


Who Controls the Immigration Bureaucracy? The Relative Influence of the Three Branches Over Asylum Policy Implementation

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Abstract

At the center of contentious debates concerning U.S. asylum policy are immigration judges, bureaucrats who decide life and death cases on a daily basis. Congress, the executive and the courts compete for influence over these key actors — administrative judges distinct from those examined in much of the bureaucratic control literature. They are hired, fired, promoted or demoted by executive officials; face congressional oversight; and must follow circuit law. We argue that, because of the fear of reversal, immigration judges will look most to the courts in the decision-making process. Our results support our theory. Examining over 900,000 immigration judges' decisions, we find that, although IJs are influenced by a fear of pushback from the elected branches, the impact is conditional on circuit preferences. Our findings inform scholarly understanding of judicial behavior and bureaucratic accountability, and support the pursuit of judicial independence and due process in immigration courts.

Keywords

bureaucracy, policy implementation, asylum, immigration, courts

U.S. asylum policy is a hotly debated topic in American politics. Scholars recognize that the “linchpin” of asylum policy are bureaucrats — immigration judges (IJs) — who make critical decisions concerning the fate of those claiming persecution in their home country (Miller et al., 2015a, 1). All three branches of the government have attempted to influence the conduct of these administrative hearings. Congress held hearings in 2020 discussing proposed changes that would purportedly bolster the independence of IJs.¹ Both Presidents Joe Biden and Donald Trump have been accused of politicizing immigration courts, either through making radical changes to the functioning of the courts or by packing them with judges that have policy preferences akin to their own.² U.S. Courts of Appeals judges have admonished IJs for their behavior, with one court suggesting the hearings fall below minimum standards of justice (Benslimane v. Gonzales 2005, 830).

A key question, therefore, is who controls the IJs? Congress, the executive, and the circuit courts compete for influence over these administrative judges, referred to as non-ALJs, or non-administrative law judges. As administrative judges, IJs are appointed by the executive but not confirmed by the Senate like the type of adjudicator studied in much of the bureaucratic control literature. Their hiring, working conditions, and termination are handled informally by the

Executive Office of Immigration Review, an agency within the Department of Justice, primarily by their immediate supervisor, the Chief Immigration Judge (Miller et al., 2015a). This suggests a different relationship than what the traditional literature might predict (e.g. Wood & Waterman 1994). Questions concerning the control of IJs are not only important and timely, but may have implications for the control of the over 10,000 non-ALJs adjudicators that work at federal agencies, presiding over the vast majority of informal adjudication proceedings.³

We develop theoretical expectations regarding which branch will be the most influential over this type of bureaucrat. In short, we argue that the political preferences of the circuit courts of appeal will have the greatest impact because, in this highly salient and complex area, IJs have reason to fear circuit court reversal (Gormley, 1986). We contend that, although the political preferences of the elected branches will influence outcomes in asylum cases, the effect

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will be conditional on the policy preferences of the circuit courts. We test this theory on a database of over 900,000 asylum cases decide between 1995 and 2021. Our findings support our argument. The courts dominate the decision-making process, especially when Congress and the president are unified. Otherwise, the elected branches have little impact. Contrary to the emphasis of the traditional political control of the bureaucracy literature, the circuit courts are very important.

Our findings make several valuable contributions. First, political scientists at least as far back as Woodrow Wilson (1887) have pondered the question of bureaucratic structure and control. Whether the bureaucracy's constitutional principals (Congress, the president, and the courts) can effectively control the vast administrative state remains a question of intense interest to scholars (e.g. Acs, 2018, 2021; Calvert et al., 1989; Lowande, 2018; McCubbins & Schwartz, 1984; Posner & Vermeule, 2010; Potter, 2019). We shed light on this question by focusing on a policy that is certainly fraught with political considerations: immigration. In asylum cases IJs make life and death decisions, as they determine whether an applicant has a well-founded, or reasonable, fear of suffering persecution in their home country based on their race, religion, nationality, political opinion, or particular social group.⁴ Their importance has garnered the attention of researchers, who have studied the perception of their role, and the influence of their policy proclivities, the law, the local context, and their congressional and executive branch superiors on their decision-making processes (Miller et al., 2015a, Chand et al., 2017, Jain, 2019; Kim and Semet 2020). While several studies examine the influence of the elected branches, to our knowledge, no studies compare the relative influence of Congress, the executive, and the judiciary on IJs' decisions to grant asylum, nor demonstrate the key role played by the courts.

Second, our study contributes to the growing number of studies within the judicial politics literature examining the impact of courts, specifically on the administrative state. Scholars suggest that the American asylum system is in the process of being "judicialized," as the judicial branch has asserted a new, powerful role in this area of law (Hamlin, 2014, 82–3). Quantitative scholars have not yet explored how IJs, or "judges-as-bureaucrats," (Keith et al., 2013) react to these moves by the federal appellate courts. Researchers recognize administrative agencies' important role in formulating and implementing policy, and examine the extent to which the court of appeals constrain administrative discretion (Humphries & Songer, 1999; Robinson, 1991; Schuck, 1994). Recent scholarship highlights the importance of focusing on the relationship between administrative agencies and the lower federal courts, rather than exclusively examining the impact of the Supreme Court (Johnson, 2019). Knowledge gained in this study will be valuable in determining the extent of judicial power in the administrative realm. Specifically, our findings demonstrate that, controlling

for the impact of key case characteristics and changes in the law, the policy preferences of circuit courts not only influence outcomes directly, but condition the impact of the elected branches' preferences. This relationship will be a fruitful area for future research.

In addition, our research speaks to the ongoing conversation surrounding refugee status determinations in the U.S. Scholars and policy-makers struggle to balance due process with security concerns in this context. Some hope that by creating a greater role for the judiciary, governments can provide a fairer process to individuals seeking refuge. In order to assess the need for increased judicial intervention, it is imperative that we understand the part Article III judges play in the system as it stands.

This article proceeds as follows. First, we draw on scholarly inquiries into bureaucratic accountability and judicial behavior to identify mechanisms by which the elected and judicial branches may exert control over IJs, and explain why we think the circuit courts of appeal will win the competition for influence. We conclude with our hypotheses concerning the likely results of these attempts, emphasizing the conditional relationship between the elected branches' preferences and those of the courts. Then, we present our data and explain our methodology for testing these expectations. Finally, we draw conclusions from our findings and suggest avenues of future research.

Serving Three Masters

We argue that ideological variation in the preferences of Congress, the executive and the courts will predict the likelihood of IJs granting asylum and, in terms of influence, the courts will dominate. In this section, we lay the theoretical groundwork for this prediction. First, we describe the type of bureaucrat we study, concentrating on the characteristics that differentiate them from the type examined in much of the bureaucratic control literature, and make them interesting to scholars in this field. We then place IJs in the context of the broader literature to develop our theoretical expectations.

Although IJs are like district court judges in the sense that they oversee a "trial" in which facts and evidence are presented, their authority is not derived from Article III of the Constitution. They are appointed by the executive, but are not confirmed by the Senate. However, there is reason to expect that the president's influence over IJs is limited. First, although the president's appointment power is significant (e.g. Devins & Lewis, 2008; Lewis, 2008; Moe, 1984; Wood & Waterman, 1991), the authority to appoint IJs is technically vested in the deputy attorney general rather than directly in the president (e.g. Miller et al., 2015a). While presidents can doubtless exercise some influence on this process, the complexity of an IJ's work suggests that a baseline level of competence on the part of appointees is necessary. Given the tradeoff between politicization and competence (e.g. Lewis, 2008), presidents may maintain a more hands-off posture

when it comes to IJs, which may blunt the president's influence.

However, just because the president's influence may be limited does not mean their influence does not exist. After all, IJs do not have life-tenure like Article III judges. They are also not Administrative Law Judges, who are granted a substantial degree of judicial independence by the Administrative Procedures Act of 1946 and may only be fired for good cause after an independent hearing process. Unlike Administrative Law Judges, IJs are evaluated by the agency in which they conduct hearings, and must act as the delegates of the Attorney General. They serve at the pleasure of the Attorney General, who him- or herself serves at the pleasure of the president, providing clear avenues of influence for the White House. IJs are subject to annual reviews by EOIR, and face case-completion goals that vary by administration. These performance criteria are often determined through negotiation between the IJ union, the National Association of IJs and the EOIR.⁵ They have civil service protections (Kim, 2018). Prior research suggests that executive branch power to threaten IJs' job security is influential; IJs respond to the ideological preferences of the current administration in asylum decisions and removal proceedings in general (Miller et al., 2015a; Kim & Semet, 2020). IJs must follow the directives of the president as communicated through law, including through unilateral powers like executive orders (e.g. Howell, 2003; Kennedy, 2015; Mayer, 2001), and BIA and Attorney General decisions in individual cases. Although the BIA enacts few precedential decisions (as a percentage of all cases decided), this is one mechanism of its control over immigration courts because such precedents bind all IJs nationwide, though it is worth nothing that the Attorney General has the statutory power to overturn BIA decisions.⁶

Congress has considerable power over the entire federal bureaucracy and a number of possible levers of control at its disposal, from statutory language (e.g. Epstein & O'Halloran, 1999; Huber & Shipan, 2002) to agency design (e.g. Lewis, 2003; Moe, 1989; Moe & Wilson, 1994) to budgets (e.g. Carpenter, 1996). It therefore determines much of their day-to-day working conditions. For example, Congress decides whether to allocate money for the hiring of more IJs. Further, it has developed an extensive committee system through which to manage its oversight of the executive branch (e.g. Aberbach, 1990; Adler, 2002; Clinton et al., 2014; Mayhew, 1974; Weingast & Moran, 1982, 1983), and a number of scholars have long theorized that agencies wisely react to legislative preferences as a result (e.g. Fiorina, 1981; McCubbins & Schwartz, 1984; Weingast, 1984; Weingast & Moran, 1982, 1983). Of course, "Congress" is not a unitary actor, and *who* in Congress exercises influence over the bureaucracy varies. One track of research (e.g. Adler, 2002; Weingast & Marshall, 1988) argues that committees comprised of "preference outliers" (Weingast & Marshall, 1988, 148) are the dominant actors, while a different track (e.g. Cox & McCubbins, 1993, 2005) holds that the majority party,

acting as a "cartel," largely controls the direction of Congress, particularly in the House, and that committees reflect the preferences of the majority party as a result. We take both perspectives into account, yet ultimately find little difference between them in terms of effect. This is explored more fully in the [Supplementary Appendix](#).

Although, in deciding cases, IJs must "exercise their independent judgment and discretion,"⁷ their decisions are carefully scrutinized by the courts of appeals, which have jurisdiction to review IJs' asylum decisions after review and a final order by the Board of Immigration Appeals.⁸ Circuit court review is in "the court of appeals for the judicial circuit in which the immigration judge completed the proceedings."⁹ A precedential decision by a U.S. Court of Appeals is binding on all immigration courts within that circuit (the BIA and the immigration judges), a fact acknowledged by the BIA.¹⁰ Circuit court control over IJs is therefore through the precedent that they issue, as the principle of *stare decisis* instructs lower courts to follow binding precedents from courts above them in the judicial hierarchy (Canon & Johnsons, 1999).

As is clear from this discussion, and as is the case with most bureaucratic actors, even nominally independent ones, IJs must deal with a complicated multiple principals dynamic, wherein they receive signals from an array of sources, which can seriously complicate bureaucrats' expectations (e.g. Clinton et al, 2014; Epstein & O'Halloran, 1999; Gailmard, 2009; Hammond & Knott, 1996; McCarty, 2004; McCubbins, Noll, and Weingast 1987; Moe, 1984; Wood & Waterman, 1993). Though the discretion afforded IJs is considerable, at least statutorily, there are still good reasons to expect that those in the immigration bureaucracy are exposed to the same political pressures that other bureaucrats encounter. Theirs is a curious position, straddling the line between being a judge and being a bureaucrat (e.g. Chand & Schreckhise, 2020), and indeed, scholarship on this very question has revealed significant, and unsurprising, efforts on the part of political principals to shape the behavior of IJs (e.g. Chand & Schreckhise, 2020; Kim and Semet 2020; Miller et al., 2015a). The question of who controls the bureaucrats, if anyone, is a thorny one, not least because the bureaucracy has more than one principal and can thus find itself pulled in vastly different directions depending on how the political constellation in which they operate is arrayed (e.g. Gailmard, 2009; Hammond & Knott, 1996; Wood & Waterman, 1991, 1993, 1994). Some foundational scholarship has studied the roles of these various principals in context and concluded that all of them are variously influential (e.g. Moe, 1985; Wood and Waterman 1994), but we believe that IJs are uniquely situated to be most heavily influenced by the courts. IJs are acting in a fundamentally judicial capacity, and the incentives to defer to the norms of one's profession (e.g. Wilson, 1989/2000/2000) should bias them to be more responsive to court preferences than to either presidential preferences or congressional ones. Why? As Moe (1985, 1101) notes, courts "are entirely reactive." That is, they must wait for proceedings

to come to them. But IJs are as reactive as other courts: they know that any individual asylum proceeding may (and likely will, if they rule against the appellant) wind up before a circuit court, but the likelihood that either Congress or the president will notice one proceeding is essentially nil. The shadow of the courts will necessarily loom larger than that of either the legislature or the executive.

Judicial review by federal court of appeals judges is a mechanism of legal constraint over IJs (Humphries & Songer, 1999, citing Schuck, 1994; Robinson, 1991). At least with regard to the interpretation of precedent, IJs act as agents to the circuit courts, their principals (Songer et al., 1994). IJs should respond to precedent because, as trial judges like federal district judges (but without life tenure), they fear reversal, but the degree of responsiveness will depend on the likelihood of their decision being reviewed and reversed (Cross & Tiller, 1998; Klein & Hume, 2003; Randazzo, 2008).¹¹ Circuit courts have mandatory jurisdiction over appeals of asylum decisions by the BIA; therefore, circuit review is likely to the extent that applicants appeal from BIA decisions. Prior research indicates that “a rather significant percentage (47%) of all IJ asylum decisions are appealed” (Miller et al., 2015a, 119).¹² This percent is far more than the 8–10% for all IJ decisions during the period of 2006–2010 (Miller et al., 2015a).

In terms of the probability of reversal, IJs must discern their circuit’s likely response to their decision. Circuit courts have a good deal of discretion in deciding asylum appeals because they face a low probability of Supreme Court review in general and particularly in immigration cases, where the Supreme Court has surrendered large portions of law and policymaking to the federal courts of appeals (Hettinger et al., 2006; Law, 2010; Songer et al., 2000).¹³ Operating with such wide discretion, circuit court judges are freer to act on their policy preferences. Studies demonstrate that circuit court ideology influences their decision-making in administrative appeals in general, and in immigration cases in particular (Humphries and Songer 1999; Westerland, 2009; Williams & Law, 2010, Taratoot & Howard, 2011).¹⁴ Federal court of appeals judges vary in their reaction to statutory changes, with some resisting congressional directives (See Stobb, 2019, citing, for example, *Doumbia v. Attorney General of the U.S.*, 2011; *Hassan v. Holder*, 2009; *Shrestha v. Holder*, 2010). Stobb (2019) finds that circuit ideology is a critical variable determining circuit responses to such changes in the law.

IJs appear to be aware of the influence of circuit court policy preferences on likelihood of reversal, as research found that median circuit ideology influences IJ decisions to order removal in immigration cases (Kim & Semet, 2020). The risk of reversal is probably a pressing reality for IJs because they are likely aware of the harsh criticism immigration courts have received from the federal courts of appeal after the 2002 reforms, which caused an influx of immigration cases before the appellate courts (Hamlin, 2014; Palmer et al.,

2005). Judges on the U.S. Courts of Appeals have explicitly noted their concerns about IJ bias, speculation, and abuse of asylum applicants (Galloni, 2008). Evidence also indicates IJs try to avoid reversal by the federal courts of appeals. As expressed by a former immigration judge, “day-to-day, your boss is the EOIR, but when the Court of Appeals reverses the decision, then your boss is the Court of Appeals ... You have to be very careful because, if you cut corners, then the Court of Appeals is going to yell at you about violating people’s due process rights” (Jain, 2019, 284).

IJs are particularly likely to be influenced by the circuit courts in asylum cases because it is a salient and complex area of law. Asylum policy affects a large number of people in a significant manner, and requires a substantial amount of expertise to understand and apply; therefore, politicians face conflicting incentives for involvement, and are more likely to offer procedural rather than substantive solutions (Gormley, 1986). Violations of such procedural requirements invite court intervention because judges can reverse without addressing the decision’s technical merits, making judicial reversal more likely (Gormley, 1986). IJs therefore have strong incentives to attend to circuit preferences.

Drawing on these theoretical perspectives, we make several predictions. Prior research does not support a strong expectation for the influence of the Congress on IJ decision-making. On the one hand, Congress has numerous mechanisms of oversight over IJs. On the other hand, investigations of Congress’ attempts to alter asylum decision-making through the REAL ID Act indicated a gap between intentions and outcomes, and that the explanation for this result is complicated (Miller et al., 2015a). Furthermore, Congress clearly suffers from collective action problems in attempting to monitor bureaucratic performance (Clinton, Lewis, and Selin 2014; Gailmard, 2009). We therefore assume that IJs will, in general, be responsive to the conservative/liberal majority in Congress, but that such response is likely weak.

Hypothesis 1: When Congress is controlled by Republicans, immigration judges will be less likely to grant asylum.

Second, as noted above, we assume based on prior research that the president’s preferences will directly influence IJ decision-making in asylum cases.

Hypothesis 2: When the White House is controlled by Republicans, immigration judges will be less likely to grant asylum.

Finally, and more central to the purpose of this research, we expect that the influence of the elected branches will be conditional on the ideological composition of the circuit in which the IJ sits. As noted above, a former immigration judge referred to the EOIR as the boss on a daily basis, but noted that the circuit is the boss when a decision is reversed. We

posit that fear of reversal will be an important mechanism of control. The number of such reversals, and the amount of criticism in circuit opinions, can make an immigration judge feel more vulnerable to adverse employment action, as the Attorney General can make IJ employment decisions based on the individual’s knowledge and ability (Kim and Semet 2020).¹⁵ In general, an IJ’s fear of reversal of an asylum grant should decrease as the circuit in which he sits becomes more liberal, and fear of reversal of a denial should decrease as the circuit in which he sits becomes more conservative.¹⁶

Hypothesis 3: As the circuit in which the IJ sits becomes more ideologically liberal/conservative, the impact of the elected branches will decrease.

In the next section, we present our data and methodology for testing these expectations.

Data and Methodology

We obtained data on IJ removal decisions from the Department of Justice website, an initial dataset of over 8 million proceedings. We narrowed the dataset to the first substantive merits decisions on an asylum claim. This reduced the number of cases to approximately 1 million. The final dataset, after dropping hearings for which variables were missing, includes over 900,000 cases decide between 1995 and 2021. The dependent variable is a dichotomous indicator for whether or not the applicant was granted asylum, 1 if yes, 0 if

no. We therefore employ two-way clustered logit models, with errors clustered on the IJ and year.

Our main independent variables measure the preferences of the three central actors: Congress, the president, and the circuit. We use a dichotomous measure to control for the preferences of the president, with values of “0” representing Republican presidents, and values of “1” representing Democratic presidents. To control for congressional preferences, we employ a trichotomous measure where values of “-1” represent Republican control of the House of Representatives and Senate, values of “0” represent split party control of the House and Senate, and values of “1” represent Democratic control of the House and Senate. We employ the measure *Circuit Democratic*, extending data from Miller and Curry (2017). It is the ratio of active Democrats to active Republicans on a circuit in a given year.¹⁷

Figure 1 below plots the variation in the mean grant rate across circuits to give the reader a sense of the degree of variation over time between circuits, including a best fit line to help discern any trends. Figure 1 constitutes some preliminary evidence of the extent to which IJs react to their circuit contexts. It is clear that there is significant variation between circuits and within circuit over time. For instance, the third and fourth Circuits have mean grant rates that hover around 40% for the time period we study, while second Circuit has a grant rate that increases from 40% to almost 80% and the 10th Circuit grant rate decreases from about 45% to 20%. Also notable is the dramatic increase across all of the circuits in 2021 grant rates, undoubtedly a reaction to the

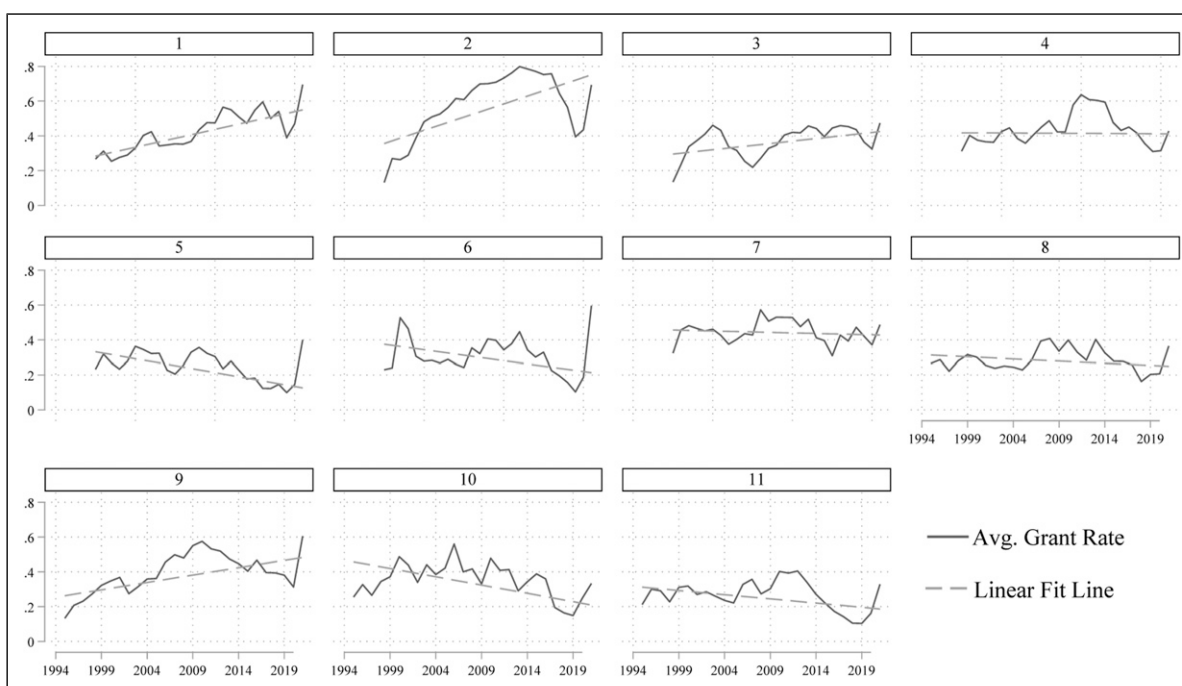


Figure 1. Average grant rate by circuit and year.

transition from Trump to Biden. We further explore variation in asylee profiles by circuit in the [Supplementary Appendix](#).

Our goal is to compare the impact of the three principals' policy preferences, with a focus on that of the courts. At the same time, we recognize that IJs' decisions will be influenced by other factors, particularly their personal policy preferences, the case characteristics, and the law applied. With regard to the latter, Congress passed two laws that drastically altered the substance of asylum law during the time-period of our analysis: [The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 \(IIRIRA\)](#), and the REAL ID Act of 2005. IIRIRA instituted a 1-year filing deadline for asylum seekers; a screening process for summary or expedited removal proceedings that can lead to a 5-year bar on reentry; and mandatory detention for certain non-citizens, including asylum seekers placed in expedited removal at a port of entry. Because this law was passed at the starting point of our analysis, we do not include controls for its effect.

In the [REAL ID Act of 2005](#), Congress altered the asylum landscape by increasing applicants' burden and broadening the discretion of IJs. Asylum seekers must now show their race, religion, nationality, membership in a social group or political opinion represents a "central reason" for their persecution, an adjudicator can require corroborating evidence for credible testimony unless the applicant cannot reasonably be expected to obtain it, and IJs can base their evaluations of applicants' credibility on any inconsistency, regardless of whether "it goes to the heart of the applicant's claim" ([REAL ID Act 2005](#)). This means that IJs can find that an applicant is not credible based on minor mistakes as to wedding or birth dates unrelated to the alleged persecution, broadening IJs' freedom to deny a claim ([Rempell, 2011](#), 391). Prior research indicates that Congress' actions in both IIRIRA and the REAL ID Act had the unintended effect of increasing asylum grant rates, as the changes appear to have sifted out fraudulent claims before they reach an immigration judge ([Miller et al., 2015a](#)). We disaggregate the effect of the REAL ID Act into several variables, and test whether this finding holds with these new measures. Specifically, we look at the changes to credibility standards prompted by the REAL ID Act. Although we do not have details of the facts of each case, it is reasonable to assume that determinations of the applicant's credibility will affect the outcome, as experts in asylum law characterize credibility assessments as perhaps the "most important determinations in asylum adjudications" ([Anker, 2016](#), 181).

We include controls for each branch's credibility standard. The indicators for Congress and the president's legal standards (*Congress Credibility Standard* and *President Credibility Standard*) are year dummy variables indicating whether an IJ decided the case before or after the elected branches changed the law. For Congress, that is the year the REAL ID Act was promulgated, 2005. For the president, the year is 2007, when the BIA adopted the REAL ID credibility standard in a binding precedent ([Matter of J-Y-C, 2007](#)). To

code the circuit precedent variable, *Circuit Credibility Standard*, we employed secondary sources to identify significant cases in each circuit concerning the credibility standard, as agreed upon by scholars ([Anker, 2016](#); [Rempell, 2011](#)). Next, we used these cases to determine the best WestLaw KeyNumbers to use in studying the path of the law in this area. We examined the binding precedent (published decisions) listed under these KeyNumbers within each circuit. The variable is coded as 1 if binding circuit precedent adopting the REAL ID standard (allowing reliance on minor inconsistencies alone) existed, and 0 if not, either because there was no binding precedent concerning relying on minor inconsistencies or because the circuit maintained a more liberal standard. Therefore, in all cases, 0 means the standard was more liberal than 1 (the conservative REAL ID standard), because prior to the REAL ID Act no circuits had binding precedent allowing reliance on minor inconsistencies alone.¹⁸ Additional control variables are included based on prior research—including whether the immigrant has an attorney and the levels of repression in the country an immigrant is fleeing, among others. To conserve space, we describe these variables in the [Supplementary Appendix](#).

Analysis

To measure the simultaneous effects of three different political principals we turn to straightforward regression approaches. Results are presented in [Table 1](#), in which we interact our measures of political preference for each actor. In addition, we control for the legal credibility standards introduced over time. The model (as well as a simplified version) simultaneously control for clustering at the level of individual IJ and year. In addition, a host of control variables, including IJ ideology and the characteristics of the asylee's case, are included. Both models fit the data reasonably well, although the model with the three-way interaction better describes the data than does the simpler Model 1 (given the significantly lower Bayesian Information Criterion (BIC) score). Additional models, using measures based on NOMINATE scores are presented in the [Supplementary Appendix](#), but our results using those measures do not differ substantially from those presented in [Table 1](#).

[Figure 2](#) below presents the primary results for our three-way interactive model (Model 2 in [Table 1](#)). On the *x*-axis we alter the control of Congress and the White House between Democrats and Republicans. The left-most panel represents how those configurations affect judging when the circuit in which the IJ is judging is composed of 25% Democratic judges. The middle-panel presents the situation with 50% Democratic control of the circuit and the right-most panel with 75% Democratic control. Average marginal effects are represented by the solid-circles and 95% confidence intervals by the bars.

Taking the left-most panel first, we see that there is little differentiation across political control when the circuit itself is

Table 1. Two-Way Clustered Logit Models.

Political Variables	Model 1		Model 2	
	Coeff	Robust SE.	Coeff	Robust SE.
Circ. Democratic	1.67***	.36	1.97***	.45
Dem. President	.76**	.19	.49*	.25
Dem. Congress	.33***	.09	.62**	.17
Interactions				
Circ. Dem * Pres	—	—	.65	.51
Circ. Dem. * Cong	—	—	-.71	.45
Pres. * Cong	—	—	-1.03**	.26
Circ Dem. * Pres. * Cong	—	—	2.45**	.61
Legal Variables				
Circ. Credibility Std	-.13	.15	.07	.11
Pres. Credibility Std	.27	.22	.21	.27
Cong. Credibility Std	.43**	.19	.40**	.16
Control Variables				
IJ Liberalism	.08**	.04	.08*	.04
Bilat. Trade	-.07***	.01	-.07***	.01
PTS Score	.26***	.04	.26***	.04
Attorney	.63***	.14	.66***	.14
Det. Status	-.60***	.09	-.59***	.09
Post-9/11	.72**	.27	.61**	.29
Constant	-2.32	.31	-2.46	.34
N	902,601		902,601	
N of IJs	687		687	
N of years	26		26	
BIC	1,080,786		1,076,652	
PRE	.10		.12	

*p < .10; **p < .05; ***p < .01 (all tests two-tailed).

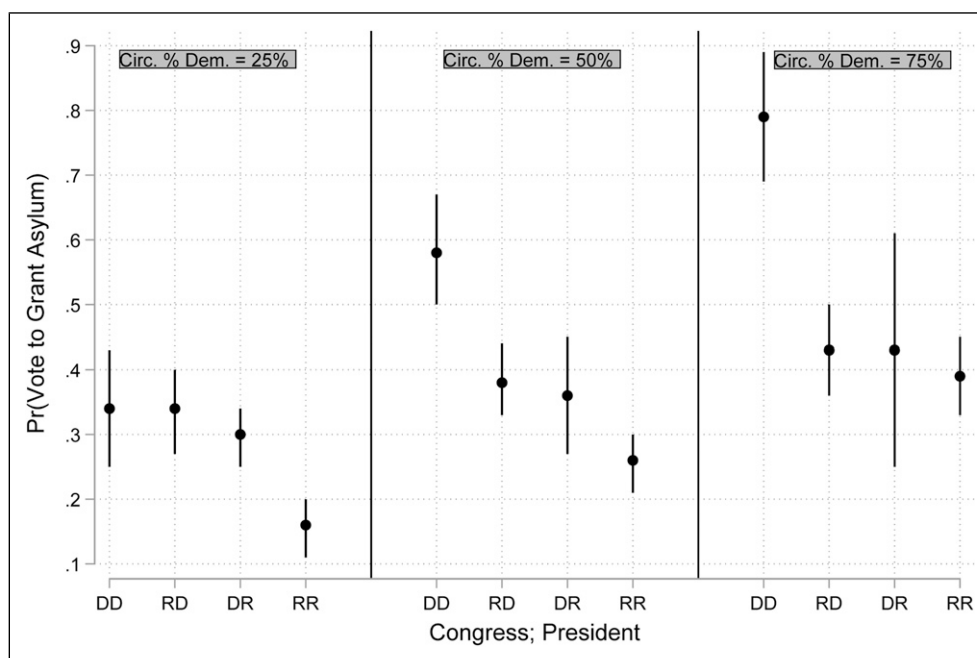


Figure 2. Effects of political preferences.

quite conservative. Only when there is unified GOP control of government do we note a substantial drop in the likelihood of receiving asylum, from about 30% to 16%. This drop is statistically distinct from the predicted grant in other political situations in the left-most panel ($\chi^2 = 13.23$ (.00)). As we expect, we see the most difference across types of political control in the middle panel where control of the circuit is uncertain. When Democrats have unified control the likelihood of vote to grant asylum is 58%, but that probability drop drastically when there is unified Republican control of government—to just 28%. The differences between the DD-scenario and the RR-scenario in the middle panel are statistically significant ($\chi^2 = 47.46$ (.000)). When the circuit is very liberal (right-most panel) the effects of unified Democratic control of government are dramatic, as the probability of an IJ vote to grant asylum is almost 80%. However, a notable effect here is that any version of mixed control (or unified Republican control) of government reduces the likelihood of a grant to the 40s. To us this suggests that IJs are only highly-likely to grant asylum when the likelihood of political pushback is unlikely from any branch. In many ways the situation with a moderate circuit (middle panel) and a liberal circuit (right panel) are similar—with unified Democratic control the asylum grant is well above 50%, but any Republican control, of either branch, will reduce grant rates dramatically and closer to the long-run norm in the mid-30s.

Figure 1 highlights the role of control of the two elected branches, but obscures how the composition of the circuit affects IJ decision making. These effects can be rather dramatic. To see this note that under unified Democratic control of government the likelihood of a vote to grant asylum varies from 33% when the circuit is conservative to 89% when the circuit is liberal. This represents a 170% increase in the probability that an individual is granted asylum. A similarly large effect is present with unified Republican control, as moving from a circuit that is 25% Democratic to one that is 75% Democratic represents an increase in the likelihood asylum is granted of 23-percentage points (in relative terms, an increase of 144%). Therefore, although control of the elected branches is clearly impactful, the impacts of such control are likely to vary widely by the circuit in which a given asylum case is adjudicated. Control by the elected branches does not have geographically uniform consequences. To put the effects of circuit composition in greater context (assuming a Republican Congress and a Democratic president), consider that an additional 86,000 immigrants would have been granted asylum if every asylum case decided since 1995 had been in circuits composed of 75% Democrats as opposed to circuits in which control was composed of 25% Democrats. This results from the 10-percentage point increase in the overall grant rate (note, the difference between the grant rates under 25% Democratic control and 75% Democratic control under mixed government is statistically significant ($\chi^2 = 4.94$ (.03))).

Table 2. Effects of Credibility Standards.

	AME
Circuit credibility Std	1 [−4, 5]
Congressional credibility Std	9 [2, 16]
Executive credibility Std	5 [−6, 16]

The effects of legal interventions are less straightforward. Recall, we have created a series of dummy variables to indicate when Congress promulgated increased credibility standards (in 2005), when the executive branch has adopted increased standards (2007), and whether the circuits have adopted these standards. Regressions indicate that executive and circuit adoptions of the increased credibility standards do not have statistically significant effects on the likelihood that an immigrant receives asylum. However, contrary to our naïve expectations (but in line with speculation from Miller et al., 2015a), the evidence suggests that congressional promulgation of the Real ID Act *increased* the likelihood of receiving asylum by 9-percentage points. This is unexpected because, intuitively, higher credibility standards ought to make any given claim easier for an IJ to dismiss. Effects for each standard are displayed in Table 2 below.

Finally, it is worth noting that case characteristics still play a major role in the likelihood that an individual is granted asylum. For instance, increasing the level of repression in the country that an asylee is fleeing from low (1 on the PTS scale) to high (5 on the PTS scale) increases the chances of being granted asylum by 21 [15, 27] percentage points. Similarly, having an attorney boosts the likelihood of asylum by 13 [8, 19] percentage points. Yet, to put these numbers in context, consider that moving from a circuit composed of 25% Democrats to one with 75% Democrats (under unified Democratic control of government) increases the likelihood of asylum by 45-percentage points, more than double the effect of fleeing the most repressive government regimes on Earth. Asylum decision making in the U.S. is intensely political and highly judicialized.

Discussion and Conclusions

Our findings have important implications for the scholarly understanding of both bureaucratic control and, more specifically, IJ behavior. Although IJs act like bureaucrats in the sense that they are responsive to the preferences of the elected branches, they also behave like judges who respond to fear of reversal. Circuit ideology's dramatic impact and legal standards' lack thereof suggests that responsiveness is rooted in an overall sense of circuit preferences rather than specific shifts in the law. It seems circuit influence is broader than the issuance of any one precedent. Asylum policy-making has been judicialized in the sense that the courts of appeal are asserting considerable power over IJ decision making in this area. The asylum system is far more judicialized, or less

“political,” than allocations of refugee status to applicants abroad. Circuit intervention acts as a check against the impact of turnover in the elected branches. The existence of a conservative circuit majority can dampen the effect of a unified Democratic government’s desire for more asylum grants, while a liberal circuit can weaken the impact of a GOP controlled governments’ push for fewer asylum grants. This result speaks to the growing literature in judicial politics examining the degree to which the courts rein in administrative discretion. The circuits appear to be winning the competition for influence.

With regard to bureaucratic accountability, we provide evidence that the elected and judicial branches are able to exert control over this part of the vast administrative state, but much depends on the degree of unified control of the government. Contra stories of either congressional or presidential dominance, the results here suggest that both branches can have a noticeable effect on IJ behavior, and that the ideological composition of the circuit in which the IJ sits tempers this relationship further. Who controls the bureaucracy? All of its principals simultaneously, at least according to the results of this analysis. Naturally, of course, this study is not about the entire bureaucracy, but rather one slice of it. Whether this extends to other types of agencies remains an open question. As we noted above, non-ALJs like IJs play a key role in federal adjudicative activity. Our findings for IJs may not apply to other judges who rule on policies that are less salient than immigration (Gormley, 1986). Future research should consider the extent to which the relationship we have identified depends on agency and policy type, or varies by the conditions under which administrative adjudicators make decisions.

Our research also has implications for the intense policy debates surrounding reform of the immigration system. We provide some answers for those who suggest we need to increase judicial control over IJs. Our findings suggest that the current state of affairs reflects a considerable amount of circuit influence. With regard to proposals for the creation of a centralized federal immigration court of appeals (Legomsky, 2010), our evidence indicates that circuits have the power to rein in IJs, at least within the area of asylum law. Federal appeals courts successfully communicate their preferences to IJs within their jurisdiction, and IJs are highly responsive to this information. The creation of one circuit to hear immigration appeals could therefore create more uniformity of asylum outcomes nationwide, assuming such uniformity is viewed a proper goal, as some have suggested (Ramji-Nogales et al., 2009). At the same time, our evidence suggests that significant variation within that circuit will persist. Clearly, IJs personal characteristics and the unique circumstances of the case will remain important factors determining outcomes, which will impact the level of consistency. In future research, we will delve more deeply into IJ responses to circuit preferences by employing matching techniques to examine the behavior of

the subset of IJs that make the majority of the decisions in the data. This research should yield additional insights into mechanisms for promoting the rule of law in immigration courts.

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Supplemental Material

Supplement material for this article is available in online.

Notes

1. <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4823>
2. <https://www.washingtontimes.com/news/2022/jun/20/doj-engaged-court-packing-steroids-immigration-jud/> ; <https://cis.org/Arthur/There-Ideological-Purge-Going-Immigration-Courts>, <https://www.aiala.org/infonet/immigration-courts>, <https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-us-immigration-courts-idUSKBN2B0179>
3. Administrative Conference of the United States, “Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal,” February 14, 2018. This number includes: , including 326 IJs employed by the DOJ. Other non-ALJs decide cases in the Patent and Trademark Office at the Department of Commerce (7856 patent examiners), the Internal Revenue Service (714 non-ALJs), the Department of Veterans Affairs (630 non-ALJs), and the National Labor Relations Board (600 non-ALJs).
4. Immigration and Nationality Act §241(b) (3). Empirically, past work has noted that IJs are heavily influenced by things like repression levels in an immigrant’s home country, whether the immigrant has an attorney, whether the immigrant has been in detention in the U.S. or not, and other strategic facets of the relationship between an immigrant’s country and the U.S. (e.g. Miller et al., 2015a; Miller et al., 2015b). We return to a discussion of these factors in the data section.
5. Information provided by TRAC at https://trac.syr.edu/immigration/reports/194/include/side_4.html#:~:text=According-to-current-Justice-Department,individual-cases-before-them-
6. 8 C.F.R. § 1003.1(h) (1)
7. 8 CFR § 1003.10(b).

8. Immigration and Nationality Act § 241(b) (3), 8 U.S.C.A. § 1231(b) (3).
9. Immigration and Nationality Act § 242(b) (2), 8 U.S.C.A. § 1252(b) (2).
10. The BIA is required to follow court of appeals precedent within the geographical confines of the relevant circuit. See [Matter of Anselmo](#) (Interim Decision), 20 I. & N. Dec. 25, 30–31, 1989 WL 331861 (May 11, 1989) (acknowledging this fact).
11. By responsiveness, we mean “the degree to which agents change their behavior as the desires of principals change;” in other words, when a Circuit court changes its preferred doctrine (to be more liberal/conservative), immigration judges alter their doctrine in the same direction (to be more liberal/conservative) ([Songer et al., 1994](#), 674).
12. This percentage of IJ asylum decisions that are appealed to the BIA is calculated for the time period of their analysis, 1990–2010 ([Miller et al., 2015a](#)).
13. This is consistent with our research as, during the time period of our analysis, the Supreme Court addressed only narrow issues concerning interpretations of criminal bars to asylum, the detention of applicants, and judicial review of government claims that changes in country conditions allow applicant’s safe return home ([INS v. Aguirre-Aguirre, 1999](#); [Johnson v. Guzman Chavez, 2021](#); [I.N.S. v. Orlando Ventura, 2002](#)). It also rejected a plea to rein in IIRIRA’s expedited removal power ([Department of Homeland Security v. Thuraissigiam, 2020](#)).
14. Prior research also indicates that circuit courts are influenced by the law in their decisions concerning administrative agencies. Therefore, we consider the influence of changes in the law on immigration judge decisions, as discussed further below.
15. Technically, the circuit court of appeals generally remands a case to the lower courts, rather than directly reversing the decision and either granting or denying asylum. The circuit remands with instructions to the administrative courts to make a decision consistent with the circuit opinion. We refer to this as reversal, for ease of discussion. The BIA, applying binding circuit precedent, can reverse the IJs decision.
16. The BIA’s asylum decisions before the Circuit will be denials of asylum by the BIA, because the government does not appeal BIA asylum grants to the Circuit. The BIA is presumed to speak for the Attorney General, and the Attorney General can unilaterally reverse a BIA decision if disagreement exists ([Miller et al., 2015a, 2015b](#), 107). But a BIA denial may either be a reversal of an IJs grant of asylum appealed by the government, or an affirmance of the IJs denial of asylum appealed by the applicant.
17. In addition to these measures of the political actors and courts, we re-estimate our models with alternative measures in the appendix, including using Judicial Common Space Scores for the circuit courts, and NOMINATE scores for the president and for Congress.
18. The effects of REAL ID are complicated to untangle and require research beyond the scope of the current project. Our strong suspicion is that REAL ID empowered the circuit courts given the legal ambiguity it introduces in the process of assessing applicant credibility. In the aggregate, this likely increased the overall grant rate. We plan future research to explore this possibility.

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