discretion affords IJs protection from reversal, it does not mean that IJs attain accurate decisions. In fact, the wide discretion afforded to IJs may simply provide greater opportunities for the injection of bias in decision-making.

B. Disparities in Decision-making

The Immigration Court's formal procedures have not prevented disparities in case outcomes. Existing empirical studies describe three separate factors that contribute to these disparities: (1) the demographics of the IJ conducting the proceeding, (2) the political and economic environment when and where the hearing is conducted, and (3) the presence of counsel.

One possible explanation for these disparities is that certain IJs—by virtue of their own biases—are more or less prone to granting relief to respondents in removal proceedings. Multiple studies find that female IJs are significantly more likely to grant asylum than their male peers.¹²⁷ Some studies suggest that women are less adversarial in removal proceedings, which may help a respondent feel comfortable sharing trauma that forms the basis of their claim.¹²⁸ Sympathies toward asylum applicants may emerge for other reasons as well. Ramji-Nogales, Schoenholtz, and Schrag find that respondents with dependents are substantially more likely to receive asylum because they may appear more credible or sympathetic.¹²⁹ Other studies have found that IJs with prior experience working for the Department of Homeland Security or its predecessor, the Immigration and National Service, were less likely to grant asylum.¹³⁰ The enforcement culture of these agencies may cause employees to develop skepticism toward asylum seekers, leading to lower grant rates once these employees become IJs.

Although many commentators describe the Immigration Courts as "too conservative" or even "too liberal," evidence is mixed on the exact impact that political ideology has on an IJ's decisions. Forthcoming work by Hausman et al.

¹²⁶ *Id.*

¹²⁷ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 21, at 342; Kim and Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21, at 628.

¹²⁸ Chand et al., *supra* note 21, at 189; Ramji-Nogales, Schoenholtz & Schrag, *supra* note 21, at 344; Kim and Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21, at 628.

¹²⁹ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 21, at 341.

¹³⁰ *Id.* at 345–46. *But see* Kim and Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21, at 628 (finding that an IJ's prior employment is not a significant predictor of removal outcomes).

finds that IJs are no more conservative or liberal than the average attorney.¹³¹ Most studies have found that the political party of the appointing Attorney General or president has no effect on removal or asylum outcomes.¹³² Yet an IJ's own political leanings may have some influence. Keith, Holmes, and Miller find evidence that liberal IJs are more sympathetic toward respondents from countries with human-rights abuses, and conservative IJs are more skeptical of respondents fleeing countries that benefit from U.S. military aid.¹³³

The political environment in which IJs work impacts their decision-making. Empirical evidence shows that the sitting president has an influence on outcomes in removal and asylum proceedings. Keith, Holmes, and Miller find that IJs are more likely to grant asylum during Democratic administrations and less likely to grant asylum during Republican administrations.¹³⁴ Likewise, Kim and Semet find that IJs were more likely to order removal during the Trump Administration irrespective of which President appointed the IJ.¹³⁵ The economic and social environment in the community where the IJ resides may also matter. IJs become less likely to grant asylum as the size of the Hispanic population in their community increases.¹³⁶ IJs working in communities with healthier economies are more likely to grant asylum.¹³⁷ However, the level of crime within the community does not impact outcomes.¹³⁸

Perhaps the greatest explanation for these disparities is whether the respondent is represented by counsel during the removal proceedings. Ramji-Nogales, Schoenholtz and Schrag find that represented respondents are three times more likely to receive asylum than *pro se* respondents.¹³⁹ A study by Eagly and Shafer estimates that respondents with counsel are five times more likely to receive

¹³¹ See David K. Hausman, Daniel E. Ho, Mark S. Krass, & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, 40 J. OF L., ECON. & ORG. ___, 20 (forthcoming 2022).

¹³² *Id.* at 18; GAO ASYLUM 2008 *supra* note 21; Chand et al., *supra* note 21, at 188.

¹³³ See Linda Camp Keith, Jennifer S. Holmes, and Banks P. Miller, *Explaining the Divergence in Asylum Grants: Rates Among Immigration Judges: An Attitudinal and Cognitive Approach*, 35 L. & POL'Y 261, 277–81 (2013).

¹³⁴ *Id.* at 100.

¹³⁵ Kim and Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21, at 625–27.

¹³⁶ Chand, *supra* note 21, at 189.

¹³⁷ *Id.*; see also Kim and Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21, at 625–27 (finding that removal rates increase as unemployment rates increase).

¹³⁸ *Id.* at 189–90.

¹³⁹ See Ramji-Nogales, Schoenholtz & Schrag, *supra* note 21, at 340.

relief.¹⁴⁰ Other studies reach similar conclusions.¹⁴¹ Yet the IJ's conduct during the proceeding may shape whether the respondent has an opportunity to find counsel. Hausman and Srikantiah find differences in the length of time granted to individuals to find counsel.¹⁴²

Only one known study has examined the relationship between EOIR's capacity and outcomes in removal proceedings. In a forthcoming study, Hausman, et al., examine whether increased hiring of IJs during the Trump Administration increased removals. Their study finds that "[t]he Trump Administration's hiring spree led to more case completions and therefore to more removal orders, because most cases end with removal orders."¹⁴³ This finding makes intuitive sense. However, their study does not address how variation in the resources provided to individual IJs shapes outcomes. This Article fills that gap.

C. EOIR Workloads, Capacity, and Pressures

Identifying suitable measures of capacity has long plagued empiricists seeking to study its effects on agency performance.¹⁴⁴ This Article remedies the problem using over 32,000 personnel records obtained from OPM. These records allow for the creation of law-clerk measures for IJs from 1998 to 2021. This Article focuses on the role of law clerks because EOIR has consistently raised concerns about its low levels of law clerks in recent budget requests. This Section reviews this data to demonstrate deficiencies in EOIR's staffing.

This data is paired with EOIR's individual case records.¹⁴⁵ EOIR periodically publishes its electronic case database, which includes over 10 million records of removal proceedings.¹⁴⁶ Each entry contains information on the charge brought against the respondent, any claims of relief raised, and the ultimate outcome. It also includes data about the respondent, such as their nationality, spoken language, and legal representation.

¹⁴⁰ Eagly and Schafer, *supra* note 23, at 9.

¹⁴¹ See Chand, *supra* note 21, at 189; Kim and Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21, at 618; Ryo, *supra* note 23.

¹⁴² See Hausman & Srikantiah, *supra* note 23, at 1829.

¹⁴³ Hausman, et al., *supra* note 131, at 12.

¹⁴⁴ See Nicholas R. Bednar, *The Workforce Capacity of the United States Bureaucracy, 1998-2022* (Manuscript, Vanderbilt University 2022).

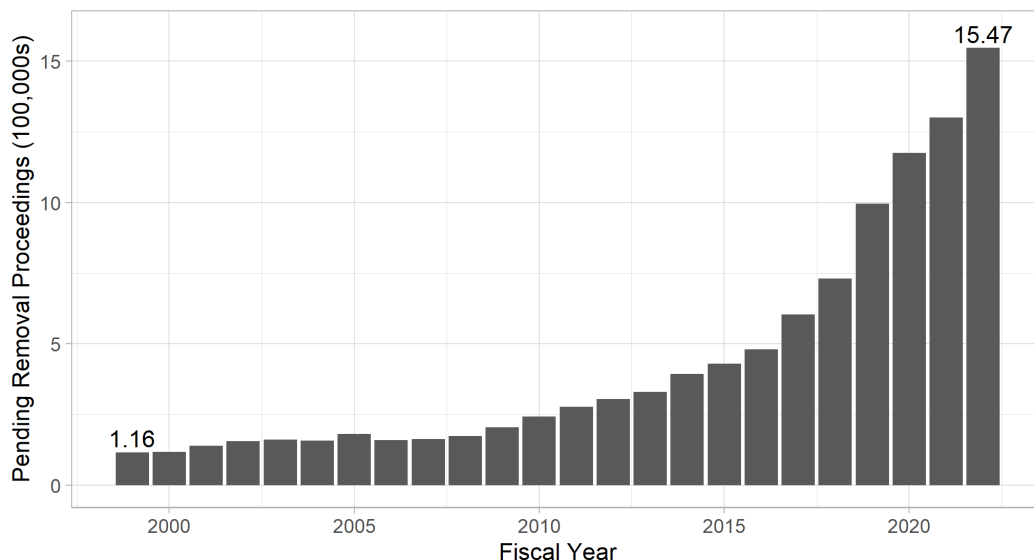
¹⁴⁵ EXECUTIVE OFFICE OF IMMIGRATION REVIEW, CASE DATA (Apr. 2022), <https://files.share.eoir.justice.gov/FOIA-TRAC-Report.zip>.

¹⁴⁶ DEPARTMENT OF JUSTICE, EOIR CASE DATA (Mar. 2022), <https://www.justice.gov/eoir/foia-library-0>.

1. Immigration Judges and Case Backlogs

The backlog of pending removal proceedings has raised concerns among advocates, scholars, and government officials for the last two decades.¹⁴⁷ Figure 1 plots the number of proceedings pending before the Immigration Courts at the beginning of each fiscal year. Since 2007, the Immigration Courts have experienced a steadily increasing workload. At the start of FY 2007, the Immigration Courts had 116,000 pending proceedings. By the start of FY 2022, the backlog had surpassed 1.5 million cases—a nearly 1,200% increase. New cases far outpace case completions. The highest number of cases that the Immigration Courts has ever completed in a single fiscal year is just shy of 400,000 cases (FY 2019). Yet the Immigration Courts are on track to receive 800,000 new cases in FY 2022 alone.¹⁴⁸

FIGURE 1: REMOVAL PROCEEDINGS PENDING AT THE BEGINNING OF THE FISCAL YEAR, FY 1999–2022



Note: Data from Executive Office of Immigration Review's Case Data (April 2022) (N=24).

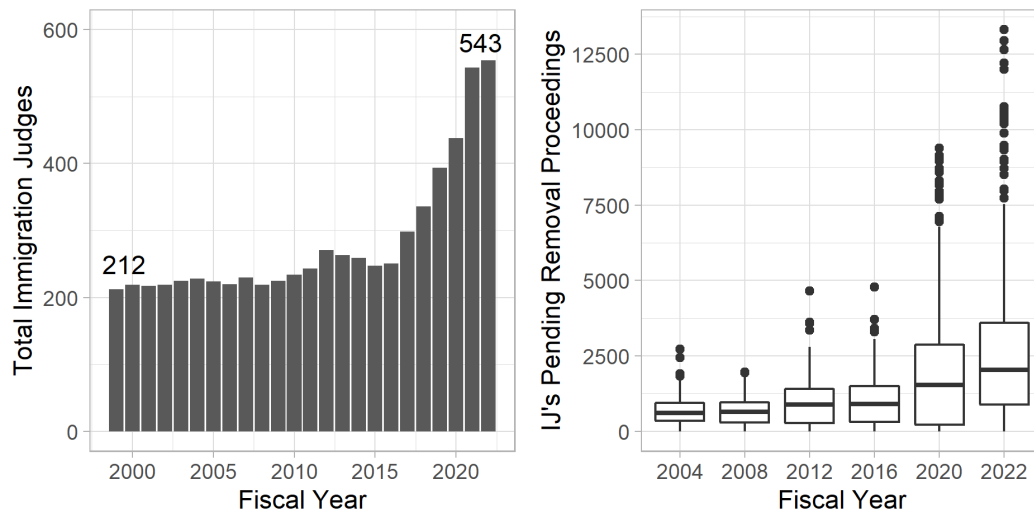
Three phenomena have contributed to this growing backlog. First, DHS has drastically increased enforcement activities over the past two decades. Second, the United States has experienced a surge of migrants fleeing gang violence in Central America since 2014. Third, the partial shutdown of immigration courts and the

¹⁴⁷ See *Operations of the Executive Office for Immigration Review (EOIR)*, Hearing before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, 117th Congress (Feb. 6, 2022), http://commdocs.house.gov/committees/judiciary/hju77558.000/hju77558_of.htm.

¹⁴⁸ See *Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in Avalanche of Cases*, TRAC (Jan. 18, 2022), <https://trac.syr.edu/immigration/reports/675>.

mismanagement of schedules during the COVID-19 Pandemic stymied efforts to reduce the backlog. The combination of increased enforcement, the Border Crisis, and the COVID-19 Pandemic has increased workload pressures on IJs.

FIGURE 2: TOTAL NUMBER OF IMMIGRATION JUDGES EMPLOYED BY EOIR AND PENDING CASES FOR EACH IMMIGRATION JUDGE



Note: Immigration Judge data from Office of Personnel Management’s Enterprise Human Resources Integration (April 2022) (N=24). An individual is categorized as an “Immigration Judge” if OPM codes their pay plan as “IJ.” Pending removal cases from Executive Office of Immigration Review’s Case Data (April 2022) (N=5513).

EOIR has responded to its growing backlog by hiring more IJs. The left plot of Figure 2 shows IJ employment from 1998 to 2021. From September 1998 to September 2016, the total number of IJs fluctuated between 212 and 300 judges. Despite complaints from President Trump himself, hiring during the Trump Administration nearly doubled the number of IJs. In September 2022, EOIR employed a total of 543 IJs. Yet EOIR has a reputation for inefficient hiring practices. In 2017, EOIR took more than two years (742 days) to hire new IJs.¹⁴⁹ These inefficient hiring practices have prevented EOIR from attaining the number of IJs authorized by congressional appropriations.¹⁵⁰

Still, the increased hiring of IJs has not kept pace with EOIR’s growing workload. The right plot of Figure 2 shows the distribution of backlogs for

¹⁴⁹ GAO, EOIR BACKLOG, *supra* note 47, at 40. *But see* DEP’T OF JUSTICE, FY 2021 CONGRESSIONAL BUDGET SUBMISSION 4 (Feb. 2020), <https://www.justice.gov/doj/page/file/1246381/download> (suggesting that EOIR had reduced the hiring time to eight months).

¹⁵⁰ GAO, EOIR BACKLOG, *supra* note 47, at 38.

individual IJs at the start of the fiscal year. At the start of FY 2005, the average IJ had a backlog of 851 pending cases. By the start of FY 2021, the average IJ had a backlog of nearly 3400 cases—a 300% increase. Due to geographic disparities in DHS enforcement efforts, EOIR’s growing workload has affected some IJs more than others. At the start of FY 2021, 144 IJs (25.6%) had a backlog exceeding 5,000 cases, and 49 IJs (8.7%) had a backlog exceeding 10,000 cases. Yet other IJs have experienced relatively little increase in their backlogs. As in all adjudicatory agencies, increasing workloads pressure IJs to increase case completions at the expense of quality. IJs have spoken openly about their concerns. In a March 2021 interview, NPR asked one IJ, “What is the effect [of the backlog] on you as someone who wants to administer justice?” She responded, “Extreme frustration.”¹⁵¹

2. Law Clerks and Mismanagement of Support Staff

The degree to which growing workloads affect IJ decision-making depends on the resources provided to these adjudicators. While the Trump Administration increased the number of IJs, it failed to hire adequate support staff to aid these IJs.¹⁵² Support staff are essential to scheduling hearings, reviewing the record, and drafting decisions. EOIR intends for each IJ to receive dedicated support from one attorney, one legal assistant, and two additional full-time employees.¹⁵³ In budget requests to Congress, EOIR has consistently requested additional attorney positions to move toward a one-to-one ratio of law clerks to IJs.¹⁵⁴ EOIR has never attained this benchmark. According to the National Association of Immigration Judges, even this benchmark would prove insufficient to address the current backlog.¹⁵⁵

¹⁵¹ Steve Inskeep, “Judge Dana Marks on How the Biden Administration Can Address Immigration Backlogs,” NPR (Mar. 26, 2021), <https://www.npr.org/2021/03/26/981486753/judge-dana-marks-on-how-the-biden-administration-can-address-immigration-backlog>

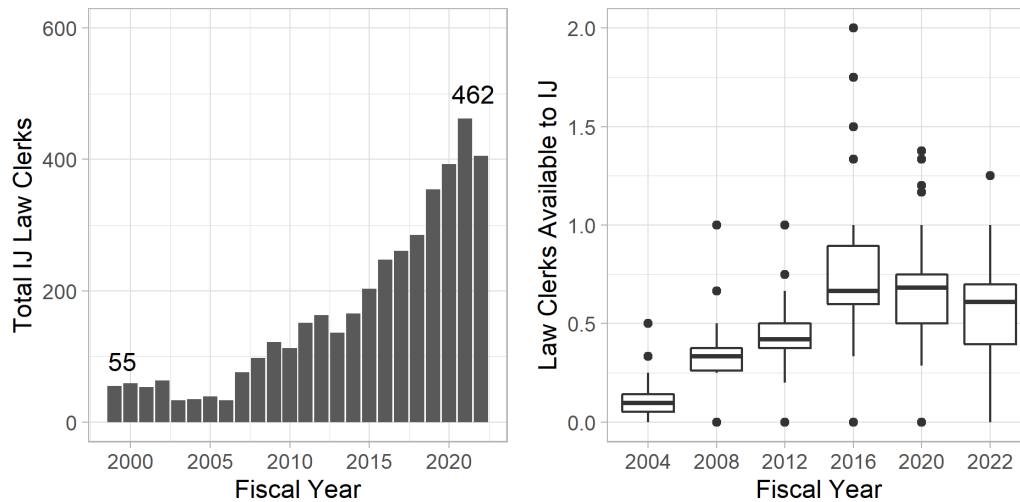
¹⁵² See *id.* (“INSKEEP: Didn’t the Trump Administration increase the number of immigration judges, though? MARKS: Yes, but there have (sic) not kept pace the amount of staff that we need to hear cases or the number of judges that would be necessary to make a significant dent in the backlog. . .”).

¹⁵³ See EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FY 2020 BUDGET REQUEST AT A GLANCE 2 (2019), <https://www.justice.gov/jmd/page/file/1142486/download>.

¹⁵⁴ See EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FY 2022 PERFORMANCE BUDGET: CONGRESSIONAL BUDGET SUBMISSION 23 (May 2021), <https://www.justice.gov/jmd/page/file/1398381/download>; EXECUTIVE OFFICE OF IMMIGRATION REVIEW, FY 2021 PERFORMANCE BUDGET: CONGRESSIONAL BUDGET SUBMISSION 21 (Feb. 2020), <https://www.justice.gov/doj/page/file/1246381/download>

¹⁵⁵ NAIJ, IN NEED OF REFORM 1–2 (2019) (“To address their daily dockets, reduce the backlog, and remain current with new receipts, each immigration judge team, at a minimum, should include two legal assistants for every 1,000 cases on a judge’s docket and a judicial law clerk.”).

FIGURE 3: TOTAL NUMBER OF LAW CLERKS EMPLOYED BY EOIR AND LAW CLERKS AVAILABLE TO EACH IJ



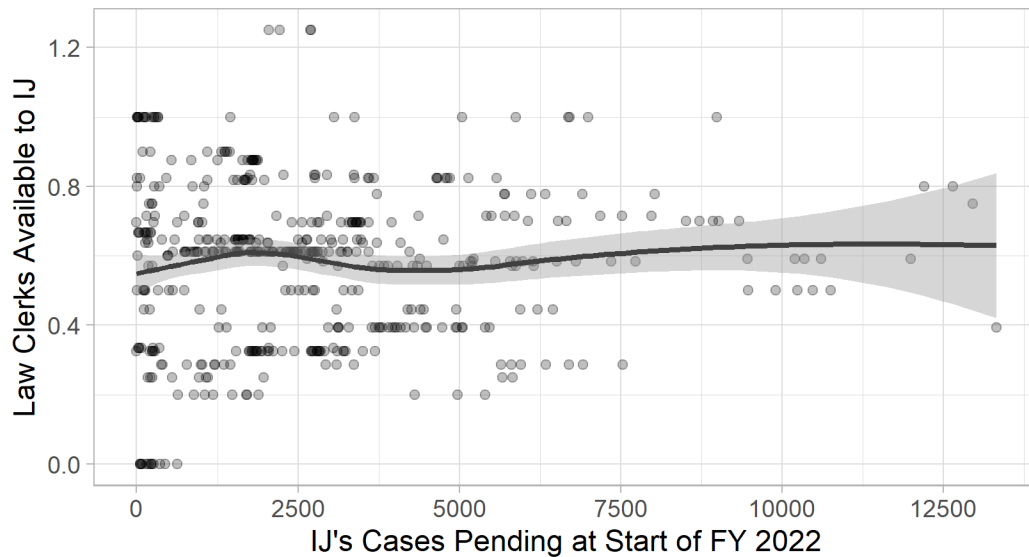
Note: Law Clerk data from Office of Personnel Management’s Enterprise Human Resources Integration (April 2022) (N=24). Individual categorized as a “Law Clerk” if OPM codes occupation as a “general attorney” or “law clerk.” Law clerks available to IJ estimated as the ratio between the number of law clerks working within an Immigration Court to the number of IJs based at that court (N=5513). Data excludes law clerks assigned to EOIR headquarters.¹⁵⁶

In Figure 3, the plot on the left shows the total number of law clerks working in the Immigration Courts in each fiscal year. At the start of FY 1999, EOIR employed 55 full-time law clerks. By FY 2021, it employed 462 law clerks. Still, this number does not reach the one-to-one ratio sought by EOIR. The average IJ shares a law clerk with at least one other member of their court. But the disparities in staffing are not spread evenly across EOIR. The plot on the right shows the estimated number of law clerks available to each IJ. At the start of FY 2022, only 103 IJs (18.3%) worked in an Immigration Court with at least a one-to-one ratio. Most IJs pooled law clerks. Other IJs, however, have more than one dedicated law clerk. For example, in the Miami Immigration Court, each IJ has a dedicated law clerk, and the court employs several additional law clerks capable of helping across the court.¹⁵⁷

¹⁵⁶ See Appendix A.

¹⁵⁷ EXECUTIVE OFFICE OF IMMIGRATION REVIEW, STAFF DIRECTORY FOR IMMIGRATION COURTS (April 11, 2022), <https://www.aila.org/infonet/eoir-provides-ocij-staff-directory> (showing assignment of law clerks within the Miami Immigration Court).

FIGURE 4: CORRELATION BETWEEN LAW CLERKS AVAILABLE TO IJ AND IJ'S PENDING CASES, FY 2022



Note: Pending removal cases from Executive Office of Immigration Review's Case Data (April 2022) (N=5513). Law Clerk data from Office of Personnel Management's Enterprise Human Resources Integration (April 2022). Trend line produced using local regression (LOESS).

Although EOIR faces staffing shortages, an effective management strategy would distribute more staff to the IJs in the greatest need (i.e., those with the largest backlogs). If EOIR effectively manages its workforce, then one would expect to observe a high correlation between staffing and the size of an IJ's backlog. As shown in Figure 4, there is no meaningful relationship between the ratio of law clerks and backlogs. The correlation between the ratio of law clerks and backlogs is negative and near zero ($\rho: -0.05$).

What factors explain law-clerk assignment if not workload? Unfortunately, anecdotal and empirical evidence point to systemic mismanagement rather than a meaningful human-capital plan. EOIR's struggle to manage personnel has earned it a place on the Government Accountability Office's (GAO) high-risk list.¹⁵⁸ According to the GAO report,¹⁵⁹ "EOIR has not developed and implemented a workforce plan to guide its effort for identifying and addressing staffing needs" and, instead, "estimates staffing needs using an informal approach." GAO found that EOIR does not account for "long-term staffing needs," "differences in the complexity of different types of cases immigration judges are required to

¹⁵⁸ GAO, EOIR BACKLOG, *supra* note 47, at 34–35.

¹⁵⁹ *Id.*

complete,” or the “resources needed to achieve the agency’s case completion goals.”¹⁶⁰ EOIR blames its inability to create staffing plans on its “lack of resources.”

IJs blame systemic mismanagement on agency leaders: “You can see that the people in Falls Church don’t really have much idea of what’s [going on] They’re always hiring analysis, statistics, personnel specialists. Immigration courts are dying and these guys are hiring more bureaucrats.”¹⁶¹ Another IJ laments, “EOIR is not run like a court; the necessary structure and infrastructure that’s supposed to be in place hasn’t been put in place.”¹⁶² Therefore, both external and internal observers believe EOIR suffers from mismanagement and a lack of capacity.

Quantitative analyses provide little insight into EOIR’s “informal” approach to personnel management.¹⁶³ Pending cases, city populations, vote shares, and IJ experience have no statistically significant effect on the ratio of law clerks to IJs within an Immigration Court. Only two variables have a substantively meaningful effect. First, Immigration Courts situated in cities with high unemployment rates have a smaller ratio of law clerks to IJs. Although EOIR hires clerks through the DOJ Honors Program, this finding may reflect that EOIR struggles to place law clerks in cities with few post-clerkship opportunities. Second, and more interestingly, Immigration Courts along the Southern Border have a *smaller* ratio of law clerks to IJs. This finding poses concern since these courts often have the highest caseloads. EOIR’s failure to adequately staff Immigration Courts in need of surge capacity reinforces concerns of systemic mismanagement.

3. Organizational Pressures to Complete Cases

Rising workloads and deficiencies in capacity occur against a backdrop of political interference in the day-to-day activities of the Immigration Courts.¹⁶⁴ Long delays in the adjudication of removal proceedings have increased public and political scrutiny of the Immigration Courts.¹⁶⁵ For better or worse, the Department

¹⁶⁰ *Id.* at 34.

¹⁶¹ See Amit Jain, *Bureaucrats in Robes: Immigration ‘Judges’ and the Trappings of ‘Courts’*, 33 GEO. IMMIGR. L.J. 261, 296 (2019) (quoting the IJ).

¹⁶² SPLC, ATTORNEY GENERAL’S JUDGES, *supra* note 20, at 20.

¹⁶³ See Appendix B.

¹⁶⁴ See generally, COX & RODRÍGUEZ, *supra* note 14 (explaining presidential administration of U.S. immigration policy more generally); Family, *Immigration Adjudication Bankruptcy*, *supra* note 18 (summarizing the Trump Administration’s efforts to influence immigration courts).

¹⁶⁵ See, e.g., Salvador Rizzo, “President Trump’s Misconceptions about Immigration Courts and Law,” WASH. POST (July 26, 2018), <https://www.washingtonpost.com/news/fact-checker/wp/2018/06/26/president-trumps-misconceptions-about-immigration-courts-and-law> (quoting President Trump as describing EOIR as “dysfunctional”).

of Justice has interfered to increase case throughput in hopes of decreasing the growing backlog. Reflecting on the differences between agency managers and the IJs conducting hearings, one IJ states, “[Management was] busy concentrating on, how do we get these numbers down? For the judges . . . these numbers are people.”¹⁶⁶

One method for increasing the speed of cases has been the implementation of stricter performance metrics. In 2018, EOIR Director James McHenry announced new performance metrics for IJs beginning in FY 2019.¹⁶⁷ To attain a “satisfactory rating,” IJs would need to complete a minimum of 700 cases per year and complete certain types of hearings within shortened timeframes. IJs expressed frustration with these new metrics. One IJ stated that the performance metrics “turn[ed] immigration judges into assembly-line workers.”¹⁶⁸ Another reported that the metrics required IJs to schedule multiple hearings in the same calendar slot to satisfy demands.¹⁶⁹ The same IJ stated, “The pressure to complete cases made me less patient and less able to uphold the constitutional protections required to properly adjudicate cases.” Scholars too have raised concerns that the implementation of these new performance metrics may have interfered with the quality of proceedings.¹⁷⁰

The general focus on case completions rather than the quality of dispositions shapes the behaviors of IJs. Like all civil servants, IJs want to demonstrate “satisfactory” performance to agency management to advance their careers. When agency management focuses on the quantity of cases completed rather than the quality of decisions, IJs adjust their behaviors to fit this vision of “satisfactory” performance. The lack of capacity requires IJs to resort to coping mechanisms to achieve these performance metrics. Proposals to transfer the Immigration Courts to an Article I court may rectify some of these concerns but, as Section IV suggests, these proposals may have limited effect without additional investments in the capacity of the Immigration Courts.

¹⁶⁶ Jain, *supra* note 161, at 301.

¹⁶⁷ E-Mail from EOIR Director James McHenry, “Immigration Judge Performance Metrics” (Mar. 30, 2018), <https://www.justice.gov/eoir/page/file/1356096/download>.

¹⁶⁸ Maria Sacchetti, *Immigration Judges Say Proposed Quotes from Justice Dept. Threaten Independence*, WASH. POST. (Oct. 12, 2017), https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aeel1-11e7-be94-fabb0f1e9ffb_story.html.

¹⁶⁹ See Shugall, *supra* note 1.

¹⁷⁰ See Jain, *supra* note 161, at 299-302; Jennifer Lee Koh, *Waiving Due Process (Goodbye)*, 90 S. CAL. L. REV. 181, 209 (2017).

D. Empirical Predictions

The evidence presented in this Section demonstrates several problems with the administration of the Immigration Courts. First, IJs possess significant discretion over their decisions, and wide disparities exist in the outcomes of removal proceedings. Second, IJs face increasing workloads and organizational pressures to expedite the completion of their workloads. Third, IJs do not have sufficient law clerks to aid in the management of these workloads. Accordingly, the Immigration Courts exhibit the sort of maladministration that Section I predicts leads to overreliance on coping mechanisms.

Coping-Mechanism Hypothesis: As organizational pressures increase, IJs increase their use of coping mechanisms to manage their caseloads. However, IJs with more law clerks rely less on these coping mechanisms.

For these coping mechanisms to affect the accuracy of outcomes, they must lead to increased errors in the disposition of removal proceedings. The wide discretion afforded to IJs makes it easy for them to employ coping mechanisms because they are not guided by strong, formalist rules for assessing the credibility of evidence. In the Immigration Courts, these errors most often bias in favor of removal and against relief for respondents because respondents carry the evidentiary burden to show their eligibility for relief.

Anecdotes demonstrate the rise of procedural shortcuts in recent years. Attorney focus groups report that IJs discourage respondents from seeking relief, eliminating the need to review additional evidence or conduct lengthy hearings.¹⁷¹ They also describe how IJs inform asylum-seekers that their claims will likely fail and encourage them to accept voluntary departure.¹⁷² At times, IJs do not respect statutory provisions about the length of time between the master hearing and the individual-merits hearing.¹⁷³ IJs themselves acknowledge that these pressures prevent them from conducting thorough hearings and lead them to seek ways to shorten proceedings.¹⁷⁴ These procedural shortcuts shorten the time that IJs spend

¹⁷¹ See Center for Gender & Refugee Studies, Statement for the Record on Courts in Crisis: The State of Judicial Independent and Due Process in U.S. Immigration Courts”, House Subcommittee on Immigration and Citizenship (Jan. 29, 2020), <https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD007.pdf>.

¹⁷² *Id.*

¹⁷³ SPLC ATTORNEY GENERAL’S JUDGES, *supra* note 20, at 13.

¹⁷⁴ *Id.* at 21.

with each case and increase the likelihood that the IJ overlooks a key piece of evidence submitted by the respondent.

Heuristics also seem to affect IJ decision-making in ways that bias against relief for respondents. Respondents appearing before Immigration Courts often belong to marginalized racial, ethnic, and religious groups subject to systemic biases. Attorneys appearing before IJs note that some judges state stereotypes on the record.¹⁷⁵ Circuit courts have excoriated IJs for relying on impermissible stereotypes instead of the evidence presented in the record.¹⁷⁶ The use of heuristics increases the likelihood that the IJ discredits the respondent's evidence based on a false stereotype.

These examples are extreme. Many IJs express sincere concerns for the respondents appearing in removal proceedings. Many want to conduct fair hearings and deliver due process. Certainly, some IJs error in favor of respondents. These too are inaccuracies. Nevertheless, most of the anecdotal evidence suggests that reliance on these coping mechanisms biases outcomes against respondents in removal proceedings. The presence of a law clerk, however, may prevent IJs from making these errors by alleviating the need for the IJ to conduct clerical work and by providing an independent review of the administrative record.

Outcome Hypothesis: All else equal, IJs with more law clerks are less likely to order the removal of a respondent and are more likely to grant an application for asylum.

III. EMPIRICAL ANALYSES: ACCURACY IN THE IMMIGRATION COURTS

Broadly, the theory predicts that the availability of law clerks affects the thoroughness with which IJs review the administrative record which, in turn, affects the accuracy of IJs' decisions. Some IJs may make errors that bias against the respondent; others may make errors that bias in favor of the respondent. Both are symptomatic of an adjudicatory system prone to inaccuracy. The fact that errors may be either pro-respondent or anti-respondent makes it difficult to statistically measure inaccuracy. If both pro-respondent and anti-respondent errors occur at equal rates, then the average "error" identified by any statistical test will be

¹⁷⁵ *Id.* at 12.

¹⁷⁶ See *Todorovico v. Att'y Gen.*, 621 F.3d 1318, 1326 (11th Cir. 2010); *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1075 (9th Cir. 2015); *Abdulashvili v. Att'y Gen.*, 663 F.3d 197, 207 (3d Cir. 2011).

“zero”.¹⁷⁷ Accordingly, the EOIR case is a difficult test of this theory. Any anti-respondent effect of law clerks will necessarily be a conservative estimate of these inaccuracies because pro-respondent errors will bias the estimates downward.

This Section exploits variation in the assignment of law clerks to test the hypotheses developed in Section II. It considers the hypotheses in reverse order. First, it examines whether the number of law clerks assigned to an IJ affects outcomes—removal orders and asylum grants—in removal proceedings. This analysis estimates the effect of law clerks on these outcomes using a multivariate regression on over 1.5 million cases decided between 2008 and 2022. Second, it examines whether increased organizational pressures cause IJs to use coping mechanisms and whether IJs with more law clerks are less likely to use these coping mechanisms. Using a regression-discontinuity design, this analysis tests whether the implementation of new performance metrics during the Trump Administration reduced hearing times. This design establishes a causal relationship between organizational pressures, law clerks, and the use of coping mechanisms by IJs. Collectively, the findings support both the coping-mechanism hypothesis and the outcome hypothesis.

A. *Statistical Relationship Between Law Clerks and Removals*

During removal proceedings, IJs must decide whether to order the removal of the respondent. To withstand removal, respondents must convince the IJ that they are entitled to some form of relief. At times, respondents submit thousands of pages of evidence to support their claims. Yet the ability of an IJ to thoroughly consider this evidence depends on whether they have sufficient capacity. Accordingly, the outcome hypothesis predicts that IJs with more law clerks have greater assistance in reviewing the administrative record and are therefore less likely to overlook key evidence that would result in the removal of the respondent.

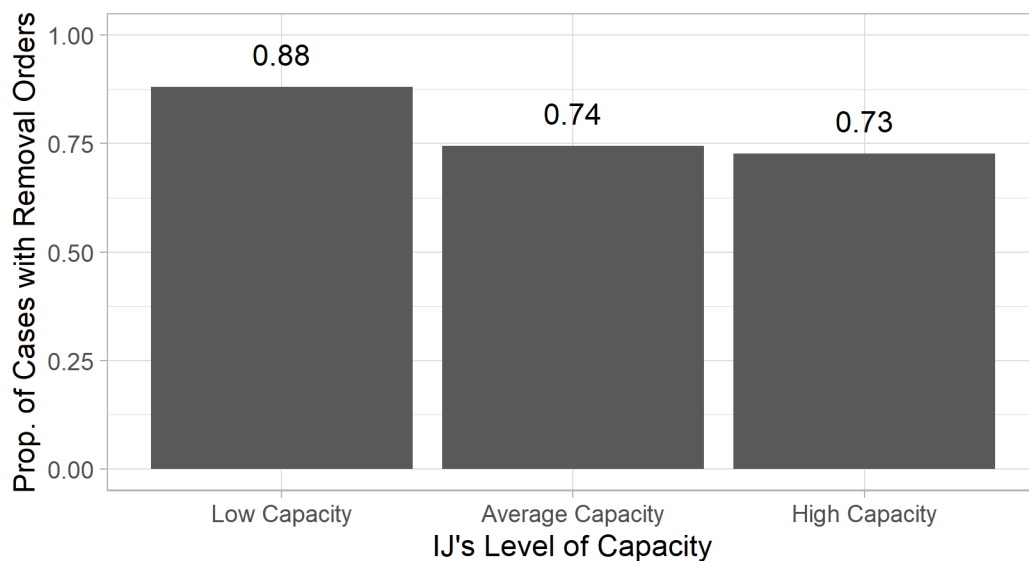
This analysis examines removal orders decided between 2004 to 2022. Each observation in the dataset is an individual removal proceeding (N=1,525,972). The dependent variable of interest is a binary indicator of whether the IJ ordered the removal of the respondent (Proportion: 0.77).¹⁷⁸ By theoretical and empirical necessity, the data excludes several classes of cases. First, the analysis excludes any case where (1) the IJ ordered the respondent removed in absentia (i.e., the respondent did not appear for the hearing) or (2) the respondent stipulated to removal. Removal orders in these cases result from alternative legal processes that do not reflect the IJ’s exercise of discretion. Second, the analysis excludes any case

¹⁷⁷ Consider a dart board. Suppose I throw five darts and they are evenly spaced around the bullseye. A statistical test will tell me that—on average—I hit the bullseye. Only if the error occurs more or less often in one direction will the statistical test reveal my incoordination.

¹⁷⁸ See *infra* Appendix A (explaining the coding of removal orders).

heard by an IJ based at the EOIR headquarters. The staffing dataset provided by the Office of Personnel Management does not disaggregate between subunits at the EOIR headquarters and, therefore, inflates the estimated number of law clerks available to IJs working at headquarters. Third, the analysis excludes cases of additional family members (i.e., rider cases) who are in removal proceedings with the lead respondent. The outcome of rider cases depends on the result of the lead case and, therefore, the decision in these cases does not reflect the discretion of the IJ.¹⁷⁹

FIGURE 5: REMOVAL ORDERS BY IJ CAPACITY



Note: Removal cases from Executive Office of Immigration Review's Case Data (April 2022) (N=1,617,199).

The independent variable of interest is number of law clerks available to the IJ (Mean: 0.41, SD: 0.31).¹⁸⁰ This is a continuous measure that ranges from zero law clerks to two law clerks. Figure 5 shows the variation in removal outcomes based on the number of law clerks assigned to the IJ. I categorize an IJ as “low capacity” if they have fewer law clerks than one standard deviation below the mean and “high capacity” if they have more law clerks than one standard deviation above the mean. Respondents assigned to low-capacity IJs are 12 percentage points more likely to be removed than respondents assigned to an average-capacity IJ.¹⁸¹

¹⁷⁹ See Kim & Semet, *An Empirical Study of Political Control over Agency Adjudication*, *supra* note 21.

¹⁸⁰ See *infra* Appendix A (discussing the estimation procedure for this measure).

¹⁸¹ A t-test reveals that this difference is statistically significant at the $p < 0.001$ level.

Respondents assigned to high-capacity IJs are the least likely to be removed. This simple analysis provides initial support for the outcome hypothesis.

However, a simple bivariate relationship between law clerks and outcomes does not account for confounding variables that may explain both the assignment of law clerks and the likelihood of removal. Confounding caused by omitted variables poses the greatest threat to statistical inference.¹⁸² For example, Section II.C. discusses how Immigration Courts along the Southern Border have fewer law clerks than other Immigration Courts. At the same time, Immigration Courts along the Southern Border may issue more removal orders because many undocumented individuals entering along the Southern Border lack a valid claim for relief. For purposes of inference, the concern is that the number of law clerks proxies other relationships, such as the location of the Immigration Court, that better explain outcomes.

A multivariate model controls for these possible confounders and allows us to separate the effect attributable to the number of law clerks from the effect attributable to other variables.¹⁸³ When the model incorporates all possible sources of confounding, it attains a causal estimate.¹⁸⁴ Practically, it is hard to control for all potential sources of confounding. Nevertheless, careful consideration of which controls are necessary increases the reliability of the estimated effects.

IJ workloads may influence the assignment of law clerks and the likelihood of removal. Although Section II.C. finds no meaningful relationship between IJ workloads and the assignment of law clerks, it remains possible that these workloads influence assignment in some unobserved way. Likewise, the theory predicts that workload pressures encourage the use of coping mechanisms. Therefore, increasing workloads may directly affect IJ decision-making. I measure workload as the proportional change in the IJ's backlog from the previous fiscal year to the current fiscal year (Mean: 0.14; SD: 1.14).¹⁸⁵ Proportional change is the appropriate measure because it captures the magnitude of change for an individual IJ whereas the raw increase does not. An IJ based along the Southern Border may be unphased by a 500 case increase in her docket, but an IJ based in Fishkill, New York, may be overwhelmed by such a staggering increase. Additionally, the effect

¹⁸² See JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 78–81 (6th ed. 2016).

¹⁸³ See *infra* Appendix A (listing all controls). I use a linear probability model for estimation. The results are also robust when estimated with a logistic regression. See *infra* Appendix B.

¹⁸⁴ JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION* 52–64 (2009).

¹⁸⁵ A proportion change of 0.0 corresponds to no change. A proportional change of 1.0 corresponds to a 100% increase in the size of the IJ's workload or, in other words, doubling the IJ's workload.

of more law clerks may vary depending on the IJ's workload. Therefore, the model includes an interaction term between the number of law clerks and the change to the IJ's workload.

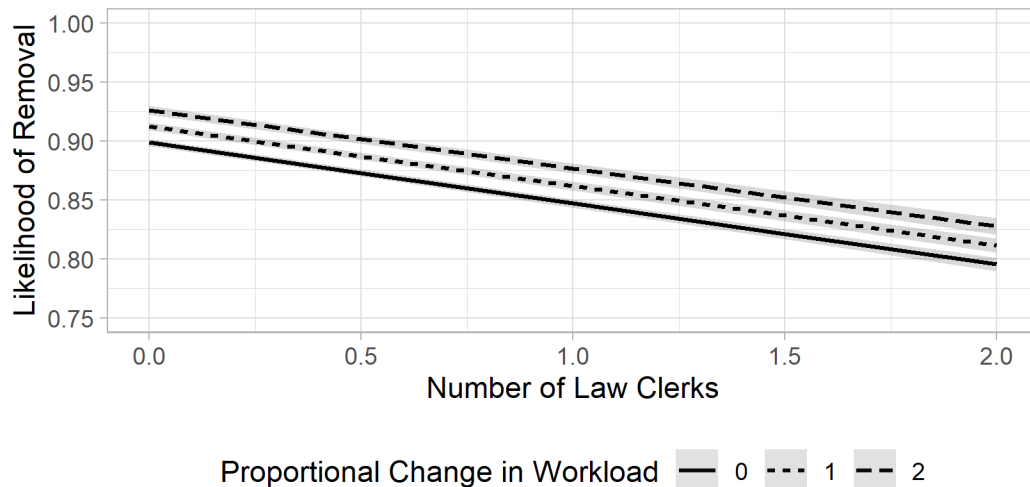
Other confounders relate to geographic and temporal variables that determine the pool of immigrants likely to appear in removal proceedings before the Immigration Court and the willingness of EOIR to assign law clerks to certain Immigration Courts.¹⁸⁶ Section II.B. explains that many of these variables have been found to influence outcomes in removal proceedings. Accordingly, the model includes controls for the IJ's base city. The model also includes time-varying characteristics in the IJ's community such as the total population, the total immigrant population, the unemployment rate, and the democratic vote share from the most recent presidential election. Likewise, temporal trends may influence law-clerk hiring and migration to the United States. Accordingly, the model controls for the fiscal year in which the IJ issued their decision.

Section II.B. describes other IJ and respondent characteristics that may influence case outcomes.¹⁸⁷ For respondents, the model controls for whether the respondent was represented in removal proceedings, whether the respondent filed an asylum claim, whether the respondent is a national of a country described as "not free" by Freedom House, whether the respondent is a national of Mexico or Central America, and whether the respondent speaks English. For IJs, the model controls for whether the IJ was previously employed by the Department of Justice, the Department of Homeland Security, or the Department of State, whether the IJ is a woman, whether the IJ was appointed during a Republican administration, and the number of years that the IJ has practiced law.

¹⁸⁶ See, e.g., David K. Hausman, Daniel E. Ho, Mark S. Krass, & Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, 40 J. OF L., ECON. & ORG. __, 7 (forthcoming 2022) (conditioning on time and place in the analysis of removal proceedings)

¹⁸⁷ Models have been estimated both with and without respondent-level and IJ-level controls. Results are consistent with or without these controls.

FIGURE 6: PREDICTED EFFECT OF LAW CLERKS ON LIKELIHOOD OF REMOVAL



Note: (N=1,538,587). All discrete variables held at their proportions. Standard errors clustered at the IJ level. Full discussion of the empirical analysis available in Appendix C.

Figure 6 plots the estimated effect of the number of law clerks on the likelihood of removal.¹⁸⁸ Relative to a respondent whose case is decided by an IJ with no law clerks, a respondent whose case is decided by an IJ with one law clerk is 5.2 percentage points less likely to be removed. The estimated effect is statistically significant. In addition, the model finds a statistically significant relationship between the proportional increase in the IJ's workload and the likelihood of removal. Doubling the IJ's workload increases the likelihood of removal by 1.4 percentage points. Doubling—and even tripling—of an IJ's workload is not unprecedented.

Although this model finds evidence of a direct effect between workload and outcomes, there is no statistically significant evidence of an interaction effect between law clerks and workload. In other words, increasing the size of an IJ's workload does not change the marginal effect that law clerks have on case outcomes.

One question is whether the effects are different for individuals who have applied for asylum. Asylum cases have large administrative records and, therefore, the use of coping mechanisms caused by an absence of law clerks should have a greater effect on the likelihood of error in these cases. Indeed, the results support

¹⁸⁸ For a full description of the empirical analysis, see *infra* Appendix C.

this conjecture. Relative to a respondent whose case is decided by an IJ with no law clerks, an asylum applicant whose case is decided by an IJ with one law clerk is 8.1 percentage points less likely to be removed. The effects of workload on the results are larger as well. Doubling the IJ's workload increases the likelihood that an asylum applicant is removed by 3.1 percentage points. These findings suggest that cases with larger administrative records are more prone to experiencing error.

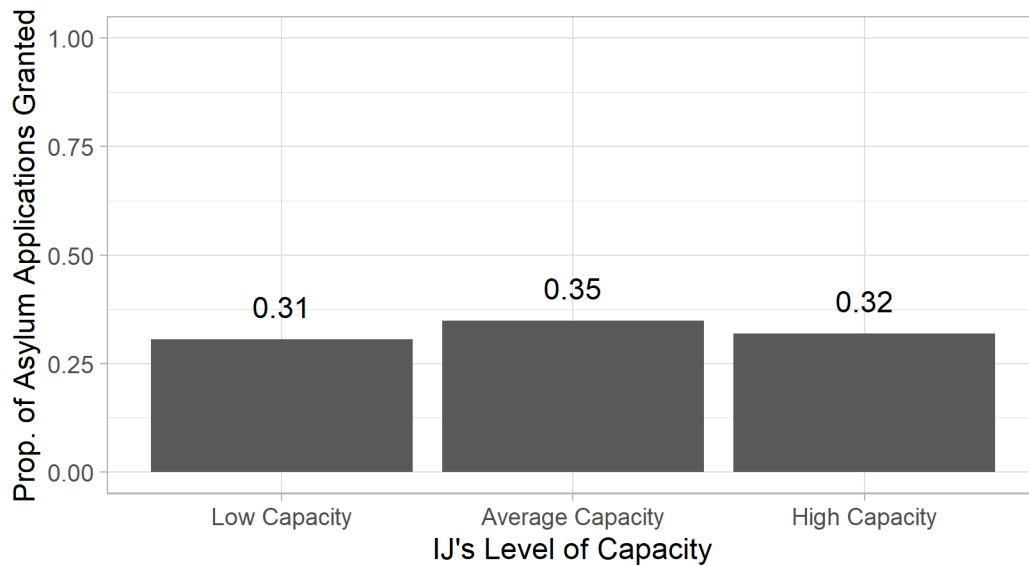
Another question is whether these results apply equally to removal proceedings conducted in Immigration Courts along the Southern Border. As a result of the Border Crisis, the Southern Border has experienced a greater increase in workloads and organizational pressures relative to other Immigration Courts. Indeed, estimating the model on the subset of removal proceedings heard at Immigration Courts along the Southern Border returns stronger results. Relative to a respondent whose case is decided by an IJ with no law clerks, a respondent whose case is decided by an IJ with one law clerk is 8.9 percentage points less likely to be removed. By contrast, the results are weaker when the model is estimated on the subset of removal proceedings heard at Immigration Courts in other parts of the country. Relative to a respondent whose case is decided by an IJ with no law clerks, a respondent whose case is decided by an IJ with one law clerk is 2.4 percentage points less likely to be removed. Regardless of where an IJ resides, they are statistically more like to remove a respondent when they have fewer law clerks.

B. Statistical Relationship Between Law Clerks and Grants of Asylum

IJs also adjudicate claims for relief from removal, such as asylum, adjustment of status, or cancellation of removal. Respondents applying for asylum must demonstrate a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁸⁹ Respondents who receive asylum cannot be removed from the United States. For many respondents, the evidentiary demands of an asylum application are steep, often requiring hundreds of pages of country reports, eye-witness affidavits, and expert testimony. These evidentiary burdens translate into longer, more complicated hearings for IJs. Attaining accurate results in asylum proceedings is essential to protecting the lives of respondents who face persecution if returned to their home countries.

¹⁸⁹ 8 U.S.C. § 1101(a)(42) (2022) (defining “refugee”).

FIGURE 7: ASYLUM GRANTS BY IJ CAPACITY



Note: Removal cases from Executive Office of Immigration Review's Case Data (April 2022) (N=335,866).

This analysis examines the relationship between law clerks and grants of asylum. It follows the same general structure as the previous analysis. The dependent variable is a binary indicator of whether the IJ granted the respondent's application for asylum (Proportion: 0.34). Each observation in the dataset is a single asylum application filed by a respondent in a removal proceeding (N=306,855). Figure 7 shows the variation in asylum outcomes based on the number of law clerks assigned to the IJ. Respondents assigned to low-capacity IJs are 4 percentage points less likely to be granted asylum than respondents assigned to an average-capacity IJ.¹⁹⁰ Interestingly, high-capacity IJs appear slightly less likely to grant asylum than average-capacity IJs. This finding is puzzling but is perhaps explained by geographic sources of confounding.

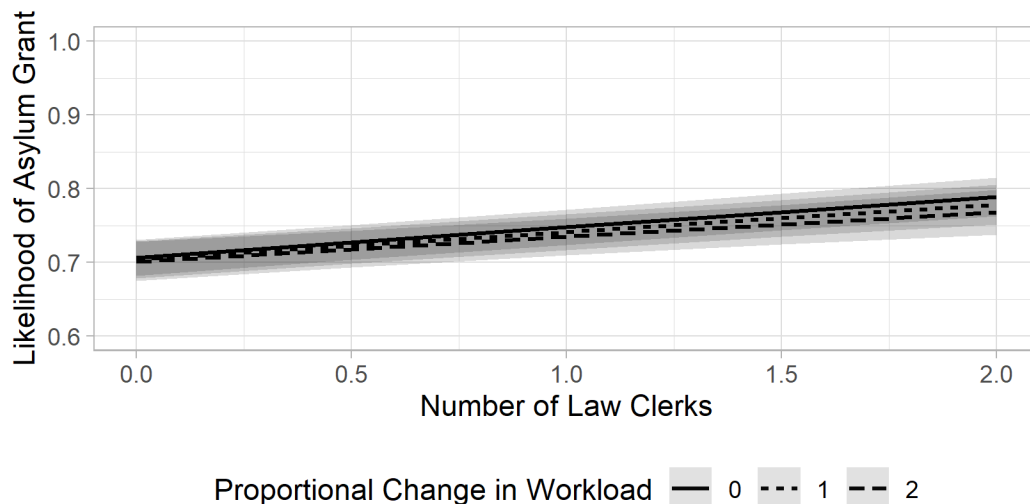
Again, the potential for confounding necessitates the use of a more sophisticated statistical technique. This analysis uses the same multivariate model as Section III.A.¹⁹¹ The model estimates the effect of law clerks on the likelihood

¹⁹⁰ A t-test reveals that this difference is statistically significant at the $p < 0.001$ level.

¹⁹¹ One adjustment is made to the model specification. I remove the control for whether the respondent applied for asylum. By definition, all respondents in this analysis have applied for asylum. Therefore, it is not possible to estimate the effect of "not applying for asylum" on the likelihood of receiving asylum.

that the IJ grants the respondent's asylum application, controlling for possible sources of confounding.

FIGURE 8: PREDICTED EFFECT OF LAW CLERKS ON LIKELIHOOD OF ASYLUM GRANT



Note: (N=273,402). All discrete variables held at their proportions. Standard errors clustered at the IJ level. Full discussion of the empirical analysis available in Appendix D.

Figure 8 plots the estimated effect of law clerks on the likelihood that the IJ grants the respondent's asylum application.¹⁹² Relative to a respondent whose case is decided by an IJ with no law clerks, a respondent whose case is decided by an IJ with one law clerk is 4.4 percentage points more likely to receive asylum. The estimated effect is statistically significant. Unlike the removal analysis, workload has no statistically significant effect on the likelihood of receiving asylum.

As before, heterogeneous effects may exist between removal proceedings conducted in Immigration Courts along the Southern Border and removal proceedings conducted elsewhere. Again, the effect of law clerks is stronger when the model is estimated on removal proceedings heard in Immigration Courts along the Southern Border. For removal proceedings heard near the Southern Border, a respondent is 14.7 percentage points more likely to receive asylum if their case is heard by an Immigration Judge with one law clerk. Again, the results are weaker when the model is estimated on removal proceedings heard in other parts of the country. In other Immigration Courts, a respondent is 2.8 percentage points more

¹⁹² All discrete variables held at their proportions. For a full description of the empirical analysis, see *infra* Appendix C.

likely to receive asylum if their case is heard by an Immigration Judge with one law clerk.

The results of these analyses support the theory in two ways. First, IJs with more law clerks are less likely to order the removal of the respondent and more likely to grant asylum. These findings comport with the expectations of the outcomes hypothesis. Second, IJs with increasing workloads are more likely to order the removal of the respondent. Although increasing workloads do not appear to influence grants of asylum, other evidence suggests that organizational pressures play a role. Law clerks have a greater effect in Southern Border states, which is consistent with the fact that the Border Crisis has increased organizational pressures on these IJs. In addition, law clerks have a greater effect in cases that involve an asylum application, which are the most administratively burdensome cases decided by IJs.

Although these findings support the outcome hypothesis, they do not provide evidence of the causal mechanism. Specifically, these results do not show that the influence of law clerks is attributable to their importance in reviewing the administrative record. The next analysis offers causal evidence to support this mechanism.

C. Causal Evidence Supporting the Coping-Mechanism Hypothesis

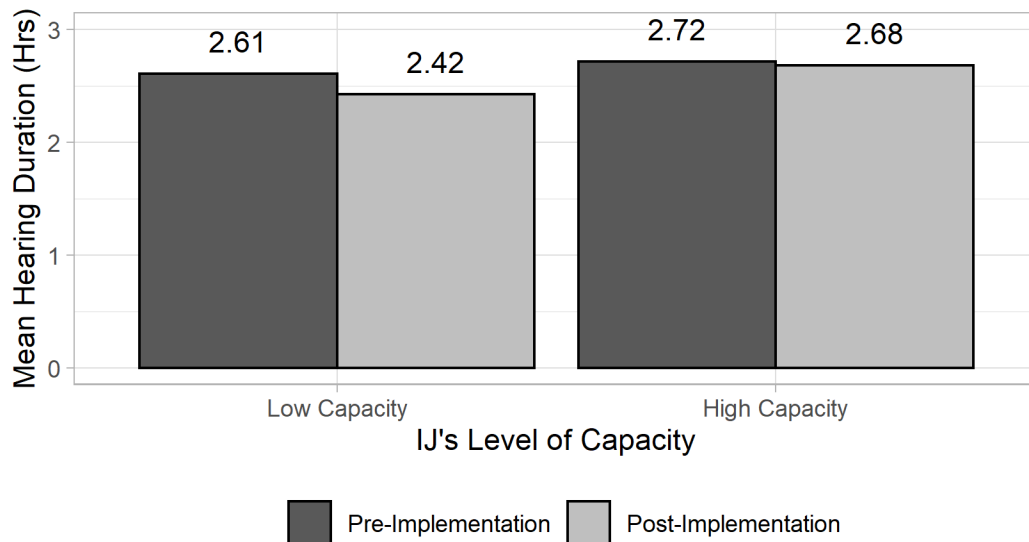
The coping-mechanism hypothesis posits that adjudicators with higher levels of capacity rely less on coping mechanisms as workloads and organizational pressures increase. IJs with more law clerks receive more help in reviewing the administrative record and, therefore, are more resistant to organizational pressures.

This analysis leverages the implementation of new performance metrics during the Trump Administration. IJs report that these performance metrics caused them to feel immense pressure to increase the speed of removals. Additionally, IJs state that the Immigration Courts manipulated their schedules to accomplish this goal.¹⁹³ The new performance metrics are the sort of organizational pressures that the theory predicts would cause increased reliance on coping mechanisms. If the theory holds, then IJs should have more readily used procedural shortcuts, such as shortening hearings, following the implementation of the performance metrics. However, IJs with more law clerks should rely on these procedural shortcuts less than IJs with fewer law clerks.

¹⁹³ See *infra* notes 167–170.

This analysis looks at the duration of individual-merits hearings pre- and post-implementation of the new performance metrics.¹⁹⁴ If IJs relied on coping mechanisms following the implementation of the performance metrics, then we should observe a sudden decrease in hearing duration following implementation of the performance metrics. Each observation in the dataset is an individual-merits hearing conducted between April 2018 and March 2019 (N=74,272). The dependent variable of interest is the duration of an individual-merits hearing in hours (Mean: 2.60, SD: 1.09). Again, the independent variable of interest is the number of law clerks available to the IJ.

FIGURE 9: AVERAGE HEARING DURATION (HOURS) BY IJ CAPACITY



Note: Hearings from Executive Office of Immigration Review's Case Data (April 2022) (N=80,938).

Figure 9 shows the difference in hearing duration for IJs with fewer law clerks than the mean ("low-capacity IJs") and IJs with more law clerks than the mean ("high-capacity IJs"). These simple statistics provide initial evidence in support of the coping-mechanism hypothesis. Before the implementation of the performance metrics, hearings conducted by high-capacity IJs were about seven minutes longer than hearings conducted by low-capacity IJs. Both high-capacity and low-capacity IJs reduced the duration of hearings following the implementation of the performance metrics. However, the implementation of the performance metrics did not affect IJs equally. Following the implementation of the performance

¹⁹⁴ I define "pre-implementation" as hearings conducted 180 days before the start of FY 2019 and "post-implementation" as hearings conducted 180 days after the start of FY 2020.

metrics, high-capacity IJs shortened hearings by only two minutes. By comparison, the average low-capacity IJ shortened hearings by more than ten minutes.

A more sophisticated research design—regression-discontinuity—produces causal evidence that the implementation of the performance metrics caused IJs to reduce the duration of hearings.¹⁹⁵ A regression-discontinuity design examines values of the dependent variable around an exogenously-determined cutoff.¹⁹⁶ In this study, the date that the Trump Administration implemented the new performance metrics—October 1, 2018—forms the cut-off. Hearings scheduled for September 30th and October 1st should be similar except for whether the hearing occurred pre- or post-implementation. This assumption would be violated if, for example, IJs scheduled hearings they expected to be longer on September 30th and hearings they expected to be shorter on October 1st.¹⁹⁷ However, the assumption seems plausible since IJs schedule individual hearings years in advance, and EOIR did not announce the new metrics until March 2018. If the implementation of the performance metrics created new organizational pressures that caused IJs to shorten hearings, then we should observe a sudden decrease in hearing duration around October 1st. To estimate the regression discontinuity, I use a linear regression with standard errors clustered at the IJ level.

¹⁹⁵ Appendix E provides a more thorough discussion of this analysis.

¹⁹⁶ See ANGRIST & PISCHE, *supra* note 184, at 251–57 (describing sharp regression-discontinuity designs). The classic example of a regression-discontinuity design uses test scores to determine whether students who become National Merit Scholars are more likely to attend graduate school. The National Merit Scholar program uses a hard cutoff on a qualifying exam to determine who becomes a Scholar. See Donald L. Thistlewaite & Donald T. Campbell, *Regression-Discontinuity Analysis: An Alternative to the Ex-Post Facto Experiment*, 2 OBSERVATIONAL STUDS. 119 (2016) (originally published 1960). Obviously, students with particularly high-test scores are more likely to attend graduate school and students with particularly low-test scores are less likely to attend graduate school. But by examining students who receive one point below the cutoff to become a National Merit Scholar and students who receive one point above the cutoff to become a National Merit Scholar, the regression-discontinuity design controls for other characteristics that may explain why high scores are more likely to attend graduate school than low scorers. *Id.* at 120–122.

¹⁹⁷ A reasonable question exists as to whether these effects are caused by the implementation of the performance metrics or something else common to the start of every fiscal year. To test for this possibility, I estimate perform the same regression-discontinuity test but use FY 2020 as the cutoff. As above, IJs with more law clerks conduct longer hearings. However, the start of the new fiscal year has no effect on hearing duration. Therefore, the results above appear attributable to the implementation of the new performance metrics at the start of FY 2019. In addition, this finding supports the assumption that IJs do not strategically schedule shorter hearings after the start of the fiscal year.

FIGURE 10: PREDICTED HEARING DURATION PRE- AND POST- IMPLEMENTATION



Note: (N=74,272). Standard errors clustered at the IJ level. Full discussion of the empirical analysis available in Appendix D.

Figure 10 plots the predicted duration of an individual hearing pre- and post-implementation of the performance metrics. The findings comport with the expectations of the coping-mechanism hypothesis. Prior to the implementation of the performance metrics, hearings conducted by IJs with one law clerk were 21 minutes longer on average than hearings conducted by IJs with no law clerks. Following the implementation of the performance metrics, hearings conducted by IJs with no law clerks declined by 24 minutes around October 1st. However, hearings conducted by IJs with at least one law clerk experienced no change to hearing duration. These findings suggest that (1) organizational pressures cause IJs to resort to coping mechanisms and (2) IJs with greater capacity rely less on coping mechanisms when they have higher levels of capacity.

These results provide causal evidence that adjudicators with higher levels of adjudicatory capacity have less need to resort to coping mechanisms. This finding warrants a brief discussion. First, this analysis offers strong, causal evidence in support of the proposed theoretical mechanism. Adjudicatory capacity acts as an effective moderate of organizational pressure. Second, these effects are likely conservative because they only measure one type of coping mechanism that IJs may use. We cannot observe the other coping mechanisms, such as a reliance on stereotypes or a failure to prepare for hearings, that IJs may have used to manage the new expectations of the performance metrics. If the twenty-minute decline in

hearing duration is symptomatic of a broader trend of coping mechanisms, the implementation of the new performance metrics substantially reduced the thoroughness with which IJs reviewed the administrative record.

D. Comparison of Law Clerks to Other Explanatory Variables

The results provide strong evidence that the number of law clerks influences IJ behavior and decision-making. Yet many other factors also influence outcomes in removal proceedings. On average, appearing before an IJ with one law clerk reduces the likelihood of removal by 5.2 percentage points and increases the likelihood of receiving asylum by 4.4 percentage points. However, these effect sizes are conservative estimates of inaccuracies in removal proceedings for two reasons. First, some IJs may make errors that *benefit* respondents. Rather than reviewing the entirety of the administrative record, these IJs may grant asylum applications for fear of being reversed on appeal. Pro-respondent errors bias the estimated effect of law clerks downward and, therefore, these tests produce conservative estimates of inaccuracies in removal proceedings. Second, law clerks are just one element of adjudicatory capacity. Estimated with more comprehensive measures, perhaps these effect sizes would be larger.

How should we think about capacity in relation to other potential sources of bias? Many sources of bias stem from the IJ's demographics or past experiences. Scholars consistently find that female IJs are less likely to order removal and are more likely to grant asylum.¹⁹⁸ That finding holds here. According to the regression models, female IJs are 4.4 percentage points less likely to remove the respondent and 4.3 percentage points more likely to grant asylum. These effect sizes are on par with the effect sizes of having one law clerk.

Other scholars focus on the IJ's former employment. Scholars predict that IJs formerly employed by immigration-enforcement agencies produce less favorable outcomes for respondents and IJs formerly employed by nonprofits produce more favorable outcomes for respondents.¹⁹⁹ Again, these findings hold. Former enforcement-agency employees are 3.6 percentage points more likely to order asylum and 2.2 percentage points less likely to grant asylum. In contrast, former nonprofit employees are 2.2 percentage points less likely to order removal and 2.6 percentage points more likely to grant asylum. Here, the effect size of law clerks is noticeably larger. To the extent we believe these sources of bias are worth studying and remedying, adjudicatory capacity raises similar concerns. Moreover,

¹⁹⁸ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 21, at 342; Kim and Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21, at 628.

¹⁹⁹ Ramji-Nogales, Schoenholtz & Schrag, *supra* note 21, at 345–46. *But see* Kim and Semet, *An Empirical Study of Political Control over Immigration Adjudication*, *supra* note 21, at 628.

these findings suggest that increasing capacity would better improve accuracy within removal proceedings relative to changing the hiring pool of IJs.

Scholars have called into question whether IJ ideology plays a significant role in removal proceedings. The analyses find no significant relationship between the appointing administration and outcomes in removal proceedings. These findings are consistent with the research of Hausman et al.²⁰⁰ Hausman et al. find that IJs appointed by different presidents make relatively similar decisions, but that the pattern of decision-making changes over time.²⁰¹ Similarly, the multivariate models in this article show near-linear increases in the likelihood of removal over time. Additional tests suggest that the effect of law clerks does not vary based on whether the IJ is liberal or conservative.²⁰² The absence of heterogeneous effects suggest that law-clerk ideology is not the mechanism that influence outcomes. In sum, IJs appear to respond to constraints in their capacity and increases in their workloads rather than their own ideological preferences or the ideological preferences of their law clerks. At the very least, ideology plays an insignificant and substantively small role relative to capacity.

Of course, law clerks do not have the largest impact on removal-proceeding outcomes. Like other studies, the analyses demonstrate the importance of legal representation. Respondents with legal representation are 29.2 percentage points less likely to be removed than respondents without representation. They are also 14.3 percentage points more likely to receive asylum. Seemingly, government-provided counsel would remedy the harm caused by an absence of adjudicatory capacity. Yet providing counsel to every respondent also necessitates investments in EOIR. As the Section IV suggests, these investments are unlikely to occur.

IV. THE PUBLIC ADMINISTRATION OF JUSTICE

Rectifying inaccuracies within the Immigration Courts requires Congress and the president to make sizeable investments in EOIR's capacity. Although IJs and immigration advocates have raised alarms about EOIR's rising backlog, neither Congress nor the president has made these investments. By investments, I do not mean simply ensuring that IJs each have a law clerk. Support staff are just one element of capacity. Rather, I mean the investments needed for wholesale increases in capacity—investments to build better courtrooms, recruit more IJs, and hire more support staff. This Section consider *why* adjudicatory agencies, such as EOIR, face perpetual deficiencies in capacity. Drawing on the experience of EOIR, it describes

²⁰⁰ See Hausman et al., *supra* note 131.

²⁰¹ *Id.* at 16.

²⁰² See *infra* Appendix F.

two reasons that adjudicatory agencies struggle to build capacity: neglect and politicization.

A. *Lack of Incentives to Invest in Capacity*

All bureaucratic agencies rely on Congress and the president for capacity. Congress appropriates the money that allows adjudicatory agencies to build new courtrooms, hire new adjudicators, and expand the workforce that supports these adjudicators.²⁰³ It has the authority to amend legislation, change enforcement priorities, and restructure agencies to improve efficiency. The president and the Office of Management and Budget propose agency budgets and inform Congress of the administration's priorities in the coming fiscal year.²⁰⁴ The president or their appointees select adjudicators for these agencies and develop procedures that govern the hiring of these adjudicators. For adjudicators appointed under the Appointments Clause, the Senate must confirm appointments before these adjudicators take office.²⁰⁵ Without occasional investments from Congress and presidents, capacity decays within these adjudicatory agencies.

Neither members of Congress nor presidents have electoral incentives to be good managers of the administrative state or, at least, not the entire administrative state.²⁰⁶ Members of Congress and presidents spend the majority of their time enacting legislation, promulgating rules, and issuing executive orders related to the substantive policies that voters and interest groups demand.²⁰⁷ Voters do not reward members of Congress and presidents for managing programs designed to prevent *possible* government failures.²⁰⁸ Individual members of Congress may pay attention to particular programs that provide economic benefits to constituents but, even then, voters rarely prove capable of identifying the agencies that implement programs they care deeply about.²⁰⁹ Sometimes, members of Congress are alerted to

²⁰³ See MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 38–39 (2d ed. 1989) R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE 52 (1979) (“Bureaucrats generally seek to build very large coalitions for the programs they administer because large coalitions help to insure that their budgets will be approved in subsequent years.”).

²⁰⁴ See Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016).

²⁰⁵ U.S. CONST. art. II, § 2, cl. 2.

²⁰⁶ See Bednar and Lewis, *supra* note 61; Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 588–89 (2021); Lewis, *supra* note 30, at 768–73.

²⁰⁷ See ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION, *supra* note 27, at 47.

²⁰⁸ Andrew Healy & Neil Malhotra, *Myopic Voters and Natural Disaster Policy*, 103 AM. POL. SCI. REV. 387, 388 (2009) (“voters offer scant incentive to presidents to pursue cost-effective preparedness spending, but do encourage them to send in the cavalry after damage has been done and lives have been lost.”).

²⁰⁹ See FIORINA, *supra* note 203, at 38–39; METTLER, *supra* note 27.

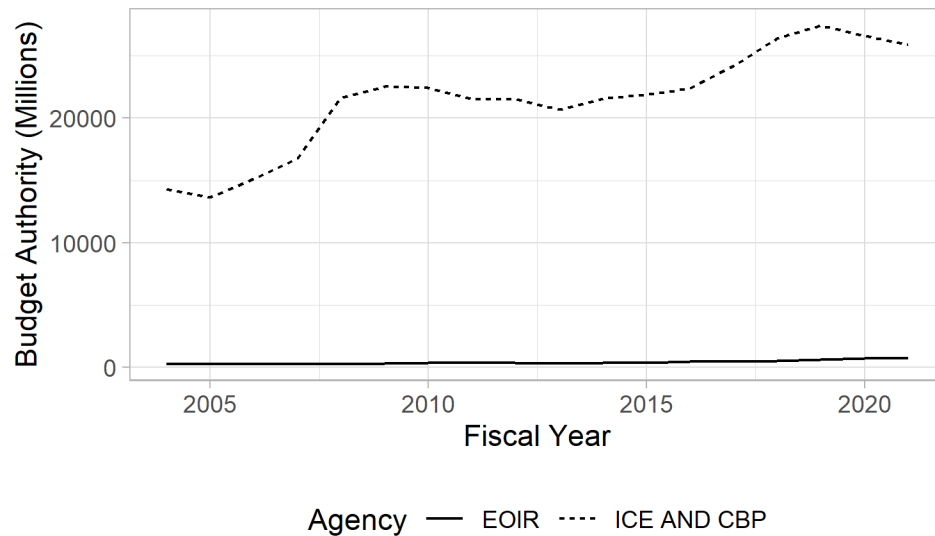
administrative problems when an individual voter finds themselves ensnared in the agency's red tape. Yet members of Congress view this as an opportunity to perform casework and earn the vote of an individual constituent—not as a symptom of systemic mismanagement.²¹⁰ In one survey of federal executives, more than half of the respondents report that the White House spends “no” or “little” effort to ensure that their agencies have what they need to carry out their missions.²¹¹

Most adjudicatory agencies do not offer the electoral benefits needed to incentivize members of Congress and presidents to invest in capacity. The respondents appearing before EOIR cannot vote. The Merit Systems Protection Board predominantly hears cases from federal employees, who make up a sizeable portion of voters in very few congressional districts. Even when adjudicatory agencies operate in salient policy areas, voters rarely think about the *management* of the agencies that adjudicate disputes related to those policies. When voters say they care about veterans' benefits, sex discrimination, or immigration, they mean they care about policies related to veterans' homelessness, equal pay for women, or securing the border. The adjudicatory agencies that engage with these policies—the Board of Veterans Appeals, the Equal Employment Opportunity Commission, and EOIR—only have a tangential relationship to these policy goals in the minds of voters. The absence of incentives to invest are particularly clear in agencies, like EOIR, that handle adjudicatory matters related to the interests of nonvoters.

²¹⁰ See FIORINA, *supra* note 203, at 45 (“In fact, it is probable that at least some congressmen deliberately stimulate the demand for their bureaucratic fixit services.”).

²¹¹ See Bednar and Lewis, *supra* note 61.

FIGURE 11: IMMIGRATION AGENCIES' BUDGET AUTHORITY (2021 DOLLARS), FY 2004-2022



Note: Data from the Office of Management and Budget (2022).

Members of Congress and presidents *do* care about agencies when failures make them salient to the mass public. Congress may conduct oversight hearings, shaming agency officials for allowing the agency to fall into disrepair.²¹² It may pass reforms and emergency appropriations that provide surge capacity. Although voters do not reward elected officials for proactively investing in these agencies, they do reward elected officials for rectifying government failures.²¹³ Unfortunately for parties whose disputes were heard prior to Congress's involvement, these investments cannot correct the injustices already perpetuated by the lack of capacity.

EOIR offers a prime example of this problem. At the start of the Obama Administration, only 1.2% of the public stated that immigration was the “most important problem” facing the United States.²¹⁴ Figure 11 plots the budget authority for immigration-enforcement agencies and EOIR. A moderate correlation exists between public opinion and the funding of EOIR (ρ : 0.28) and the immigration-enforcement agencies (ρ : 0.36). Until FY 2014, EOIR's budget remained relatively flat with only minor increases in 2009 and 2010. These increases followed a

²¹² See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. OF POLI. SCI. 165, 167–168 (1984).

²¹³ Healy and Malhotra, *supra* note 208.

²¹⁴ COMPARATIVE AGENDAS PROJECT, DATASET: GALLUP'S MOST IMPORTANT PROBLEM (2022), <https://www.comparativeagendas.net/us>.

publicly salient scandal in which the Bush Administration was accused of considering political ideology in the hiring of IJs.²¹⁵ Nevertheless, the number of IJs and law clerks remained stable during this same period. These trends also affected Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). Following an initial build-up of DHS's capacity, the budgets of ICE and CBP show little change from FY 2010 to FY 2014. The trends for both EOIR and the immigration-enforcement agencies comport with the expectation that Congress and presidents pay little attention to the capacity of agencies when their policy areas are not politically salient.

Public demand for both immigration benefits and enforcement increased following the 2014 Border Crisis. At that time, 6.6% of the public stated that immigration was the most important problem. The proportion of respondents concerned with immigration remained between 5.1% and 6.6% during the 2016 campaign and the first year of the Trump Administration.²¹⁶ Consistent with rising public interest in immigration, both parties pursued visible immigration policies that aligned with their ideological leanings. President Obama sought to balance increased enforcement with programs of prosecutorial discretion.²¹⁷ President Trump invested in enforcement activities by increasing enforcement resources at the Southern Border and banning immigrants from certain countries from entering the United States.²¹⁸

Rising public interest in immigration policies resulted in expansive funding of ICE and CBP. Comparatively, Congress starved EOIR. Figure 11 shows the large disparities between the funding for EOIR and enforcement agencies. In FY 2021 alone, Congress appropriated \$25.9 billion to ICE and CBP. By comparison, EOIR only received a cumulative sum of \$7.7 billion from FY 2004 to FY 2021. Although EOIR is crucial to the implementation of any enforcement or relief policy, it is less traceable to immigration problems in the minds of voters and, therefore, an afterthought for most elected officials.

EOIR's workload is a natural outgrowth of immigration enforcement. The failure to provide commensurate investments in EOIR's capacity produces the backlogs that cause IJs to rely on procedural shortcuts and heuristics. For decades, EOIR has told Congress and the White House that it cannot keep pace with the

²¹⁵ As expected, the years of the scandal also have significant increases in the proportion of respondents stating that immigration is the most important problem facing the United States.

²¹⁶ By comparison, the proportion of the public stating that the environment is the most important problem has only ever reached a high of 2.1%.

²¹⁷ See COX & RODRIGUEZ, *supra* note 14, at 162–88.

²¹⁸ See generally SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (2019) (providing an in-depth consideration of the enforcement policies of the Trump Administration).

growing rate of immigration enforcement. In its FY 2008 budget request, EOIR warned Congress, “EOIR cannot and does not operate in a vacuum. The volume, nature, and geographic concentration of DOJ/EOIR immigration caseloads relates to government-wide immigration enforcement efforts.”²¹⁹ In its FY 2021 budget request, the agency repeated that “it remains critically important that EOIR has sufficient resources to keep pace with DHS enforcement efforts.”²²⁰

Yet Congress and presidents only express episodic interest in funding EOIR. Although members of Congress conduct hearings in which they raise concerns about the understaffing of EOIR, they do little to mend the problem.²²¹ Presidents appear reticent to invest resources in EOIR that could otherwise be spent in ICE or CBP. In June 2018, President Trump tweeted, “Hiring many thousands of judges, and going through a long and complicated legal process is not the way to go—will always be dysfunctional. People must simply be stopped at the Border and told they cannot come into the U.S. illegally.”²²² He dismissed proposals of hiring additional IJs as “crazy.”²²³ Even though the Trump Administration hired more IJs than any other administration, individual adjudicators’ backlogs continued to climb during the Trump Administration because of the Administration’s aggressive enforcement measures.²²⁴

Congress and presidents only build capacity in adjudicatory agencies when government failures make the agency salient to the public. Yet these agencies are often a natural outgrowth of policies Congress and presidents want to implement. While reactive investments are necessary in the face of failure, they cannot substitute for proactive management. By the time Congress and the president recognize a need to invest, the damage is already done. While Congress and the president search for solutions, adjudicators’ backlogs continue to grow and exceed manageable limits. By the time the agency has constructed new hearing offices, recruited new adjudicators, and trained additional support staff, thousands of respondents have received inadequate hearings.

²¹⁹ DEP’T OF JUSTICE, FY 2008 CONGRESSIONAL BUDGET SUBMISSION: ADMINISTRATIVE REVIEW AND APPEALS 3 (Jan. 30, 2007), https://www.justice.gov/archive/jmd/2008justification/pdf/07_ara.pdf.

²²⁰ DEP’T OF JUSTICE, FY 2021 CONGRESSIONAL BUDGET SUBMISSION 1 (Feb. 2020), <https://www.justice.gov/doj/page/file/1246381/download>.

²²¹ See, e.g., EOIR June 2020 Hearing, *supra* note 24 (“It is clear that resources, training, supervision and other systemic issues at EOIR have been overlooked for far too long.”).

²²² Donald Trump (@realDonaldTrump), TWITTER (June 25, 2018, 5:43 AM).

²²³ Michael D. Shear et al., *G.O.P. Moves to End Trump’s Family Separation Policy, but Can’t Agree How*, N.Y. TIMES (June 19, 2018), <https://nyti.ms/2MBGA1Y>.

²²⁴ See *infra* Figure 2.

B. Politicization

Presidents view the administrative state as a tool to deliver on policy promises.²²⁵ Adjudicatory agencies can become wrapped up in presidential priorities when they focus on highly salient policies related to the president's agenda. While scholars often think of politicization as it relates to judicial independence,²²⁶ politicization also carries the sinister side effect of lowering the overall capacity of federal agencies.

Civil servants assume office based on the promise of discretion. The promise of discretion attracts expert candidates who seek to dedicate their lives to public service.²²⁷ Politicization of an agency threatens this discretion by transferring control of agency activities from the hands of civil servants to presidential appointees.²²⁸ As politicization increases within an agency, civil servants express a greater desire to exit public service.²²⁹ Moreover, political appointees tend to be less effective managers than career civil servants.²³⁰

Presidents have sought to exercise greater control over EOIR's hiring of IJs to achieve certain outcomes in removal proceedings. In 2008, the Department of Justice (DOJ) became embroiled in scandal after it was revealed that the Bush Administration had considered political ideology in the hiring of IJs.²³¹ In interviews with DOJ investigators, the Counselor to the Attorney General stated that he believed that it was "appropriate to consider political factors in assessing IJ candidates." The Department of Justice's White House Liaison pledged to find IJ positions for "priority candidates" who "loyally served the President."²³² Consistent with this promise, DOJ solicited candidates for IJ positions directly from the White House.²³³ The Inspector General found that involvement of the White House

²²⁵ See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246 (2001).

²²⁶ See Kent Barnett, *Against Administrative Judges*, 49 UC DAVIS L. REV. 1649–50 (2016) (describing the perils of agency control of administrative judges); Family, *Immigration Adjudication Bankruptcy*, *supra* note 18, at 1037–46 (discussing President Trump's efforts to control EOIR).

²²⁷ See Bednar, *supra* note 144; Sean Gailmard and John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. OF POL. SCI. 873 (2007).

²²⁸ See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* (2008); Terry M. Moe, *The Politicized Presidency*, in JOHN E. CHUBB & PAUL E. PETERSON, *THE NEW DIRECTION IN AMERICAN POLITICS* 235 (1984).

²²⁹ See Anthony M. Bertelli & David E. Lewis, *Policy Influence, Agency-Specific Expertise, and Exist in the Federal Service*, 23 J. OF PUB. ADMIN. RES. & THEORY 233 (2013); Richardson, *supra* note 28, at 886.

²³⁰ See generally George A. Krause & Anne Joseph O'Connell, *Loyalty-Competence Trade-offs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 PRESIDENTIAL STUDS. Q. 527 (2019).

²³¹ INVESTIGATION OF POLITICIZED HIRING, *supra* note 61.

²³² *Id.* at 94.

²³³ *Id.* at 83.

delayed hiring of IJs during a period of significant vacancies and resulted in high-quality candidates being rejected for important positions.²³⁴ The Trump Administration faced similar accusations over EOIR hiring.²³⁵

Presidents may also seek to influence outcomes by implementing new performance metrics that require adjudicators to attain certain results. The National Association of Immigration Judges condemned the Trump Administration's performance metrics, stating that the new metrics would "compromise the judicial independence and the fundamental fairness that judges have been sworn to uphold."²³⁶ Multiple IJs have stated that they retired from EOIR as a result of the political pressures thrust upon the agency by the Trump Administration. One IJ says he left the agency in 2018 as "a direct result of the draconian policies of the Administration, [including] the relegation of [judges] to the status of 'action officers' who deport as many people as possible as soon as possible with only token due process."²³⁷ Others have expressed that the job "has become so emotionally brutal and exhausting that many people . . . are leaving or talking about finding an exit strategy. Morale has never, ever been lower."²³⁸

Proposals to reestablish the Immigration Courts as independent agencies would reduce political pressures that threaten the retention of adjudicatory capacity. In 1997, the U.S. Commission on Immigration Reform proposed creating an independent "Agency for Immigration Review" that would inherit the functions of EOIR.²³⁹ Since the late 1990s, IJs and scholars have advocated for such an independent agency.²⁴⁰ Independent agencies tend to have more skilled workforces than executive-branch agencies.²⁴¹ A recent proposal in the House of Representatives would establish the United States Immigration Courts as Article I courts.²⁴² However, even if Congress transfers the functions of EOIR to this Article

²³⁴ *Id.* at 138.

²³⁵ See Kopan, *supra* note 49.

²³⁶ Kate Morrissey, *New Performance Metrics for Immigration Judges Focus on Higher Volume, Speedier Decisions*, THE SAN DIEGO UNION-TRIBUNE (Apr. 4, 2018), <https://www.sandiegouniontribune.com/news/immigration/sd-me-immigration-judges-20180404-story.html>.

²³⁷ SPLC, ATTORNEY GENERAL'S JUDGES, *supra* note 20, at 23.

²³⁸ *Id.*

²³⁹ UNITED STATES COMMISSION ON IMMIGRATION REFORM, *supra* note 58, at 174–78.

²⁴⁰ See Family, *Immigration Adjudication Bankruptcy*, *supra* note 18, at 1048; Testimony of The Honorable Dana Marks Keener, Senate Committee of the Judiciary (June 26, 2002), https://www.judiciary.senate.gov/imo/media/doc/keener_testimony_06_26_02.pdf.

²⁴¹ See Bednar, *supra* note 144.

²⁴² A Bill to Establish, Under Article I of the Constitution of the United States, a Court of Record to Be Known as the United States Immigration Courts, H.R. 6577, 117th CONG. (Feb. 3, 2022), <https://docs.house.gov/meetings/JU/JU00/20220405/114621/BILLS-117HR6577ih.pdf>.

I court, it will still require maintenance and funding to prevent the problems that have plagued EOIR.

Increased politicization threatens capacity by slowing the time it takes to find qualified candidates and increasing the likelihood that careerists depart from the agency. Scholars can debate the reasonable balance of presidential administration of agency adjudication versus judicial independence. Regardless of the chosen balance, tipping the scales in favor of presidential administration threatens to further reduce the capacity of already-neglected adjudicatory agencies.

V. DOCTRINAL IMPLICATIONS

The preceding sections develop three stylized facts about agency adjudication and capacity. First, agency adjudicators often lack sufficient capacity to conduct a thorough review of the record in every case. Second, the absence of capacity threatens the accuracy of agency adjudication and leads to disparate outcomes for individuals whose cases are assigned to low-capacity adjudicators. Third and finally, neither Congress nor the president has sufficient electoral incentives to build capacity within these agencies and, in fact, takes actions that undermine their capacity.

Using these stylized facts, this final section begins to reimagine the law of agency adjudication. Administrative law often assumes that agencies have sufficient capacity and competency to implement the formal procedures that govern adjudicatory proceedings. This assumption is faulty. To promote accuracy, administrative law must recognize the administrative problems associated with agency adjudication.²⁴³ Reimagined from the perspective of public administration, the law of agency adjudication can preserve due-process rights while providing low-capacity agencies the flexibility needed to implement the adjudicatory systems established by Congress.

A. Due Process Clause

The Due Process Clause guarantees individuals a right to a hearing when the government deprives them of life, liberty, or property. In examining whether an adjudicatory system satisfies the requirements of the Due Process Clause, the balancing test adopted in *Mathews v. Eldridge* requires courts to weigh the risk that the government erroneously deprives an individual of the interest versus the government's interest in avoiding the fiscal and administrative burdens that would

²⁴³See ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 4 (2020) (“[A]dministrative law should be about both the capacity of agencies to perform their legislative missions and their authority to do so.”).

result from new procedures.²⁴⁴ Balancing harms against government burdens involves a contextual inquiry as to the “fairness and reliability of the existing . . . procedures.”²⁴⁵

In assessing the validity of existing procedures under the Due Process Clause, courts generally focus on the facial validity of the formal procedures enumerated in the agency’s governing statute and regulations. Relative to other adjudicatory agencies, EOIR has robust formal procedures. Respondents receive an in-person hearing, they have a right to an interpreter, and they have an opportunity to present documentary and testimonial evidence to the IJ. Nevertheless, IJs do not apply these formal procedures in a way that promotes accuracy. If EOIR had adequate courtrooms, sufficient support staff, and manageable workloads, its trial-like procedures may offer adequate due-process protections. Accordingly, a richer theory of the Due Process Clause considers both the formal procedures described in law and whether the management of the agency allows for adjudicators to apply those procedures in a way that results in accurate decisions.

The empirical findings in this Article strengthen existing theoretical arguments that the Due Process Clause incorporates a right to “good administration” as advocated by Mashaw. Mashaw argues that the Due Process Clause compels adjudicatory agencies to adopt standards and procedures to improve accuracy.²⁴⁶ For Mashaw, the right to good administration concerns *internal management* and, therefore, obligates agency leaders.²⁴⁷ Yet this conception remains focused on the formal (albeit, internal) procedures used by the agency to protect due-process rights.

Consider Mashaw’s recommendation that adjudicatory agencies adopt “quality assurance systems” that allow them to audit the decisions of adjudicators, identify patterns of error, and adopt interventions that prevent these errors in the future.²⁴⁸ These programs have a questionable track record of promoting accuracy within adjudicatory agencies. An empirical study of the Board of Veteran Appeals’ quality-assurance program by Ames et al. reveals that cases reviewed by the program were just as likely to be remanded by the federal courts as cases not reviewed by the program.²⁴⁹ Veterans Affairs’ officials revealed that “[e]veryone . . . knows [the program is] kind of a sham.”²⁵⁰ Like all agency

²⁴⁴ See *Mathews v. Eldridge*, 424 U.S. 319, 339–349 (1976).

²⁴⁵ See *id.* at 343; *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”)

²⁴⁶ Mashaw, *supra* note 36, at 775.

²⁴⁷ MASHAW, *supra* note 45, at 149.

²⁴⁸ MASHAW, *supra* note 45, at 149.

²⁴⁹ See Ames et al., *supra* note 36, 42–56 (surveying the Quality Review Program).

²⁵⁰ *Id.* at 55.

programs, an absence of capacity may cause these programs to fail. Therefore, even if the Due Process Clause requires effective internal management, agencies cannot satisfy this obligation without sufficient capacity.

Good administration begins with *external investments* from Congress and the president. Agency leadership alone cannot bear the burden of effectuating good administration. Although maladministration within the agency does cause systemic errors in agency adjudication, the failure of Congress and the president to invest in the capacity of these agencies causes as many—if not more—problems for adjudicators. If the Due Process Clause requires good administration, then it must also include a right for the parties to have their cases heard by adjudicators with a threshold level of capacity. This threshold increases with the risk of erroneous deprivation and the level of irreversible harm that results from an erroneous decision. Removal proceedings require a high threshold of capacity because these proceedings produce voluminous records and respondents face a significant risk of persecution if the IJ arrives at an erroneous decision.

Through the right to good administration, the Due Process Clause may obligate Congress and the president to build capacity in adjudicatory agencies. Congress makes a choice when deciding to delegate administrative disputes to adjudicatory agencies. When it does so, it commits to ensuring that the agency has the resources it needs to fulfill its mission in a way that comports with the Constitution.

Other scholars have recognized a similar constitutional duty of Congress and the president to manage and supervise the administrative state. Several scholars have identified a presidential “duty to supervise” in the Take Care and Oath clauses of the Constitution.²⁵¹ Delegation of adjudicatory authority to the executive branch may create an imperative for the president to use their authority in ways consistent with the Constitution.²⁵² This obligation not only incorporates a positive duty to promote good administration but also requires presidents to actively prevent maladministration.²⁵³ Congress may also have a similar duty to fund the administrative state.²⁵⁴ According to Metzger, “Congress can alter the government’s

²⁵¹ See, e.g., David M. Dreisen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 80–94 (2009); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 585, 627–638 (2021); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875–78 (2015).

²⁵² See Metzger, *supra* note 251, at 1895.

²⁵³ See Dreisen, *supra* note 251, at 1877.

²⁵⁴ See Metzger, *supra* note 251, at 1895; Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1149–1150 (2021).

substantive responsibilities, but it violates the duty if it leaves the responsibilities in place but sabotages the government's ability to meet them."²⁵⁵

The empirical findings of this Article suggest that these duties are clearly implicated in contexts where the Due Process Clause applies. Adjudicatory agencies cannot fulfill their constitutional obligations under the Due Process Clause without capacity. Therefore, the Due Process Clause may incorporate a similar "duty to build" in agencies tasked with adjudicating the rights of individuals in the United States. Such a duty would require Congress and the president to fund and maintain the material resources and human capital of adjudicatory agencies.

Nevertheless, a violation of this duty is likely nonjusticiable.²⁵⁶ The onus to resolve deficiencies in capacity lies with Congress and the president. Article I empowers Congress to appropriate money to these adjudicatory agencies and design structures that promote good management.²⁵⁷ Presidents propose the budget, reprogram funds, and influence federal personnel policies.²⁵⁸ How much to fund an agency is a question left to the political branches. These determinations involve weighing different policy priorities and, therefore, are inherently political. The Supreme Court has long expressed trepidation toward intervening in issues related to the distribution of agency resources.²⁵⁹ How a court should even begin to evaluate a claim of "poor administration" is unclear. For some bureaucratic institutions, such as prisons, egregious violations stemming from poor administration may reach a point that demands receivership.²⁶⁰ Yet whether a court could ever order receivership for an adjudicatory agency is unclear.

Nor is it clear that we should *want* courts to impose managerial remedies for maladministration. Most federal judges have little training or experience in public administration. Courts do not know where adjudicatory agencies should build their next courtroom, which adjudicators should receive law clerks, or how many law clerks the agency needs to hire to prevent adjudicators from resorting to

²⁵⁵ Metzger, *supra* note 251, at 1932–32.

²⁵⁶ See Metzger, *Taking Appropriations Seriously*, *supra* note 254, at 1149.

²⁵⁷ U.S. CONST. art. I, § 9.

²⁵⁸ See Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016). See generally Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

²⁵⁹ *Lincoln v. Vigil*, 508 U.S. 182 (1993) (holding that an agency's allocation of lump-sum appropriations is left to agency discretion); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding that agency enforcement decisions are unreviewable because the agency has a better sense of "whether agency resources are best spent on this violation or another").

²⁶⁰ See generally Liat Weingart, *Receiverships in the Prison Litigation Context: Factors Necessary for an Effective Judicial Remedy of Last Resort*, 9 CARDOZO PUB. L., POL'Y, & ETHICS 193 (surveying receivership of prisons).

coping mechanisms.²⁶¹ Whatever remedy courts may impose could prove ineffective or, worse, may require the agency to take actions that further exacerbate ongoing issues. Courts have traditionally viewed “more procedure” as the solution to mismanagement in contexts implicating the Due Process Clause. There are good reasons to believe that more procedure would only increase agency workloads and further strain capacity. Even Mashaw ultimately tempered earlier assertions that “the judiciary should insist that management be restructured,”²⁶² acknowledging that “the quality of administrative justice will not be improved significantly by the substantive or procedural interventions of courts.”²⁶³

Even if courts cannot mandate external investment, the acknowledgement that adjudicatory capacity is a constitutional right should cause us to reconsider the ways that existing doctrines and remedies promote or obstruct that right. Administrative-law doctrine can—and should—consider capacity as it relates to promoting due-process rights in adjudicatory agencies.

B. Internal Administrative Law and Interagency Coordination

If courts cannot easily mandate external investments in capacity, then internal-management processes become essential to ensuring that adjudicators’ workloads do not exceed their capacity. These processes belong to a corpus of “internal administrative law.” Metzger and Stack define internal administrative law as the “internal procedures for agency action, structures of internal agency organization and allocation of authority, specifications for how agency actors are to make evaluations or conduct analysis, guidance about the agency’s understanding of what statutes and regulations mean, informal agency practices, interagency agreements and norms, and centrally generated cross-cutting requirements for agency action.”²⁶⁴ Mashaw’s proposed quality assurance systems belong to this category of law. Yet as Ames et al. note, the literature on internal administrative law “remains still too formalistic, failing to conceptualize key internal institutional dynamics that can thwart internal administrative law.”²⁶⁵

Formal procedures offer few solutions for adjudicatory agencies experiencing a dearth of capacity. Layering audits, additional procedures, and performance metrics onto the adjudicatory process increases the likelihood that adjudicators rely on coping mechanisms. As Bagley states, “[I]f an agency consistently makes bad decisions, the lawyer’s assumption that more procedures

²⁶¹ Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1296 (2017).

²⁶² Mashaw, *supra* note 38, at 824.

²⁶³ MASHAW, *supra* note 45, at 226.

²⁶⁴ Metzger & Stack, *supra* note 258, at 1256.

²⁶⁵ Ames et al., *supra* note 36, at 57.

will force it to make good ones is quite dubious.”²⁶⁶ A low-capacity agency will fail to effectively implement formal procedures regardless of whether those procedures are related to internal management or adjudicatory procedures. Put differently, proceduralization may cause the *exact harm* that new procedures are designed to prevent in low-capacity agencies.

But internal administrative law has the power to alleviate the burdensome workloads experienced by adjudicatory agencies. Two classes of policies deserve the attention of adjudicatory agencies: *priority-setting policies* and *jurisdiction-shifting policies*. Both priority-setting policies and jurisdiction-shifting policies leverage intra- or inter-agency coordination to reduce adjudicator workloads. Both types emerge in the immigration context.

Priority-setting policies announce the prosecutorial priorities of enforcement agencies. These programs acknowledge the resource constraints of the federal bureaucracy and encourage enforcement agencies to prioritize the prosecution of certain offenses. In the immigration context, DHS has broad discretion to cancel removal proceedings.²⁶⁷ In 2012, the Obama Administration established the Deferred Action for Childhood Arrivals (DACA) program, which deferred removal proceedings for certain noncitizens who entered the United States as children and provided them with employment authorization.²⁶⁸ Two years later, the Obama Administration extended DACA to parents of American citizens with the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program.²⁶⁹ Both memoranda justified the need for these programs based on “limited resources.”²⁷⁰ Most recently, the Biden Administration issued a memo outlining its priorities, noting that DHS does “not have the resources to apprehend

²⁶⁶ Bagley, *supra* note 29, at 380.

²⁶⁷ Shalini Bhargava Ray, *Immigration Law’s Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2078-2091 (2021).

²⁶⁸ Memorandum from Janet Napolitano to David V. Aguilar et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

²⁶⁹ Memorandum from Jeh Charles Johnson to León Rodríguez et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://web.archive.org/web/20170102203547/www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

²⁷⁰ *Id.*

and seek the removal” of the more than 11 million noncitizens unlawfully present in the United States.²⁷¹

The ability of EOIR to benefit from these policies depends on DHS’s willingness to adopt them. Even when the president spearheads the adoption of leaner enforcement policies, enforcement agencies may resist their implementation.²⁷² Accordingly, priority-setting policies may thrive best when they develop new programs within non-enforcement agencies (e.g., DACA and DAPA) or when adjudicators and enforcers are united within a single agency.

Jurisdiction-shifting policies shift adjudication from one agency to another. In March 2022, DHS and EOIR issued a joint interim rule that created a new process for evaluating asylum applications submitted by individuals in removal proceedings.²⁷³ Under the new process, DHS reviews the asylum application in the first instance and decides whether to grant or deny the application. DHS only refers the individual to removal proceedings if DHS denies the application. Even then, the individual is afforded a second opportunity to apply for asylum while in removal proceedings. The asylum rule reveals how internal administrative law can address increasing workloads while preserving the due-process rights of respondents. The rule redistributes caseloads across multiple agencies with jurisdiction to decide these issues. Additionally, it *increases* the rights of individuals applying for asylum by providing them an additional opportunity to request asylum.

Yet some jurisdiction-shifting policies may diminish due-process rights. During the COVID-19 Pandemic, the Trump Administration used the Center for Disease Control’s authority under Title 42 to suspend entries into the United States for migrants at the Southern Border—even for individuals seeking asylum.²⁷⁴ In

²⁷¹ Memorandum from Alejandro N. Mayorkas to Tae D. Johnson et al., Guidelines for Enforcement of Civil Immigration Law at 2 (Sep. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

²⁷² COX & RODRÍGUEZ, *supra* note 14, at 167–73 (describing ICE’s resistance to Obama’s prosecutorial policies).

²⁷³ See Executive Office of Immigration Review, *Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, 87 FED. REG. 18,078 (Mar. 29, 2022).

²⁷⁴ Centers for Disease Control and Prevention, Department of Health and Human Services, “Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists,” 85 FED. REG. 17060 (March 26, 2020), <https://www.federalregister.gov/documents/2020/03/26/2020-06327/notice-of-order-under-sections362-and-365-of-the-public-health-service-act-suspending-introduction>; see also Joel Rose, *Title 42 Was Meant to Slow COVID at the Border. It’s Being Used to Manage Migration*, NPR (Apr. 30, 2022), <https://www.npr.org/2022/04/30/1095750165/title-42-was-meant-to-slow-covid-at-the-border-its-being-used-to-manage-migratio>.

effect, Title 42 allowed CBP to expel individuals from the United States without removal proceedings. Few doubted that the Trump Administration used Title 42 as a border-security policy rather than a public-health policy.²⁷⁵ Although Title 42 prevented some increases in adjudicator workloads,²⁷⁶ it did so by denying individuals a hearing. Other forms of jurisdiction shifting may pose similar problems.²⁷⁷

The effectiveness of priority-setting policies and jurisdiction-shifting policies depends on the willingness of courts to accept that these policies are necessary for the health of adjudicatory agencies and, therefore, the due-process rights of respondents. Yet courts express immense skepticism toward internal policies adopted without notice-and-comment rulemaking.²⁷⁸ In *United States v. Texas*, the Fifth Circuit enjoined DAPA, reasoning that it conferred rights to applicants and, therefore, was a legislative rule required to undergo rulemaking.²⁷⁹ In June 2022, a federal district court enjoined the Biden Administration's priority memo, because the guidelines bound DHS officials.²⁸⁰ Additionally, the court stated that the memo conferred rights to individuals because DHS committed to "work to establish a fair and equitable case review process to afford noncitizens and their representatives the opportunity to obtain expeditious review of the enforcement actions taken" and provided a process for individuals to challenge enforcement actions.²⁸¹ Following the logic of *Texas v. United States*, the district court held that the Biden Administration's policy was "not an exercise of prosecutorial discretion on a case-by-case basis" and, therefore, was a legislative rule subject to rulemaking.

By categorizing these policies as legislative rules rather than procedural rules exempt from rulemaking requirements, courts neglect the reality of agency adjudication. Policies that accord prosecutorial discretion to nonpriority individuals allow the administrative state to respond to rising workloads within adjudicatory agencies. Mitigation of rising workloads requires immediate action. Neither adjudicatory nor enforcement agencies have the time and capacity to undergo the

²⁷⁵ Rose, *supra* note 274 ("We'll be totally overwhelmed, be crushed by the sheer numbers and the weight of illegal immigration. And there will no longer be any border, any security here, any sovereignty at all." (Rep. Mike Johnson)).

²⁷⁶ "Major Swings in Immigration Criminal Prosecutions During Trump Administration," TRAC (Dec. 18, 2020), <https://trac.syr.edu/immigration/reports/633/>.

²⁷⁷ See Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 579 (2011).

²⁷⁸ Metzger & Stack, *supra* note 261, at 1295.

²⁷⁹ 809 F.3d 134, 146–47 (2015).

²⁸⁰ *Texas v. United States*, 21-cv-00016, at 38 (S.D. Texas, June 21, 2022).

²⁸¹ *Id.* at 38.

rulemaking process.²⁸² DHS implemented DACA through an executive memorandum because it feared that it lacked sufficient resources to complete the rulemaking process. By the time agencies undergo the rulemaking process, years have passed, backlogs have amassed, and potentially thousands of individuals have been deprived of the quality of hearing to which they are entitled.

Administrative-law doctrine should recognize that the administrative state uses internal administrative law to manage capacity and to reduce the harms that may otherwise impact respondents in agency adjudication. As Metzger and Stack argue, “courts should abandon their current approach of treating agency attempts to bind internal agency officials as grounds for characterizing an agency rule as a legislative rule requiring notice and comment.”²⁸³ Courts should afford deference to the internal procedures adopted by agencies to manage adjudicatory workloads so long as those procedures adequately protect the due-process rights of individuals.

C. Judicial Review of Adjudicatory Decisions

Internal administrative law has limitations. For adjudicators with the largest workloads and lowest capacity, internal policymaking is akin to rearranging the deckchairs on the Titanic. The absence of capacity will affect the accuracy of adjudicators’ decisions no matter what procedures and processes the agency develops to manage workloads and reduce errors. While courts must afford agencies deference in their managerial decisions, they should take seriously their role in reviewing the administrative record.

Judicial review provides the federal courts with opportunities to correct errors committed during adjudication. Yet the doctrines that govern judicial review of agency adjudication—whether contained with the Administrative Procedure Act or the agency’s organic statute—have proven toothless. Courts assume a less-stringent standard of review is warranted based on the adjudicatory agency’s expertise in deciding certain administrative matters and the adjudicator’s review of the record. Two problems emerge with this assumption. First, it is unclear whether agency adjudicators have significantly more expertise than federal courts when it comes to the application of law to facts. Second, the absence of capacity within these agencies prevents adjudicators from conducting a thorough review of the record, calling into question whether courts should trust the review performed by low-capacity adjudicators.

²⁸² See Nicholas R. Bednar, “Bureaucratic Capacity in the Administrative Presidency” (Manuscript, Vanderbilt University 2022) (providing empirical evidence that rulemaking takes longer in lower capacity agencies).

²⁸³ Metzger & Stack, *supra* note 261, at 1295.

Courts should increase the scrutiny with which they review adjudicators' findings. Shah argues that strengthening these doctrines would prevent agencies from making "sloppy" mistakes.²⁸⁴ Kim argues that the adoption of the substantial-evidence standard would prevent the most egregious errors.²⁸⁵ Of course, Congress has demanded deferential review in the Immigration and Nationality Act (INA). The INA provides that a reviewing court must accept the IJ's "administrative findings" as "conclusive unless any reasonable adjudicator would be compelled to conclude the contrary."²⁸⁶ But federal appellate judges acknowledge that removal proceedings are decided in contexts that are not conducive to a thorough review of the administrative record. Therefore, a reasonable adjudicator should assess the factual findings with greater scrutiny, knowing that errors are more common in the immigration context. Courts need not remand every case with a harmless error, but they should take seriously claims by respondents that the IJ neglected key evidence in the record.

Strengthening judicial review is a piecemeal solution. The federal courts only review a sliver of cases decided by IJs. Moreover, a variety of statutory bars preclude review in certain types of removal proceedings. Family asks, "If the quality of adjudication is low in the cases immigration judges and the Board know a court of appeals may see, what is the quality of those decisions these adjudicators know to be exempted from review?"²⁸⁷ "Low," the empirical findings of this paper suggest. Still, strengthening judicial review may cause adjudicators to adjust their behavior to conform better to the expectations of due process.²⁸⁸

VI. CONCLUSION

External investments in adjudicatory capacity are necessary to satisfy the Due Process Clause's aim of accuracy. For the most part, scholars address due-process concerns by recommending additional procedures.²⁸⁹ Yet a primary reason that adjudicators fail to provide fair hearings stems from a lack of resources. Adjudicators need well-equipped hearing offices, manageable workloads, and sufficient support staff to make accurate decisions. Accuracy can only emerge in agencies where adjudicators have sufficient resources.

²⁸⁴ Bijal Shah, *Judicial Administration*, 11 UC IRVINE L. REV. 1119, 1191–92 (2021).

²⁸⁵ Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 646 (2013).

²⁸⁶ 8 U.S.C. § 1252(b)(4)(B).

²⁸⁷ Family, *supra* note 277, at 587.

²⁸⁸ Cf. McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1635 (1995) (developing a formal model to explain how appellate-court doctrine constrains lower courts).

²⁸⁹ See Bagley, *supra* note 29 (describing the "fetishization" of procedure in the administrative-law literature).

Adjudicatory agencies require proactive rather than reactive management. It takes time to build capacity within any administrative agency. Introducing new technologies, updating agency procedures, and building new courtrooms takes years of planning and implementation. Hiring new adjudicators takes months of recruiting, interviewing, and onboarding. While Congress may prefer to wait until a government failure brings mismanagement to light, reforms may take years to diminish the agency's backlog. By the time these problems become salient to the public, thousands of respondents will have already received inadequate hearings conducted by underfunded and understaffed adjudicators. Only proactive management protects due process for all present and future respondents.

Congress need not break the bank to support these agencies. Not every problem requires appropriations. Sometimes increasing capacity means reducing thick layers of middle management,²⁹⁰ selling unused equipment, and reorganizing agency personnel to increase team production.²⁹¹ There are those who assert that greater attention to bureaucratic capacity and management will lead to better and *smaller* government.²⁹² As the case of EOIR exhibits, staffing resources are often poorly distributed because the agency lacks a human-capital plan. Regardless of where one stands on the small- versus big-government spectrum, there can be little dispute that when the federal government decides to do something, it should do it well.²⁹³

Building capacity in adjudicatory agencies is hard. Convincing members of Congress and presidents to engage in proactive management is harder. But administrative law can promote due process and accuracy even in the face of neglect. By incorporating more public administration into administrative-law doctrine, the courts can provide agencies the flexibility they need to manage their caseloads while protecting individuals from the most egregious violations of their due-process rights.

²⁹⁰ See generally PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 169 (1995) (arguing that government has “thickened” during the last century).

²⁹¹ See Martin J. Williams, *Beyond State Capacity: Bureaucratic Performance, Policy Implementation, and Reform*, 17 J. OF INST. ECON. 339, 346 (2021).

²⁹² See generally JOHN J. DI IULIO, JR., BRING BACK THE BUREAUCRATS: WHY MORE FEDERAL WORKERS WILL LEAD TO BETTER (AND SMALLER!) GOVERNMENT (2014) (see title).

²⁹³ See generally PAMELA HERD AND DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN BY OTHER MEANS (2019) (providing many examples of how government inefficiencies harm citizens).

THE PUBLIC ADMINISTRATION OF JUSTICE

Nicholas R. Bednar

APPENDIX

A. DATA ASSEMBLY AND CODEBOOK

The following Appendix describes the assembly of the two main datasets for the empirical analyses performed in Section III: (1) the removal-proceedings dataset and (2) the individual-hearings dataset. I use the procedures described by Kim and Semet as a guide in assembling the data.²⁹⁴ The majority of the data comes from the Executive Office of Immigration Review's (EOIR) Case Data (April 2022).²⁹⁵ The data is supplemented with data from other sources for independent variables and control variables. EOIR's Case Data includes dozens of files that require meticulous assembly. The assembly of the data follows the recommendations of Kim and Semet.²⁹⁶ Additional instruction comes from questions submitted to EOIR via FOIA request.

1. Assembly of the Removal-Proceedings Dataset

Assembly of the removal-proceedings dataset proceeds as follows. Individual characteristics of the respondent are extracted from the case file in EOIR's Case Data. This data is subset to only removal cases. Dates, outcomes, and the name of the IJ who decided the case are extracted from the proceedings file and merged with the respondent characteristics.

Each row in the dataset is the first outcome in a removal proceeding. In EOIR's Case Data, an individual removal proceeding may include multiple entries because of transfers and remands from appeals. The results in these cases are not representative of the Immigration Judge's (IJ) discretion and, instead, are influenced by other factors. *First*, the dataset excludes any entry that ended in a transfer to another Immigration Court because it does not result in a substantive outcome for the removal proceeding. *Second*, the dataset excludes any removal proceeding where the IJ ordered the individual removed in absentia.²⁹⁷ When an individual fails to appear before an IJ for a scheduled removal proceeding, IJs have little discretion to afford relief to the individual.²⁹⁸ *Third*, for each removal proceeding, I subset the data to include the first entry that resulted in a substantive

²⁹⁴ See Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L.J. 579, 641–47 (2020).

²⁹⁵ See "FOIA Library," DEP'T OF JUSTICE (Apr. 2022), <https://www.justice.gov/eoir/foia-library-0>.

²⁹⁶ See Kim and Semet, *supra* note 294.

²⁹⁷ EOIR POLICY MANUAL 4.8 (2022), <https://www.justice.gov/eoir/eoir-policy-manual/4/8>.

²⁹⁸ See 8 C.F.R. § 1003.26(c) (2022) ("In any removal proceeding before an Immigration Judge in which the alien fails to appeal, the Immigration Judge shall order the alien removed *in absentia* if: (1) The Service establishes by clear, unequivocal, and convincing evidence that the alien is removable, and (2) The Service establishes by clear, unequivocal, and convincing evidence that written notice of the consequences of failure to appear were provided to the alien or the alien's counsel of record.").

outcome. Outcomes in cases decided on remand are a function of the appellate decision and, therefore, constrain the discretion of the IJ. *Third*, I include only cases categorized as the “lead” case in a removal proceeding and exclude any “rider” cases associated with the lead case. In general, rider cases involve immediate family members of the lead case.²⁹⁹ The outcomes in these “rider” cases are generally determined by the outcome of the lead case.

Several other categories of cases are excluded from the dataset to strengthen the reliability of the empirical estimates and remove outliers that are likely to bias the estimated treatment effects. *First*, the dataset excludes any cases completed before 2004. The Homeland Security Act of 2002 reorganized the U.S. immigration system in ways that may affect the comparability of pre-Act cases to post-Act cases.³⁰⁰ *Second*, I exclude any case heard by an Immigration Judge located in Falls Church, Virginia. EOIR’s headquarters are in Falls Church. It is not possible to attain a reliable estimate of the number of law clerks assigned to each IJ seated in Falls Church because the law-clerk data does not disaggregate between clerks working for the Falls Church Immigration Court, the Board of Immigration Appeals, and EOIR’s headquarters. Accordingly, estimates of the number of law clerks assigned to each IJ working in Falls Church far exceed the actual number assigned to these IJs.³⁰¹

The removal-proceedings dataset includes two dependent variables of interest:

Removed:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.77)

Whether the IJ ordered the removal of the respondent. *Removed* takes a value of “1” if the IJ ordered the respondent removed, excluded, or deported. It also takes a value a “1” if the IJ granted a request for voluntary departure. *Removed* takes a value of “0” if the IJ admitted the respondent, granted relief, or terminated or closed the case.

²⁹⁹ EOIR POLICY MANUAL 4.21(a) (2022), <https://www.justice.gov/eoir/eoir-policy-manual/4/21>.

³⁰⁰ Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135.

³⁰¹ The 2022 OCIJ Staff Directory illustrates this point. According to the directory, each IJ in Falls Church has one dedicated law clerk. OCIJ STAFF DIRECTORY, AILA Doc. No. 22042500 (Apr. 25, 2022), <https://www.aila.org/File/DownloadEmbeddedFile/92244>. The estimates attained from the Office of Personnel Management data far exceed 1.0 in 2022. I submitted a Freedom of Information Act request to the Department of Justice to attain similar directories. However, the Department of Justice informed me that no similar directory exists for any other year.

Asylum Granted:

(Indicator Variable) (Min: 0, Max: 1, Mean: 0.34)

Whether the IJ granted the respondent's asylum application. *Asylum Granted* takes a value of "1" if the IJ issued a grant or conditional grant of the asylum application. *Asylum Granted* takes a value of "0" if the IJ denied the application or the respondent withdrew the application.

2. Assembly of the Individual-Hearings Dataset

Assembly of the individual-hearings dataset proceeds as follows. The dataset of individual hearings uses the schedule dataset from EOIR's Case Data. This dataset is subset to individual-merits hearings. The individual-hearings dataset includes one dependent variable of interest:

Hearing Duration (Hours):

(Continuous Variable) (Min: 0, Max: 14, Mean: 2.60, SD: 1.08)

The duration of an individual hearing as measured in number of hours. The length of the hearing is calculated by subtracting the end time of the hearing from the start time of the hearing.

3. Ratio of Law Clerks to Immigration Judges

The primary independent of interest in all analyses is the number of law clerks assigned to each IJ. I submitted a Freedom of Information Act request to the Office of Personnel Management (OPM) for all personnel records of EOIR from Fiscal Year 1998 to Fiscal Year 2022.³⁰² OPM returned over 32,000 personnel records retrieved from its Enterprise Human Resources Integration database. These records are reported as of September each year. The personnel records are anonymized but include the duty station of each employee and their position.³⁰³ Therefore, it is possible to estimate the number of law clerks assigned to each IJ for each Immigration Court i in Year t using the following formula.

³⁰² I also submitted a Freedom of Information Act (FOIA) request to the Department of Justice for a list of law clerks assigned to each IJ from 1998 to 2022. The Department of Justice did not provide these records.

³⁰³ The duty station lists the city in which employee works but does not list the specific Immigration Court. Some cities have multiple Immigration Courts. Likewise, many judges operating in cities with multiple courts have a base court but hear cases at various courts in the area. The aggregated courts include the following. All Los Angeles, Santa Ana, and San Diego Immigration Courts use Los Angeles personnel data. All Atlanta Immigration Courts use Atlanta personnel data. All New York City Immigration Courts use New York City personnel data. All Houston and Conroe Immigration Courts use the combined Conroe and Houston personnel data.

$$\text{Ratio}_{it} = \frac{\sum \text{Clerk}_{it}}{\sum \text{IJ}_{it}}$$

where an individual is classified as a “clerk” if they are in a “law clerk” occupation (Occupational Code: 0904) or a “general attorney” occupation (Occupational Code: 0905).³⁰⁴ The number of Immigration Judges working in an Immigration Court is identified using pay schedule because IJs are on a separate pay schedule from other EOIR employees. Using this measure for the law clerks assumes that an Immigration Court evenly distributes its allotted law clerks among IJs. This is a reasonable assumption based on other personnel records that detail the assignment of law clerks to IJs.³⁰⁵

Number of Law Clerks Assigned to IJ:

(Continuous Variable) (Min: 0, Max: 2, Mean: 0.41, SD: 0.31)

The estimated number of law clerks assigned to an individual Immigration Judge at the start of the fiscal year.

4. Independent Variables for Regression Discontinuity Design

Section III.A. uses a regression-discontinuity design to estimate the causal effect of the implementation of new performance metrics on the length of individual hearings. The implementation of the performance metrics creates a discrete cut-off that distinguishes between hearings conducted before the implementation of the performance metrics (i.e. untreated hearings) and hearings conducted after the implementation of the performance metrics (i.e. treated hearings). This design requires three independent variables: (1) a discrete treatment variable that measures whether the hearing occurred before or after the implementation of the performance metrics, (2) a running variable that measures the number of days before or after the implementation, and (3) an interaction between the discrete variable and the running variable.³⁰⁶

Post-Implementation:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.55)

Whether the hearing was held after the start of Fiscal Year 2019 when the Trump Administration implemented the new performance metrics. Post-

³⁰⁴ See “About the Data,” TRAC IMMIGRATION (2008), https://trac.syr.edu/immigration/reports/189/include/side_1.html.

³⁰⁵ See OCIJ STAFF DIRECTORY, *supra* note 301.

³⁰⁶ See JOSHUA ANGRIST & JÖRN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS 253 (2008).

Fiscal Year 2019 takes a value of “1” if the hearing was held after October 1, 2018. Otherwise, takes a value of “0.” This is the discrete treatment variable for the regression-discontinuity design and is only used in the regression-discontinuity design.³⁰⁷

Time to Implementation:

(Continuous Variable) (Min: -180, Max: 180, Mean: 9.82, SD: 105.1)

The number of days from the hearing date to October 1, 2018. A value of “0” indicates a case heard on October 1, 2018. A positive value indicates a case heard after October 1, 2018, and a negative value indicates a case heard before October 1, 2018. This is the running variable for the regression-discontinuity design and is only used in the regression-discontinuity design.

5. Controls for Omitted Variable Bias and Court-Level Controls

To properly estimate the treatment effect of law clerks, the model should include all variables that correlate with both (1) the assignment of law clerks to an Immigration Court and (2) the outcome of the removal proceeding.³⁰⁸ In the removal and asylum analyses, the following controls are included to reduce the risk of omitted-variable bias.

Year Fixed Effects:

(Categorical Fixed Effects)

The fiscal year in which the removal proceeding had its first substantive outcome. These fixed effects account for annual trends that may affect law-clerk assignments and outcomes, such as increases in the number of migrants arriving in the United States each year.

IJ Base City Fixed Effects:

(Categorical Fixed Effects)

The city in which the IJ is based. The IJ’s base city is identified by examining the Immigration Court Listing Page on EOIR’s website across time.³⁰⁹ Previous versions of this webpage are identified using the Wayback Machine.³¹⁰ To ensure the composition of each Immigration

³⁰⁷ See *id.* at 251.

³⁰⁸ See JEFFREY M. WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS: A MODERN APPROACH* 78–81 (6th ed. 2016).

³⁰⁹ See, e.g., “EOIR Immigration Court Listing,” DEP’T OF JUSTICE, <https://www.justice.gov/eoir/eoir-immigration-court-listing>.

³¹⁰ See “Internet Archive,” WAYBACK MACHINE, <https://archive.org/web>.

Court reflects its composition at the start of the fiscal year, I use the version of this webpage closest to the start of the fiscal year.

Proportional Change in IJ Workload

(Continuous Variable) (Min: -1, Max: 49, Mean: 0.12, SD: 0.78)

The proportional change in the IJ's backlog from the previous fiscal year to the current fiscal year.

Base City Population (Logged):

(Continuous Variable) (Min: 14,834; Max: 10,094,865; Mean: 2,146,938; SD: 2,577,601)

The estimated population living in the county of the IJ's base city. This data comes from the U.S. Census Bureau.³¹¹

Base City Immigrant Population (Logged):

(Continuous Variable) (Min: 746; Max: 105,642; Mean: 32,569; SD: 31,500)

The estimated immigrant population living in the state where the IJ's base city is located. In the analysis, the natural log of these measures is taken to correct skewness. This data comes from the Migration Policy Institute, which used the U.S. Census Bureau's American Community Survey to tabulate state-level measures of immigrant populations.³¹²

Unemployment Rate:

(Continuous Variable) (Min: 1.90; Max: 29.40; Mean: 6.81; SD: 3.04)

The unemployment level in the county of the IJ's base city. This data comes from the Bureau of Labor Statistics.³¹³

³¹¹ See *Population and Housing Unit Estimates*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/popest/data/tables.html>.

³¹² See *State Immigration Trends: Number and Share of Total State Population, 1990-2019*, MIGRATION POLICY INST., <https://www.migrationpolicy.org/programs/data-hub/us-immigration-trends>.

³¹³ See Bureau of Labor Statistics, *Local Area Unemployment Statistics* (2022), <https://www.bls.gov/lau/>.

Democratic Vote Share:

(Continuous Variable) (Min: 0.09; Max: 0.87; Mean: 0.59; SD: 0.15):

The vote share of the Democratic candidate in the previous presidential election in the county of the IJ's base city. This data comes from the MIT Election Lab.³¹⁴

6. Respondent-Level Controls

The analyses include a variety of controls related to individual respondents. The data for these controls comes from EOIR's case database.

Represented:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.38)

Whether the respondent was represented in removal proceedings. *Represented* is coded as "1" if an attorney filed a E-28 with EOIR before the completion of the proceeding. Otherwise, takes a value of "0."

Asylum Applicant:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.21)

Whether the respondent filed an asylum application in their first proceeding. *Asylum Applicant* takes a value of "1" if the respondent filed an asylum application in their first proceeding. Otherwise, takes a value of "0."

Home Country Not Free:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.10)

Whether Freedom House describes the respondent's country of nationality as "Not Free" in the fiscal year in which the respondent's case was decided. *Home Country Not Free* takes a value of "1" if Freedom House describes the respondent's country as "Not Free." Otherwise, takes a value of "0."

Central American:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.71):

Whether the respondent is a national of a landlocked Central American country or Mexico. *Central American* takes a value of "1" if the respondent is a national of Mexico or a landlocked Central American country. Otherwise, takes a value of "0."

³¹⁴ See *County Presidential Election Returns 2000-2020*, MIT ELECTION LAB (Mar 18, 2022), <https://electionlab.mit.edu/data>.

English Speaker:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.15)

Whether the respondent spoke English as their primary language during removal proceedings. *English Speaker* takes a value of “1” if the respondent spoke English during removal proceedings. Otherwise, takes a value of “0.”

7. IJ-Level Controls

Characteristics of IJs are found in press releases about the appointment of IJs and on the TRAC website. If the press release announcing the appointment of the IJ cannot be found, then alternative biographies are searched for on Google and LinkedIn.

Republican Appointee:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.46)

Whether the IJ was appointed by a Republican president.

Former Government Employee:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.69)

Whether the IJ previously worked for a federal agency related to immigration policy. *Former Government Employee* takes a value of “1” if the biography describes the IJ as working for Department of Homeland Security, Department of State, or Department of State. No biography describes an IJ as working for an immigration component of the Department of Labor. Otherwise, takes a value of “0.”

Former Judge:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.08)

Whether the IJ previously worked as a state, local, or administrative judge. *Former Judge* takes a value of “1” if the biography describes the IJ as working as a state, local, or administrative judge. Otherwise, takes a value of “0.”

Former Nonprofit Employee:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.11)

Whether the IJ previously worked for a nonprofit organization, regardless of the policy focus of the nonprofit organization. *Former Nonprofit Employee* takes a value of “1” if the biography describes the IJ as working for a nonprofit organization. Otherwise, takes a value of “0.”

Female IJ:

(Indicator Variable) (Min: 0, Max: 1, Proportion: 0.29)

Whether the IJ is female. *Female IJ* takes a value of “1” if the IJ’s biography uses “she/her” pronouns. Otherwise, takes a value of “0.”

Years of Practice:

(Continuous Variable) (Min: 8.34, Max: 69.38, Mean: 27.03, SD: 7.86)

The number of years that the IJ has practiced law as of the start of the Fiscal Year. This variable assumes that the IJ has practiced law since they received their law degree and that the IJ graduated in May of the year the IJ received their law degree. The date the IJ received their law degree is determined using the IJ’s biography.

B. ANALYSIS OF LAW CLERK ASSIGNMENT

Qualitative evidence suggests that EOIR lacks a meaningful personnel plan and uses “informal” methods to decide which Immigration Courts should receive additional support staff. As the analysis in the main text shows, there is no correlation between the number of cases an IJ has pending and the number of law clerks available to them. This Appendix examines whether other factors may explain the level of law clerks assigned to a particular judge.

The unit of analysis is an Immigration Court in a given fiscal year. I conduct the analysis at the Immigration Court-level since the ratio of law clerks to IJs is a court-level measure. The dependent variable of interest is the *Ratio of Law Clerks to IJs*. The model includes a variety of possible explanatory variables including the *Total Pending Cases*, *Base City Population*, *Base City Immigrant Population*, *Southern Border*, *Unemployment Rate*, *Democratic Vote Share*, *Median IJ Experience*, *Proportion of IJs with Government Experience*, and the *Proportion of IJs Hired During Democratic Administration*. All continuous dependent variables are normalized to allow for comparisons across coefficients. The model includes year-fixed effects to examine law-clerk assignment within year. I estimate the model using an ordinary least squares (OLS) regression. Standard errors are clustered at the court-level.

Table B1 reports the results. Consistent with the qualitative evidence reported in the main text, the model reveals a weak relationship between *Total Pending Cases* and the *Ratio of Law Clerks to IJs*. Although the relationship is positive, it is statistically insignificant and substantively small. A one standard deviation increase in the number of pending cases increases the *Ratio* by only 0.03.

Only three coefficients reach statistical significance. First, Immigration Courts located at the Southern Border have a smaller *Ratio* than other Immigration Courts. Given the surge of migrants at the Southern Border, the lack of sufficient support staff for IJs in courts along the Border provides further evidence of mismanagement. Second, Immigration Courts in cities with higher unemployment rates have a lower *Ratio of Law Clerks to IJs*. Although EOIR recruits law clerks through the Department of Justice Honors Program, it may have a harder time placing individuals in cities with lower economic opportunities. Third, Immigration Courts with a greater proportion of IJs who have served in government service has a lower *Ratio*. However, the substantive size of this effect is small.

TABLE B1. MODEL ESTIMATE OF RATIO OF LAW CLERKS TO IJS

	<i>Dependent Variable</i> Ratio of Law Clerks to IJs
	(1)
Total Pending Cases	0.031 (0.044)
Base City Population (Logged)	-0.012 (0.030)
Base City Immigrant Population (Logged)	0.030 (0.026)
Southern Border	-0.123** (0.051)
Unemployment Rate	-0.111** (0.053)
Democratic Vote Share	-0.018 (0.018)
Median IJ Experience	-0.008 (0.022)
Proportion of IJs with Government Experience	-0.032* (0.018)
Proportion of Democratic-Hired IJs	0.012 (0.023)
Constant	0.149*** (0.046)
Year Fixed Effects	✓
Estimator	OLS
Observations	425
R ²	0.367

*Note: Standard errors clustered at the IJ-level using HC3 heteroskedastic-consistent errors. All continuous variables standardized. *p<0.05, **p<0.01; ***p<0.001.*

C. REMOVAL ANALYSIS

The outcome hypothesis predicts that respondents appearing before IJs with fewer law clerks are more likely to be ordered removed. The dependent variable is a binary indicator of whether the IJ ordered the removal of the respondent (*Removed*). The independent variable of interest is a continuous variable of the number of law clerks assigned to the IJ (*Law Clerks*, τ) in the IJ's base city. To test whether the marginal effect of *Law Clerks* declines as the IJ's workload increases, I interact *Law Clerks* with *Workload* (ω). To test this hypothesis, I use a multivariate linear probability model.³¹⁵ I estimate the following model

$$Removed_i = \alpha + \beta_1\tau_i + \beta_2\omega_i + \beta_3\tau_i\omega_i + \gamma\mathbf{x}_i + \epsilon_i,$$

where τ_i is the *Law Clerks* for the IJ who decides the removal proceeding for respondent i , ω_i is the *Workload* for that IJ, and \mathbf{x}_i is the vector of additional controls described in Appendix A. If the estimate of the coefficient β_1 is negative and statistically significant, then we may reject the null hypothesis that the number of law clerks has no effect on the likelihood that a respondent is removed. The model is estimated using a linear probability model. Consistent with most studies examining individual outcomes in adjudicatory proceedings, I cluster standard errors at the IJ level. Table C1 reports the results. Model (3) is reported in the main text of the paper.

Table C2 estimates the model on three subsets of interest: (1) proceedings conducted at an Immigration Court along the Southern Border, (2) proceedings conducted at an Immigration Court not along the Southern Border, (3) proceedings in which the respondent filed an asylum application.

³¹⁵ The results are robust to a logistic regression.

TABLE C1. MODEL ESTIMATES OF LIKELIHOOD OF REMOVAL

	<i>Dependent Variable</i>		
		Removed	
	(1)	(2)	(3)
<i>Relationships of Interest</i>			
Law Clerks	-0.12*** (0.01)	-0.06*** (0.01)	-0.05*** (0.01)
Workload		0.01* (0.01)	0.01*** (0.005)
Law Clerks*Workload		0.01 (0.01)	0.001 (0.01)
<i>Court-Level Controls</i>			
Population		0.08* (0.04)	0.14*** (0.04)
Immigrant Population		0.24*** (0.07)	0.22*** (0.05)
Unemployment Rate		-0.01** (0.003)	-0.004** (0.002)
Democratic Vote Share		0.07 (0.10)	-0.03 (0.07)
<i>Respondent-Level Controls</i>			
Represented			-0.29*** (0.01)
Asylum Applicant			0.04*** (0.01)
Not Free Country			-0.15*** (0.01)
Central American			0.14*** (0.01)
English Speaker			-0.05*** (0.004)
<i>IJ-Level Controls</i>			
Republican Appointee			0.01 (0.01)
Female			-0.04*** (0.01)
Government Employee			0.04*** (0.01)
Judge			0.02 (0.02)
Nonprofit			-0.02 (0.02)
Years of Practice			0.0002 (0.0005)
Constant	0.81*** (0.75)	-2.89*** (1.02)	-3.48*** (0.75)
Estimator	OLS	OLS	OLS
IJ Location Fixed Effects	No	Yes	Yes
Year Fixed Effects	No	Yes	Yes
N	1,609,767	1,578,890	1,525,972
R ²	0.01	0.21	0.36

Note: See Appendix A for data description. Robust standard errors clustered at the IJ-level.

*p<0.05 **p<0.01 ***p<0.01

TABLE C2. MODEL ESTIMATES OF LIKELIHOOD OF REMOVAL, DATA SUBSETS

	<i>Dependent Variable</i>		
	Border Courts	Removed No Border Courts	Asylum Cases
<i>Relationships of Interest</i>			
Law Clerks	-0.09*** (0.02)	-0.02*** (0.01)	-0.08*** (0.02)
Workload	-0.004*** (0.01)	0.03*** (0.01)	0.03*** (0.01)
Law Clerks*Workload	0.02 (0.01)	-0.01** (0.01)	-0.01 (0.01)
<i>Court-Level Controls</i>			
Population	0.06** (0.10)	0.11 (0.10)	0.24** (0.10)
Immigrant Population	0.82* (0.06)	0.15*** (0.05)	0.10* (0.06)
Unemployment Rate	-0.003 (0.003)	-0.01** (0.002)	-0.004 (0.003)
Democratic Vote Share	-0.51*** (0.15)	0.13 (0.10)	0.52*** (0.15)
<i>Respondent-Level Controls</i>			
Represented	-0.24*** (0.01)	-0.30*** (0.01)	-0.21*** (0.01)
Asylum Applicant	0.07*** (0.01)	0.03*** (0.01)	
Not Free Country	-0.22*** (0.01)	-0.14*** (0.01)	-0.15*** (0.01)
Central American	0.01*** (0.01)	0.15*** (0.01)	0.09*** (0.01)
English Speaker	-0.06*** (0.01)	-0.05*** (0.004)	-0.02*** (0.01)
<i>IJ-Level Controls</i>			
Republican Appointee	0.01 (0.01)	0.003 (0.01)	0.01 (0.01)
Female	0.01*** (0.02)	-0.05*** (0.01)	-0.06*** (0.02)
Government Employee	-0.02* (0.02)	0.05*** (0.01)	0.03* (0.02)
Judge	0.002 (0.02)	0.02 (0.03)	0.03 (0.02)
Nonprofit	0.003 (0.02)	-0.02 (0.02)	-0.02 (0.02)
Years of Practice	-0.0002 (0.001)	0.001 (0.001)	-0.001 (0.001)
Constant	-8.78*** (1.35)	-2.34* (1.31)	-3.83*** (1.35)
Estimator	OLS	OLS	OLS
IJ Location Fixed Effects	Yes	Yes	Yes
Year Fixed Effects	Yes	Yes	Yes
N	329,369	1,195,330	306,855
R ²	0.26	0.37	0.23

Note: See Appendix A for data description. Robust standard errors clustered at the IJ-level.

*p<0.05 **p<0.01 ***p<0.01

D. ASYLUM ANALYSIS

The outcome hypothesis predicts that respondents appearing before IJs with fewer law clerks are more likely to receive a grant of asylum. Additionally, the hypothesis predicts that the marginal effect of law clerks declines as the IJ's workload increases. The dependent variable is a binary indicator of whether the IJ ordered the removal of the respondent (*Asylum Granted*). The independent variable of interest is a continuous variable of the ratio of law clerks to IJs (*Law Clerks*, τ) in the IJ's base city. To test whether the marginal effect of *Law Clerks* declines as the IJ's workload increases, I interact *Law Clerks* with *Workload* (ω). To test this hypothesis, I use a multivariate linear probability model.³¹⁶ I estimate the following model

$$\text{Asylum Granted}_i = \alpha + \beta_1 \tau_i + \beta_2 \omega_i + \beta_3 \tau_i \omega_i + \gamma \mathbf{x}_i + \epsilon_i,$$

where τ_i is the *Law Clerks* for the IJ who decides the removal proceeding for respondent i , ω_i is the *Workload* for that IJ, and \mathbf{x}_i is the vector of additional controls described in Appendix A. If the estimate of the coefficient β_1 is positive and statistically significant, then we may reject the null hypothesis that the ratio of law clerks to IJs has no effect on the likelihood that a respondent is granted asylum. If the estimate of the coefficient β_3 is negative and statistically significant, then we may reject the null hypothesis that the marginal effect of *Law Clerks* decreases as *Workload* increases. As in the removal analysis, I cluster standard errors at the IJ level. Table D1 reports the results. Model (3) is reported in the main text of the paper.

Table D2 estimates the model on two subsets of interest: (1) proceedings conducted at an Immigration Court along the Southern Border and (2) proceedings conducted at an Immigration Court not along the Southern Border.

³¹⁶ The results are robust to a logistic regression.

TABLE D1. MODEL ESTIMATES OF LIKELIHOOD OF ASYLUM GRANT

	Dependent Variable		
	Asylum Granted		
	(1)	(2)	(3)
<i>Relationships of Interest</i>			
Law Clerks	-0.02*** (0.01)	0.05*** (0.02)	0.04*** (0.01)
Workload		0.001 (0.01)	-0.004 (0.01)
Law Clerks*Workload		-0.02* (0.01)	-0.003 (0.01)
<i>Court-Level Controls</i>			
Population		0.11 (0.11)	0.09 (0.09)
Immigrant Population		-0.17*** (0.06)	-0.01 (0.05)
Unemployment Rate		-0.01*** (0.004)	-0.01*** (0.003)
Democratic Vote Share		-1.04*** (0.17)	-0.66*** (0.14)
<i>Respondent-Level Controls</i>			
Represented			0.14*** (0.01)
Not Free Country			0.21*** (0.01)
Central American			-0.24*** (0.01)
English Speaker			-0.05*** (0.01)
<i>IJ-Level Controls</i>			
Republican Appointee			0.0002 (0.01)
Female			0.04*** (0.01)
Government Employee			-0.02 (0.01)
Judge			-0.03* (0.02)
Nonprofit			0.03 (0.02)
Years of Practice			-0.0000 (0.001)
Constant	0.35 (1.24)	0.99 (1.62)	-0.79 (1.24)
Estimator	OLS	OLS	OLS
IJ Location Fixed Effects	Yes	Yes	Yes
Year Fixed Effects	No	Yes	Yes
N	295,150	285,904	272,570
R ²	0.00	0.23	0.37

Note: See Appendix A for data description. Robust standard errors clustered at the IJ-level.

*p<0.05 **p<0.01 ***p<0.01

TABLE D2. MODEL ESTIMATES OF LIKELIHOOD OF ASYLUM GRANT, DATA SUBSETS

	Dependent Variable	
	Asylum Granted	
	Border Courts	No Border Courts
<i>Relationships of Interest</i>		
Law Clerks	0.15*** (0.02)	0.03** (0.01)
Workload	0.01 (0.01)	-0.01 (0.01)
Law Clerks*Workload	-0.03 (0.02)	0.001 (0.01)
<i>Court-Level Controls</i>		
Population	0.17 (0.24)	0.12 (0.13)
Immigrant Population	-0.01 (0.21)	-0.003 (0.05)
Unemployment Rate	-0.003 (0.01)	-0.01*** (0.003)
Democratic Vote Share	-0.59 (0.56)	-0.64*** (0.14)
<i>Respondent-Level Controls</i>		
Represented	0.11*** (0.01)	0.15*** (0.01)
Not Free Country	0.34*** (0.03)	0.20*** (0.01)
Central American	-0.10*** (0.01)	-0.25*** (0.01)
English Speaker	-0.04*** (0.01)	-0.05*** (0.01)
<i>IJ-Level Controls</i>		
Republican Appointee	-0.06*** (0.02)	0.01 (0.01)
Female	0.05* (0.03)	0.04*** (0.01)
Government Employee	-0.05 (0.03)	-0.02 (0.01)
Judge	-0.05 (0.03)	-0.03 (0.02)
Nonprofit	0.07* (0.04)	0.02 (0.02)
Years of Practice	0.0003 (0.001)	0.0001 (0.001)
Constant	-2.18 (4.12)	-1.30 (1.67)
Estimator	OLS	OLS
IJ Location Fixed Effects	Yes	Yes
Year Fixed Effects	Yes	Yes
N	20,870	251,361
R ²	0.36	0.38

Note: See Appendix A for data description. Robust standard errors clustered at the IJ-level.

*p<0.05 **p<0.01 ***p<0.01

E. PERFORMANCE METRICS ANALYSES

The performance-metrics analyses use a regression-discontinuity design to test whether IJs shortened hearings following the implementation of the Trump Administration's performance metrics. The dependent variable is a continuous variable of the duration of the individual hearing (*Duration*). To test this hypothesis, I use ordinary least squares (OLS) regression. I estimate the following models

$$Duration_i = \alpha + \beta_1\tau_i + \beta_2r_i + \beta_3\tau_i r_i + \beta_4g_i + \beta_5\tau_i g_i + \epsilon_i,$$

where τ_i is an indicator for *Post-Implementation*, r_i is the running variable (i.e. *Days Since Implementation*), and g_i is an indicator of whether the IJ had *Law Clerks Above the Mean*. The model includes an interaction term between *Post-Implementation* and *Days Since Implementation* to allow the slope of the lines to vary pre- and post-implementation. The model also includes an interaction between *Post-Implementation* and *Law Clerks Above the Mean* to assess the marginal effect of law clerks on implementation of the performance metrics. I also estimate the model with the continuous measure of *Law Clerks*. If the estimate of the coefficient β_1 is negative and statistically significant, then we may reject the null hypothesis that the performance metrics had no effect on the dependent variables. If the estimate of the coefficient β_5 is statistically significant, then we may reject the null hypothesis that *Law Clerks* has no interactive effect with the treatment. I cluster standard errors at the IJ level. Table E1 reports the results. Model (2) is reported in the main text of the paper.

TABLE E1. REGRESSION DISCONTINUITY ESTIMATES OF HEARING DURATION

	<i>Dependent variable:</i>	
	Hearing Duration	
	(1)	(2)
<i>Relationships of Interest</i>		
Post-Implementation	-0.17*** (0.05)	-0.39*** (0.11)
Law Clerks Above Mean	0.11 (0.13)	
Post-Implementation*Law Clerks Above Mean	0.15** (0.07)	
Law Clerks		0.36 (0.46)
Post-Implementation*Law Clerks		0.40** (0.16)
<i>Running Variables</i>		
Running Variable	-0.0002 (0.0003)	0.0001 (0.0002)
Post-Implementation*Running Variable	0.0004 (0.0004)	0.0001 (0.0003)
Constant	2.59*** (0.09)	1.87 (1.17)
Estimator	OLS	OLS
IJ Location Fixed Effects	No	Yes
N	80,938	74,272
R ²	0.01	0.44

Note: See Appendix A for data description. Robust standard errors clustered at the IJ-level.

*p<0.05 **p<0.01 ***p<0.01

F. POLITICAL IDEOLOGY AS AN ALTERNATIVE MECHANISM

The analyses in Appendices D and E suggest that IJs with more law clerks are (1) less likely to order the removal of a given respondent and (2) more likely to grant asylum applications. The proposed theory claims that IJs with more support staff do not rely as heavily on coping mechanisms and, therefore, their decisions are less biased against respondents. An alternative explanation attributes these results to the political leanings of law clerks. If law clerks are consistently more liberal than IJs, then the dispositions of IJs with law clerks may be more favorable to respondents in removal proceedings. This Appendix provides several reasons to doubt this alternative mechanism.

First, IJs report that the absence of capacity—and, most specifically, law clerks—impacts their ability to conduct fair, unbiased hearings. Immigration Judges express concern that mismanagement of the Immigration Courts increases their likelihood of error. Therefore, the theoretical account offered in this paper comports with the beliefs of those with experience within the immigration system.

Second, the regression-discontinuity design provides causal evidence that IJs with fewer law clerks are more prone to coping mechanisms. Although law clerks may assist IJs during hearings, their primary responsibilities involve preparing the administrative record and drafting opinions. IJs conduct individual hearings, and there is no theoretical reason to believe that the presence of a liberal law clerk would lengthen the hearing. If a law clerk reduces an IJ's likelihood of shortening a hearing, then the better explanation is that they perform the IJ's ministerial and preparatory work that would otherwise cause them to shorten hearings. The fact that we observe that IJs without law clerks shorten hearings provides evidence that these IJs conduct a less thorough review of the administrative record, which increases the likelihood of error.

Third, as Section II.B. discusses, evidence of ideological effects in removal proceedings are empirically weak across studies. Recent work by Hausman, et al., confirms that IJs with different ideological leanings make similar decisions when controlling for time and location.³¹⁷ Although folk wisdom suggests that IJs are relatively conservative, there is no empirical evidence that IJs are more conservative than the general population of attorneys.³¹⁸ Like other attorneys, IJs skew slightly

³¹⁷ See David K. Hausman, Daniel E. Ho, Mark S. Krass, and Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, __ J. OF L., ECON. & ORG. __, 20 (Forthcoming 2022).

³¹⁸ See *id.*

more liberal than the general public. Likewise, there is no reason to believe that EOIR law clerks are more liberal than the general population of attorneys. The Department of Justice recruits law clerks using its Honors Program. This program is competitive and prestigious, and there is no reason to believe it skews more liberal than the general population of attorneys.

Although empirical trends cast doubt on this alternative theory, there are ways to test it. If the effect of law clerks is best explained through the liberalness of law clerks, then the effect of law clerks should vary with the ideology of IJs. This interaction could work in either direction. Law clerks may drag liberal IJs toward more pro-respondent outcomes but prove less effective with conservative IJs. Alternatively, liberal IJs may already be predisposed toward pro-respondent outcomes and, therefore, these law clerks have a greater effect on the dispositions of conservative IJs. Regardless of the theoretical direction of this relationship, an estimated effect near zero would suggest that the liberalness of law clerks does not explain pro-respondent outcomes.

I estimate IJ ideology using DIME scores.³¹⁹ DIME scores use 130 million campaign donations to estimate ideological scores for millions of Americans and organizations. I follow the method of Hausman, et al., to pair IJs with DIME Scores.³²⁰ Specifically, I identify IJs in the DIME dataset using their name, location, and their self-reported employment. To test whether liberal or conservative IJs shift their decisions when they have more law clerks, I reestimate Model (3) from both the removal and asylum analyses, including an interaction term between *IJ Ideology* and *Law Clerks*. Table F1 reports the results, which show there is no statistically significant interaction between *IJ Ideology* and *Law Clerks*.

³¹⁹ Adam Bonica, *Database on Ideology, Money in Politics, and Elections: Public Version 2.0*, SDSS SOCIAL SCIENCE DATA COLLECTION (2016), <https://data.stanford.edu/dime>.

³²⁰ See David K. Hausman, Daniel E. Ho, Mark S. Krass, and Anne McDonough, *Executive Control of Agency Adjudication: Capacity, Selection, and Precedential Rulemaking*, __ J. OF L., ECON. & ORG. __, 20 (Forthcoming 2022).

TABLE F1. MODEL ESTIMATES OF IDEOLOGY ON REMOVAL AND ASYLUM GRANTS

	<i>Dependent Variable</i>	
	Removed (1)	Asylum Granted (2)
<i>Relationships of Interest</i>		
Law Clerks	-0.03 (0.02)	0.08*** (0.03)
IJ Ideology	-0.003 (0.01)	-0.02 (0.02)
Law Clerks*IJ Ideology	0.02 (0.02)	0.01 (0.02)
Workload	0.01* (0.01)	-0.03 (0.03)
Law Clerks*Workload	-0.004 (0.01)	0.01 (0.02)
<i>Court-Level Controls</i>		
Population	0.0000 (0.0000)	-0.0000 (0.0000)
Immigrant Population	-0.0000 (0.0000)	0.0000*** (0.0000)
Unemployment Rate	-0.01** (0.004)	-0.02*** (0.01)
Democratic Vote Share	-0.19 (0.21)	-0.94*** (0.24)
<i>Respondent-Level Controls</i>		
Represented	-0.29*** (0.02)	0.14*** (0.01)
Asylum Applicant	0.04** (0.02)	
Not Free Country	-0.14*** (0.02)	0.19*** (0.02)
Central American	0.12*** (0.01)	-0.26*** (0.02)
English Speaker	-0.07*** (0.01)	-0.06*** (0.01)
<i>IJ-Level Controls</i>		
Republican Appointee	0.002 (0.02)	0.02 (0.02)
Female	-0.08*** (0.03)	0.06** (0.02)
Government Employee	0.02 (0.02)	-0.03* (0.02)
Judge	0.02 (0.04)	-0.04 (0.04)
Nonprofit	-0.03 (0.02)	0.01 (0.02)
Years of Practice	-0.002 (0.001)	-0.001 (0.001)
Constant	1.09*** (0.17)	0.75*** (0.16)
Estimator	OLS	OLS
IJ Location Fixed Effects	Yes	Yes
Year Fixed Effects	Yes	Yes
N	346,033	65,281
R ²	0.46	0.44

Note: See Appendix A for data description. Robust standard errors clustered at the IJ-level.

*p<0.05 **p<0.01 ***p<0.001

