

# UNDERSTANDING JUDICIAL DECISION MAKING IN IMMIGRATION CASES AT THE U.S. COURTS OF APPEALS\*

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*Immigration is an increasingly important area of decision making for federal judges. The recent increase in appeals of immigration cases to the courts of appeals raises the question whether judges deciding these cases behave in ways consistent with the extant attitudinal literature or if other factors, such as case characteristics and institutional concerns, weigh more heavily on the decision making of judges. It is possible, for example, that the country of origin for the alien, or the panel on which a judge serves, also influences decision making. Using an original data set of immigration cases drawn from the Third, Fifth, and Ninth circuits, this article presents models that examine whether and how ideology influences the decision making of courts of appeals judges in immigration-removal cases, given other case and institutional factors that might temper the effects of ideology.*

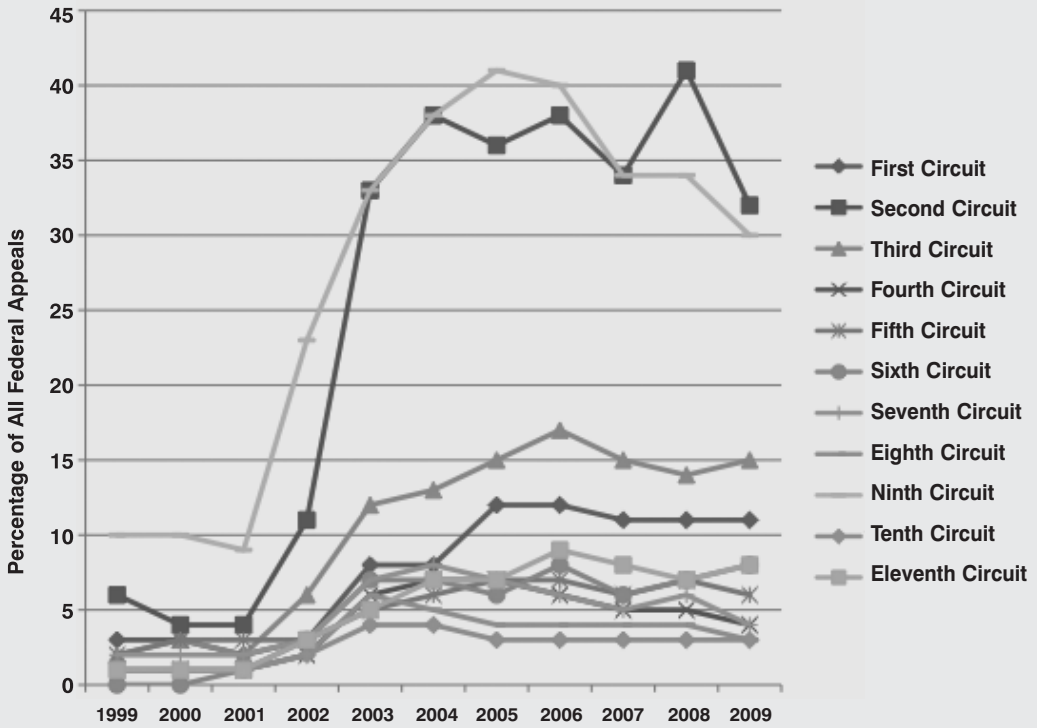
While the candidates in the 2008 presidential race were more likely to focus on the economy than immigration, federal judges are less able to avoid dealing with the issue (Preston, 2008). Immigration cases are an increasing part of the federal caseload. Figure 1 shows the increase in immigration appeals as a percentage of all federal appeals for a ten-year period. There is an increase both in the number of immigration appeals over this period and in immigration appeals as a percentage of all appeals. This means not only that more immigration cases are being decided in the courts of appeals today, but also that immigration appeals are taking up a larger percentage of the federal appellate docket now than in years past. The increasing importance of this area of law, along with the increasing rhetoric surrounding the issue of immigration, makes it an area ripe for study by judicial scholars (MacLean, 2009).

Despite the increasing importance of immigration cases to the courts of appeals, relatively few empirical studies have examined this area of law. Studies that do consider decision making in immigration cases examine the behavior of those serving as immigration judges or on the Board of Immigration Appeals, or use immigration as a vignette to understand publication decisions.<sup>1</sup> This article seeks to understand deci-

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<sup>1</sup> See Ramji-Nogales, Schoenholtz, and Schrag, 2007; Rosenblum and Salehyan, 2004; Salehyan and Rosenblum, 2008; Law, 2006, 2005; Schrag et al., 2010. While the importance of these studies cannot be understated, their intent was not always to focus on the factors that influence decision making of judges in immigration cases. Any findings relevant to the influences on judicial decision making are discussed below.

**Figure 1**  
**Immigration Appeals January 1999-June 2009\***



\* This figure is based on data compiled by the Administrative Office of the U.S. Courts for the Judicial Business Report.

sion making in this area of law, including how cases reach the courts of appeals from executive-branch administrative agencies, and how both case and judge characteristics may influence decision making in immigration cases. To understand decision making in immigration cases at the courts of appeals, we must first draw on the existing judicial decision-making literature.

### JUDICIAL BEHAVIOR IN THE COURT OF APPEALS

The behavior of courts of appeals judges has been a subject of study to scholars for quite some time. Application of the attitudinal model to explain the behavior of these judges is not without its critics.<sup>2</sup> Certainly the discipline is replete with studies examining the effects of individual characteristics on the decision making of courts of appeals judges (see, for example, Ashenfelter, Eisenberg, and Schwab, 1995; Davis,

<sup>2</sup> See, at the Supreme Court level, Segal and Spaeth, 1993, 2002; Epstein and Knight, 1998; Maltzman, Spriggs, and Wahlbeck, 2000. See, at the Courts of Appeals level, Cross and Tiller, 1998; Songer, Segal, and Cameron, 1994.

Haire, and Songer, 1993; Songer, Davis, and Haire, 1994; Walker and Barrow, 1985). This literature considers not only the effect of these characteristics on an individual's own vote, but also how working with political minorities can influence the decision making of other judges on the panel (see Cross, 2007; Farhang and Wawro, 2004; Revesz, 1997; Cross and Tiller, 1998; Law, 2005, 2006). The influence of principal-agent relationships also should not be ignored (Hettinger, Lindquist, and Martinek, 2004). Scholars have demonstrated that the environments in which federal judges make their decisions can have varying effects on their behavior (Scott, 2006). Both the culture of the circuit and the dynamics of small groups within courts of appeals panels have been shown to affect judicial decision making (Cross, 2007; Farhang and Wawro, 2004; Goldman, 1975; Green and Atkins, 1978; Hettinger, Lindquist, and Martinek, 2004; Kastellec, 2007; Songer, 1982).

Outside of the more general studies of the behavior of courts of appeals judges, some studies examine the behavior of these institutional actors in specific issue areas. Judges' behavior in gender discrimination, other civil-rights issues, and criminal law have been considered (Ashenfelder, Eisenberg, and Schwab, 1995; Brudney, Schiavoni, and Merritt, 1999; Davis, Songer, and Haire, 1993; Farhang and Wawro, 2004; Law, 2005, 2006; Revesz 1997; Songer, Davis, and Haire, 1994; Walker and Barrow, 1985). The results regarding the effects of individual characteristics on decision making are somewhat mixed, with gender results slightly more consistent than race, but still heavily dependent on the type of case before the decision maker. Alternate methodological techniques offer a different perspective on the effects of judge characteristics such as gender, but continue to suggest that the area of law drives these effects.<sup>3</sup>

While the discipline is piece by piece working to develop a better understanding of the variation in behavior across issue areas, political scientists know relatively little about the decision making of courts of appeals judges in immigration cases. While this is a notable oversight, there is reason to believe that the models of judicial behavior developed from civil and criminal cases studied to this point can be applied to immigration cases. In many cases, litigants are seeking asylum or trying to avoid deportation, often claiming that return to their country of origin would result in persecution or a violation of their human rights. While no previously studied case type is exactly the same as immigration, there are similarities; our study and the existing literature both focus on individual rights and liberties. Moreover, even in immigration cases judges must still make their decisions given their policy preferences, the institutional constraints on their decision making, and the relevant case law.

Similar to the studies of the courts of appeals, those studies that have considered the factors affecting litigant claims in cases before immigration judges consider the effects of both case and individual factors on outcome. Not only do the characteristics of the individual making the asylum claim matter but so do the characteristics of the person reviewing the claim, with some studies finding Republicans less likely to

<sup>3</sup> See Boyd, Epstein, and Martin (2010). While matching pairs may offer insight into the decision making of judges, using such a technique is outside the bounds of this research.

support asylum claims. The country to which a claimant may return can also affect the decision, with both humanitarian concerns and diplomatic relations affecting outcomes. Finally, there is also regional variation in support for asylum claims, with some areas not only more prone to hearing such claims, but also more likely to decide claims differently (see Ramji-Nogales, Schoenholtz, and Schrag, 2007; Rosenblum and Salehyan, 2004; Salehyan and Rosenblum, 2008; Law, 2006, 2005; Schrag et al., 2010). The effect of these additional factors on judicial decisions is a question worthy of empirical investigation.

Past studies of decision making in immigration cases provide a strong theoretical background for understanding this area of law, but the models largely consider the decision making of those within the executive branch. Immigration judges and those serving on the Board of Immigration Appeals do not make decisions in the same environment as Article III judges sitting on the courts of appeals. At the very least, the absence of judicial independence and an alternate method of selection for Article I actors are likely to influence their decision making. The lone study to look at immigration outcomes in the courts of appeals considers the behavior of courts in the aggregate, examining how circuits behave relative to each other during the period from 2004 to 2006 (see Ramji-Nogales, Schoenholtz, and Schrag, 2007). In fact, these scholars suggest examining the decision making of individual judges is problematic because there are too few judge votes in some circuits and too many judge votes for others.

While looking at the behavior of individual court of appeals judges may have been outside the bounds of their work, the problem noted by Ramji-Nogales, Schoenholtz, and Schrag (2007), that there are too few votes to study in some circuits is easily solved. Looking over time and across circuits provides a substantial number of cases for an analysis of judicial decision making. Not only can we consider how the behavior of individual judges varies, but we can also examine how circuits differ from one another, as well as how the characteristics of the country of origin and the alien seeking redress influence the outcome of immigration cases in the courts of appeals. These factors are the focus of our study.

## IMMIGRATION IN THE COURTS OF APPEALS

To bridge the gap between the existing court of appeals and immigration literatures, we constructed a database of immigration cases. The cases in this original data set were generated through a LexisNexis search using the keywords “immigration” and “exclusion” or “deportation” within the time period of 1891-2002. Any cases that were not actually immigration-exclusion or deportation cases were discarded. Because asylum is a subcategory of deportation, asylum cases were included in the analysis as well. We limited the study to exclusion and deportation cases to maintain analytical consistency in the types of constitutional, statutory, and political issues that arise in these cases. In exclusion and deportation cases, the courts must make decisions about whether a

person may enter or remain in the United States. Exclusion and deportation cases also constitute the most common types of immigration cases, and limiting the sample to these cases captures roughly three-fourths of all immigration cases.<sup>4</sup>

The database contains cases from the Third, Fifth, and Ninth circuits and covers the period 1891-2002. By 1981, it became necessary to randomly sample the cases in the Ninth Circuit because the caseload in that circuit increased substantially. A master list of Ninth Circuit cases was created, and a random sampling procedure was applied to that list to gather 10 percent of the cases on the list (650 cases total). Only the Ninth Circuit cases between 1981 and 2002 were obtained through a random sampling procedure, and the sample is of sufficient size to draw reliable conclusions about the population.<sup>5</sup> Below, we further discuss the immigration process, as well as the choices of courts and years for this study.

***Choice of Exclusion and Deportation.*** General deportation cases involve an attempt by the government to remove an alien from the United States, typically because of involvement in criminal activity or because the alien entered the country illegally. By contrast, political-asylum cases, one subcategory of deportation cases, involve a request to the United States to provide safe haven to aliens who are unwilling or cannot return to their home countries based on a “well founded fear of persecution” on account of their “race, religion, nationality, political opinion, or membership in a social group.”<sup>6</sup> The U.S. offers these protections because it, along with seventy other countries, is a signatory to international agreements recognizing an asylum seeker’s right to “nonrefoulement,” or the right of an alien not to be forcibly returned to his or her country of origin if he or she faces persecution.<sup>7</sup>

When aliens apply for refugee status upon arriving on U.S. shores, they have two options for making an asylum claim that may involve the courts of appeals: an offensive track and a defensive one.<sup>8</sup> If an alien takes the offensive option, he or she voluntarily seeks out a government official to file an asylum claim. In defensive asylum, the

<sup>4</sup> An example of the kinds of cases that were excluded using our selection criteria are cases involving the enforcement of employer sanctions against U.S. employers hiring illegal aliens, or cases involving a native-born U.S. citizen charged with selling fraudulent documents to aliens.

<sup>5</sup> While the original time period for this study spanned 1891-2001, our concern about the influence of 9/11 on immigration policy caused us to add cases from this time period as well. All cases for the Third and Fifth circuits were added, along with a sample of 10 percent of the 2002 immigration cases in the Ninth Circuit (included in the description of the sample above). Our concern was not that formal policy changed or that the types of cases reaching the judges were different, but that after 9/11 a protectionist sentiment may have affected judicial decision making. A dummy variable for cases decided after 9/11 was included in a separate analysis, but was not statistically significant.

<sup>6</sup> See 8 U.S.C. §§ 110(a)(42), 1158(b)(1) (2000).

<sup>7</sup> The multinational commitment to nonrefoulement is based in the 1951 Refugee Convention or to the 1967 Protocol (see U.N. High Commissioner for Refugees, 1977).

<sup>8</sup> U.S. refugee policy by contrast involves the grant of a refugee status to applicants and, more likely, groups of applicants that are still overseas. Refugee policy consists of an entirely different set of procedures from asylum and does not include the involvement of the federal courts. Refugee applicants, however, must also meet the statutory requirements for asylum protection.

alien raises an asylum claim to avoid being expelled from the country after having been apprehended by the Department of Homeland Security (DHS) and being placed in deportation and removal proceedings.<sup>9</sup>

Offensive claims of asylum begin in a hearing before an asylum officer, who is a part of a specially trained corps of adjudicators.<sup>10</sup> An affirmative grant of asylum can place one on the path to permanent residence and ultimately, American citizenship. Because only 35 percent of the claims result in grants by asylum officers, the majority of the claims are referred to an immigration judge (Ramji-Nogales, Schoenholtz, and Schrag, 2007:308). Defensive claims of asylum begin before an immigration judge. Immigration court proceedings are administrative hearings and are adversarial in nature. The DHS attorney may cross-examine the asylum applicant about their credibility and will likely argue to the immigration judge that asylum is not warranted. Under U.S. law, immigration proceedings are considered civil rather than criminal in nature. This classification means that asylum applicants who wish to be represented by counsel must do so at their own expense. Even indigent applicants are not provided with counsel (Ramji-Nogales, Schoenholtz, and Schrag, 2007:309). Evaluations of claims by asylum officers and immigration judges can be construed as trial-level adjudications. The duties of these administrative bodies center on sorting out the evidence, ascertaining the credibility of the applicant, and determining whether the applicant has met the statutorily prescribed definition of asylum.

Either DHS or the alien applicant may appeal an immigration judge's decision to the Board of Immigration Appeals (BIA), the highest body in the immigration bureaucracy. The BIA has been described as the "Supreme Court of immigration law" (Aleinikoff and Martin, 2006:A21). Despite its importance, the BIA is not a statutorily mandated body; it is a part of the attorney general's office. As a report commissioned by the American Bar Association noted, the BIA "exists only by virtue of the Attorney General's regulations. As the Attorney General's creation, [the Attorney General] is also that person that defines and modifies the BIA's powers" (Dorsey and Whitney, LLP, 2003:8). BIA members do not enjoy the same judicial independence that Article III judges enjoy and the BIA operates in a very different institutional context than Article III courts (Ramji-Nogales, Schoenholtz, and Schrag, 2007:350). Aliens may appeal an adverse BIA ruling to the U.S. Courts of Appeals.

In two respects, an appeal to the U.S. Courts of Appeals is the last place an alien may try to gain a favorable ruling. First, as Ramji-Nogales, Schoenholtz, and Schrag (2007) explain, "The Board acts for the Attorney General and the Attorney General's decisions bind the Department of Homeland Security, so the Department does not appeal adverse decisions of the Board" (p. 310, n. 30). Second, while an alien may appeal an adverse ruling at the courts of appeals to the Supreme Court, given the very small number of appeals (immigration or otherwise) to which the Supreme Court

<sup>9</sup> Both types of cases are included in our analysis, and we are unable at this time to distinguish one type of case from another.

<sup>10</sup> The asylum officers receive training on a range of subjects, including nonadversarial interview techniques, human-rights law, international law, and U.S. immigration law.

grants certiorari, the U.S. Courts of Appeals are in practice the court of last resort for most federal litigants, including aliens pursuing a conferral of asylum. For example, in the time period covered by our data set, 1891-2002, the twelve U.S. Courts of Appeals collectively adjudicated more than 11,000 immigration appeals in contrast to the 200 immigration cases the Supreme Court decided in the same time period.

The courts of appeals may either affirm or remand the decision to the BIA for further consideration. While asylum claims before an asylum officer or immigration judge focus on sorting out facts, determining the credibility of the witness, and applying the statutory requirement for asylum to the facts, the courts of appeals adjudications are focused on error correction. The courts of appeals are also bound by statutory directives that require deference to the attorney general's decision making, including the attorney general's designees on the Board of Immigration Appeals.<sup>11</sup> Under this deferential standard, the courts of appeals may not overturn an administrative decision maker's credibility determination or interpretation of the facts unless they find that body has made a determination not supported by specific reasoning. In reality, the courts of appeals vary in their standards of deference to administrative decision makers (Ramji-Nogales, Schoenholtz, and Schrag, 2007:310, n. 31). In many of the opinions in our database, judges appeared not to be limited to the legal issues raised in the appeal, and many were undertaking *de novo* review and finding other legal issues to address. The varying levels of discretion across courts of appeals may have consequences that are empirically ascertainable through cross-circuit comparisons.

## METHODOLOGY

Several factors went into the choice of the Third, Fifth, and Ninth circuits. The Fifth and Ninth circuits were selected to maximize the number of cases in this data set since these two courts, in raw numbers, adjudicated the largest number of immigration appeals during our study. Because of its proximity to numerous international ports of entry—both airports and land borders—the Ninth Circuit (Los Angeles, Tijuana, San Francisco, Honolulu, Seattle/Tacoma) has traditionally fielded the most immigration appeals of all the circuits. Also driving the high number of immigration cases in the Ninth Circuit are the immigration settlement patterns; aliens, both legal and illegal, tend to permanently settle in the metroplex areas of six states: California, Arizona, New York, Illinois, Texas, and New Jersey. Immigrants also tend to concentrate in or near the gateway ports of entry in these states, including Los Angeles, Tucson, Miami, and New York City (Migrations Policy Institute, 2005). By the mid-1990s, the Ninth Circuit adjudicated a little over 50 percent of all immigration cases nationwide (Catterson, 2006:294).

<sup>11</sup> In 1996, Congress revised the immigration statutes in an attempt to standardize the level of deference courts of appeals should provide administrative decision makers. This section codified at 8 U.S.C. § 1252(b)(4)(B) states that circuits must uphold factual findings, unless “any reasonable adjudicator would be compelled to conclude to the contrary.”



In addition to including circuits that had a substantial number of immigration cases for analysis, regional variation in the circuits was an important consideration. The Third, Fifth, and Ninth circuits cover very different geographical regions in the country: the northeast, south/southwest, and western regions, thereby allowing an evaluation of any regional effects as well as a mix of nationalities of the aliens. The geographical variation also creates cultural variation in the circuits. The Ninth Circuit is more liberal, the Fifth Circuit more conservative, and the Third Circuit more moderate (Ramji-Nogales, Schoenholtz, and Schrag, 2007; Velona, 2005). Not only is the Third Circuit historically a more moderate court, but it is also smaller than the Fifth or Ninth circuits and has had steady growth in the number of immigration appeals. Thus, the addition of the Third Circuit allows a comparison of the effect of rising caseloads on the adjudication of cases (see Figure 1).

The circuits chosen also vary with respect to the country of origin for the aliens making the asylum or deportation claims. The Ninth Circuit sees a large percentage of aliens from Asia, southeast Asia, Mexico, and Central America. By contrast, the Fifth Circuit's immigration cases generally involve Mexican and Central American aliens, while the Third Circuit's immigration caseload involves a mix of all these groups.

***Selection of Time Period.*** We chose to begin the time period for the study in 1891 because the Evarts Act created the structure of the contemporary courts of appeals system at that time. In addition, the broad timeframe encompasses moments of both liberal and conservative policy in U.S. immigration history. The three decades following 1882 marked the beginning of a conservative era in immigration history, beginning with the passage of the Chinese Exclusion Act in 1882. Likewise, the decade following the passage of the 1921 and 1924 national origins based acts is another conservative time period in American immigration history. Conversely, 1965 marks the year a watershed immigration act was passed that is widely regarded as liberal. The Immigration Act of 1965 was an outgrowth of the civil-rights era. The years 1990-95 were also a relatively liberal period for immigration policy, a period that ended in 1996 with the passage of a series of bills that were more conservative.<sup>12</sup>

In total there are 6,084 judge votes in our database, covering 2,000 cases from 1891 to 2002 in the Third, Fifth, and Ninth circuits.<sup>13</sup> Because we want to consider the effects of individual characteristics, including their decision-making environment, our dependent variable is the vote of the judge in each case. Because en banc decisions are included in our sample, some cases have more than three judge votes, but this is a relatively small portion of all observations. Both asylum and deportation claims are included in the same model, and the model does not consider from where the case was appealed (a lower district court versus the BIA). Separate analyses were estimat-

<sup>12</sup> The Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigrant Reform and Responsibility Act were both passed in 1996, and both limited the right of appeal for aliens involved in criminal activity.

<sup>13</sup> The figure in Appendix C shows the number of cases by circuit and year in our database. The figure shows that our database, much like all immigration filings in the courts of appeals, is heavily weighted toward cases from 1950 to 2002.



ed to consider asylum separate from deportation, and if the judges examine appeals from the Board of Immigration Appeals differently from other cases. The results are no different than what is reported below.

## FACTORS AFFECTING JUDGE VOTES

In considering what affects the judge's vote in an immigration case, we have three classes of variables: litigant characteristics, judge characteristics, and court characteristics. For litigant characteristics, we considered whether the gender of the alien affected decision making, hypothesizing female aliens may receive more favorable treatment by decision makers.<sup>14</sup>

*Hypothesis 1: Judges are more likely to vote pro-alien when the alien is female.*<sup>15</sup>

The country to which an alien may be deported is also likely to influence the judge's vote, though the literature is uncertain as to the effect of country characteristics. Past studies hypothesized that countries that were less democratic and more likely to violate human rights would see their citizens granted asylum at a higher rate, but diplomatic ties were also thought to be important (Rosenblum and Salehyan, 2004; Salehyan and Rosenblum, 2008). The results of the study, however, were mixed. Given the support in the comparative politics literature for the theoretical expectation that decision makers are hesitant to return people to undemocratic countries, we posit the same relationship. We are confident in this expectation because judges on the courts of appeals are unlikely to be influenced by diplomatic concerns that might influence Article I decision makers. To measure the country-level conditions to which an alien may return, we included the Polity IV score for the country of origin (Marshall, Jagers, and Gurr, 2003; Rosenblum and Salehyan, 2004; Salehyan and Rosenblum, 2008). The Polity IV score is a measure of the institutional democracy in a country, including the protections of civil and political rights. We found this measure favorable to others (such as Freedom House Scores) because Polity IV scores cover a broader time period, more appropriate for our data set.

*Hypothesis 2: Judges are more likely to vote pro-alien if the country of origin is less democratic.*

In addition to the individual characteristics of the alien influencing the decision of the judge, the judge's own characteristics are likely to influence his or her behavior. Perhaps the most obvious factor affecting the decision making of the judge is ideology. Liberal judges are more likely to vote in a pro-alien manner (Segal and Spaeth, 1993,

<sup>14</sup> See Ramji-Nogales, Schoenholtz, and Schrag, 2007; Rosenblum and Salehyan, 2004; Salehyan and Rosenblum, 2008; Law, 2006, 2005; Schrag et al., 2010. While we hypothesize that female aliens are more likely to see their claims supported, we should note that the courts have said an alien with a child who is a U.S. citizen will not automatically gain favored status (*Choe v. INS*, 597 F.2d 170).

<sup>15</sup> We are aware that the term "alien" can have derogatory connotations. We use the term in this study for the sake of consistency with U.S. government documents and federal legal opinions, both of which use the term to reference noncitizens. As stipulated by 8 U.S.C. 12 § 1108 (a)(3), "alien" is a legal term that refers to "any person not a citizen or national of the United States."

2002). To determine the ideology of the judge, we utilize the Judicial Common Space (JCS) scores developed by Epstein et al. (2007). JCS scores create an ideology score for the judge from the appointing president and confirming senators from the state, when senatorial courtesy applies.<sup>16</sup>

*Hypothesis 3: Judges who are more liberal are more likely to vote pro-alien.*

The extant literature suggests that women and political minorities are both more likely to favor civil-liberties claims (Ashenfelter, Eisenberg, and Schwab, 1995; Brudney, Schiavoni, and Merritt, 1999; Cox and Miles, 2008; Farhang and Wawro, 2004; Law, 2006, 2005; Revesz, 1997; Songer, Davis, and Haire, 1993; Walker and Barrow, 1985). Because of the similarity in civil-liberties claims and claims of asylum, we expect the same relationships here.

*Hypothesis 4: Female judges are more likely to vote pro-alien.*

*Hypothesis 5: Minority judges are more likely to vote pro-alien.*

In addition to the alien and judge characteristics, we anticipate that court dynamics are likely to influence pro-alien votes by judges. The past studies of panel effects highlight the importance of controlling for the ideology of the other decision makers in the case. Past studies have considered both the influence of the median voter and the ability of judges to sway their colleagues, each of which typically results in unanimous decisions (Farhang and Wawro, 2004). The influence of the other members of the court of appeals panel has a tempering effect on the attitudes of the justices. We expect that as the panel becomes more liberal, the judge is more likely to vote in a pro-alien way. Likewise, serving on a panel with a female or minority judge will increase the likelihood a judge will vote pro-alien.<sup>17</sup>

*Hypothesis 6: Judges serving on liberal panels are more likely to vote pro-alien.*

*Hypothesis 7: Judges serving on a panel with another female judge are more likely to vote pro-alien.*

*Hypothesis 8: Judges serving on a panel with another minority judge are more likely to vote pro-alien.*

<sup>16</sup> As explained by the authors, “[i]f a judge is appointed from a state where the President and at least one home-state Senator are of the same party, the nominee is assigned the NOMINATE Common Space score of the home-state Senator (or the average of the home-state Senators if both members of the delegation are from the President’s party). If neither home-state Senator is of the President’s party, the nominee receives the NOMINATE Common Space score of the appointing President” (Epstein et al., 2007:303). While there is variability in the NOMINATE scores of senators that can be problematic for analysis, common space scores are the best available, and most commonly accepted, measure of judicial ideology (but see Law and Fischman, 2009).

<sup>17</sup> To operationalize these two variables we took two different approaches. For ideology, we calculated the average ideology score for the other two judges on the panel. For serving on a panel with a woman or political minority (not including the judge herself), we created dummy variables to capture this panel effect. The variable is coded one if the judge served on a panel with a woman, or political minority, and zero otherwise. We considered the possibility of counting the number of women and political minorities. However, because such a small number of panels included more than one judge of either group, the count of these groups functions no differently from the dichotomous measures. For further explanation of variable coding, see Appendix A.

**Table 1**  
**Binary Logit Model Predicting Pro-Alien Judge Votes (Judicial Common Space Model)**

| <b>Variable</b>                                 | <b>Model 1</b><br>(Robust S.E.) | <b>Model 2</b><br>(Robust S.E.) | <b>Model 3</b><br>(Robust S.E.) | <b>Model 4</b><br>(Robust S.E.) |
|---|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| Polity IV Score                                 | 0.010<br>(0.011)                | 0.009<br>(0.011)                | 0.010<br>(0.011)                | 0.010<br>(0.011)                |
| Female Alien                                    | 0.035<br>(0.127)                | 0.121<br>(0.139)                | 0.029<br>(0.126)                | 0.113<br>(0.138)                |
| Judicial Ideology                               | -0.975***<br>(0.171)            | -0.976***<br>(0.170)            | -0.995***<br>(0.172)            | -0.995***<br>(0.172)            |
| Female Judge                                    | -0.141<br>(0.246)               | -0.042<br>(0.251)               | -0.138<br>(0.243)               | -0.042<br>(0.248)               |
| Minority Judge                                  | -0.528*<br>(0.237)              | -0.528*<br>(0.236)              | ---                             | ---                             |
| African-American Judge                          | ---                             | ---                             | -0.949**<br>(0.366)             | -0.943*<br>(0.369)              |
| Asian Judge                                     | ---                             | ---                             | -0.214<br>(0.159)               | -0.222<br>(0.160)               |
| Hispanic Judge                                  | ---                             | ---                             | -0.375<br>(0.418)               | -0.376<br>(0.416)               |
| Panel Ideology                                  | -1.267***<br>(0.217)            | -1.276***<br>(0.218)            | -1.280***<br>(0.216)            | -1.288***<br>(0.217)            |
| Unpublished Opinion                             | -1.227***<br>(0.145)            | -1.217***<br>(0.146)            | -1.241***<br>(0.148)            | -1.231***<br>(0.148)            |
| Female Judge* Female Alien                      | ---                             | -0.535*<br>(0.268)              | ---                             | -0.523#<br>(0.269)              |
| Panel with Female Judges                        | 0.544***<br>(0.161)             | 0.544***<br>(0.161)             | 0.535***<br>(0.163)             | 0.535***<br>(0.163)             |
| Panel with Minority Judges                      | -0.639***<br>(0.167)            | -0.644***<br>(0.168)            | -0.649***<br>(0.167)            | -0.654***<br>(0.168)            |
| National Origins Act                            | 0.604<br>(0.562)                | 0.619<br>(0.563)                | 0.606<br>(0.562)                | 0.620<br>(0.564)                |
| Hart Cellar Act                                 | 0.167<br>(0.564)                | 0.177<br>(0.565)                | 0.157<br>(0.565)                | 0.166<br>(0.565)                |
| Refugees Act of 1980                            | 0.908***<br>(0.242)             | 0.902***<br>(0.242)             | 0.920***<br>(0.238)             | 0.914***<br>(0.238)             |
| Immigration Reform and Control Act<br>1996 Acts | -0.422<br>(0.175)               | -0.421<br>(0.175)               | -0.412<br>(0.177)               | -0.412<br>(0.177)               |
| Constant  | -1.428*<br>(0.612)              | -1.450*<br>(0.613)              | -1.421*<br>(0.612)              | -1.443*<br>(0.613)              |
| Percent Correctly Predicted                     | 78                              | 78                              | 78                              | 78                              |
| N   | 2,526                           | 2,526                           | 2,526                           | 2,526                           |

# p<.10, \* p<.05, \*\* p<.01, \*\*\* p<.001

Finally, aside from the variables of theoretical interest there are some factors for which we must control. For example, Law's (2006) work on the decision to publish suggests judges behave differently in cases that are published versus unpublished opinions (Law, 2006, 2005). Therefore, we must control for the effect of unpublished decisions. Because of the lengthy time span for our study we must also account for the number of changes in immigration policy. As noted above, we included control variables for National Origins Act of 1924, the Hart Cellar Act of 1965, the Refugees Act of 1980, the Immigration Reform and Control Act in 1986, and the Illegal Immigration Reform and Responsibility Act and Anti-Terrorism and Effective Death Penalty Act, two acts passed in 1996.

## FINDINGS

The estimation examines what factors affect the support for alien claims by court of appeals judges. Table 1 shows four binary logit models, varying the measures for racial characteristics of the judge between a vague "minority judge" variable and three more specific dummy variables for three minority groups (African-American, Asian, and Hispanic).<sup>18</sup> In addition to varying the measures for a judge's race, the models also consider any potential interaction between the gender of the judge and the gender of the alien. Alternate specifications of the analysis were estimated, including separate models for asylum, deportation, and appeals from the Board of Immigration appeals.<sup>19</sup> The results of those models are not different from what is discussed below, and thus are not included here.

Models 1 through 4 show consistent effects for many of the variables of interest; ideology of the judge and race both affect the judge vote, but so does the panel on which the judge sits, if the decision is published, and the changes in immigration policy during the time period of our study. The interaction between female judges and female aliens is also significant in some of the models. Variables that do not significantly affect the judge's vote are the gender of the alien and the judge individually and the Polity IV score for the country of origin. As expected, more conservative judges and more conservative panels are less likely to favor the alien's claims. Surprisingly, other political minorities, in this case racial minorities, are less likely to vote in a pro-alien manner than their white counterparts. This result holds across both measures of judge race, though the effect for Asian and Hispanic judges fails to reach statistical significance. Finally, female aliens before female judges are less likely to see their claims upheld, though the effects for the variables individually were not statistically significant.

In addition to the judge factors affecting the votes of courts of appeals judges, the court environment also affects their behavior in immigration cases. Conservative

<sup>18</sup> Because there are multiple votes for the same judge in the database, the models clustered on the judge name creating robust standard errors.

<sup>19</sup> Separate models were also estimated for each circuit; the results are no different from what is listed here.

**Table 2**  
**Predicted Probabilities of the Pro-Alien Vote**

| <b>Variable</b>                               | <b>Predicted Probabilities Model 2</b> | <b>Predicted Probabilities Model 3</b> |
|---|--|--|
| Baseline                                      | 19%                                    | 19%                                    |
| Judicial Ideology Minimum (Most Liberal)      | 32                                     | 33                                     |
| Judicial Ideology Maximum (Most Conservative) | 11                                     | 12                                     |
| Minority Judge                                | 12                                     | —                                      |
| African-American Judge                        | —                                      | 8                                      |
| Panel Ideology Minimum                        | 36                                     | 37                                     |
| Panel Ideology Maximum                        | 10                                     | 11                                     |
| Unpublished decision                          | 6                                      | 6                                      |
| Female Alien Before Female Judge              | 13                                     | —                                      |
| Panel with a Female Judge                     | 28                                     | 29                                     |
| Panel with a Minority Judge                   | 11                                     | 11                                     |

panels are more likely to yield conservative votes by the judges, undoubtedly a part of the norm of consensus on the appellate bench. Likewise, decisions that are not published lead to more conservative votes by the judges. The panel effects for gender and race are especially interesting. Panels on which a judge serves with women or racial minorities behave differently from all-white or all-male panels. Panels with women are more likely to lead to pro-alien votes by the judge, while panels with political minorities decrease the likelihood of a judge favoring the alien's claim, counter to our expectation.

To understand the effects of the various factors influencing the likelihood of a pro-alien outcome, we estimated predicted probabilities.<sup>20</sup> A baseline probability was estimated, holding all continuous variables at the mean and most dichotomous variables at the mode. The exceptions to the dichotomous variables are the pieces of legislation, which were all held at zero so that predictions would reflect each change in immigration policy. The probabilities across all four models are largely the same, suggesting the results are robust to alternate specifications of the models. Because the gender interaction was not significant in the model with specified racial groups, the results discussed below are from models 2 and 3 only (see table 2).

In model 2, the baseline probability of a pro-alien outcome is 19 percent. The most conservative judge in our analysis has an 11 percent probability of deciding in favor of the alien, while the most liberal judge has a 32 percent probability of deciding in a pro-alien manner. Minority judges, on the other hand, have a much lower

<sup>20</sup> The predicted probabilities were estimated using the *SPost* commands for STATA (see Long and Freese, 2005).

probability of deciding in a pro-alien manner, a mere 12 percent. This effect is even more pronounced when we consider the predicted probability by minority group in model 3 (see below). The most conservative judicial panel has a 10 percent probability of deciding in a pro-alien manner, while the most liberal panel has a 36 percent probability of voting pro-alien. Unpublished decisions result in a 13-percentage-point reduction in the likelihood a judge will vote in a pro-alien manner. Serving on a panel with two female judges increases the likelihood of a pro-alien vote to 33 percent, while serving with one female judge raises the probability of a pro-alien vote to 28 percent. Panels with racial minorities had a substantially negative effect on a judge voting pro-alien. When a judge served with one minority judge, there was an 11 percent chance of voting pro-alien. Finally, the passage of the Refugees Act of 1980 increased the probability of a pro-alien vote to 36 percent.

The predictions for model 3 are almost exactly the same as those for model 2. The effects for minority group, however, require some further explanation. While the variables for Asian and Hispanic judges fail to reach statistical significance, this is probably the result of the paucity of Asian and Hispanic judges on the bench. African-American judges, however, are less favorable to alien claims than their white counterparts. African-American judges have an 8 percent probability of voting pro-alien.

Because the measure of judicial ideology we use spans from 1953 to 2000, but our database covers a larger span of time, we alternately included the party of the appointing president and the presence of a Democratic judge serving on the panel as proxies for judicial ideology and panel effects. The results of these models are not different from what was discussed above and are shown in Appendix B.<sup>21</sup>

## DISCUSSION AND CONCLUSIONS

While the results are consistent with most of the larger judicial politics literature, the effects of judicial characteristics merit further discussion. That panels with female judges are more sympathetic to alien claims is consistent with past work considering the differences in judicial behavior between male and female judges (Ashenfelter, Eisenberg, and Schwab, 1995; Brudney, Schiavoni, and Merritt, 1999; Cox and Miles, *supra* n. 40; Davis, Songer and Haire, *supra* n. 5; Farhang & Wawro, *supra* n. 6; Law, *supra* n. 3; Revesz, 2008; Songer, Davis, and Haire, 1993; Walker and Barrow, 1985; Ramji-Nogales, Schoenholtz, and Schrag, 2007). The interaction effect, demonstrating female judges are less likely to support the claims of female aliens, is also not different from the larger literature examining the sentencing behavior of female judges relative to their male counterparts (Steffensmeier and Hebert, 1999).

The finding that minority judges, regardless of minority group, are less supportive of alien claims is counterintuitive. These effects exist both for the individual judge

<sup>21</sup> The effects for race and gender are likely to be less pronounced as we move back in time because of the extremely small number of judges in these groups before 1970. Nonetheless, the results are not substantially different for the two models, suggesting that judicial decision making in this particular area of law has not changed substantially over the last 100 years.

and for panels that include minority judges. It is possible that minority judges are less supportive of alien claims, all else being equal, because the judges are not sympathetic to claims made by people who may have entered the country illegally (Burns and Gimpel, 2000; de la Garza et al., 1992; Epenshade and Hempstead, 1996). The literature examining attitudes toward immigration suggests that a lack of support for liberal immigration policies is more likely among African-Americans and Latinos than one might expect, though the attitudes vary significantly by the number of generations someone has been in the United States. Future studies of judicial behavior may want to consider the variation in attitudes among minority judges more fully. It is also possible that the judges are less sympathetic because they are cognizant of the scrutiny they are under in deciding these cases, scrutiny that is only more pronounced when the judge, too, is from a minority group. While these explanations are really just speculation, they do raise the need for additional work on this topic.

The remaining findings of this study are largely consistent with the existing literature on judicial behavior. Ideologically liberal judges (or those appointed by Democratic presidents) are more likely to favor alien claims, all else being equal. The differences in probability, however, are more limited than one might expect given the extant literature. In no incarnation of the variables in our models did the probability exceed the 50 percent threshold, meaning that no matter the change to the factors known to support judge votes does the alien have anything over a 50 percent chance of gaining the judge's vote. All judges appear to be disinclined to vote pro-alien across circuits, throughout our study period, even in the Ninth Circuit. While this may seem problematic from a number of perspectives, the results do, however, make sense when we consider the process for appealing these cases. As stated above, only aliens appeal adverse rulings to the courts of appeals, meaning that these are the more difficult cases for judges to find in favor of the alien. Viewed in this context, the probability of a pro-alien outcome, while small, is still substantively significant.

Interestingly, the political situation in the country of origin had no effect on judge vote. This result, however, could be a function of the variable used to measure the situation the alien is facing in their home country. One could argue that Polity IV scores, while a dynamic measure that spans a great deal of time, are incomplete for purposes of understanding asylum and deportation claims. Countries that are involved in a war, a situation that might make judges sympathetic to alien claims of persecution, do not have Polity IV scores. Alternatively, the lack of significance may be due to the competing interests of human rights and international law on judges' decisions, and more work should be done to consider these competing interests.<sup>22</sup>

Finally, our finding that institutional considerations of judges matter, including the panel on which judges serve and whether the decision is published, is generally consistent with the larger literature. Judges appear to be influenced by both ideology

<sup>22</sup> While it is unfortunate that Polity IV scores do not include values when a country is at war, these scores are the most comprehensive for the time period of our study.



and institutional constraints, deciding more conservatively in unpublished decisions and more conservatively when other conservatives serve on the panel with them. Given the current composition of the federal judiciary this is a result that is not likely to change soon (see Velona, 2005). The gender and racial composition of the panel also have interesting effects that merit further consideration, with panel effects serving as a more important factor on decision making than the demographic characteristics of the judge.

Our efforts here to explain judicial behavior by courts of appeals judges in asylum and deportation cases contribute to the larger literature in several ways. We not only consider a new area of decision making, broadening the explanatory power of the attitudinal model, but also add a new type of case factor to the decision-making calculus. Not only are judges influenced by their own characteristics, and the dynamics of their court, but the significance (or lack of significance) for alien and country characteristics moves us in the direction of developing a fact-based model of decision making in immigration cases. Future research can consider the effect of the claims made by the alien, the circumstances under which they find themselves in deportation or removal proceedings, the process by which the case works through the immigration system, and the existing immigration policy. Given the increase in immigration filings, this is an area of research that will only become more important to the federal courts.

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8 U.S.C. §§ 110(a)(42), 1158(b)(1) (2000).

8 U.S.C. § 1252(b)(4)(B).

8 U.S.C. 12 § 1108 (a)(3).

## APPENDIX A

### VARIABLE DESCRIPTIONS

| Variable                      | Description  | Minimum | Maximum | Mean/Mode      |
|-------------------------------|--|---------|---------|----------------|
| Polity IV Score               | Polity2 score for the country of origin from the Polity IV database (Marshall, Jaggers, and Gurr, 2003). Higher scores indicate more democratic countries. | -10     | 10      | 1.1263         |
| Female Alien                  | Coded as 1 if the alien was female and 0 otherwise.  | 0       | 1       | 0              |
| Judicial Ideology             | Judicial Common Space score for the judge (Epstein et al., 2007). Higher scores indicate more conservative judges.   | -0.699  | 0.608   | 0.020          |
| Democratic Judge              | Coded as 1 if the judge was appointed by a Democratic president and 0 otherwise. <sup>a</sup>  | 0       | 1       | 0              |
| Female Judge                  | Coded as 1 if the judge was female and 0 otherwise.  | 0       | 1       | 0              |
| Minority Judge                | Coded as 1 if the judge was a racial minority and 0 otherwise.   | 0       | 1       | 0              |
| African-American Judge        | Coded as 1 if the judge was African-American and 0 otherwise.  | 0       | 1       | 0              |
| Asian Judge                   | Coded as 1 if the judge was Asian and 0 otherwise.   | 0       | 1       | 0              |
| Hispanic Judge                | Coded as 1 if the judge was Hispanic and 0 otherwise.  | 0       | 1       | 0              |
| Panel Ideology                | The average of the Judicial Common Space Scores for the other two judges on the panel (see above). Higher scores indicate more conservative panels.        | -0.699  | 0.566   | 0.020          |
| Panel with Democrats          | Coded as 1 if the judge served on a panel with at least one Democratic appointee (not including self) and 0 otherwise.                                     | 0       | 1       | 1 <sup>b</sup> |
| Unpublished Opinion           | Coded as 1 if the decision was unpublished and 0 otherwise.  | 0       | 1       | 0              |
| Female Judge*<br>Female Alien | Coded as 1 if both the judge and the alien were female and 0 otherwise.  | 0       | 1       | 0              |

<sup>a</sup> For the gender, race, and party of the judge, the database compiled by the Federal Judicial Center was used.

<sup>b</sup> For the mean/mode column we report the mode so we can meaningfully talk about the number of Democrats as a whole number. We also report the number of women and minorities on the panel as whole numbers below.

APPENDIX A (CONTINUED)

| <b>Variable</b>                    | <b>Description</b>  | <b>Minimum</b> | <b>Maximum</b> | <b>Mean/Mode</b> |
|------------------------------------|---|----------------|----------------|------------------|
| Panel with Women                   | Coded as 1 if the judge served on a panel with at least one female judge (not including self) and 0 otherwise.  | 0              | 1              | 0                |
| Panel with Minorities              | Coded as 1 if the judge served on a panel with at least one minority judge (not including self) and 0 otherwise.  | 0              | 1              | 0                |
| National Origins Quota             | LawCoded as 1 for the years the law was in effect (1924-1965), otherwise coded 0.   | 0              | 1              | 0                |
| Hart Celler Act                    | Coded as 1 for the years the law was in effect (1965 to present day), otherwise coded 0.  | 0              | 1              | 1                |
| Refugees Act of 1980               | Coded as 1 for the years the law was in effect (1980 to present day), otherwise coded 0.  | 0              | 1              | 1                |
| Immigration Reform and Control Act | Coded as 1 for the years the law was in effect (1986 to present day), otherwise coded 0.  | 0              | 1              | 0                |
| 1996 Acts                          | Anti-Death Penalty Act/Illegal Alien Reform and Individual Responsibility Act: coded as 1 for the years the law was in effect (1996 to present day), otherwise coded 0. | 0              | 1              | 0                |

APPENDIX B  
 BINARY LOGIT MODEL PREDICTING PRO-ALIEN JUDGE VOTES  
 (PARTY MODEL)

| Variable                           | Model 1                        | Model 2                        | Model 3                        | Model 4                        |
|------------------------------------|--------------------------------|--------------------------------|--------------------------------|--------------------------------|
|                                    | (Robust S.E.)                  | (Robust S.E.)                  | (Robust S.E.)                  | (Robust S.E.)                  |
| Polity IV Score                    | 0.012 <sup>#</sup><br>(0.006)  | 0.011<br>(0.008)               | 0.012<br>(0.008)               | 0.012<br>(0.008)               |
| Female Alien                       | -0.080<br>(0.105)              | -0.032<br>(0.092)              | -0.081<br>(0.087)              | -0.034<br>(0.092)              |
| Judicial Ideology                  | 0.406***<br>(0.079)            | 0.408***<br>(0.105)            | 0.409***<br>(0.105)            | 0.412***<br>(0.105)            |
| Female Judge                       | -0.027<br>(0.156)              | 0.043<br>(0.257)               | -0.012<br>(0.255)              | 0.056<br>(0.259)               |
| Minority Judge                     | -0.292 <sup>#</sup><br>(0.158) | -0.291<br>(0.186)              | ---                            | ---                            |
| African-American Judge             | ---                            | ---                            | -0.447<br>(0.315)              | -0.445<br>(0.316)              |
| Asian Judge                        | ---                            | ---                            | 0.063<br>(0.168)               | 0.058<br>(0.167)               |
| Hispanic Judge                     | ---                            | ---                            | -0.409<br>(0.299)              | -0.405<br>(0.300)              |
| Panel Ideology                     | 0.283***<br>(0.083)            | 0.285**<br>(0.098)             | 0.280**<br>(0.097)             | 0.282**<br>(0.097)             |
| Unpublished Opinion                | -1.105***<br>(0.123)           | -1.094***<br>(0.143)           | -1.120***<br>(0.144)           | -1.109***<br>(0.144)           |
| Female Judge* Female Alien         | ---                            | -0.462 <sup>#</sup><br>(0.237) | ---                            | -0.454 <sup>#</sup><br>(0.238) |
| Panel with Female Judges           | 0.491***<br>(0.129)            | 0.493***<br>(0.154)            | 0.478***<br>(0.156)            | 0.480***<br>(0.156)            |
| Panel with Minority Judges         | -0.267*<br>(0.120)             | -0.269*<br>(0.137)             | -0.251 <sup>#</sup><br>(0.137) | -0.254 <sup>#</sup><br>(0.137) |
| National Origins Act               | -0.580***<br>(0.142)           | -0.572***<br>(0.160)           | -0.579***<br>(0.160)           | -0.571***<br>(0.160)           |
| Hart Cellar Act                    | -0.677***<br>(0.154)           | -0.673***<br>(0.160)           | -0.688***<br>(0.160)           | -0.683***<br>(0.160)           |
| Refugees Act of 1980               | 0.599***<br>(0.180)            | 0.596**<br>(0.202)             | 0.599**<br>(0.199)             | 0.597**<br>(0.199)             |
| Immigration Reform and Control Act | -0.434*<br>(0.185)             | -0.436*<br>(0.211)             | -0.415*<br>(0.208)             | -0.417*<br>(0.209)             |
| 1996 Acts                          | 0.164<br>(0.130)               | 0.163<br>(0.167)               | 0.164<br>(0.168)               | 0.163<br>(0.168)               |
| Constant                           | -0.932***<br>(0.134)           | -0.948***<br>(0.131)           | -0.932***<br>(0.131)           | -0.948***<br>(0.131)           |
| Percent Correctly Predicted        | 78                             | 78                             | 78                             | 78                             |
| N                                  | 4,277                          | 4,277                          | 4,277                          | 4,277                          |

<sup>#</sup> p<.10, \* p<.05, \*\* p<.01, \*\*\* p<.001



## APPENDIX B (CONTINUED)

| <b>Variable</b>                    | <b>Predicted Probabilities<br/>Model 1</b> |
|------------------------------------|--|
| Baseline                           | 29%  |
| Democratic Judge                   | 37   |
| Panel with Democratic Judges       | 37   |
| Unpublished Decision               | 12   |
| Panel with a Female Judge          | 39   |
| Panel with a Minority Judge        | 23   |
| National Origins Act               | 18   |
| Hart Cellar Act                    | 17   |
| Refugees Act of 1980               | 42   |
| Immigration Reform and Control Act | 21   |

### APPENDIX C NUMBER OF CASES BY CIRCUIT AND YEAR IN DATABASE

