PRESIDENTIAL IDEOLOGY AND IMMIGRANT DETENTION

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In our nation's immigration system, a noncitizen charged with deportability may be detained pending the outcome of removal proceedings. These individuals are housed in remote facilities closely resembling prisons, with severe restrictions on access to counsel and contact with family members. Due to severe backlogs in the adjudication of removal proceedings, such detention may last months or even years.

Many of the noncitizens initially detained by enforcement officials have the opportunity to request a bond hearing before an administrative adjudicator called an Immigration Judge ("IJ"). Although these IJs preside over relatively formal, on-the-record hearings and are understood to exercise "independent judgement," concerns have been raised that they are subject to control by political superiors in the executive branch.

This Article analyzes approximately 785,000 custody decisions by IJs from January 2001 through September 2019 to explore the question of political influence over these adjudicators. Its bivariate analyses based on cross-tabulations, without additional controls, show that noncitizens have fared worse in bond proceedings during the Trump administration than they did during the prior two presidential administrations. Importantly, these differences were not limited to decisions rendered by Trump-appointed IJs. Rather, all IJs—regardless of the president whose Attorney General appointed them—have been more likely to deny bond or impose a higher bond amount during the Donald Trump Era than during the Barack Obama or George W. Bush ("Bush II") Eras. Although this analysis does not control for the myriad of demographic, political, economic, geographic, and institutional factors that could impact decision-making, and an analysis with controls could lead to different conclusions, these findings call into question the political independence of IJs making decisions on immigrant bonds.

INTRODUCTION

The detention of noncitizens pending deportation proceedings has been the subject of considerable controversy. Over the past year alone, the media has reported on the troubling conditions of confinement,[1] efforts to eliminate time limits for the detention of children,[2] and the diversion of funds from the Federal Emergency Management Agency ("FEMA") to finance additional bed space in detention centers.[3]

In the United States, a noncitizen charged with deportability may be detained pending the outcome of removal proceedings in immigration court. The immigrant detention system constitutes the largest single system for confinement in our nation.[4] Almost 400,000 individuals were detained in

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1 *See, e.g.*, Quinn Owen, *DHS Watchdog Finds 'Egregious Violations' at ICE Immigrant Detention Facilities*, ABC NEWS (June 6, 2019, 2:58 PM), https://abcnews.go.com/Politics/dhs-watchdog-finds-egregious-violations-ice-immigrant-detention/story?id=63534100 [https://perma.cc/B4P5-2LM2] (reporting on violations of government standards including spoiled food, poor medical care, and "standing-room-only conditions"); Ian Urbina, *The Capricious Use of Solitary Confinement Against Detained Immigrants*, ATLANTIC (Sept. 6, 2019), https://www.theatlantic.com/politics/archive/2019/09/ice-uses-solitary-confinement-among-detained-immigrants/597433 [https://perma.cc/425Y-4JMQ] (documenting the arbitrary use of solitary confinement).

2 *See, e.g.*, Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. TIMES (Aug. 22, 2019), https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html [https://perma.cc/AEU2-BSEE].

3 *See, e.g.*, Julia Ainsley & Frank Thorp V, *Trump Admin Pulling Millions from FEMA Disaster Relief To Send to Southern Border*, NBC NEWS (Aug. 27, 2019, 2:48 PM), https://www.nbcnews.com/politics/immigration/trump-admin-pulling-millions-fema-disaster-relief-send-southern-border-n1046691 [https://perma.cc/GJG4-ACXZ].

4 DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 6 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/A924-7F7N].

fiscal year 2018,[5] and on any given day, facilities hold up to 47,000 noncitizens.[6] Although immigrant detention has been characterized as civil rather than penological in nature,[7] immigrant detention facilities are virtually indistinguishable from jails and prisons.[8] Many are operated by private-prison corporations and are in remote locations far from detainees' communities.[9] There are significant restrictions on access to counsel[10] and

[5] U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 8 (2018), https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [https://perma.cc/B7EY-FSSJ] (reporting 396,448 initial detentions); *see also* KATHERINE WITSMAN, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2017, at 10 tbl.5 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [https://perma.cc/3XDF-VDGJ] (reporting 323,591 initial admissions into Immigration and Customs Enforcement ("ICE") Detention facilities in fiscal year 2017, from a high of 464,190 in 2012). Detentions of individuals from Mexico and the "Northern Triangle" countries of El Salvador, Guatemala, and Honduras constituted 83% of the total. *See id.*

[6] U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT: OPERATIONS AND SUPPORT: FISCAL YEAR 2019 CONGRESSIONAL JUSTIFICATION ICE-O&S - 13 (2019), https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf [https://perma.cc/7FZG-MQG7]. In fiscal year 2019, ICE requested funding for 47,000 immigrant detention beds, including 44,500 adult beds and 2,500 family beds. *Id.* The prior year it had requested funding for over 51,000 beds. *Id.*

[7] *See* Wong Wing v. United States, 163 U.S. 228, 235, 238 (1896) (invalidating criminal punishment for unlawfully present noncitizens without a trial, but noting, "We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid"); *cf.* Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATLANTIC Q. 621, 623 (2014) ("The glaring problem with the legal doctrine that constructs immigration detention as nonpunitive is that it is a fiction. Detention is punitive, and it is experienced as such by immigrants."); César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. REV. 1346, 1349–50 (2014) (identifying similarities between immigrant detention and criminal incarceration); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010) (suggesting that immigrant detention has evolved into a "quasi-punitive system of *immcarceration*").

[8] *See* SCHRIRO, *supra* note 4, at 2 ("With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate[d], as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards . . . and on correctional principles of care, custody, and control.").

[9] Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 28–29 & tbl.2 (2018). In fiscal year 2015, 10% of detention facilities were operated by private, for-profit prison corporations, and two-thirds of all immigrant detainees were held in such facilities. *Id.*

[10] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015) (finding that nondetained respondents in removal proceedings are almost five times more likely to secure representation by counsel than detained respondents).

contact with family members.[11] Substandard conditions in these facilities have been documented extensively.[12] The government and various media outlets have documented deficiencies in access to medical services,[13] lack of hygiene in bathrooms, and poor food quality,[14] as well as the extensive use of solitary confinement.[15] Given the severe backlog in the adjudication of removal proceedings, detention in this system may last months or even years.[16]

Many of the individuals initially detained by immigration-enforcement officers[17]—though not all[18]—have the right to a bond hearing before an

[11] *See* U.S. DEP'T OF HOMELAND SEC., OIG-19-47, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 11 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf [https://perma.cc/8N72-PSGK]. Unfortunately, in many cases the noncitizen is detained with family members, including children. *See generally* Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785 (2018) (examining asylum adjudication for families in detention).

[12] *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., OIG-19-47, *supra* note 11 (documenting results from unannounced site visits at four detention facilities and reporting unhealthy conditions, absence of outside recreation facilities, and unjustified strip searches, among other violations); *see also generally* SCHRIRO, *supra* note 4 (identifying deficiencies in the management of the immigrant detention system).

[13] *See, e.g.*, SCHRIRO, *supra* note 4, at 25–26; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-231, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN MANAGEMENT AND OVERSIGHT OF DETAINEE MEDICAL CARE (2016).

[14] *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., OIG-19-47, *supra* note 11, at 3–4, 8–10 (noting the failure of ICE facilities to comply with ICE's food and hygiene standards).

[15] Urbina, *supra* note 1; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-38, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE (2013).

[16] Ryo & Peacock, *supra* note 9, at 2 (finding that in fiscal year 2015, the average length of immigrant detention was thirty-eight days, but "tens of thousands were detained for many months or years").

[17] Immigration-enforcement officials within ICE who apprehend a noncitizen suspected to be removable make the initial determination as to whether the noncitizen will be detained pending the outcome of removal proceedings. For those who are not subject to mandatory detention, *see infra* note 18, the ICE official may release on conditional parole—release on recognizance—or on bond of at least $1,500. 8 U.S.C. § 1226(a) (2018); 8 C.F.R. §§ 236.1, 1003.19, 1236.1(d)(1) (2019).

[18] Congress *mandates* the detention of certain categories of noncitizens in removal proceedings, denying any opportunity for bond altogether. These include noncitizens apprehended at the border, as well as those removable on certain criminal and national security grounds. 8 U.S.C. §§ 1225(b), 1226(c); *see also* Demore v. Kim, 538 U.S. 510, 517–31 (2003) (affirming the constitutionality of mandatory detention under section 1226(c)). In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Supreme Court interpreted the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, to preclude any bond hearing for these categories of detainees even if their detention had been for prolonged periods of over six months. In last term's decision in *Nielsen v. Preap*, 139 S. Ct. 954 (2019), the Court again

immigration judge ("IJ") to argue for their release.[19] IJs—the same officials who ultimately determine whether the noncitizen will be deported—are adjudicatory officials who preside over formal, on-the-record hearings.[20] They are structurally insulated from enforcement or prosecutorial duties and are understood to exercise "independent judgment" in their decision-making.[21] Yet, housed within the Department of Justice's Executive Office for Immigration Review ("EOIR"), they are explicitly subordinate to the Attorney General.[22] Further, they do not enjoy the tenure protections of Administrative Law Judges ("ALJs"),[23] much less those of Article III federal judges.[24]

It is commonly accepted that the decisions of enforcement officials may,

interpreted the INA, this time to mandate the detention without bond of noncitizens arrested by immigration officials years after being released from criminal incarceration.

The Government Accountability Office ("GAO") reported that from fiscal year 2011 to fiscal year 2013, 77% to 80% of noncitizens in detention facilities were subject to mandatory detention. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 28 (2014).

[19] 8 C.F.R. § 1003.19.

[20] *See* 8 U.S.C. § 1229a (describing removal proceedings).

[21] 8 C.F.R. § 1003.10.

[22] 8 U.S.C. § 1101(b)(4) (defining "immigration judge" as "an attorney whom the Attorney General appoints" and who "shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe").

[23] *See* MICHAEL ASIMOW, ADMIN. CONFERENCE OF THE U.S., EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 1, 62–68 (2016) (cataloging different types of agency adjudications presided over by non-ALJs, including immigration-court hearings); KENT BARNETT, MALIA REDDICK, LOGAN CORNETT & RUSSELL WHEELER, ADMIN. CONFERENCE OF THE U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 60–61 (2018) (comparing tenure protections of ALJs with other agency adjudicators, including IJs); Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 143–45, 153–57 (2019) (discussing the "new world" of agency adjudication occurring before non-ALJs and noting the uniqueness of litigation before the Patent Trial and Appeal Board ("PTAB") because its adjudications are not subject to review by the politically appointed head of the agency).

[24] *See* U.S. CONST. art. III, § 1 (providing that judges "shall hold their Offices during good Behaviour, and shall . . . receive . . . Compensation, which shall not be diminished during their Continuance in Office"). Immigration law scholars have long recognized the importance of independence among IJs. *See, e.g.*, Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 385–403 (2006) (articulating the necessity of independence among the IJ corps); *cf.* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Déjà Vu of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 481 (2007) (discussing the "tension between the oversight that promotes consistency and accuracy and the decisional independence of agency adjudicators").

and perhaps should, comply with the policy preferences of the president.[25] But whether *adjudicatory* decisions, even those made by administrative officials, should be made on the basis of a president's political agenda is far more controversial.[26] The constitutional system places a heavy premium on

[25] For an examination of the constitutional, historical, and practical scope of presidential authority over immigration law, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 461–63 (2009). *See also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 962–63 (1998) (examining the separation-of-powers concerns raised by executive branch detention of noncitizens). For discussions of presidential control over administrative agencies more generally, see Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 50–52, 65–70 (2006) (examining mechanisms for presidential influence over agency decision-making); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 143 (2018) (discussing the resistance of career agency officials to presidential control and noting practical constraints on the bureaucracy's ability to constrain presidential action); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–38 (2011) (analyzing the allocation of power between different agency stakeholders, including politically appointed agency leadership and civil servants); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 610–12 (2018) (identifying concerns associated with presidential control over agencies); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures As Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 245 (1987) (examining how agency structure ensures bureaucratic compliance with the desires of political actors); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 423–26 (2009) (examining how internal constraints on agency action work with external constraints to check "aggrandized presidential authority"); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1246–48 (2017) (examining agency structures, civil service, and professionalism as forming a body of law that constrains executive overreach); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 (2015) (examining how the distribution of power between political appointees and the independent civil service in the modern administrative state produces checks and balances to constrain agency power); and Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 3 (1994) (examining the role of the presidency in agency action).

[26] *See, e.g.*, Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1300 (1962) ("Everyone, including the presidential activists, seems to agree that 'the outcome of any particular adjudicatory matter is . . . as much beyond . . . [the President's] concern . . . as the outcome of any cause pending in the courts . . . .'" (alteration in original) (quoting JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 33 (1960))); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013) (asserting the existence of a "network of tacit unwritten conventions" protecting agency adjudications from political interference); *cf.* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1480 (2009) (maintaining that a major issue regarding ALJs is not whether they are sufficiently independent, but rather whether they are sufficiently deliberative); Charles H.

the independence of adjudications, reflected in the extraordinary tenure protections afforded to Article III judges.[27] Martin Redish and Lawrence Marshall have characterized adjudicatory independence as the "*sine qua non* of procedural due process," expressing concern that "if the adjudicator is himself an integral part of the governmental body on the other side of the case," then the "government would, in effect, be the judge of its own case."[28] As such, even then-Professor Elena Kagan—who as an academic championed presidential control over agency decisions[29]—conceded that in the context of individual adjudications, "presidential participation . . . of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies."[30] Adjudicatory independence is particularly important in the context of immigrant detention decisions, given the explicit deprivation of liberty as well as the length and conditions of confinement. At present, however, little is known about whether, as an empirical matter, IJs comply with the policy preferences of the president and his political appointees or whether they instead preserve decision-making independence.[31]

Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 272–73 (1994) (advocating for increased supervision and monitoring over agency adjudicators); Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. 589, 603–07 (1993) (proposing a system to evaluate the performance of ALJs); James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1191–92, 1209–34 (2006) (arguing that agency adjudicators should be impartial but not independent).

[27] U.S. CONST. art. III, § 1.

[28] Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 477 (1986); *see also* Kent H. Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 524–37 (2019) (discussing the due process interest in non-ALJ impartiality).

[29] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251–52 (2001).

[30] *Id.* at 2363.

[31] Scholars outside of the immigration field have examined the independence of agency adjudicators, focusing largely on political supervision over ALJs. *See, e.g.*, Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1, 3–4 (2017) (examining the decision-making of ALJs within the Securities and Exchange Commission ("SEC")); Charles D. Delorme, Jr., R. Carter Hill & Norman J. Wood, *The Determinants of Voting by the National Labor Relations Board on Unfair Labor Practice Cases:1955–1975*, 37 PUB. CHOICE 207, 216 (1981) (examining the impact of presidential ideology on National Labor Relations Board ("NLRB") members' voting patterns); Nicholas R. Seabrook, Eric M. Wilk, & Charles M. Lamb, *Administrative Law Judges in Fair Housing Enforcement: Attitudes, Case Facts, and Political Control*, 94 SOC. SCI. Q. 362, 363, 373 (2013) (conducting an empirical assessment of the voting patterns of ALJs assigned to fair housing cases); Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L.

In earlier work, we evaluated the extent to which IJs operate independently from their political superiors in rendering the final decision to remove.[32] Using logistic regression and controlling for over a dozen variables commonly analyzed in assessing deportation outcomes, we found that the identity of the presidential administration that *appointed* the IJ was not a statistically significantly factor in predicting whether or not that judge ordered a noncitizen deported from the country.[33] We did find, however, that the identity of the presidential administration *in control at the time of the removal decision* was a statistically significant predictor of removal outcomes.[34] For example, George W. Bush ("Bush II") appointees were 22% more likely to order removal during the Trump Era than during the Obama years, and 22% less likely during the Bush II Era than the Trump Era.[35] These results suggest that a sitting president may exert some measure of direct or indirect influence over IJs' decisions to deport.

This project shifts our attention from the final outcome of removal proceedings to the decision to detain *pending* removal proceedings. Several studies have examined immigrant detention decisions. In one of the earliest of these, Janet Gilboy analyzed a sample of cases in Chicago immigration court in 1983 to examine the rates at which IJs released noncitizens from detention or reduced bond amounts set by enforcement officials.[36] Other

223, 226–28 (2016) (examining the NLRB's review of ALJ decisions); Cole D. Taratoot & Robert M. Howard, *The Labor of Judging: Examining Administrative Law Judge Decisions*, 39 AM. POL. RES. 832, 834 (2011) (finding no relationship between case outcomes of ALJs and political superiors at the NLRB); Cole D. Taratoot, *The Politics of Administrative Law Judge Decision Making at the FCC in Comparative Licensing Cases*, 38 JUST. SYS. J. 37, 37–38 (2017) (finding that ALJs at the Federal Communications Commission ("FCC") were not subject to political influence by political superiors in the executive branch); Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315, 362 (2017) (finding no evidence that ALJs within the SEC were biased in favor of the agency).

[32] Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 579 (2020).

[33] *Id.* at 621.

[34] *Id.*

[35] *Id*.

[36] Janet A. Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 SAN DIEGO L. REV. 347, 369–70 (1987) (finding that among a sample of 126 detainees, 95% obtained a reduction in bond amount—including 16% who were released altogether—and that bonds were reduced by an average of 68%); *see also* Robert M. Sanders, *Immigration Bond: An Analysis of the Determinants of Official Decisions*, 20 CRIME, L. & SOC. CHANGE 139, 156–59 (1993) (examining detention decisions of enforcement officials—rather than IJs—in the Miami region in the late 1980s to identify factors impacting detention decision, including criminal background, financial assets, country of origin, sex, and family status).

studies, notably those conducted by Ingrid Eagly and Steven Shafer[37] and by Emily Ryo,[38] have identified various factors that were associated with an IJ's decision to release a noncitizen or reduce bond amounts—including attorney representation, whether the noncitizen was part of a family unit claiming asylum, criminal history, and national origin, among other variables. This Article, however, is the first to focus on the potential for *political influence* over detention decisions. A given presidential administration might seek to influence detention decisions through its power to *appoint* like-minded immigration judges who are likely to render decisions in accord with the administration's policy preferences or through its power to *supervise* immigration judges—for example, through implicit threats to employment for decisions that depart from the administration's agenda.

Presidential administrations have been explicit in their varied policy preferences with respect to immigrant detention. For example, the Obama administration expressed a clear preference for detaining noncitizens with criminal convictions as well as recent arrivals.[39] The Trump administration, for its part, has broadened its priorities to maximize the number of noncitizens detained regardless of whether they have criminal backgrounds.[40]

[37] Eagly & Shafer, *supra* note 10, at 70 (evaluating the impact of attorney representation on detention decisions and finding that represented noncitizens were almost seven times more likely to be released from detention than pro se litigants); *see also* Eagly et al., *supra* note 11, at 837–38 (examining the adjudication of claims brought by detained families seeking asylum and finding that 19% of such families were released from custody, as compared to only 1% of individuals who were not part of family units).

[38] Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 118–19, 146–47 (2016) [hereinafter Ryo, *A Study of Immigration Bond Hearings*] (examining a sample of long-term detainees in the Central District of California to find that the only legally relevant factor impacting IJs' custody decisions was the noncitizen's criminal history, and factors relating to flight risk such as family ties or employment were not statistically significant predictors in immigrant detention decisions); Emily Ryo, *Predicting Danger in Immigration Courts*, 44 LAW & SOC. INQUIRY 227, 245–48 (2019) [hereinafter Ryo, *Predicting Danger*] (analyzing a subset of the earlier sample to find that a noncitizen was more likely to be detained on the ground of dangerousness if he or she was Central American, proceeded *pro se*, or had a history of felony and violent convictions).

[39] Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 3–5 (Nov. 20, 2014) [hereinafter Memorandum from Jeh Charles Johnson], https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion%281%29.pdf [https://perma.cc/PYV7-WBTC].

[40] Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017) (announcing the policy of detaining all individuals suspected of violating immigration laws). President Trump and his former Attorney General Jeff Sessions announced the end of a policy they termed "catch and release," whereby noncitizens were apprehended and then released while their removal proceedings were pending. *See, e.g.*, Memorandum from the President to Sec'y of State et

Anecdotal reports suggest that IJs have been responsive to those preferences. One media report describes the policy changes between the Obama and Trump Eras:

> The Obama [a]dministration directed immigration judges to use their discretion to release eligible immigrants on low-cost bonds or without any bond at all . . . . That is no longer the case under President Donald Trump . . . . Instead, immigration court judges . . . are increasingly denying bond requests altogether, or setting them at amounts in excess of $10,000 . . . .[41]

This Article examines IJs' responsiveness to the policy preferences of their political superiors within the executive branch. We analyze government data from approximately 785,000 bond proceedings held in immigration courts from January 2001 through September 2019.[42] Our study thus covers

al., Ending "Catch and Release" at the Border of the United States and Directing Other Enhancements to Immigration Enforcement, 83 Fed. Reg. 16,179 (Apr. 13, 2018); Jeff Sessions, Att'y Gen., Remarks on Immigration Enforcement (Apr. 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement [https://perma.cc/7AMM-BFUF]; Jeff Sessions, Att'y Gen., Remarks to the Executive Office for Immigration Review Legal Training Program (June 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal [https://perma.cc/C28G-BB9H]; *Fact Sheets: Trump Administration Immigration Policy Priorities*, WHITE HOUSE (Oct. 8, 2017), https://www.whitehouse.gov/briefings-statements/trump-administration-immigration-policy-priorities [https://perma.cc/Z4GR-5ZQQ].

41 Daniel Bush, *Under Trump, Higher Immigration Bonds Mean Longer Family Separations*, PBS NEWS HOUR (June 28, 2018, 2:38 PM), https://www.pbs.org/newshour/politics/under-trump-higher-immigration-bonds-mean-longer-family-separations [https://perma.cc/YU4B-WWAM].

42 *See Frequently Requested Agency Records*, U.S. DEP'T JUST., EXECUTIVE OFF. FOR IMMIGR. REV. (Jan. 13, 2020), https://www.justice.gov/eoir/frequently-requested-agency-records [https://perma.cc/XB3V-4K59]. In 2008, TRAC researchers at Syracuse University successfully filed a lawsuit under the Freedom of Information Act ("FOIA") to force EOIR to release the data, and EOIR published these data on its website pursuant to reporting standards under the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (codified at 5 U.S.C. § 552 (2018)). We limited the analysis to cases involving removal, detention, or exclusion proceedings. Overall, 99% of the bond proceedings fell within these categories. *See* OFFICE OF THE CHIEF IMMIGRATION JUDGE, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 118 (2016) [hereinafter IMMIGRATION COURT PRACTICE MANUAL], https://www.justice.gov/eoir/file/1205666/download [https://perma.cc/GY7U-CDAH]. We eliminated the several hundred observations of bond proceedings for the following case types: (1) "credible fear" cases, 8 C.F.R. § 1003.42 (2019); (2) "withholding-only" cases, 8 U.S.C. § 1231(b)(3) (2018); "reasonable fear" cases involving noncitizens with a reinstated order of removal, 8 C.F.R. § 208.31; (4) "asylum only" cases, 8 C.F.R. § 253.1(f); (5) "claimed status review," 8 C.F.R. § 1235.3(b)(5); and (6) claims under the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No.

custody decisions rendered during the Bush II Era (Jan. 20, 2001 through Jan. 19, 2009), the Obama Era (Jan. 20, 2009 through Jan. 19, 2017), and the Trump Era (Jan. 20, 2017 through September 30, 2019). We refer to each of these periods as presidential "eras." The data on bond hearings generally provide detailed information on case outcomes, referring to whether the individual was released on recognizance, granted bond, denied bond, or some other decision; the identity of the IJ who made the decision; and, where bond was granted, the amount of bond set. We analyze these data to identify descriptive political trends in bond decisions across different presidential eras. For example, are noncitizens less likely to be released on recognizance during the Trump Era as compared to preceding administrations? Are they more likely to be denied bond altogether? Where bond is granted, are bond rates higher today than they were during the Obama or Bush II Eras? We further analyze how different appointee cohorts behave during each era. For example, do IJs appointed by Clinton differ in their behavior across different presidential eras?

We find that on every metric of bond hearings, noncitizens fare worse during the Trump Era than they did during either the Bush II or Obama Eras. Although rates of release on recognizance were extremely low throughout the period of study, they started at 2% of all cases decided during the Bush II Era, dropping to 0.24% during the Obama Era and then to 0.18% during the Trump Era. Similarly, while only 7% of custody hearings during the Bush II Era resulted in an outright denial of bond, that figure rose to 14% during the Obama Era and 19% during the Trump Era. Perhaps more telling, overall win rates—release on recognizance and reduced bond amount—indicated that all appointee cohorts except Obama appointees were less likely to award relief to noncitizens during the Trump Era than during the Obama Era. For example, while IJs appointed during the George H.W. Bush ("Bush I") Era granted a favorable outcome to the noncitizen in 39% of all cases between 2001 and 2019, they awarded such relief in only 11% of cases during the Trump Era. Although this analysis does not control for other factors, these preliminary, bivariate results suggest it is possible that the Trump administration may influence bond decisions not only through its power to appoint more like-minded IJs, but also though its power to supervise earlier appointees.

An examination of bond amounts set by IJs reveals a similar picture. Bond medians grew from $5,000 during the Bush II Era to $6,500 during the Obama Era, and then jumped to $8,000 during the Trump Era. Indeed, 42% of the bonds set by IJs during the Trump Era were $10,000 or higher, as

105-100, § 203, 111 Stat. 2160, 2193–2200 (1997). *Id. See also* IMMIGRATION COURT PRACTICE MANUAL, *supra*, at 118–33. Rescission, departure control, and DD appeal cases were also excluded.

compared to only 23% and 25% for the Obama and Bush II Eras, respectively. Again, breaking down these results by appointee cohort indicates that earlier-appointed IJs mostly issued different bond amounts during the Trump Era than during preceding administrations.

Our bivariate analyses do not control for other factors that might independently influence bond decisions. We do not control for the multitude of potential independent variables such as the individual circumstances of the noncitizen (such as whether he or she has a family or was represented by counsel), the demographic features of the IJs, changes in migration patterns, the sociopolitical or socioeconomic contexts in which bond decisions are made, geographic features of the court hearing the case, or the institutional behavior of other political actors like Congress, the circuit courts, or the Board of Immigration Appeals ("BIA").[43] As such, our conclusions are purely descriptive and do not seek to make causal inferences. They do, however, show descriptive trends that indicate statistically significant differences and raise the question of whether IJs are truly politically independent. We hope that these findings will encourage further research into the factors that shape, and those that should shape, immigrant detention decisions.

This Article proceeds as follows. Part I sets forth the legal and policy context in which immigrant custody decisions are rendered in immigration courts. Part II sets forth our analyses. Part III considers avenues for further research. We conclude with some thoughts on the appropriate role of political actors in immigrant detention decisions.

I. THE LEGAL AND POLICY CONTEXT FOR IMMIGRANT DETENTION

This section sets forth the legal and policy context for immigrant detention decisions. Part A summarizes the legal framework in which immigrant detention decisions are made. Part B describes how political preferences for immigrant detention have shifted through the Bush II, Obama, and Trump administrations.

A. The Legal Framework

Immigrant detention occurs in the context of removal proceedings that determine whether a noncitizen can be removed from the country and, if so, whether he or she warrants a discretionary grant of relief from removal. Noncitizens within the United States are removable where, for example, their presence is unauthorized—perhaps because they entered without inspection or overstayed a visa[44]—or where they are lawfully present but engaged in

[43] Unlike the current analysis, in our analysis of removal decisions, we controlled for these variables. Kim & Semet, *supra* note 32, at 607–18.

[44] 8 U.S.C. §§ 1182(a)(7), 1227(a)(1). Visa overstays account for approximately 40% of the

conduct that renders them deportable, such as criminal activity.[45] These individuals generally are entitled to a relatively formal hearing to determine whether they will in fact be removed.[46] At these hearings, the noncitizen is entitled to be represented by private counsel, to present evidence and witnesses, to cross-examine evidence and witnesses, and to a formal record of the proceedings.[47]

Noncitizens often do not contest the grounds for removal, and their individual merits hearings typically focus on whether the immigration court will grant relief from removal.[48] Congress has legislated various forms of discretionary relief, including "asylum" where the individual establishes a "well-founded fear of persecution" on one of five protected grounds;[49] "waivers" of various grounds for removability;[50] and "cancellation of removal" where the noncitizen satisfies a list of statutory eligibility factors, including significant hardship to family members if removal were effectuated.[51] For decades, noncitizens could also seek a form of relief called "administrative closure," which removed a case from the immigration court's active docket where, for example, the noncitizen would soon qualify for legal residence through a family member or was in the process of litigating a direct challenge to a criminal conviction that formed the basis for removal.[52] Given

undocumented population. *Fact Sheets: Enforce Immigration Laws Across the United States*, WHITE HOUSE (Oct. 8, 2017), https://www.whitehouse.gov/briefings-statements/enforce-immigration-laws-across-united-states [https://perma.cc/X42J-85YV]. In fiscal year 2016, 628,000 noncitizens overstayed their visas. *Id.*

[45] *See* 8 U.S.C. § 1227(a)(2).

[46] *See id.* § 1229a (describing removal proceedings). Some noncitizens are not entitled to formal removal proceedings and are instead subject to "expedited removal." *See id.* § 1225(b)(1) (applying expedited removal to certain categories of noncitizens lacking proper documentation or engaged in fraud); *id.* § 1225(c) (extending expedited removal to individuals posing a threat to national security).

[47] 8 U.S.C. § 1229a(b)(4).

[48] T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 723 (8th ed. 2016).

[49] *See* 8 U.S.C. § 1101(a)(42)(A) (defining the term "refugee"); *id.* § 1158 (setting forth procedures for granting asylum to individuals within the United States or at the U.S. border who meet the statutory definition of "refugee"). Individuals may file for asylum affirmatively, before removal proceedings have been initiated, or defensively, after removal proceedings have been initiated. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-72, ASYLUM: VARIATION EXISTS IN OUTCOMES OF APPLICANTS ACROSS IMMIGRATION COURTS AND JUDGES 1–2 (2016).

[50] *See, e.g.*, 8 U.S.C. §§ 1182(h), 1227(a)(1)(E)(iii), (a)(1)(H), (a)(7) (setting forth waiver categories).

[51] *Id.* § 1229b.

[52] The Trump administration curtailed the use of administrative closure as an option for IJs. In *In re Castro-Tum*, 27 I. & N. Dec. 271 (Att'y Gen. 2018), the Attorney General

the significant evidentiary burdens on noncitizens in seeking these forms of relief[53] and the staggering backlog of pending cases,[54] these removal proceedings often take years to resolve.[55] A crucial question for noncitizens, then, is whether they will be detained pending the completion of those proceedings.[56]

When an individual is initially apprehended on suspicion of removability,[57] enforcement officials within the Department of Homeland Security's ("DHS") Immigration and Customs Enforcement ("ICE") agency make the initial determination as to whether the individual will be detained.[58] Congress has imposed *mandatory* detention for certain categories of noncitizens, including those apprehended at the border[59] and those who are

exercised his refer-and-review authority to overturn Board of Immigration Appeals ("BIA") precedent acknowledging the propriety of "administrative closure." The Fourth Circuit overturned *In re Castro-Tum* in *Romero v. Barr*, 937 F.3d 282, 297 (4th Cir. 2019), preserving the availability of this form of discretionary relief in that circuit.

53 *See* 8 U.S.C. § 1229a(c)(4) (providing application criteria for relief from removal).

54 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 22, 25–26 (2017), https://www.gao.gov/assets/690/685022.pdf [https://perma.cc/DC3T-VKQY] (describing increases in initial case-completion time and the resulting case backlog).

55 *See id*.

56 For an overview of the statutory framework for immigrant detention, see generally HILLEL R. SMITH, CONG. RESEARCH SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW (2019), https://fas.org/sgp/crs/homesec/R45915.pdf [https://perma.cc/PF34-LHDK].

57 8 C.F.R. § 236.1 (2019). ICE officials are also responsible for representing the government in prosecuting the noncitizen during removal proceedings. IMMIGRATION COURT PRACTICE MANUAL, *supra* note 42, at 2.

58 *See* 8 C.F.R. § 236.1 (setting forth regulations for detention of noncitizens prior to order for removal).

59 *See* 8 U.S.C. § 1225(b). The enforcement officials of the DHS retain authority to release these noncitizens through a grant of humanitarian parole "for urgent humanitarian reasons or significant public benefit" pursuant to 8 U.S.C. § 1182(d)(5). For many years, the BIA concluded that arriving noncitizens who lack proper documentation—and are thus "subject to expedited removal"—and establish a credible fear of persecution to form an asylum claim were not subject to mandatory detention and remained eligible for release on bond if they were apprehended at a port of entry, but not if they were apprehended between ports of entry. *In re* X-K-, 23 I. & N. Dec. 731, 732 (BIA 2005). Attorney General Bill Barr overruled that decision in *In re M-S-*, 27 I. & N. Dec. 509 (Att'y Gen. 2019). The Western District of Washington, however, has concluded that individuals apprehended in the nation's interior and subject to expedited removal are constitutionally entitled to a bond hearing before an IJ if they establish a credible fear of persecution. Padilla v. U.S. Immigration & Customs Enf't, 387 F. Supp. 3d 1219, 1223, 1232 (W.D. Wash. 2019), *appeal filed*, No. 19-35565 (9th Cir. July 5, 2019).

removable on certain criminal and national security grounds.[60] For those who are not subject to mandatory detention, ICE exercises discretion to release the noncitizen on conditional parole (also known as release on recognizance), set a bond of at least $1,500, or deny bond altogether.[61]

An individual who has been detained by ICE enforcement officers, however, has a right to appeal that initial custody determination by seeking a bond hearing before the IJ.[62] Like the ICE officials before them, IJs have authority to release the noncitizen on conditional parole, set a bond amount, or deny bond altogether.[63] Children are subject to different detention rules.[64]

Although IJs are also responsible for adjudicating the question of whether the noncitizen ultimately will be removed,[65] regulations provide that bond proceedings must be "separate and apart from, and shall form no part of" the removal proceeding.[66] The IJ may consider any information available to him

[60] 8 U.S.C. § 1226(c)(1). These individuals may be released only for witness-protection purposes. *Id.* § 1226(c)(2).

[61] *Id.* § 1226(a); *see also* 8 C.F.R. §§ 236.1, 1236.1 (setting forth regulations for detention of noncitizens prior to order for removal). Conditional parole pursuant to § 1226(a)(2)(B) differs from humanitarian parole pursuant to § 1182(d)(5). Conditional parole allows the release of a noncitizen who is subject to discretionary detention provisions and may impose conditions on release. 8 U.S.C. § 1226(a)(2)(B). Humanitarian parole allows the release of any arriving noncitizen, including those subject to mandatory detention, but only where such release is for an "urgent humanitarian reason or significant benefit." *Id.* § 1182(d)(5). Conditional parole may be granted by either DHS officials or an IJ; humanitarian parole is only available to be granted by DHS officials. *See In re* Castillo-Padilla, 25 I. & N. 257, 260–61 (BIA 2010).

[62] 8 C.F.R. § 1003.19; *see also id*. § 1236.1(d) (allowing noncitizens to request amelioration of release conditions). Such hearings are sometimes referred to as "bond redetermination hearings" or "custody redetermination hearings." Noncitizens subject to mandatory detention generally are not entitled to a bond hearing before an IJ. *See id.* § 1003.19(h)(1)(i). A noncitizen may seek a "Joseph" hearing for the IJ to determine whether he or she falls within one of the categories for mandatory detention. *See In re* Joseph, 22 I. & N. Dec. 799, 800 (BIA 1999).

[63] 8 U.S.C. § 1226(a); *see also* 8 C.F.R. § 236.1(d) (providing that requests for amelioration of custody conditions are made to IJs); *id.* § 1003.19(a) (providing that custody and bond determinations are reviewable by IJs).

[64] In a class action lawsuit over juvenile detention, the government entered into a settlement agreement in 1997 known as the *Flores* Settlement imposing time limits to the detention of juveniles. *See* Flores v. Sessions, 862 F.3d 863, 866, 869 (9th Cir. 2017) (discussing the *Flores* litigation and settlement). The Trump administration has taken the position that those limits apply only to unaccompanied juveniles, not to children traveling with parents. 84 Fed. Reg. 44,392 (Aug. 23, 2019) (to be codified at 8 C.F.R. pts. 212, 236). *See generally* Peter Margulies, *What Ending the Flores Agreement on Detention of Immigrant Children Really Means*, LAWFARE (Aug. 29, 2019, 5:39 PM), https://www.lawfareblog.com/what-ending-flores-agreement-detention-immigrant-children-really-means [https://perma.cc/LG6H-YF3D] (describing shifting policies on the detention of immigrant children).

[65] 8 U.S.C. § 1229a(a)(1).

[66] 8 C.F.R. § 1003.19(d).

or her in rendering the custody decision.[67] A noncitizen may subsequently request an additional bond hearing after the first, but only upon showing that circumstances have materially changed.[68]

At the start of October 2019, there were 442 IJs serving across the United States—the most in U.S. history.[69] IJs possess many of the powers associated with ordinary judges; for example, they are authorized to administer oaths, receive evidence, examine and cross-examine witnesses, issue subpoenas, and hold individuals in contempt.[70] IJs do not possess enforcement or prosecutorial responsibilities. Rather, they are designed to be independent and apolitical. Indeed, regulations provide: "In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgement and discretion . . . ."[71] Due process may well mandate such independence given the liberty interests at stake in detention decisions.

Despite these norms of adjudicatory independence, IJs are executive branch officials subordinate to the Attorney General. The Immigration and Nationality Act ("INA") explicitly provides they shall be appointed by the Attorney General and "subject to such supervision and shall perform such duties as the Attorney General shall prescribe."[72] IJs do not enjoy the tenure protections of ALJs under the Administrative Procedure Act ("APA").[73] Instead, their independence is protected only to the extent of ordinary civil service laws.[74]

Outside of the mandatory-detention context, the Supreme Court has authorized the detention of a noncitizen pending removal proceedings on two grounds only: (1) to ensure the noncitizen appears for removal proceedings[75]

[67] *Id.*
[68] *Id.* § 1003.19(e).
[69] [To come.]
[70] 8 U.S.C. § 1229a(b)(1) (2018).
[71] 8 C.F.R. § 1003.10.
[72] 8 U.S.C. § 1101(b)(4).
[73] *See supra* note 23.
[74] *See* OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 135, 137 (2008) [hereinafter DOJ INVESTIGATION OF POLITICIZED HIRING], https://oig.justice.gov/special/s0807/final.pdf [https://perma.cc/L44T-C599] (detailing an investigation into the hiring of IJs, "which are career positions protected by the civil services laws"); *see also* Legomsky, *supra* note 24, at 372–79 (describing civil service protections of IJs and the BIA).
[75] *See* Demore v. Kim, 538 U.S. 510, 527–28 (2003) (noting that detention "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings").

or (2) for public safety reasons.[76] Circuit courts frequently affirm that immigrant detention is warranted only where the noncitizen poses a flight risk or danger to the community.[77] IJs may consider a wide range of factors in determining flight risk or public safety risk, including whether the noncitizen has a fixed address in the United States, length of U.S. residence, family ties, employment history, record of court appearances, criminal record, history of immigration violations, prior attempts to flee, and manner of entry into the United States.[78] IJs enjoy a great deal of discretion in determining which factors to consider.[79] The IJ's discretion is further enhanced by the lack of federal court review over detention decisions. The IJ's decision is subject to review by the BIA,[80] but the INA provides that decisions "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole" shall not be subject to judicial review.[81]

B. Policy Preferences of Political Superiors Within the Executive Branch

IJs are understood to exercise "independent judgment" based on the

[76] *See* Carlson v. Landon, 342 U.S. 524, 541, 544 (1952) (sustaining the detention of Communist noncitizens in removal proceedings for public safety reasons).

[77] *See, e.g.*, Guerrero-Sanchez v. Warden York Cty. Prison, 905 F.3d 208, 224 & n.12, 226 n.15 (3d Cir. 2018) (concluding that detention is permitted only if a noncitizen "poses a risk of flight or a danger to the community" or if an "alien's release or removal is imminent" (first quoting Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015), *vacated by* Shanahan v. Lora, 138 S.Ct. 1260 (2018) (mem.); then quoting Diouf v. Napolitano, 634 F.3d 1081, 1092 n.13 (9th Cir. 2011))); Hernandez v. Sessions, 872 F.3d 976, 982 (9th Cir. 2017) (quoting *In re* Guerra, 24 I. & N. Dec. 37, 38 (BIA 2006), *abrogated on other grounds by* Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass. 2018)) (noting that detention depends on whether a noncitizen "present[s] a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight"); Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1217 (11th Cir. 2016) (concluding that Congress intended for immigrant detention to "prevent[] flight and recidivism"); *see also* 8 C.F.R. § 236.1(c)(8) (2019) (noting that an arresting officer may release certain noncitizens provided that such release would not pose a danger and that the noncitizen is likely to appear for future proceedings); *id.* § 1236.1(c)(8) (applying the same standard of release to noncitizens not covered under § 236.1(c)(8)); *In re* Adeniji, 22 I. & N. Dec. 1102, 1111–13 (BIA 1999) (applying § 236.1(c)(8)), *abrogated by* Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass. 2018) (holding that the burden of proving flight risk or dangerousness lies with the government, not the noncitizen).

[78] *In re Guerra*, 24 I. & N. Dec. at 40.

[79] *Id.* at 37; *see also Carlson*, 342 U.S. at 543 (noting that the Attorney General is vested with wide discretion as to bail in cases involving noncitizens).

[80] 8 C.F.R. § 1003.38(a).

[81] 8 U.S.C. § 1226(e) (2018). The Supreme Court has ruled, however, that noncitizens retain the right to habeas review to challenge their detention as a violation of the U.S. Constitution or federal statute. Demore v. Kim, 538 U.S. 510, 517 (2003) (holding that § 1226(e) does not bar habeas review).

record of the proceedings, but they may, nonetheless, be susceptible to deciding cases in accordance with the policy preferences of their political superiors in the executive branch. The Bush II, Obama, and Trump administrations each took public positions with respect to immigrant detention, which might have influenced IJs in deciding individual cases.

In 2006, President George W. Bush announced his administration's policy preference for detaining noncitizens entering the United States without documentation, ending the "catch-and-release" policies of the past, and increasing detention capacity.[82] At the same time, however, he urged Congress to enact comprehensive immigration reform to grant a path to lawful status for longtime undocumented residents, implicitly suggesting that these individuals should not be deported, much less detained.[83]

The Obama administration expressed policy preferences that were somewhat more complex, ultimately broadening the categories of noncitizens who would be prioritized for detention. Like his predecessor, President Obama urged Congress to enact comprehensive immigration reform;[84] indeed, he went further to announce a policy of granting deferred action, a form of relief from removal, for individuals brought to the United States as children[85]—and then for parents of U.S. citizens and legal residents[86]—as long as they passed certain requirements, including criminal background checks. Under these new policies, millions of noncitizens were shielded from removal and, as a corollary, detention. At the same time, however, the Obama administration prioritized the detention not only of recent arrivals as the Bush II administration had, but also noncitizens with criminal backgrounds.[87] The administration also piloted a risk-assessment tool in 2013 to systematize

82 President George W. Bush, Speech on Immigration (May 15, 2006), https://www.nytimes.com/2006/05/15/washington/15text-bush.html [https://perma.cc/7TRA-MCKZ].

83 *See id.*

84 *See, e.g.*, President Barack Obama, News Conference (Nov. 14, 2012), https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-1156 [https://perma.cc/U2MP-ZLFW].

85 President Barack Obama, Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/CR6K-TMFQ] (announcing the Deferred Action for Childhood Arrivals program).

86 President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://perma.cc/5PX2-PPGS] (announcing the Deferred Action for Parents of Americans and Lawful Permanent Residents program).

87 See *supra* note 39 and accompanying text.

which noncitizens would be detained as a danger or a flight risk.[88] Then, in 2014, the administration adopted a policy of detaining, without the possibility for release, the growing numbers of unaccompanied minors and families who crossed the Southern Border seeking asylum from Central America.[89]

The Trump administration adopted an even broader approach to immigrant detention, announcing a policy of detaining *all* noncitizens charged with removal. Within one week of his inauguration, President Trump issued an executive order explicitly stating his administration's policy of detaining all noncitizens suspected of violating immigration laws.[90] In February of that year, the administration issued a directive to all ICE employees—but not IJs—to detain all noncitizens pending removal proceedings except in narrow circumstances.[91] It continued, "There is no presumption that an individual alien's release would not pose a danger or risk of flight."[92]

In April of 2017, then-Attorney General Jeff Sessions addressed a group of DHS's Customs and Border Protection officers and stated, "Pursuant to the President's executive order, we will now be detaining all adults who are apprehended at the border."[93] Then, on October 12, 2017, Attorney General

[88] *See* U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) RISK CLASSIFICATION ASSESSMENT (RCA 1.0), ENFORCE ALIEN REMOVAL MODULE (EARM 5.0), AND CRIME ENTRY SCREEN (CES 2.0), at 3–4 (2012), https://www.dhs.gov/xlibrary/assets/privacy/privacy_piaupdate_EID_april2012.pdf [https://perma.cc/XTT3-FBAB] (describing the new, automated Risk Classification Assessment process). For a detailed description and criticism of the Risk Classification Assessment tool, see generally Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45 (2014).

[89] *See* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 185 (2016) ("[I]n the summer of 2014, DHS adopted a policy of detention without the possibility for release on bond for mothers and children arriving from Central America to seek asylum in the United States."); *see also id.* at 212 ("After an initial period when the DHS insisted on continued detention [of Central American mothers and children] without potential for release on bond, DHS began setting across-the-board bond amounts as a condition of release." (footnote omitted)). These individuals were subject to mandatory detention, 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2018), but DHS officials—though not IJs—retained authority to release them on humanitarian parole, *see supra* note 61.

[90] Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 30, 2017).

[91] Memorandum from Matthew T. Albence, Exec. Assoc. Dir., U.S. Immigration & Customs Enf't, to All Enf't & Removal Operations Emps., Implementing the President's Border Security and Interior Immigration Enforcement Policies 1–3 (Feb. 21, 2017), https://www.aila.org/infonet/ice-memo-on-implementing-the-presidents-border [https://perma.cc/9Z46-62NQ].

[92] *Id.* at 3.

[93] Jeff Sessions, Att'y Gen., Remarks Announcing the Department of Justice's Renewed

Sessions addressed IJs directly, complaining about the Obama administration's policy of releasing noncitizens who demonstrated a fear of persecution.[94] He asserted, "Not surprisingly, many of those who are released into the United States . . . simply disappear and never show up at their immigration hearings."[95] More recently, the Trump administration has demonstrated a policy preference for simply turning away asylum claimants seeking entry at the Southern Border, rather than detaining them within the United States.[96]

The extent to which IJs, as opposed to enforcement officers, are responsive to the policy preferences of political appointees in the executive branch remains to be seen. Media reports based on anecdotal evidence suggest that they are.[97] This study seeks to examine whether bivariate analyses, without additional controls, show statistically significant differences in IJs' bond decision-making based on either 1) the president who appointed the Attorney General who appointed the IJ; or 2) the sitting presidential administration.[98]

Commitment to Criminal Immigration Enforcement (Apr. 11, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed [https://perma.cc/7S8R-N3RP].

94 Jeff Sessions, Att'y Gen., Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [https://perma.cc/4XBV-J2EP].

95 *Id.*

96 Memorandum from Kirstjen M. Nielsen, Sec'y, Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigration Servs., et al., Policy Guidance for Implementation of the Migrant Protection Protocols (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/T855-8JN7] (describing the announcement of "Migrant Protection Protocols" to require asylum claimants to remain in Mexico pending adjudication of their claims in immigration court).

97 *See* Bush, *supra* note 41 (noting that the practice of setting large bonds for detained immigrants appears to have grown under the Trump administration); Mica Rosenberg & Reade Levinson, *Trump's Catch-and-Detain Policy Snares Many Who Have Long Called U.S. Home*, REUTERS (June 20, 2018, 3:18 PM), https://www.reuters.com/investigates/special-report/usa-immigration-court [https://perma.cc/DQ5R-KESX] (concluding that immigration officials are increasingly denying bond in the Trump Era); *see also* Alejandro Fernández Sanabria, Inti Pacheco & Antonio Cucho, *Costly Bonds: For Undocumented Immigrants, Bail Depends On a Judge's Subjectivity*, UNIVISION NEWS (Feb. 28, 2018, 3:41 PM), https://www.univision.com/univision-news/immigration/costly-bonds-for-undocumented-immigrants-freedom-depends-on-a-judges-subjectivity [https://perma.cc/VF2U-DQZN] (offering descriptive information that bond amounts differ by the ideological leanings of IJs).

98 Specifically, the analysis is done using a chi-square test to determine whether two variables are independent. If differences were random, we would expect 95% of the resulting *p*-values to be greater than 0.05. Here, many of the results have a *p*-value below 0.05, indicating statistical significance.

II. ANALYSIS

We reviewed EOIR records to examine political trends in IJs' bond decisions. This Part begins with an overview of how we constructed our dataset. It then sets forth our findings from two analyses: changes in "win rates" for noncitizens and changes in the bond amounts set by IJs. This analysis is done in a bivariate matter without additional controls to see if the measures differ significantly by 1) the president whose Attorney General appointed the IJ; and 2) the president in control at the time the decision was rendered, across the three most recent presidential administrations.

A. Construction of Dataset

We obtained from the EOIR's website records of every bond hearing in immigration court from January 20, 2001, through September 30, 2019.[99] These records identify the IJ before whom the request was made, the date of the IJ's decision, the decision itself, and if bond was granted, the bond amount. Where the bond amount was missing in the EOIR data, we imputed the amount.

We used two approaches to code for the IJ's bond decision. First, we determined whether the decision was favorable to the noncitizen. In this specification, which we call "Custody Hearing Outcomes," we coded the decision as a "win" if the IJ released the noncitizen on recognizance or set a bond amount that was lower than the amount previously set by ICE to the best we were able to discern that information. In the second specification, which we call "Bond Amounts Set by IJ," we examined the specific bond amounts set by IJs to the extent they could be gleaned from the data, categorizing them as "low" if they were $2,500 and under and "high" if they were $10,000 and above.[100]

For each specification, we examine changes through time—specifically, during different presidential eras. Custody decisions rendered from January 20, 2001, through January 19, 2009, were coded as "Bush II Era." Custody proceedings decided between January 20, 2009, through January 19, 2017, were coded as "Obama Era." Cases decided from January 20, 2017, through September 30, 2019 were coded as "Trump Era." This analysis thus shows

[99] *See infra* Appendix for further discussion of how the EOIR records were obtained and how the analysis was conducted.

[100] We found many internal inconsistencies in EOIR's coding on the old and new bond amounts. For example, some cases coded as a "no bond" decision actually had a dollar amount listed in the "new bond" column. We treated such decisions as no bond cases and excluded the dollar amount from further analysis when calculating the IJ's bond. There were also much missing data, particularly for initial ICE bond amounts. Missingness in the data cannot be ignored because there could be a correlation between the missing data and a given decision, IJ, court location, or other factor. Some IJs, for example, may always record the data, while others do not. We explain in the Appendix how we imputed data.

differences across eras in rates at which IJs as a whole granted a favorable custody decision to noncitizens and the bond amounts set by IJs across eras.

For each era, we further analyzed the behavior of different cohorts of appointees. For example, during the Trump Era, we compared the bond decisions of Trump appointees, Obama appointees, Bush II appointees, Clinton appointees, Bush I appointees, and Reagan appointees. This exercise allows us to show descriptively whether there are statistically significant differences in the way cohorts of judge appointees made decisions on bond determinations during different eras, though without controlling for other variables.

Importantly, our study is limited to using cross-tabulations to conduct bivariate analyses. Unlike our prior analysis on politicization in the removal process,[101] we do not conduct a multivariate regression analysis, nor do we control for other variables that might impact an IJ's custody decision.[102] As such, this study does not attempt to identify predictive values or causal relationships. Rather, our much more modest goal is to provide a descriptive picture of IJs' custody decisions, examining potential differences in the decision-making of IJs during different presidential eras as well as between different appointment cohorts.

B. Custody Hearing Outcomes

We first measured "Custody Hearing Outcomes," meaning the rates at which the noncitizen was released on recognizance, obtained bond for the first time if ICE granted no bond, received a lower bond amount, or was denied bond altogether. Table 1 shows changes in these rates across appointee cohorts for the full period of study.

Overall, the rates at which IJs granted release on recognizance were notably low; only 0.64% of custody decisions between January 2001 and September 2019 fell into this category.[103] IJs were far more likely (42%) to issue a favorable ruling in the form of granting bond for the first time or lowering the initial bond amount.[104] On the loss side, IJs denied bond

[101] Kim & Semet, *supra* note 32.

[102] *See* Part IV(A) (describing other variables that might influence IJs' custody decisions).

[103] Scholars have reported that some IJs conclude they lack authority to grant release on recognizance. *See, e.g.*, Gilman, *supra* note 89, at 189–90.

[104] Oftentimes, the initial bond amount is missing, so when the bond decision is coded "new amount," it is impossible to tell whether the IJ set a higher or lower bond amount. If the data indicate that the noncitizen was released, we assumed that the new bond amount was lower. There were approximately 41,000 cases where the initial ICE bond was missing that were coded "new amount" and where the noncitizen remains detained. If the amount remained missing, we imputed the median bond based on the presidential era and either bond base city or IJ. *See infra* Appendix. In alternative specifications, we imputed all missing data, and did not assume that the IJ bond amount was lower if the noncitizen was released. In those specifications, approximately 9% of relevant IJ decisions had a higher bond amount than the amount set by ICE. We saw the same trends in the data using this alternative measure.

altogether in 14% of the cases, appeared to increase bond in 2% of cases, took no action in 31% of the cases, and indicated no change in bond amount in 11% of the cases.[105]

1. Differences Between Appointee Cohorts—All Eras

We first examine differences between groups of appointees across all eras from January 20, 2001, through September 30, 2019, reflected in the top section of Table 1. For example, did IJs appointed by Trump behave differently than those appointed by Obama or Bush II? This analysis examines trends in the relationship between the appointing president and bond outcomes, providing percentages of the given outcomes broken down by appointee cohort.[106]

Table 1: Custody Hearing Outcomes and Win Rate, by Appointee Cohort

	All App.	**Trump App.**	**Obama App.**	**Bush II App.**	**Clinton App.**	**Bush I App.**	**Reagan App.**
Release	0.64	0.14	0.13	0.23	1.21	1.01	1.02
Lower $	41.07	38.05	43.36	41.27	42.22	38.05	32.49
Win Rate	41.68	38.11	43.44	41.46	43.41	39.05	33.50
Higher $	2.44	2.19	3.14	3.00	1.95	1.78	1.57
No Action	31.14	37.33	29.72	29.53	30.75	34.03	34.78
No Change	11.18	7.79	6.30	12.71	11.67	14.34	21.52
No Bond	13.53	14.50	17.35	13.26	12.20	10.80	8.63
Loss Rate	58.32	61.89	56.56	58.54	56.59	60.95	66.50

IJs appointed by earlier administrations were more likely to grant release on recognizance than more recently appointed IJs. It has been reported that some EOIR documents tell IJs that they may lack the power under INA § 236 to grant conditional parole; such beliefs may be depressing the percentages for own-recognizance rulings.[107] Throughout the time period of study,

[105] EOIR's coding does not explain the distinctions between the "no action" and "no change' categories.

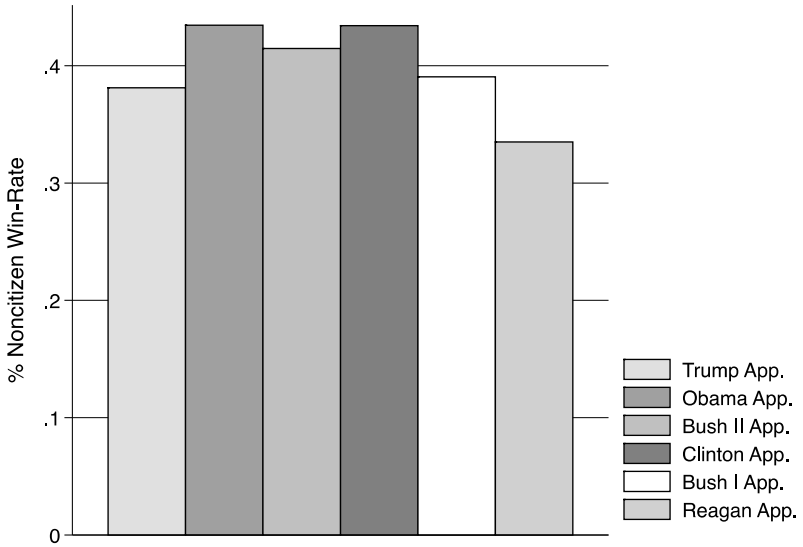
[106] These figures are across the entire range of the study. As such, the figures for Obama appointees are from 2009–2019, while the figures for Trump appointees are only from 2017–2019.

[107] *See* Andrea Saenz, *Not Dangerous, but Too Poor To Get Out of Detention*, CRIMMIGRATION.COM (Sept. 8, 2015, 4:00 AM), http://crimmigration.com/2015/09/08/not-dangerous-but-too-poor-to-get-out-of-detention [https://perma.cc/T2PU-DVTR] (noting a DOJ online resource for IJs); *see also* U.S. DEP'T OF JUSTICE, EO–R - IJ BENCHBOOK- TOO–S - GUID–S - BOND GUIDE 3 (2013), https://federaldefendersny.org/IJ%20Benchbook%20-%20Tools%20-%20Guides%20-%20Bond%20Guide.pdf [https://perma.cc/FV6C-56C9] ("Section 236(a) of the Act does not provide for the release of an alien on the alien's own recognizance."). We have no reason to believe that such beliefs are correlated with appointee cohort or era.

Clinton, Bush I, and Reagan appointees granted release on recognizance in about 1% of the cases, while IJs appointed by Trump, Obama, or Bush II granted release in 0.2% of cases or less. Perhaps surprisingly, Obama appointees were no more likely to grant release on recognizance than their Trump-appointed counterparts. Throughout the years of study, Trump and Obama appointees granted release in 0.14% and 0.13% of cases, respectively.

But an examination of overall win-rates yields a slightly different picture, as shown in Figure 1.[108] Obama and Clinton appointees had the highest win rates; they granted a favorable outcome to the noncitizen—either release, set a bond for the first time if ICE denied bond, or lower the bond amount—in 43% of their custody hearings. Trump appointees were less likely than Obama-appointed IJs overall to grant relief; they did so only 38% of the time, a result statistically significant at 95% confidence. But they were not the least likely to grant relief among appointee cohorts across the time frame of the study: IJs appointed by Reagan were less likely than Trump appointees to grant relief (34%) to the requesting noncitizen than either Trump or Obama appointees to a statistically significant degree. One possible explanation for this trend would be if ICE enforcement officers set lower bond amounts in the first instance during the earlier years, and higher initial bond amounts more recently.

Figure 1: Win Rates, by Appointee Cohort

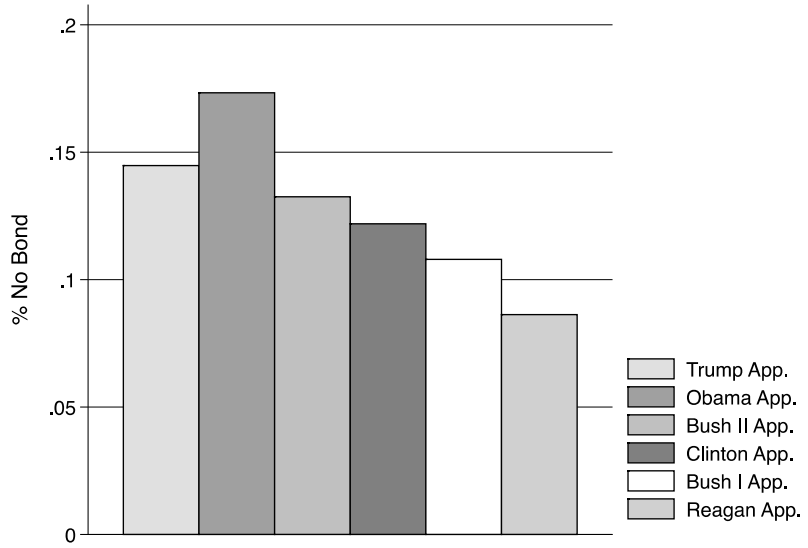


At the opposite end of the spectrum, we looked at the likelihood of denying bond outright. Again, both Trump appointees and Obama appointees

[108] Not everyone who prevails in a bond hearing is ultimately released. Some lack the financial ability to pay bond.

were far harsher to noncitizens than any other group of appointees. Across all eras, about 15% of cases decided by Trump appointees and 17% by Obama appointees resulted in no bond being issued at all, as compared to 12% for IJs appointed by the four other most recent presidents, a result statistically significant at 95% confidence. These findings are reflected in Figure 2.

Figure 2: No Bond, by Appointee Cohort



These findings suggest that IJs appointed by Trump are among the strictest in their decision-making compared to IJs appointed by earlier presidents. Perhaps surprisingly, Obama appointees are comparably strict, at least in terms of the rates at which they granted release and the rates at which they denied bond altogether.

2. Differences Across Presidential Eras

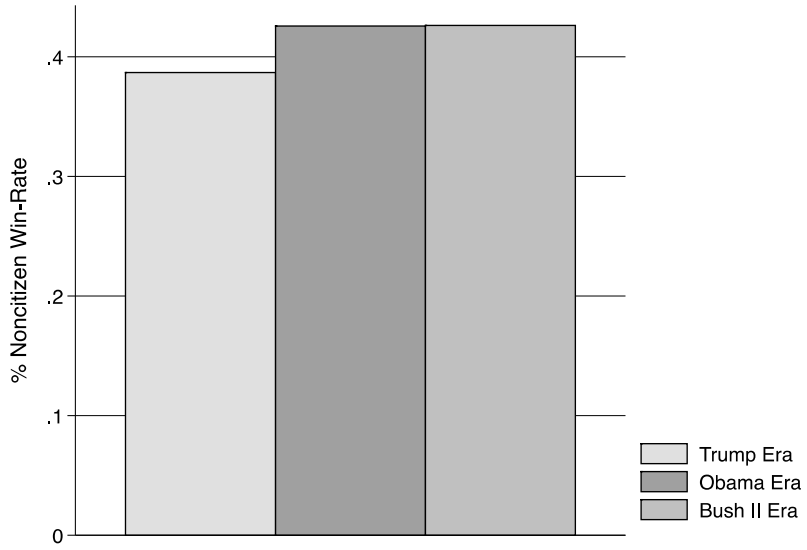
Next we look at differences in bond outcomes across different presidential eras for all appointees, reflected in Table 2. Were IJs as a whole—regardless of who appointed them—less likely to grant relief to noncitizens during the Trump Era than prior eras? This analysis offers descriptive information on the extent to which a presidential administration could potentially influence IJs through the power to *supervise*.

Table 2: Custody Hearing Outcomes and Win Rate, by Presidential Era

	Trump Era	**Obama Era**	**Bush II Era**
Release	0.18	0.24	1.88
Lower $	38.57	42.36	40.76
Win Rate	38.68	42.57	42.62
Higher $	1.72	2.55	1.37
No Action	33.30	30.38	30.66
No Change	6.84	9.70	18.11
No Bond	18.79	14.24	7.31
Loss Rate	61.32	57.43	57.38

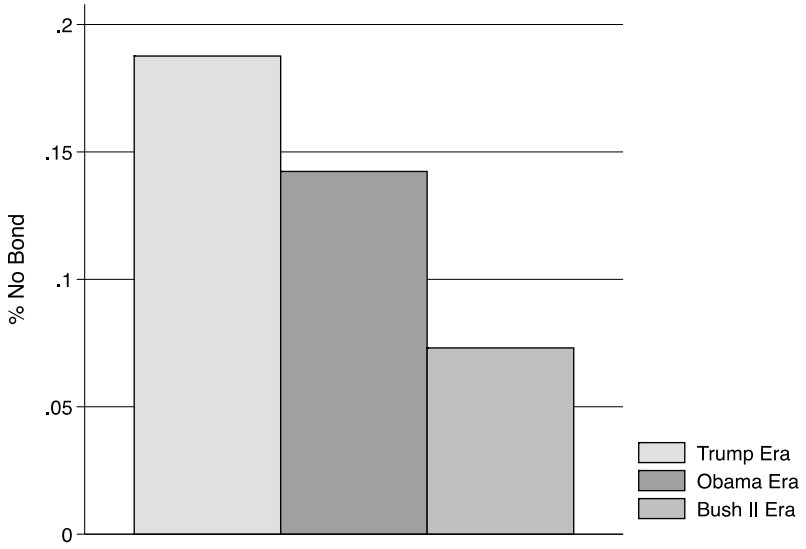
Interestingly, overall win rates were lower to a statistically significantly degree during the Trump Era (39%) than the Obama and Bush II Eras (43% during both eras. The overall win rates by presidential era are reflected in Figure 3. But rates of release from recognizance were considerably lower during both the Trump and Obama Eras (0.18% and 0.24%, respectively) as compared to the Bush II Era (2%), a result statistically significant at 95% confidence in the bivariate analysis.

Figure 3: Win Rates, by Presidential Era



Similarly, in terms of the percentage of cases that resulted in bond being denied outright, noncitizens fared worse as time progressed. Only 7% of custody hearings resulted in a denial of bond during the Bush II Era, rising to 14% during the Obama Era, and to 19% during the Trump Era. These results are reflected in Figure 4.

Figure 4: No Bond, by Presidential Era



3. Differences Across Presidential Eras *and* Appointees

Finally, and most importantly, we examine how different cohorts of appointees behaved during different eras. These data are reflected in the Table 3.

Table 3: Custody Hearing Outcome and Win Rate, by Appointee Cohort and Presidential Era

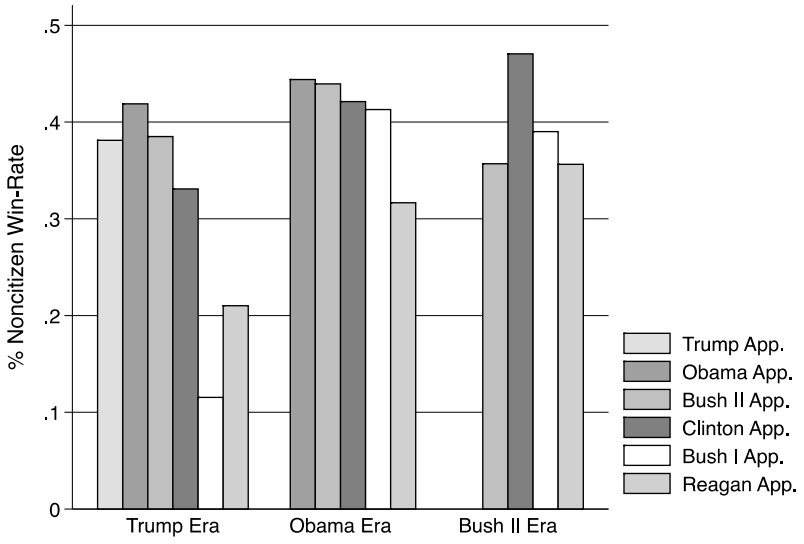
	Trump App.	**Obama App.**	**Bush II App.**	**Clinton App.**	**Bush I App.**	**Reagan App.**
Trump Era						
Release	0.14	0.12	0.13	0.49	0.09	0.22
Lower $	38.05	41.82	38.42	32.63	11.45	20.83
Win Rate	38.11	41.88	38.50	33.09	11.54	21.01
Higher $	2.19	2.45	2.20	2.49	1.32	1.18
No Action	37.33	29.51	32.66	37.69	55.16	26.87
No Change	7.79	5.36	6.91	5.94	2.93	41.25
No Bond	14.50	20.74	19.69	20.76	29.04	9.66
Loss Rate	61.89	58.12	61.50	66.91	88.46	78.99
Obama Era						
Release		0.13	0.15	0.40	0.39	0.15
Lower $		44.29	43.83	41.74	40.90	31.52
Win Rate		44.40	43.95	42.12	41.29	31.66
Higher $		3.57	3.44	2.55	2.60	2.45
No Action		29.86	28.38	31.34	33.67	33.74
No Change		6.88	11.29	8.32	12.97	22.88
No Bond		15.28	12.92	15.65	9.47	9.26
Loss Rate		55.69	56.05	57.88	58.71	68.34
Bush Era						
Release			0.60	2.28	1.61	1.66
Lower $			35.21	44.78	37.41	33.96
Win Rate			35.69	47.04	39.01	35.62
Higher $			2.27	1.16	1.09	1.00
No Action			30.44	28.62	32.86	36.03
No Change			23.52	16.71	16.35	19.22
No Bond			8.05	6.44	10.93	8.13
Loss Rate			64.31	52.96	60.99	64.38

During the Trump Era, Obama appointees issued more favorable bond decisions to noncitizen detainees than any other group of appointees. They granted relief to noncitizens in 42% of cases, as compared to the 36% win rate for IJs appointed by any other president ruling during the Trump Era, a result statistically significant at 95% confidence. Trump and Bush II appointees also had higher win rates (38% and 39%, respectively) for noncitizens during this era than appointees of all other presidents besides Obama. Surprisingly, then, it was the earlier-appointed cohorts—those appointed by Clinton, Bush I, and Reagan—who exhibited the lowest win rates during the Trump Era. These discrepancies could be explained by the higher percent of "no action" or "no change" decisions by Bush I and Reagan appointees in particular.

Moreover, many of these same earlier appointees were far more sympathetic to noncitizens during the preceding eras than during the Trump Era. For example, IJs appointed by Clinton granted relief to noncitizens in

33% of the cases they heard during the Trump Era, but in 45% of cases in prior years, a result statistically significant at 95% confidence. Even more stark, Bush I appointees granted relief to detainees in only 12% of cases during the Trump Era even though they granted such relief in 45% of cases in prior years, again a statistically significant result. Reagan appointees had a statistically significant win rate of 21% during the Trump Era compared to 35% prior. Bush II appointees are the exception to this trend; although Bush II appointees had a lower win rate during the Obama Era than the Trump Era (44% versus 39%), they had their lowest win rate during the Bush II Era (37%). These findings, showing changes in behavior during different presidential eras amongst the same cohort of judges, suggest that it is possible the Trump administration could be exercising some influence over IJs through their supervisory authority. These findings are reflected in Figure 5.

Figure 5: Win-Rate Percentages, by Appointee Cohort and Presidential Era



C. Bond Amounts Set by IJs

Next we examine changes in the bond amounts set by IJs. As an initial matter, we analyze median bond amounts by appointee cohort and presidential era.[109] These data are reflected in Table 4.

[109] We used median bond amount rather than mean bond amount because the median is less affected by IJs who may issue bond amounts in the extreme. We excluded IJ bond amounts when the bond decision was "no bond" or release on own recognizance as erroneously coded. Trends are similar using the original, nonimputed data with missing values.

Table 4: Median Bond Amounts, by Appointee Cohort and Presidential Era

	All App.	Trump App.	Obama App.	Bush II App.	Clinton App.	Bush I App.	Reagan App.
Trump Era	$8,000	$8,000	$7,500	$10,000	$7,500	$10,000	$10,000
Obama Era	$6,500	--	$7,000	$7,500	$5,000	$5,000	$7,500
Bush II Era	$5,000	--	--	$7,000	$5,000	$7,500	$5,000
All Eras	$5,000	$8,000	$7,500	$7,500	$5,000	$7,000	$7,500

Bond medians grew throughout the three eras in our study, starting at $5,000 during the Bush Era, rising too $6,500 during the Obama Era, then jumping to $8,000 during the Trump Era. Trump appointees have had a median bond amount of $8,000, but most of the appointee cohorts exhibited a higher median bond amount during the Trump Era than either the Obama or Bush II Eras. IJs appointed by Bush II, for example, set a median bond amount of $7,000 during the Bush II Era and $7,500 during the Obama Era; this amount jumped to $10,000 during the Trump Era. The biggest jump occurred for Bush I appointees—$5,000 during the Obama Era to $11,000 during the Trump Era. These findings suggest that although bond amounts grew overall as time passed, they grew at a faster rate under the Trump administration.[110]

Data for the rates at which IJs set low, medium, or high bond amounts are set forth in Table 5.

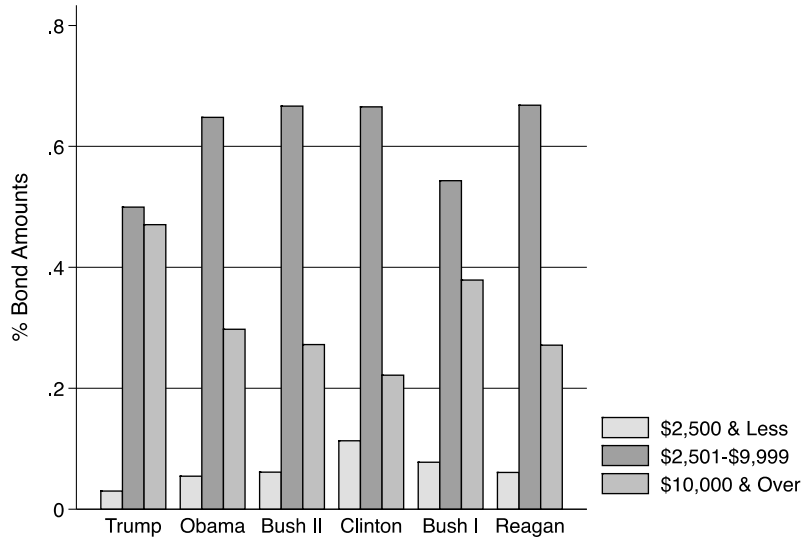
[110] These changes do not account for changes in inflation over the nearly twenty-year period of study, nor do they account for shifts in the bond amounts initially set by enforcement officials across time and region. These variables would contribute to the general tendency for bond to increase but that would not necessarily negate political influence as a potential contributory factor in the overall trend of higher bond amounts.

Table 5: Bond Amount Percentages, by Appointee Cohort and Presidential Era

	All App.	Trump App.	Obama App.	Bush II App.	Clinton App.	Bush I App.	Reagan App.
All Eras							
$2,500 & Less	7.68	2.99	5.46	6.13	11.31	7.76	6.08
$2,501-$9,999	64.65	49.95	64.79	66.66	66.55	54.34	66.80
$10,000 & Over	27.67	47.06	29.75	27.22	22.15	37.90	27.12
Trump Era							
$2,500 & Less	3.58	2.99	4.15	2.58	4.65	2.41	0.57
$2,501-$9,999	54.15	49.95	60.01	42.39	64.15	21.05	16.37
$10,000 & Over	42.27	47.06	35.84	55.02	31.20	76.54	83.05
Obama Era							
$2,500 & Less	7.78	—	6.21	6.69	10.92	6.56	4.30
$2,501-$9,999	69.17	—	67.54	72.29	69.95	59.50	66.53
$10,000 & Over	23.05	—	26.27	21.02	19.13	33.94	29.16
Bush II Era							
$2,500 & Less	10.85	—	—	7.34	12.91	9.16	7.68
$2,501-$9,999	64.70	—	—	69.09	63.37	51.55	70.51
$10,000 & Over	24.45	—	—	23.57	23.72	39.30	21.81

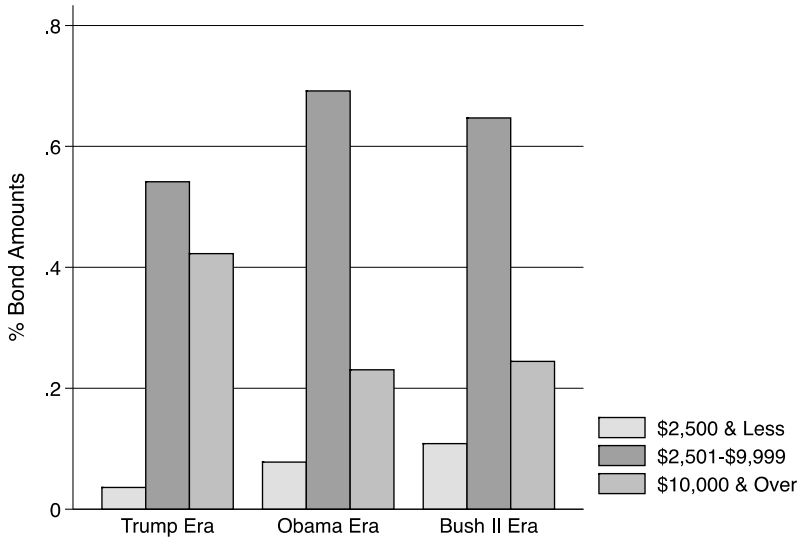
Looking only at differences between cohorts of appointees, reflected in the top section of Table 5 and Figure 6, we see that Trump appointees were more likely than appointees from other cohorts to set a bond of $10,000 or more ("high bond"). Across the entire period of study, about 47% of the bond decisions by Trump appointees, as compared to 30% for Obama appointees and 27% Bush II appointees, resulted in high bonds. The inverse was also true to some extent: Trump appointees were less likely to set bond at $2,500 or lower ("low bond") than Obama appointees, for example (47% versus 30% overall).

Figure 6: Bond Amount Percentages, by Appointee Cohort



Next, we examine differences in bond amounts across presidential eras. These data are reflected in Figure 7. Consistent with the findings on median bond amounts, we find that high bonds were more frequent during the Trump Era than the preceding eras. About 42% of bonds set by IJs during the Trump Era were $10,000 or more, as compared to only 23% for Obama Era and 25% for the Bush II Era. Conversely, the percentage of cases in which a low bond was set declined through the three presidential eras to a statistically significant degree, constituting 4% of cases during the Trump Era, 8% of cases during the Obama Era, and 11% during the Bush II Era.

Figure 7: Bond Amount Percentages, by Presidential Era



We then examine low bond amounts and high bond amounts by appointee cohorts across the three presidential eras. These data are presented in Figures 8 and 9.

Figure 8: Low Bond Amount Percentages ($2,500 and Lower), by Appointee Cohort and Presidential Era

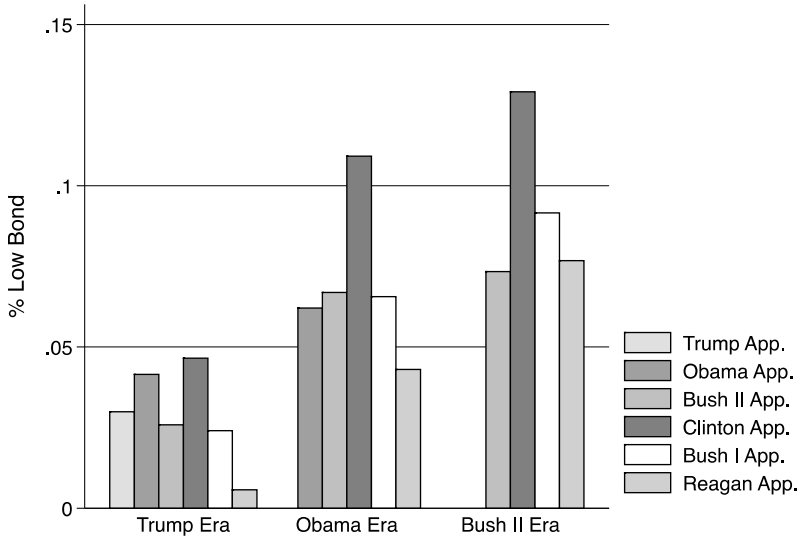
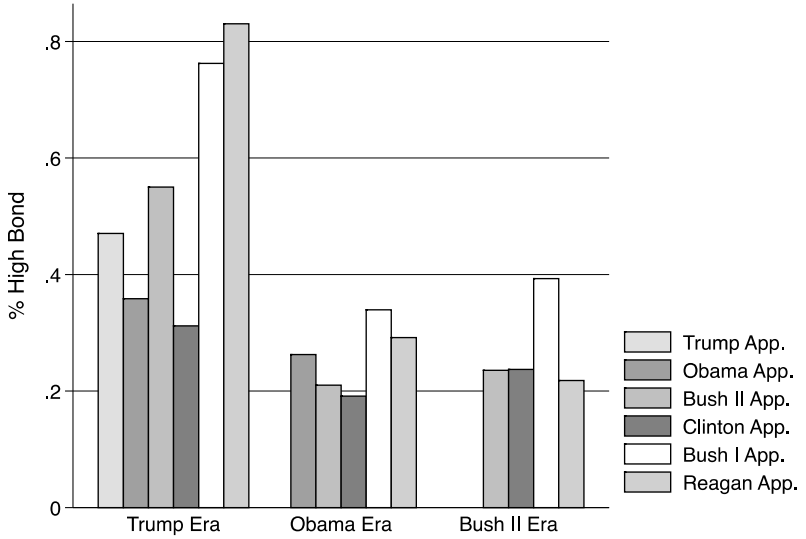


Figure 9: High Bond Amount Percentages ($10,000 and Higher), by Appointee Cohort and Presidential Era



Most appointee cohorts were more likely to issue a high bond amount during the Trump Era than during the preceding two administrations. Bush II appointees, for example, set a bond of $10,000 or more in only 24% of cases during the Bush II Era, declining slightly to 21% of cases during the Obama Era, and jumping to 55% of cases during the Trump Era, a difference statistically significant at 95% confidence. Interestingly, during the Trump Era, Bush II, Bush I, and Reagan appointees were even more likely to issue a high bond amount than Trump appointees during the same time frame. These findings show that bond amounts set by IJs have risen considerably during the Trump administration, and all cohorts of judges have behaved more harshly during the Trump Era than during prior eras.

***

Our descriptive findings show that along every metric of bond hearings, noncitizens appear to have been faring considerably worse during the Trump Era than they did during either the Bush II or Obama Eras. Perhaps most telling, overall win rates indicate that all appointee cohorts except Obama appointees were less likely to award relief to the noncitizen during the Trump administration than during prior eras. Although the analysis does not control for other factors that could mitigate the impact of presidential influence, these results raise the question of whether the Trump administration is influencing IJ decision-making in bond decisions through its power to supervise earlier

appointees.

An examination of bond amounts set by IJs reveals a similar picture. Without controlling for inflation or initial amounts set by ICE, bond medians grew from $5,000 during the Bush II Era, to $6,500 during the Obama Era, and then jumped to $8,000 during the Trump Era. Indeed, 42% of the bonds set by IJs during the Trump Era were $10,000 or higher, as compared to only 23% and 25% for the Obama and Bush II Eras, respectively—differences that are statistically significant. Again, breaking down these results by appointee cohort and era indicates that earlier-appointed IJs have behaved more harshly during the Trump Era than during preceding administrations.

III. MAPPING FUTURE RESEARCH

In the preceding section, our analysis suggested that immigration bond decisions may be shaped in part by a sitting president's political agenda. This Part identifies two directions for future research. First, it proposes further study to determine whether our findings remain robust after controlling for other factors that otherwise impact immigrant custody decisions. Second, it encourages a renewed exploration of which factors *should* shape these decisions.

A. Controlling for Potentially Confounding Variables

Our assessment of the role of presidential politics in individual immigrant custody decisions employs simple bivariate analyses and does not control for the myriad of other factors that may influence such decisions. A predictive study seeking to isolate and measure the role that political superiors play in immigrant detention outcomes would need to control for a wide variety of factors, including the legal factors that immigration judges are instructed to consider, as well as extralegal factors that may be shaping decision-making without legal grounds.

To evaluate whether detention decisions are a product of political influence rather than, for example, legally relevant factors relating to a noncitizen's dangerousness or flight risk, one would need to see whether our findings remain robust after controlling for variables such as the noncitizen's family ties, length of U.S. residence, employment background, financial situation, and criminal history.[111] EOIR currently does not reliably code for these factors, but prior studies indicate at least some of these variables may be statistically significant predictors of IJs' custody decisions.[112] Such a study

[111] *See In re* Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006) (providing a nonexhaustive list of factors that may be considered by IJs in rendering custody decisions), *abrogated on other grounds by* Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass. 2018).

[112] *See* Ryo, *A Study of Immigration Bond Hearings*, *supra* note 38, at 119 (finding a noncitizen's criminal history to be the only significant, legally relevant factor predicting immigrant detention decisions).

would also need to control for factors that are not legally relevant but may nonetheless influence IJs' custody decisions.[113] For example, Ingrid Eagly and Steven Shafer have found that attorney representation plays a significant role in determining whether a noncitizen will remain detained or not.[114] Emily Ryo has found that the noncitizen's national origin is a significant predictor of detention decisions.[115] Outside of the detention context, scholars, including the authors, have identified other extralegal variables that have a statistically significant effect in predicting immigration decisions, including 1) factors related to the noncitizen, including not only attorney representation and national origin, but also criminal history, language, continent of origin, and whether the noncitizen arrived from a politically intolerant or poor country; 2) factors related to the IJ, such as gender, prior work experience, or tenure on the bench; 3) factors related to the base city, including whether the case was heard at a large base city, whether the base city was located at the Southern Border, and the base city's political and economic climate; and 4) factors related to other institutional actors such as Congress, the circuit courts, and the BIA.[116] Although the immigrant-detention context differs

[113] *See* Kim & Semet, *supra* note 32, at 596–600 (citing scholarship identifying factors that predict immigration-removal decisions).

[114] Eagly & Shafer, *supra* note 10, at 70 (finding that noncitizens represented by counsel are almost seven times more likely to be released than pro se counterparts); *see also* Ryo, *A Study of Immigration Bond Hearings*, *supra* note 38, at 143 (finding presence of counsel to be a statistically significant predictor of IJ custody decisions).

[115] Ryo, *Predicting Danger*, *supra* note 38, at 239 (finding, in a sample of immigrant detention decisions from 2013 to 2015, that Central Americans were 68% more likely to be detained because they pose a danger to the community than those from other countries); *see also* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 450–51, 505–15 (1992) (describing deficiencies in language translation in immigration courts).

[116] *See*, *e.g.*, BANKS MILLER ET AL., IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 99 tbl.4.2, 100 (2014) (analyzing factors); Daniel E. Chand et al., *The Dynamics of State and Local Contexts and Immigration Asylum Hearing Decisions*, 2017 J. PUB. ADMIN. RES. & THEORY 182, 182, 188–89, 188 fig.1, 193 tbl.5. (same); Linda Camp Keith, Jennifer S. Holmes & Banks P. Miller, *Explaining the Divergence in Asylum Grant Rates Among Immigration Judges: An Attitudinal and Cognitive Approach*, 35 L. & POL'Y 261, 278–80, 279 fig.1 (2013) (same); Kim & Semet, *supra* note 32, at 628–29 (same); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 957, 958 fig.5 (2015) (same); Eagly & Shafer, *supra* note 10, at 70 (same); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Shrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 342–49 (2007) (same); Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal in Immigration Court*, 168 U. PA. L. REV. (forthcoming 2020) (same); Daniel L. Chen & Jess Eagel, *Can Machine Learning Help Predict the Outcome of Asylum Adjudications?* 1, 6 tbl.3 (Proceedings of the Ass'n for Computing Mach. Conference on Artificial Intelligence & the Law, Working Paper, 2017).

from the criminal pretrial-detention context in important respects,[117] scholarship examining the factors that play a role in a judge's decision to release a criminal defendant from pretrial detention provide useful guidance as well. Criminal justice scholars have found, for example, that bond decisions vary significantly based on factors such as caseload pressures[118] and the availability of bed space in detention facilities.[119]

Changes in bond decision-making may also result from factors entirely exogenous to the immigration courts, such as shifts in migration patterns. For example, prior to 2014, the majority of noncitizens in detention were from Mexico; the years since have witnessed a surge in detainees seeking asylum from the "Northern Triangle" countries of El Salvador, Guatemala, and Honduras.

Similarly, the behavior of ICE enforcement officials may shift IJ custody decisions. For instance, in the past, ICE set uniformly high bond rates for women detained in particular facilities.[120] Those high bond amounts may have had an anchoring effect on the IJs' subsequent review of the bond amount. Changes in ICE enforcement patterns may also impact the types of cases IJs hear. For example, cases decided during the Obama administration, which sought to prioritize the removal of criminal noncitizens,[121] would likely have had a higher proportion of such noncitizens in the pool of immigrants seeking bond hearings. By contrast, we might expect to see a lower proportion of criminal noncitizens in bond hearings during the Trump administration given its policy of enforcement against all noncitizens who

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815876 [https://perma.cc/4JW9-AE4R]; U.S. GOV'T ACCOUNTABILITY OFF., U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES 7, 36, 119, 120 tbl.19, 121 tbl.20, 123–24 (2008) (same), https://www.gao.gov/new.items/d08940.pdf [https://perma.cc/AY7J-FD5T]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-72, *supra* note 49, at 62 tbl.10, 63 tbl.11 (2016) (same).

117 *See* Gilman, *supra* note 89, at 206–09 (identifying important differences between pretrial criminal detention and detention pending immigration-removal proceedings).

118 Katherine Hood & Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 126, 129–30 (2019) (discussing studies suggesting that caseload pressure shapes pretrial decisions in criminal proceedings (citing Jeffery T. Ulmer & Brian Johnson, *Sentencing in Context: A Multilevel Analysis*, 42 CRIMINOLOGY 137 (2004) and Brian Johnson, *Contextual Disparities in Guidelines Departures: Courtroom Social Contexts, Guidelines Compliance, and Extralegal Disparities in Criminal Sentencing*, 43 CRIMINOLOGY 761 (2005))).

119 *Id.* at 130 (citing ROY B. FLEMMING, PUNISHMENT BEFORE TRIAL: AN ORGANIZATIONAL PERSPECTIVE ON FELONY BAIL PROCESSES (1982)).

120 *See* Gilman, *supra* note 89, at 211 (identifying FOIA records to show that "DHS sets the same bond amounts for all individuals in custody at a particular detention facility or in a particular region during a specific time period").

121 *See* Memorandum from Jeh Charles Johnson, *supra* note 39 (prioritizing the removal of criminal noncitizens and those apprehended at the border).

may be removable.[122] Nor can we reliably code for whether the noncitizen has a criminal record or how such a record would affect outcomes.[123] These case-selection effects could alter custody outcomes even if IJs—as opposed to enforcement officials—were entirely independent from their political superiors in the administration.

Changes in caseload volume could also impact custody determinations, as IJs may have less time for individualized considerations of the legally relevant factors and default to categorical thinking based on their own predilections and policy preferences or those of their political superiors. As of October 2019, there were over 980,000 cases pending on the courts' dockets, up from 430,000 in 2014.[124]

Future research should determine whether the findings reported above remain robust after controlling for these other variables that likely have an independent effect on immigrant custody decisions. Such research would then move closer to identifying and measuring the extent to which IJs' custody decisions are a function of a given president's political agenda rather than an independent assessment of record evidence.

B. The Search for Factors that Should Determine Immigrant Detention

A second avenue for future research would be to identify the factors that *should* be used in immigrant custody hearings. Such findings could produce fairer and more accurate detention decisions. They would also aid the government's efforts to establish a "risk classification assessment" to systematize the factors IJs would use in determining whether a noncitizen will be detained.[125]

As noted earlier, the Supreme Court has authorized the detention of

[122] *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017) (stating the policy of enforcing immigration laws "against all removable aliens").

[123] Whether the noncitizen was charged under 8 U.S.C. §§ 1182(a)(2) or 1227(a)(2)—listing crime-based grounds for inadmissibility and deportability, respectively—would not reliably indicate whether the noncitizen had a criminal background. ICE prosecutors typically charge noncitizens with the ground or grounds that are easiest to prove, not necessarily the most serious ground for removal. Kim & Semet, *supra* note 32, at _.

[124] EXEC. OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: PENDING CASES (2019), https://www.justice.gov/eoir/page/file/1060836/download [https://perma.cc/9UBP-Z3AB].

[125] *Cf.* Noferi & Koulish, *supra* note 88 at 58–72 (criticizing the current assessment tool for failing to accurately predict bail risks). We recognize that in the pretrial criminal-detention context, such assessments have been shown to perpetuate structural bias and inequality. Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2296–97 (2019). Nonetheless, as Sandra G. Mayson points out, such assessments could be used to provide additional support for, rather than additional detention of, individuals found to be high risk. *Id.* at 2225–26, 2286–93.

noncitizens pending removal proceedings on two grounds only: to protect the community from danger—public safety[126]—and to ensure the noncitizen's appearance at further removal proceedings—flight risk.[127] It has emphasized, however, that detention may not be used as punishment.[128]

As an initial matter, deterring future migrants, in our view, should play no role in immigrant custody decisions. Deterrence is a rationale for penological incarceration; it cannot be a ground for detention pending removal. But presidential administrations have periodically defended immigrant detention precisely on such grounds, asserting that such detention is necessary to deter others from seeking to enter the United States.[129] The District Court for the District of Columbia has cast doubt on such reasoning, rejecting the notion that "one particular individual may be civilly detained for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration" as "out of line with analogous Supreme Court decisions" reserving deterrence goals for the criminal justice system.[130]

Additionally, from a normative perspective, one should question whether concerns that the noncitizen would endanger public safety if released constitute a valid ground for detention pending removal proceedings. Unlike in the criminal pretrial context, noncitizens in removal proceedings need not have been accused of any crime at all—they may simply be removable because they overstayed a visa, for example. Even for those who are removable on the basis of criminal conduct, detention pending the outcome of removal proceedings generally occurs only *after* the alien has already

[126] Carlson v. Landon, 342 U.S. 524, 541, 544 (1952) (sustaining the detention of Communist noncitizens pending deportation proceedings for public safety reasons).

[127] Demore v. Kim, 538 U.S. 510, 527–28 (2003) (sustaining mandatory detention on the ground that it "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings").

[128] Wong Wing v. United States, 163 U.S. 228, 235, 237–38 (1896) (holding that although detention is a valid action in enforcing immigration laws, noncitizens cannot be subjected to punishment such as hard labor or confiscation of property without a judicial trial establishing guilt).

[129] *See* Emily Ryo, *Detention As Deterrence*, 71 STAN. L. REV. ONLINE 237, 238–40 (2019) (tracing the history of administrations' use of immigrant detention to deter migration); Julia Preston, *Detention Center Presented As Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html [https://perma.cc/C7KJ-NYWN] (describing the Obama policy of using family detention as a deterrent).

[130] R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015); *see also* Aracely v. Nielsen, 319 F. Supp. 3d 110, 153–54 (D.D.C. 2018) (rejecting the deterrence rationale for immigrant detention).

served the full criminal sentence deemed appropriate for the crime.[131] Detaining them further due to their immigration status under these circumstances begins to look punitive.

Justice Black's dissenting opinion in *Carlson v. Landon*[132] is instructive in this regard. In that case, noncitizens were charged with removal on the basis of their membership in the Communist Party.[133] In a 5-4 decision, the Supreme Court sustained their detention for the purpose of preventing them from "aid[ing] in carrying out the objectives of the world communist movement."[134] Justice Black dissented, reasoning, "Since it is not necessary to keep them in jail to assure their compliance with a deportation order, their imprisonment cannot possibly be intended as an aid to deportation. . . . A power to put in jail because dangerous cannot be derived from a power to deport."[135] Justice Black would have permitted immigrant detention only for the purpose of effectuating removal.[136] For him—and for us—immigrant detention to prevent crimes impermissibly reaches beyond the core justification for the confinement of noncitizens in this context: to facilitate their deportation.

As for the detention of individuals for the purpose of ensuring their appearance for removal proceedings, IJs currently may consider the noncitizen's length of residence in the United States, family ties, employment background, and prior efforts to abscond from law enforcement.[137] But none of these factors have been empirically proven to predict the likelihood that a noncitizen will appear for removal proceedings.[138]

It is worth noting here that the necessity of using detention at all, at least in the vast majority of cases, remains unclear. Although it is true that detaining a noncitizen guarantees his or her later appearance, recent scholarship shows that noncitizens' appearance rate is high even without detention. For example, scholars find that 96% of families seeking asylum attended all of their hearings after being released from detention.[139] Other

131 *See* 8 U.S.C. § 1226(c) (2018) (directing that noncitizens convicted of specified crimes be taken into immigration custody "when the alien is released" from criminal custody).

132 Carlson v. Landon, 342 U.S. 524 (1952).

133 *Id.* at 528–29.

134 *Id.* at 544.

135 *Id.* at 551 (Black, J., dissenting).

136 *See id.*

137 *In re* Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006) (providing a nonexhaustive list of factors that may be considered by IJs in rendering custody decisions), *abrogated on other grounds by* Pensamiento v. McDonald, 315 F. Supp. 3d 684 (D. Mass. 2018).

138 *See* Gilman, *supra* note 89, at 206 ("No empirical research has taken place to identify factors that accurately predict the risk of flight or danger presented by a migrant in deportation proceedings.").

139 Eagly et al., *supra* note 11, at 848.

mechanisms such as electronic monitoring and periodic check-in requirements may also be effective in increasing the likelihood of appearance in immigration court.[140] The danger of erroneously detaining someone absent a flight risk is particularly acute in the immigration context, where a noncitizen with a valid claim to remain in the United States might opt to abandon that claim simply to end the period of detention.

It is also possible that additional factors should be considered in assessing flight risk. For example, a noncitizen's likelihood of ultimately obtaining relief from removal may be relevant in calculating flight risk. It stands to reason that if a noncitizen has no colorable claim to relief from removal, then he or she is more likely to abscond to avoid inevitable removal. By contrast, a noncitizen with a strong claim to relief from removal is likely to attend removal proceedings that will lead to lawful presence in the United States. Indeed, the current system, which does not generally consider likelihood of ultimate relief,[141] creates a perversion in the immigrant detention system. Those with the strongest legal claims to remain in the United States are the ones most likely to remain detained. An individual with a weak legal claim may well decide to abandon it in the face of detention, but individuals would likely tolerate lengthy detentions in oppressive conditions if they truly and reasonably feared persecution if repatriated, for example.

Another factor that might be considered is the noncitizen's ability to pay a bond amount. Policies that impose the same bond amount to entire categories of noncitizens make little sense because a wealthier noncitizen may be able to post the bond amount easily and care little for losing the bond if he or she absconds, while a poorer noncitizen may be detained simply because of his or her inability to pay.[142] Pursuant to a class action lawsuit in the Ninth Circuit, IJs in that circuit—but only that circuit—are required to consider ability to pay in setting bond amounts.[143]

Our findings on the relationship between presidential administrations and outcomes in individual detention decisions suggest that future research is

140 AUDREY SINGER, CONG. RESEARCH SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 7–9 (2019), https://fas.org/sgp/crs/homesec/R45804.pdf [https://perma.cc/TZZ4-W46F]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-26, *supra* note 18, at 8–10, 30.

141 *Cf. In re Guerra*, 24 I. & N. Dec. at 40 (omitting the likelihood of ultimate relief in a list of factors to consider in determining immigrant custody but noting the list is nonexhaustive). *But see* United States *ex rel.* Potash v. Dist. Dir. of Immigration & Naturalization, 169 F.2d 747, 751 (2d Cir. 1948) (identifying the likelihood of ultimate removal as a permissible factor in immigrant detention decisions).

142 ACLU Analytics & Immigrants' Rights Project, *Discretionary Detention by the Numbers*, ACLU, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/discretionary-detention [https://perma.cc/6BLU-ZUC6] (showing rates at which noncitizens remain detained due to inability to post bond amount).

143 *See* Hernandez v. Sessions, 872 F.3d 976, 982 (9th Cir. 2017).

warranted to further identify the factors that shape IJs' detention decisions, as well as the factors that *should* shape such decisions.

CONCLUSION

The prospect of politicized custody decisions challenges the very core of our notions of due process. Even those who view the ultimate decision to deport noncitizens as being vested exclusively in the political branches should chafe at the suggestion that the decision of whom to detain—for spans of months or even years—should be directed by an individual president's political agenda.[144]

There may be some role, however, for executive branch political officials, at least under the current system in which IJs are housed in the executive branch.[145] Political supervisors might legitimately act to reduce arbitrariness and disparities in custody decisions. After all, such disparities arguably compromise rule-of-law norms. Political actors within the executive branch might properly engage in notice-and-comment rulemaking to promulgate regulations specifying the types of factors IJs should consider in their detention decisions. Alternatively, the Attorney General might identify such factors through his power to refer BIA cases to herself and formally review

[144] *Cf.* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 541 (2011) (arguing that the lack of decisional independence among IJs "only scratches the surface" of the many problems associated with immigration court adjudication).

[145] A growing number of scholars and organizations have endorsed moving immigration proceedings into a new Article I court. *See* AM. BAR ASS'N COMM'N ON IMMIGRATION, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES, at UD 6 – 14 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [https://perma.cc/7GVT-BY72] (endorsing the creation of an Article I court to handle removal adjudication); Jill Family, *Injecting Independence and Proportionality into Immigration Adjudication*, *in* AM. CONSTITUTION SOC'Y, RETHINKING ADMIN LAW: FROM APA TO Z 45, 49 (2019), https://www.acslaw.org/wp-content/uploads/2019/06/Rethinking-Admin-Law-From-APA-to-Z.pdf [https://perma.cc/ND7K-S4X5] (same); Am. Immigration Lawyers Ass'n, Statement of the American Immigration Lawyers Association Submitted to the Senate Judiciary Subcommittee on Border Security and Immigration Hearing on "Strengthening and Reforming America's Immigration Court System" 1–2 (Apr. 18, 2018), https://www.aila.org/advo-media/aila-correspondence/2018/aila-statement-on-strengthening-and-reforming [https://perma.cc/7EMZ-NW85] (same); *Article I Immigration Court: Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N, https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court [https://perma.cc/YBB4-UC64] (same). Stephen Legomsky has proposed an alternative structural reform, creating a new, independent, Article III immigration court. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1686–87 (2010).

them.[146] Where such actions do not exceed statutory bounds and do not compromise individual due process interests, they may legitimately limit the adjudicatory discretion of IJs.

By contrast, efforts by the president, the Attorney General, or any other political subordinates to sway IJ decisions by simply directing IJs to detain more immigrants or set uniformly high bond amounts would raise due process concerns. They would also result in the pointless expenditure of considerable funds to detain someone who poses little-to-no flight risk. A solution to mitigating decisional disparities that opts to uniformly deny bond or consistently set unrealistically high bond amounts, without any individualized assessment of the person's flight risk or dangerousness, raises significant due process concerns. A better approach would be to impose stronger guidelines on the factors that should be considered in determining whether the noncitizen should be detained or released. Uniformity need not bend toward more detention.

* * *

Appendix

The data for this Article is available to the public on EOIR's website.[147] EOIR maintains an electronic case-management system of its data.[148] EOIR also

146 8 C.F.R. § 1003.1(h) (2019). We primarily used the "D_TblAssociatedBond" file ("Bond Table") as the base table. We then merged in additional CSV files, including: (1) the "[T]bl_[S]chedule" file ("Schedule Table") to determine hearing-level information, (2) the "A_TblCase" ("Case Table") to identify information on case type and custody status, (3) the "B_TblProceeding" file ("Proceeding Table") to identify information on case type and custody status; (4) the "[T]bl_[L]ead/[R]ider" file ("Lead/Rider Table") to discern case ids for the cases that were leads and riders, (5) the "[T]bl_CustodyHistory" file ("Custody Table") to see custody dates; and (6) the "[T]bl_JuvenileHistory" file ("Juvenile Table") to identify juvenile ids.

147 *See supra* note 42.

148 Prior to 2007, this system was called the "Automated Nationwide System for Immigration Review" ("ANSIR") and after, the system was updated to the "Case Access System for EOIR" ("CASE"). *See* OFFICE OF THE CHIEF IMMIGRATION JUDGE, U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS 2 n.2, https://trac.syr.edu/immigration/reports/210/include/08-EOIR_asylum_disparity_report.pdf [https://perma.cc/XFJ8-7RTA] (explaining the upcoming switch from ANSIR to CASE in fiscal year 2007). This change in reporting impacted our dataset since some information was not consistently coded throughout the time of study. In addition, TRAC has noted significant discrepancies in the data EOIR releases to the public. *See Incomplete and Garbled Immigration Court Data Suggest Lack*

publishes a "Lookup File" that describes the codes used in its documents. Each EOIR case has a case number (labeled "idncase") with potentially multiple proceeding numbers ("idnproceeding"). To determine the bond decision, we relied on the variable "dec" in "Bond Table."[149] We narrowed the dataset in a few ways. First, we included only the first substantive bond decision.[150] Second, we included only bond hearings that occurred in the context of removal proceedings, deleting the 1% of cases that were associated with nonremoval cases. Third, we eliminated the cases in which the IJ concluded that they lacked jurisdiction. A lack of jurisdiction would occur where the noncitizen was ineligible for release because they were subject to mandatory detention statutes, provided the decision was after January 19, 2001. If there was more than one hearing and if the court concluded it lacked jurisdiction during the first hearing, we used the next hearing in which there was a substantive bond decision. Fourth, we deleted custody cases heard by Nixon and Carter appointees to simplify the analysis. Fifth, we eliminated all proceedings heard by IJs who decided less than fifty bond proceedings. We also eliminated proceedings heard by an individual who had not yet been

of Commitment to Accuracy, TRAC (Oct. 31, 2019), https://trac.syr.edu/immigration/reports/580 [https://perma.cc/W7BX-T9TK]. EOIR has responded that it has no duty under FOIA to "certify" the accuracy of its records. *Id.* The GAO has launched an investigation. *GAO To Probe Missing Records*, LAW360 (March 4, 2020), https://www.law360.com/immigration/articles/1238391/gao-to-probe-missing-doj-immigration-records [https://perma.cc/2454-3PSP]. By necessity, our analysis is limited to the extent any information provided by EOIR is incomplete or inaccurate. We relied on the files released in October 2019 and February 2020 to complete this analysis.

149 Bond decisions are coded as follows in the EOIR database: 1) no action ("A"); 2) new amount ("C"), 3) "no jurisdiction" ("J"); 4) no bond ("N"); 5) own recognizance ("R"); or 6) no change ("S"); Data tables produced by EOIR in response to a FOIA request indicate that decisions coded as "G," "D," "O," or "F" are not valid. Cases with these invalid codings mostly involved pre-2001 cases and any post-2001 cases with these codes were dropped. The Bond Table has thousands of entries lacking data on the presiding judge, base city, and hearing location of the cases, and the completion. To identify missing information, we merged in the "Schedule Table, which codes "CY" or "Custody" to signify the custody proceeding. If the judge was still missing even after merging in the "Schedule Table , we used the judge listed in the "Proceeding Table."

150 Prior to 2005, most bond hearings were coded as "BD" or "bond re-determinations" proceedings. After 2005, most proceedings were coded as "BB" or "custody re-determinations." *See What Happens When Individuals Are Released on Bond in Immigration Court Proceedings?*, TRAC (Sept. 14, 2016), https://trac.syr.edu/immigration/reports/438 [https://perma.cc/XDA4-TMNM] (noting a shift in coding twenty years ago). We treated BB and BD proceedings the same. "SB" proceedings indicate a subsequent bond hearing after one was already heard. Many of these subsequent cases were coded as bond type "SB." However, we found that some cases were coded as "SB" even if they were the only bond proceeding for a given noncitizen, so this variable alone was not useful in identifying the first substantive case. Rather, the data had to be sorted by case and proceeding ids, the bond completion date ("comp_date"), and the hearing time ("hearing_time").

formally appointed as an IJ, as well as those heard by two IJs for whom we were not able to obtain reliable biographical information. Sixth, we eliminated proceedings in which custody status was listed as "never detained."[151] It is possible that in those cases, the noncitizen had never been detained but sought review over the conditions for their release; it is also possible that those cases were erroneously coded. Seventh, we eliminated cases coded as involving juvenile on the ground that IJ decisions on bond will differ systematically in juvenile cases.[152]

The reliability of the data is unclear. If the bond amount was below the statutory minimum of $1,500, we made it $1,500. Most observations included a bond decision, but many did not record a bond amount. We found many internal inconsistencies in EOIR's coding on the old and new bond amounts. For example, some cases coded as a "no bond" or "own recognizance" decision actually had an amount listed in the "new bond" column. We treated such decisions as no-bond or own-recognizance cases, opining that the "bond decision" variable was coded accurately. In addition, we imputed IJ bond amounts based on the bond decision. If the IJ bond was missing but the ICE bond was filled in with the decision being "no action" or "no change," we imputed the ICE amount.[153] If bond amounts were missing, it was often unclear if the IJ sought to issue a lower or higher bond. We assumed that if the noncitizen was released, the IJ lowered bond. If the information for initial bond was still missing, we imputed the median ICE bond based on the city in which the hearing took place and the presidential era. For missing new bond amounts, we imputed the median amount set by that IJ for the presidential era. We did the imputations on the truncated dataset. The bond amounts presented exclude what we perceive to be erroneous bond decisions for no

[151] To identify custody cases, we relied on the "Case Table" as well as the "Custody Table" and "Proceeding Table." Noncitizens coded as "N" were never detained, while those coded "R" or "D" were detained but released, or detained, respectively.

[152] *See supra* note 64. To identify juveniles, we relied on both the "Juvenile Table" and the "Lead and Rider Tables." We assumed that rider cases involved juveniles. EOIR's coding identifying juvenile cases is unclear, so we only eliminated the cases with a juvenile id from the Juvenile Table (other than if coded "NA" or "Not Applicable") or who had a case id from either the lead or rider Tables. Some analysis has suggested this is underinclusive of all juveniles. *See* NINA SIULC, ZHIFEN CHENG, ARNOLD SON & OLGA BYRNE, VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at 79 (2008), https://www.vera.org/downloads/Publications/legal-orientation-program-evaluation-and-performance-and-outcome-measurement-report-phase-ii/legacy_downloads/LOP_evalution_updated_5-20-08.pdf [https://perma.cc/2Z5B-PCV8]. We eliminated all rider case as well as all lead cases that had a rider case.

[153] The American Civil Liberties Union made this assumption. *See* ACLU, IMMIGRATION BOND ANALYSIS: METHODOLOGY 2, https://www.aclu.org/report/immigration-bond-analysis-methodology [https://perma.cc/DW4E-R53K].

bond, own recognizance, or nonsubstantive outcomes.