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### Random Chance or Loaded Dice: The Politics of Judicial Designation

Todd C. Peppers

*Washington and Lee University School of Law, pepperst@wlu.edu*

Katherine Vigilante

*Emory University*

Christopher Zorn

*The Pennsylvania State University*

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# Random Chance or Loaded Dice: The Politics of Judicial Designation

TODD C. PEPPERS<sup>\*</sup>  
KATHERINE VIGILANTE<sup>\*\*</sup>  
CHRISTOPHER ZORN<sup>\*\*\*</sup>

## TABLE OF CONTENTS

|   |    |
|---|----|
| I. INTRODUCTION .....   | 69 |
| II. DISTRICT COURT JUDGE DESIGNATION IN THE FEDERAL COURTS OF APPEALS ..... | 74 |
| III. IDEOLOGY, OVERSIGHT, AND THE POLITICS OF DESIGNATION .....             | 77 |
| A. <i>Split Panels</i> .....  | 78 |
| B. <i>Unified Panels</i> .....  | 80 |
| C. <i>Workload and Designation</i> .....                                    | 84 |
| IV. DATA, OPERATIONALIZATION, AND METHODS .....                             | 85 |
| V. ANALYSIS AND RESULTS .....   | 88 |
| VI. CONCLUSION .....  | 90 |
| VII. APPENDIX .....   | 92 |

## I. INTRODUCTION

In the 1950s and 1960s, the southern states struggled to respond to the civil rights decisions being issued by the U.S. Supreme Court as well as the new civil rights laws being passed by Congress. The judicial battleground for this perfect storm of evasion and massive resistance was found in the “old” Fifth Circuit Court of Appeals,

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\* Henry H. and Trudye H. Fowler Associate Professor of Public Affairs, Roanoke College, and Visiting Professor of Law, Washington and Lee School of Law; e-mail: pepperst@wlu.edu

\*\* Lecturer in Political Science, Department of Public Science, Oxford College of Emory University, Oxford, GA, 30054; e-mail: kvigila@emory.edu

\*\*\* Liberal Arts Research Professor of Political Science, Department of Political Science, Pennsylvania State University, University Park, PA 16802; e-mail: zorn@psu.edu

which encompassed the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas.<sup>1</sup> In the “old” Fifth Circuit, a minority of liberal appeals court judges—sympathetic to the civil rights movement—used all legal and administrative power at their disposal to make sure that the federal district and appeals courts were complying with the U.S. Supreme Court’s mandate in *Brown v. Board of Education*.<sup>2</sup> In their ground-breaking book *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*,<sup>3</sup> political scientists Deborah J. Barrow and Thomas G. Walker carefully examined the political behavior of these aforementioned liberal appeals court judges and found evidence that Elbert Parr Tuttle, the Fifth Circuit’s chief judge from 1960 to 1967, was manipulating, or “gerrymandering,” the assignment of appeals court judges to both three-judge district court panels,<sup>4</sup> and three-judge appellate court panels to guarantee that the panels had at least two liberal judges who would enforce the Supreme Court’s desegregation rulings.<sup>5</sup>

The finding that a federal court of appeals judge may have used his administrative powers to create judicial panels sympathetic to civil rights cases is hardly surprising to Barrow and Walker; the basic assumption of their entire study is that “federal judges in the United States are by nature and necessity politicians” or “black-robed homo sapiens” who are “subject to the same forces that influence the behavior of other individuals.”<sup>6</sup> Add Barrow and Walker: “A judge must always be cognizant of the obligations and responsibilities of the judicial role, but putting on the black robe cannot be

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1. DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM*, 40–41, 56–60 (1988).

2. 347 U.S. 483 (1954).

3. See generally BARROW & WALKER, *supra* note 1.

4. Federal law authorized three-judge district court panels to hear specific types of cases, including civil rights and reapportionment cases. The panel is composed of the original district court judge assigned to the case and at least one federal appeals court judge. See generally Thomas G. Walker, *Behavioral Tendencies in the Three-Judge District Court*, 17 AM. J. POL. SCI. 407 (1973).

5. BARROW & WALKER, *supra* note 1, at 40–41, 56–60.

6. *Id.* at ix (citing S. Sidney Ulmer, *Dissent Behavior and the Social Background of Supreme Court Justices*, 32 J. POL. 580, 580 (1970)).

expected to neutralize an individual's political nature."<sup>7</sup> Of course, the argument that judges achieved preferred policy outcomes by the selective interpretation of controlling legal principles is hardly a new insight.<sup>8</sup> Barrow and Walker, however, examine the more interesting question of whether an appeals court judge can take advantage of administrative rules—such as how judges are selected to sit on appeals court panels—to pack panels with like-minded jurists, bring lower courts into compliance with the chief judge's policy preferences, and achieve specific policy goals.<sup>9</sup>

In highlighting the role that panel packing played in the "old" Fifth Circuit, Barrow and Walker contribute to a rich socio-legal literature that explores the mechanisms used for effective oversight and control in a judicial hierarchy.<sup>10</sup> Nearly all judicial systems provide for some means of oversight, and research into the interplay of such systems and the legal actors situated within them is of interest to scholars of constitutional design, judicial administration, and judicial decision making.<sup>11</sup> In particular, the relative effectiveness of various mechanisms of hierarchical control has long been a central

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7. *Id.*

8. *See generally* JEFFREY SEGAL & HOWARD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

9. BARROW & WALKER, *supra* note 1, at 40–41, 56–60.

10. *Id.*

11. *Id.*

focus for students of socio-legal phenomena,<sup>12</sup> as well as for scholars of social and political institutions more generally.<sup>13</sup>

In common law systems, judicial institutions often face significant challenges relating to oversight.<sup>14</sup> Hierarchy is arguably the signature institutional trait of the U.S. federal courts, and social scientists have long recognized the importance of that structure for the operation of those courts.<sup>15</sup> Higher court oversight of the decisions of lower courts has been found to be important in a host of different contexts.<sup>16</sup> Most of these studies have focused on the U.S. courts of appeals, investigating the influence of such factors as Supreme Court doctrinal trends on court of appeals decision making,<sup>17</sup> as well as on more direct forms of monitoring such as en banc rehearings.<sup>18</sup> Other studies have looked beyond the courts of appeals, either to the dis-

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12. See generally LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006); LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR (1997); VIRGINIA HETTINGER, STEFANIE LINDQUIST & WENDY MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON APPELLATE DECISION MAKING (2006); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS (2002); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994); Frank B. Cross, *Decisionmaking in the U.S. Circuit Court of Appeals*, 91 CALIF. L. REV. 1459 (2003); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579 (2003); Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005).

13. See generally HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (3d ed. 1976).

14. *Id.*

15. *Id.*

16. *Id.*

17. See generally Klein & Hume, *supra* note 12; Donald R. Songer, *Consensual and Nonconsensual Decisions of the United States Court of Appeals*, 26 AM. J. POL. SCI. 225 (1982); Donald R. Songer, *The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830 (1987); Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes*, 43 W. POL. Q. 297 (1990).

18. See generally Tracey George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999); Tracey George & Michael E. Solimine, *Supreme Court Monitoring of the United States Court of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171 (2001).

trict courts<sup>19</sup> or to other actors, including state supreme courts,<sup>20</sup> litigants,<sup>21</sup> and even the agenda-setting of the U.S. Supreme Court itself.<sup>22</sup>

Here, we take advantage of a unique characteristic of the procedures of the U.S. courts of appeals—the discretion held by chief judges to designate district court judges to three-judge appellate panels<sup>23</sup>—to examine empirically the importance of oversight and judicial hierarchy on judges' behavior in those courts. Specifically, we examine the extent to which decisions about the policy preferences of designated judges vary systematically with the ideological tenor of the chief judge himself, the court as a whole, and the U.S. Supreme Court. More simply put, we ask: are district court judges selected to sit on appeals court panels simply to help ease the workload of the federal courts of appeals, or are the chief judges of the courts of appeals free to take a page from Chief Judge Tuttle's playbook and use the designation process to select district court judges that share the chief judges' political preferences? In Part II of this article, we outline in detail the court of appeals designation process. Part III sets forth a series of expectations regarding chief judges' decisions about the delegation decision. We then examine those expectations empirically, using data on a random sample of court of appeals cases decided between 1925 and 1988. Part IV outlines our data and methods, while Part V discusses our findings and Part VI

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19. See generally Lawrence Baum, *Responses of Federal District Judges to Courts of Appeals Policies: An Exploration*, 33 W. POL. Q. 217 (1980); Susan B. Haire, Donald R. Songer & Stephanie A. Lindquist, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143 (2003).

20. See generally Bradley C. Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision*, 8 LAW & SOC'Y REV. 109 (1973); Scott A. Comparato & Scott D. McClurg, *State Supreme Court Compliance with the United States Supreme Court* (2002) (paper presented at the annual meeting of the Midwest Political Science Association, Chicago, IL).

21. See generally Donald R. Songer, Charles M. Cameron & Jeffrey A. Segal, *An Empirical Test of the Rational-Actor Theory of Litigation*, 57 J. POL. 1119 (1995).

22. See generally Charles M. Cameron, Jeffrey A. Segal & Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101 (2000).

23. S. Res. 253, 106<sup>th</sup> Cong. (1999) (enacted).

briefly examines future research questions regarding judicial designation.

## II. DISTRICT COURT JUDGE DESIGNATION IN THE FEDERAL COURTS OF APPEALS

The familiar structure of the modern federal judiciary has its roots in the Evarts Act.<sup>24</sup> Passed by Congress in 1891, the Evarts Act dramatically restructured the federal judiciary by creating the federal courts of appeals. The Act also affected the duties performed by federal court judges, including authorizing district court judges to sit by designation on three-judge appellate panels. The statutory authority for judicial designation is codified at 28 U.S.C. § 292, which states that a chief circuit court judge may designate district court judges within the circuit (and from outside the circuit, if authorized by the Chief Justice of the Supreme Court) to hear appeals on three-judge appellate panels.<sup>25</sup> In other words, district court judges are permitted to sit by designation on three-judge appellate panels, hear appeals taken from federal district courts, vote on the merits of the appeal, and draft the panel opinion as if they were court of appeals judges.<sup>26</sup>

The process by which district court judges are selected to sit by designation on court of appeals panels is illustrated in Figure 1. It is especially important to note that each federal circuit follows strict procedures designed to guarantee that appellate judges are randomly selected to each three-judge panel, and that cases are randomly assigned to those panels.<sup>27</sup> This is very different from the practices of the “old” Fifth Circuit studied by Barrow and Walker, in which a

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24. Evarts Act, ch. 517, 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. § 292 (2006)).

25. 28 U.S.C. § 292 (2006).

26. Beyond the scope of this paper is the question of how the practice of selecting district court judges to sit by designation might run afoul of the United States Constitution. For an excellent discussion on this point, see Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Court of Appeals*, 28 U. MICH. J.L. REFORM 351, 360 (1995).

27. See, e.g., 11TH CIR. INTERNAL OPERATING P. 34-2(b).

chief judge knew the exact case that a designated judge would be hearing. There are no rules, however, which stipulate that the selection of a designated judge to complete an appellate panel is similarly conducted in a random fashion;<sup>28</sup> instead, chief judges are given only loosely-bounded authority to designate judges as they see fit.<sup>29</sup> As a practical matter, chief judges retain complete discretion to create a pool of designated judges from which to select and, more importantly, to hand-pick specific district court judges and assign them to pre-existing appellate panels of two court of appeals judges.<sup>30</sup> While the completed panels are then randomly assigned to blocks of cases—thus preventing the deliberate assignment of specific panels to certain cases—chief judges nonetheless clearly have at least the potential to shape the composition of the circuit's three-judge panels<sup>31</sup>.

The lack of institutional rules regarding designation provides scholars with a unique opportunity to study the impact of circuit-level environmental factors on the actions of chief judges. First, in making their designation decisions, chief judges are presented with a random stimulus: a court of appeals panel already consisting of two randomly-selected judges<sup>32</sup>. Second, and more important, the fact that the subsequent assignment of cases to panels occurs randomly means that case-level factors do not (indeed, cannot) play a role in the designation decision<sup>33</sup>. The designation process thus provides a valuable natural quasi-experiment for examining questions of judicial behavior as well as greatly simplifying our analysis of the designation decision.<sup>34</sup>

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28. See Saphire & Solimine, *supra* note 26, at 361.

29. S. Res. 253, 106<sup>th</sup> Cong. (1999) (enacted).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. As a secondary matter, we would note that this discretion over district court judge designation is also potentially important for studies of the federal courts of appeals. In fact, despite their nearly universal presence in the courts of appeals, no clear consensus has emerged regarding the treatment of district court judges sitting by designation in studies of those courts. Compare Burton M. Atkins & Justin J. Green, *Consensus on the United States Court of Appeals: Illusion or Reality?*, 20 AM. J. POL. SCI. 735, 744 (1976) (excluding designated judges in determining that panel structure of the U.S. Courts of Appeals permits conflict to be hidden within



It is interesting to note that, with the exception of Barrow and Walker, scholars have not focused on the strategic possibilities afforded chief judges by the designation of district court judges to appellate panels in the U.S. context.<sup>35</sup> Scholars have, however, studied other institutional rules that provide chief judges with the discretion

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unanimous decisions); Burton M. Atkins & William Zavoina, *Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit*, 18 AM. J. POL. SCI. 701, 701–11 (1974); Virginia Hettinger, Stefanie Lindquist & Wendy Martinek, *Comparing Strategic and Attitudinal Accounts of Dissenting Behavior on the United States Courts of Appeals*, 48 AM. J. POL. SCI. 123, 131 (2004) [hereinafter Hettinger, *Comparing Strategic and Attitudinal Accounts*] (limiting analysis to decisions rendered by three-judge panels composed of active or senior court of appeals judges); John P. McIver, *Scaling Judicial Decisions: The Panel Decisionmaking Process of the U.S. Courts of Appeals*, 20 AM. J. POL. SCI. 749, 753 (1976) (excluding district court judges sitting by designation in order to isolate the nine judges and their working relationships with each of their fellow circuit judges); Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 963–82 (1992) with Martha Anne Humphries & Donald R. Songer, *Law and Politics in Judicial Oversight of Federal Administrative Agencies*, 61 J. POL. 212 (1999) (deliberately including designated judges in analysis). *Contra*, Virginia Hettinger, Stefanie Lindquist & Wendy Martinek, *The Role and Impact of Chief Judges on the United States Courts of Appeals*, 24 JUST. SYS. J. 91, 105 (2003) [hereinafter Hettinger, *The Role and Impact of Chief Judges*]; Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 980 (1989); Isaac Unah, *Specialized Courts of Appeals' Review of Bureaucratic Action and the Politics of Protectionism*, 50 POL. RES. Q. 851-878 (1997) (examining the potential effects of designation on judicial behavior, while other studies are unclear on precisely how they treat the presence or absence of designated judges). *See, e.g.*, Virginia Hettinger, Stefanie Lindquist & Wendy Martinek, *Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals*, 84 SOC. SCI. Q. 792 (2003) [hereinafter Hettinger, *Acclimation Effects and Separate Opinion Writing*]; Songer, *supra* note 17; Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955–1986*, 43 W. POL. Q. 317 (1990). If there are systematic differences in the characteristics and behavior of designated judges vis-à-vis their appellate colleagues, then this broad inconsistency in treatment is potentially troubling.

35. *See, e.g.*, Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 111–12 (1996).

to appoint judges to achieve certain goals.<sup>36</sup> Moreover, one recent study found compelling evidence of ideologically-driven behavior in the making of panel assignments in both the Canadian and South African Supreme Courts.<sup>37</sup> These two courts are similar to the circuit courts of appeals because chief judges have significant discretion over panel assignments; to the extent that the same dynamics hold across the various systems, we have at least some reason to believe that judges in these systems might use designation in a policy-driven fashion.<sup>38</sup>

### III. IDEOLOGY, OVERSIGHT, AND THE POLITICS OF DESIGNATION

As noted above, the lack of formal rules governing the selection of district court judges to sit by designation provides at least the opportunity for chief judges to use the designation process to pursue their own goals. We begin with the contention that judges in the courts of appeals are motivated by substantive political preferences. In addition to the widely-supported importance of such considerations on judges's decisions on the merits,<sup>39</sup> scholars have amassed substantial evidence that policy-related factors also exert influence in other facets of court of appeals decision making, including panel assignments,<sup>40</sup> opinion assignments,<sup>41</sup> authorship of dissenting opinions,<sup>42</sup> and publication decisions.<sup>43</sup> Accordingly, we begin with the

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36. *Id.*

37. See Lori Hausegger & Stacia Haynie, *Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division*, 37 LAW & SOC'Y REV. 635, 653 (2003).

38. *Id.*

39. See J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS 184–85 (1981); McIver, *supra* note 34, at 753, 755; Songer & Davis, *supra* note 34, at 319–20; Songer & Haire, *supra* note 34, at 970, 978.

40. See Atkins & Zavoina, *supra* note 34, at 708.

41. See Burton M. Atkins, *Opinion Assignments on the United States Courts of Appeals: The Question of Specialization*, 27 W. POL. Q. 409, 427 (1974).

42. See Hettinger, *Acclimation Effects and Separate Opinion Writing*, *supra* note 34, at 807; Hettinger, *Comparing Strategic and Attitudinal Accounts*, *supra* note 34, at 130, 134.

43. See Songer, Smith & Sheehan, *supra* note 34, at 14.

expectation that chief judges will use the designation process to bring the law into accord with their own personal policy preferences by designating ideologically like-minded judges to panels. At the same time, we suggest that chief judges will be constrained, both in their incentives to do so (by the ideological makeup of the existing panel) and in their ability to do so (by the possibility of oversight by the circuit sitting en banc or the U.S. Supreme Court). We outline the contours of these expectations below.

#### A. "Split" Panels

At the broadest level, chief judges faced with the decision of whom to designate to an existing two-judge panel are presented with two circumstances: those two judges are either ideologically similar (what we term a unified panel) or they are ideologically different (or split). Consider first the case of a split panel, consisting of one ideologically conservative and one ideologically liberal circuit court judge. Such a situation presents a chief judge with the greatest opportunity to affect the decisions of the panel, since he or she is effectively appointing the swing vote. In the absence of other constraints, our policy-based perspective would suggest that he or she would appoint a judge with an ideology similar to his or her own. At the same time, however, a number of other factors suggest that his or her ability to do so effectively may be limited.

The most important such factor is oversight: both the circuit as a whole (sitting en banc) and the U.S. Supreme Court may reverse what they perceive as incorrect panel decisions of the courts of appeals. The possibility of such a reversal is exacerbated to the extent that the panel's minority judge might act as a watchdog,<sup>44</sup> bringing the actions of the panel to the attention of the circuit and/or the Supreme Court through dissenting opinions and/or requests for rehearing en banc. Note, however, that if the ideology of the chief judge is consistent with that of the panel's overseers, such considerations cease to be a concern. Thus, for example, a conservative chief judge

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44. See Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175-76 (1998); Steven R. Van Winkle, *Dissent as a Signal: Evidence from the U.S. Courts of Appeals* (1997) (Unpublished manuscript).

may designate an equally conservative district court judge to a split panel if the circuit and/or the Supreme Court are also conservative. If, however, there is a liberal majority at the circuit or Supreme Court level, the chief judge's ability to select such a like-minded designee is reduced since the chances are relatively good that a conservative decision rendered by the panel would be revisited. The reverse is true for liberals: the ability of a liberal chief judge to select a liberal designee will be constrained by the presence of conservative oversight at the circuit or Supreme Court level. Put differently, we predict that the probability that a liberal chief judge will designate a liberal district court judge increases as the fraction of liberal judges on the circuit and/or the U.S. Supreme Court increases and that the reverse is true for conservative chief judges (that is, that they will be more likely to designate a conservative district court judge as the fraction of conservative judges on the circuit and/or the Supreme Court increases).

More generally, our expectation for split panels is that the influence of the ideology of the chief judge on the identity of the designee will depend on the ideological tenor of the court exercising oversight. This in turn implies an interactive empirical model, of the form:

$$\text{Pr(Like-Minded Designee)} = f [\beta_0 + \beta_1 (\text{Conservative Chief Judge}) + \beta_2 (\text{Conservative Circuit/Supreme Court}) + \beta_3 (\text{Conservative Chief Judge} (1) \times \text{Conservative Circuit/Supreme Court}) + u]$$

Equation (1) specifies that the probability that a chief judge designates a like-minded district court judge is a function  $f(\bullet)$  of three things: how conservative (or liberal) that chief judge is; how conservative or liberal the circuit as a whole (and/or the Supreme Court) is; and the interaction of the two. The multiplicative interaction of the two components allows for the effect of each variable on the probability of a like-minded designee to depend on the value of the other.<sup>45</sup>

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45. See generally Thomas Brambor, William Clark & Matt Golder, *Understanding Interaction Models: Improving Empirical Analyses*, 14 POL. ANAL. 63 (2006)

The discussion above suggests that, for split panels, we would expect that on a liberal circuit (or in the presence of a liberal Supreme Court), a conservative chief judge would be less likely to designate a like-minded judge than would a liberal. Statistically, this expectation is borne out if the estimated value of  $\beta_1$  is less than zero. Similarly, for liberal chief judges (that is, when *Conservative Chief Judge* = 0), the probability of designating a like-minded judge should decrease as the fraction of conservatives on the circuit as a whole or on the Supreme Court increases; this implies that  $\beta_2$ , the coefficient on the term for Conservative Circuit/Supreme Court, should also be less than zero. Finally, we expect these effects to reverse for conservative chief judges and/or conservative oversight: on a conservative circuit or in the presence of a conservative Supreme Court, a conservative chief judge will be more likely to designate a like-minded district court judge; for a conservative chief judge, the probability of picking a like-minded designate increases as the fraction of conservatives on the circuit or the Supreme Court increases. These last expectations imply that the sign of the coefficient on the interaction term  $\beta_3$  is positive and that the relative size of that coefficient is greater than either  $\beta_1$  or  $\beta_2$ . These expectations are summarized in column two of Table 1, located in the appendix.

### B. *Unified Panels*

Panels consisting of two ideologically-similar circuit court judges present a different designation scenario for chief judges. The signature characteristic of such unified panels is that, as a practical matter, the chief judge's decision about who to designate will not affect that panel's decisions to the same degree as in split panels, since he or she is no longer selecting the pivotal voter. Accordingly, in des-

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(outlining the use of multiplicative interaction terms for testing conditional expectations in statistical models); Bear Braumoeller, *Hypothesis Testing and Multiplicative Interaction Terms*, 58 INT'L. ORG. 807 (2004) (explaining that when a statistical equation incorporates a multiplicative term in an attempt to model interaction effects, the statistical significance of the lower-order coefficients is largely useless for the typical purposes of hypothesis testing). For a recent illustration of this approach, see generally Christopher Zorn, William D. Henderson & Jason J. Czarnezki, *Working Class Judges*, 88 B.U. L. Rev. 829 (illustrating the interpretation of regression models with multiplicative interactions).

ignating judges to such a panel, chief judges might seek to achieve one of two possible (and, in some cases, inconsistent) goals: selecting watchdog judges and administrative efficiency.

The first of these two goals is directly implied by our assumption about chief judges' interest in influencing policy. As we mentioned above, watchdogs are partisans who, by dissent or other means, will signal to the circuit when the panel makes decisions at odds with the rest of the circuit, the Supreme Court, and/or the chief judge himself.<sup>46</sup> These signals, in turn, increase the likelihood of either en banc review<sup>47</sup> or certiorari by the U.S. Supreme Court.<sup>48</sup>

It is useful to note some important elements of this watchdog theory. First, the ability of a designee to act as a watchdog depends on a very specific set of conditions being present; in particular, the ideological orientation of the overseeing courts must differ from that of the two judges on the unified panel to which she or he is designating. In the absence of that difference, the expectation would be that the reviewing court would ratify the decision of the panel, and so the choice of a designated judge would be expected to have little effect on the final outcome of a case. Second, from the perspective of the chief judge, the value of a watchdog also depends on whether or not the chief judge is in ideological agreement with the overseeing court; a liberal chief judge, for example, would hardly be expected to designate a conservative watchdog to call the actions of a liberal panel to the attention of a more conservative circuit. Taken together, these two points make clear that the use of watchdog judges cuts both ways: just as we would expect a liberal chief judge on a liberal circuit to designate a liberal watchdog to a conservative panel, we would also expect that a conservative chief judge in the same situation would endeavor to ensure that his or her designee was conservative (in order to prevent watchdog-like behavior and so minimize the chance of en banc or Supreme Court review).

The fact that a chief judge's incentives to designate a watchdog depend on his or her ideological congruence with both the existing

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46. See Cross & Tiller, *supra* note 44, at 2175–76; Van Winkle, *supra* note 44.

47. See George, *supra* note 18, at 247.

48. See Gregory A. Caldeira, John R. Wright & Christopher Zorn, *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549, 570 (1999).

panel and the overseeing court implies that the marginal influence of both the ideology of the chief judge and that of the circuit or Supreme Court on the probability of a like-minded designee will also depend on the ideology of the two existing panelists. In this respect, a model for unified panels differs from that for split panels, in that it requires a three-way interaction among the composition of the panel, the ideology of the chief judge, and the ideology of the overseeing court. In terms of the model in equation (1), the expectations stemming from the watchdog theory would be that, for a panel consisting of two liberal court of appeals judges, we would expect to find no direct effect of *Conservative Chief Judge* (that is, the value of  $\beta_1$  would be zero), while the direct effect of *Conservative Circuit/Supreme Court* ( $\beta_2$ ) would be less than zero, and the interactive term ( $\beta_3$ ) would be greater than zero. The first of these expectations is due to the fact that, when both the panel and the overseeing court are liberal, the ideology of the chief judge should have little or no impact on the likelihood of a like-minded designee. The second is because, given both a liberal panel and a liberal chief judge, the likelihood of a like-minded (liberal) designee increases as the overseeing court grows more conservative. Finally, the third is due to the fact that, when the overseeing court is conservative, both conservative and liberal chief judges should strongly prefer to pick like-minded designees—the former to act as watchdogs and the latter to ensure that such behavior did not occur. In a similar fashion, the expectations for unified conservative panels are somewhat reversed; there, we would expect that the direct influence of the *Conservative Chief Judge* variable ( $\beta_1$ ) on the probability of designating a like-minded judge would be negative, while that of *Conservative Circuit/Supreme Court* ( $\beta_2$ ) would be negative and that for the interaction term ( $\beta_3$ ) would be positive.<sup>49</sup> All of these expectations are presented in columns three and four of Table 1.<sup>50</sup>

A second possibility for unified panels is that the chief judge, recognizing that the choice of designee will have little or no effect

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49. See generally Brambor, Clark & Golder, *supra* note 45.

50. The Appendix contains a table of expectations for each of the  $2 \times 2 \times 2 =$  eight possible ideological combinations of panel (liberal or conservative), chief judge (liberal or conservative), and overseeing court (liberal or conservative), along with the corresponding contrasts in Equation (1).



on the panel's decisions, will attempt to maximize the decision making efficiency of the panel. This administrative efficiency motivation suggests that, at the margin, we would expect a chief judge to select a designated judge who would increase the probability of what we term ideological harmony on the panel. Such ideological harmony contributes to the efficiency of panel decision making by making it more likely that panel decisions will be issued quickly without oral argument,<sup>51</sup> speeding the review of amicus briefs,<sup>52</sup> minimizing lengthy delays stemming from contentious debates among the judges, and reducing the extent of writing and circulation of multiple drafts of concurring or dissenting opinions. In addition, an ideologically homogenous panel is less likely to grant a party's petition for a panel rehearing.<sup>53</sup> Empirically, this view suggests that, irrespective of their own ideology, chief judges will designate judges with ideologies consistent with the existing panel members. With reference to the model in (1), the administrative view leads us to expect that the effect of *Conservative Chief Judge* ( $\beta_1$ ) will be negative for ideologically liberal panels and positive for ideologically conservative ones, while the effects of *Conservative Circuit/Supreme Court* will be zero across all panels; these expectations are outlined in columns five and six of Table 1.<sup>54</sup> Importantly, the expectations derived from the administrative efficiency view present a stark contrast to those based in policy considerations.

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51. On appeal, the panel may decline to grant a motion for oral argument if all three judges unanimously agree that argument is unnecessary. FED. R. APP. P. 34(a)(2).

52. FED. R. APP. P. 29. This rule only permits the filing of amicus briefs by leave of court or the consent of all parties (with some exceptions). *Id.*

53. FED. R. APP. P. 40.

54. A third possibility is that chief judges act at all times as if the panel was split; such behavior might occur, for example, if judges do not vote precisely along ideological lines. If this is the case, then a chief judge's behavior in the face of unified panels ought to be more-or-less consistent with that when the panel is split, and we would expect precisely the same relationship between designation, a chief judge's ideology and that of the circuit or Supreme Court as discussed above.



### C. *Workload and Designation*

As we mentioned in Part II, the conventional wisdom states that the courts of appeals have turned with greater frequency to federal district court judges for assistance with their rising workloads. In their recent survey of circuit clerks and chief judges, Saphire and Solimine found that workload concerns were among the most frequently cited reasons for the use of designated judges.<sup>55</sup> Yet studies examining district court judges sitting by designation have uncovered widely varying levels of district court designation, ranging from a high of 47%<sup>56</sup> to lows between 12% and 24%.<sup>57</sup> Drawing upon Songer's *United States Court of Appeals Data Base, Phase I*, we find that district court judges participated in 3,389 (or 22.46%) of the 15,086 non-en banc decisions in Songer's data for the 1925–1988 period.<sup>58</sup> Figure 2 presents the annual proportion of three-judge decisions in Songer's data in which a designated district court judge participated from 1925 to 1988. The data points in Figure 2 are broadly consistent with earlier findings regarding the incidence of designations: aggregate annual percentages average 21.0% over the entire period, and range from a low of 5.5% in 1953 to highs of 42.3% in 1930 and 37.1% in 1981.<sup>59</sup> In accord with the earlier studies of Green and Atkins, and Wasby, we note an increase in the inci-

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55. See Saphire & Solimine, *supra* note 26, at 362.

56. See Justin J. Green & Burton M. Atkins, *Designated Judges: How Well Do They Perform?*, 6 JUDICATURE 358, 363 (1978).

57. See Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 236 tbl.3 (1999); Stephen L. Wasby, *Of Judges, Hobgoblins, and Small Minds: Dimensions of Disagreement in the Ninth Circuit* (September 2–5, 1982) (paper presented at the Annual Meeting of the American Political Science Association, Denver, CO).

58. DONALD R. SONGER, U.S. COURT OF APPEALS DATA BASE, PHASE I (last updated Oct. 21, 2008), available at <http://www.cas.sc.edu/poli/juri/appct.htm>. These data are a probability sample of decisions of the United States courts of appeals published in the Federal Reporter from 1925 to 1988. We rely on Songer's coding of the identity of judges sitting on each panel to identify district court judges sitting by designation. Specifically, we code decisions as containing a designated district court judge if one or more of the judge codes in Songer's data are identified as such.

59. *Id.*

dence of designations during the late 1960s and 1970s.<sup>60</sup> The highest rates occurred in the late 1920s and early 1930s, and again in the late 1970s and early 1980s, while the lowest levels are found in the 1940s and 1950s.<sup>61</sup> Moreover, designation rates clearly track closely with aggregate workload levels over time; the Pearson's  $r$  correlation between the two variables is 0.57, an effect that is statistically differentiable from zero with a high degree of confidence ( $p < .001$ ).<sup>62</sup>

The apparent importance of workload in the incidence of designation suggests that workload-related factors may play a role in the practice of designating district court judges to the courts of appeals. In particular, workload concerns may suppress the ability of chief judges to select like-minded panelists from the district courts. To address this possibility, we include a control variable for the circuit/year-specific workload in our models of the designation decision below, with the expectation that its effects will be negative.

#### IV. DATA, OPERATIONALIZATION, AND METHODS

We assess the determinants of the designation process using Songer's (1997) data on the U.S. courts of appeals between 1925 and 1988. We restrict our analysis to the 3,320 cases in which a district court judge sat by designation, and on which data are available for all variables. For all district court judges appearing in Songer's data, we coded their political party affiliation, as well as that of their appointing president.<sup>63</sup> Our response variable is whether (coded one) or not (coded zero) the political party of the designated judge is the same as that of the chief judge of the circuit responsible for the des-

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60. See Atkins & Green, *supra* note 34; Wasby, *supra* note 57.

61. Songer, *supra* note 58.

62. H.T. REYNOLDS, JANET BUTTOLPH JOHNSON, & JASON D. MYCOFF, *POLITICAL SCIENCE RESEARCH METHODS*, 140-142 (2007).

63. Several sources were used to gather data on district court judges, including *Directory of American Judges*, *The American Bench*, *the Almanac of the Federal Judiciary*, and *Directory of Minority Judges in the United States*. If the judge did not self-identify as a Democrat or a Republican, we used the appointing president's party as a surrogate.

ignation decision.<sup>64</sup> To address matters relating to caseload, we include a variable measuring the nominal workload of active judges on the circuit in any given year. From Songer's (1997) Appendix 5, we obtained the total number of published decisions in each circuit in each year. We then divided this number by the number of active judges sitting on each circuit in each year, as derived from Zuk et al.,<sup>65</sup> to obtain a measure of the effective caseload per active judge. This variable ranges from a low of just under seven cases per judge to a high of 141.5 cases, with a mean of 44.9 cases per judge per year. While imperfect—for example, it fails to account for the increasing use of senior judges over time<sup>66</sup>—it is nonetheless an accurate proxy for each court's true workload.

We assess our hypotheses regarding the influence of ideological factors on the designation process through three key independent variables. First, we note the party identification of the circuit's chief judge, coded one for Republicans and zero for Democrats. Second, we operationalize oversight by higher courts in two ways. As a measure of circuit-level ideology, for each case we include a variable measuring the proportion of the circuit who are Republicans in that year. Similarly, we measure Supreme Court ideology as the fraction of Supreme Court justices who are Republicans. Following

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64. Recognizing that party identification is an imperfect surrogate for a judge's ideology, we opt for it nonetheless. Party identification is generally a good indicator of political ideology, and has been shown in other studies to be a good predictor of the behavior of judges on the courts of appeals. *E.g.*, HOWARD, *supra* note 39, at 184–85; Donald Songer, *Factors Affecting Variation in Rates of Dissent in the U.S. Courts of Appeals*, in JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS # (Sheldon Goldman & Charles Lamb eds., 1986); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 504–05 (1975); Songer and Davis, *supra* note 34, at 319–20. Also, to account for potential differences between Southern and non-Southern Democrats, we conducted separate analyses for Southern (defined as the 4th, 5th, and 11th) and Northern circuits. While smaller *N*s led to slightly larger standard error estimates in these analyses, the substantive direction of the results did not change.

65. GARY ZUK, DEBORAH J. BARROW & GERARD S. GRYSKI, MULTI-USER DATABASE ON THE ATTRIBUTES OF UNITED STATES APPEALS COURT JUDGES, 1801–1994 (1997).

66. See Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495, 517–20 (2005).

equation (1), we include as well an interaction between the chief judge and overseeing court variables. Finally, for each case in our data, we record the party identification of the two circuit court judges comprising the panel prior to designation, and we undertake separate analyses for split (one Democrat and one Republican) and unified (two Democrats or two Republicans) panels.<sup>67</sup>

As we note above, the fact that cases are randomly assigned to panels after the designation decision has been made permits us to omit case-specific factors from the model, since any such characteristics are by construction unrelated to the designation decision. At the same time, because of the panel-like structure of our data, there is a significant possibility of interdependence across cases. In particular, cases arising in the same circuit in a given year may be related due to similarities in case types, regional effects, or other factors. To address this issue, we estimate a series of probit models incorporating random effects for each circuit-year.<sup>68</sup>

These models—which are appropriate when the outcome variable is a dichotomous outcome, as it is here—include a separate intercept (or baseline) term for each circuit in each year of the data. A key requirement of such models is that the independent variables be unrelated to those unit-specific effects; failure to meet this requirement can lead to parameter estimates and standard errors that are badly biased. Here again, the structure of the designation process outlined in Figure 1, in the appendix, ensures that this requirement is

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67. We are also aware that the seniority of the district court judge may affect designation patterns. For example, chief judges often designate newly-appointed district court judges as part of their socialization process, while judges with senior status might be called up more often due to their reduced workloads at the district court level. While such considerations are potentially important, we leave inquiry into the possible effects of seniority to future work, for a number of reasons. First, because our data represent only a sample of all court of appeals cases, it is impossible for us to ascertain if the first instance of designation for a particular judge is, in fact, his or her first time on the higher court. This difficulty is compounded by our lack of knowledge of the effective pool from which district court judges are chosen; without this information, we have no way of assessing chief judges's decisions regarding the selection of senior versus active district court judges. Finally, with respect to senior status, the precise date on which district court judges take such status is often hard to determine, making such distinctions very difficult to make in practice.

68. See, e.g., CHENG HSIAO, *ANALYSIS OF PANEL DATA* (2d ed. 2003).

met: because court of appeals judges are randomly selected for panels, we can be certain that the panels' pre-designation compositions are unrelated to those effects.

## V. ANALYSIS AND RESULTS

Results of our analyses are presented in Table 2 in the appendix. We note at the outset that workload has no appreciable influence on the propensity of chief judges to designate their ideological allies to court of appeals panels. In light of existing work, this is unsurprising; Cohen, for example, highlights the ability of the courts of appeals to respond to increasing workloads without substantially affecting their decision making process.<sup>69</sup> More generally, one might expect that, to the extent that workload is a factor in designation, its influence should appear only on the incidence of such designation itself, but not necessarily on the identity of the designee.<sup>70</sup>

Broadly speaking, our findings with respect to the influence of ideology and oversight are consistent with a pattern of chief judge behavior motivated by policy considerations; moreover, these results are remarkably consistent across a range of different specifications and conditions. Columns two through five of Table 2 report results that operationalize oversight at the circuit level. The clear pattern

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69. JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* (2002).

70. To further address this issue, and to support our contention that there is no relationship between designation and case-related factors, we also estimated a two-stage probit model with selection, where the first stage indicated whether the panel contained a designated judge and the second was the party of that designee. *See* WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* § 21.6.4, at 713–14 (5th ed. 2003). In those analyses, we included an indicator for the year of the decision, a count of amicus curiae briefs in the selection stage, and fixed effects for each circuit. Such a model allows us to assess whether case-related factors such as the importance of the case (using the number of amici present in a given case serves as a proxy for the case's importance) are related to the incidence of designation and hence whether the results in Table 2 are biased by selection effects. In all cases, we found no relationship between case-related factors and designation decisions, and the estimates of the selection effects parameter were small and insignificant. These results are available from the authors upon request.

that emerges corresponds precisely to that expected from the policy influence perspective: the significant, negative estimate for  $\beta_1$  indicates that, irrespective of the composition of the panel (unified or split, Democratic or Republican), the presence of a Democratic majority at the circuit level makes Republican chief judges less likely (and Democratic chief judges more likely) to select a member of their own party to sit by designation. At the same time, the large, positive estimate for the coefficient on the interaction term ( $\beta_3$ ) indicates that the reverse is true on Republican-dominated circuits: there, Republican chief judges are more likely (and Democrats less likely) to tap their ideological allies for service on the courts of appeals.

Equally important is what we do not find; in particular, our results offer little or no support for the administrative perspective and only marginal support for the watchdog perspective. The consistently large and significant estimates for  $\beta_3$ , particularly in the models of unified panels, are telling evidence against the administrative theory. Similarly, evidence for the watchdog hypotheses is partial at best. For the models of unified panels, we can distinguish between the watchdog and policy influence hypotheses only via the differential effects across Republican and Democratic panels; while we find no significant direct effects among the Democratic-majority panels (column five), we also find no significant interaction effect.

These same findings persist—and, in fact, are even stronger—when we operationalize oversight in terms of Supreme Court ideology. Those results are presented in columns six through nine of Table 2. To illustrate the size of these effects, Figure 3 plots the predicted probabilities (along with their associated 95 percent confidence intervals) of designating a like-minded judge, for both Democratic and Republican chief judges, as a function of the Republican proportion of the U.S. Supreme Court.<sup>71</sup> The results are striking: for Republican chief judges, increasing the degree of sympathetic oversight from 0.09 to 0.73 (that is, from one Republican justice to seven, effectively the full range of values in the data) yields a corresponding increase of 0.76 in the probability of a Republican designee (from

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71. Results in Figure 2 are based on the analysis in column seven of Table 2, holding the unit-level effects constant at their mean value of zero: similar results are obtained if we base our predictions on the other Supreme Court results presented in Table 2.

0.09 to 0.85). The same increase in the Republican composition of the Supreme Court causes a decline in the probability of a Democratic judge designating a fellow Democrat, from 0.54 to 0.40. In both instances, the magnitude of these changes exceed their confidence intervals, leading us to conclude that, particularly for Republican chief judges, the presence of judicial oversight exerts a strong effect on those individuals' designation decisions.

## VI. CONCLUSION

The phenomenon of district court judge designation on the U.S. courts of appeals is a unique example of a practice in which chief judges have almost unconstrained discretion over a potentially crucial aspect of the decision-making process. Scholars are increasingly aware of the significance of this power<sup>72</sup> as well as the importance of the chief judges in the operation of the circuit courts of appeals more generally.<sup>73</sup> Our analysis of the means by which those judges are selected provides clear and consistent evidence that chief judges, in making designation decisions, tend to choose individuals with similar ideologies. In this respect, our results mirror those of Hausegger and Haynie,<sup>74</sup> who suggest that the practice of judicial designation provides at least the potential for policy-motivated behavior across a range of different institutional contexts. Our results make equally clear, however, that the extent to which judges are willing and able to do so depends on their institutional context—in particular, the potential for oversight provided by the circuit en banc and/or the U.S. Supreme Court.

But while our results regarding designation are both robust and substantial, it is important to note that the selection of judges with a particular ideological bent is only the first step in influencing the direction of the law. Whether or not these judges behave in a manner consistent with the designating chief judge's intentions remains an empirical question, though a number of previous studies suggest

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72. See, e.g., Robert J. Brown Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1066 (2000).

73. See Hettinger, *The Role and Impact of Chief Judges*, *supra* note 34, at 93.

74. Hausegger & Haynie, *supra* note 37, at 651, 653.



that, owing to internal pressures on three-judge panels, a given judge's influence over case outcomes is likely to be small.<sup>75</sup> Until the extent of such influence is more precisely determined, the practical value of policy changes to limit the influence of the designation process remains uncertain.

More broadly, our findings thus support two general propositions: that chief judges' decisions about designation are motivated by policy factors, and these same judges behave strategically by taking into consideration the likely actions of other actors in making decisions relating to the operation of the courts. A long line of empirical research on the courts of appeals support the notion that such judges are driven by policy goals; in the second case, our work squares with other recent studies of court of appeals decision making,<sup>76</sup> as well as those that expand the notion of strategic behavior beyond case-level votes to include such other institutional phenomena as the selection of decision-making instruments.<sup>77</sup> At the same time, our work contrasts with a number of recent studies that have called into question the conditional nature of court of appeals behavior,<sup>78</sup> suggesting the importance of additional inquiries into the contours of constraints in the federal judicial hierarchy.

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75. See, e.g., Atkins & Green, *supra* note 34, at 740.

76. See, e.g., Cross & Tiller, *supra* note 44, at 2175; Van Winkle, *supra* note 44.

77. See, e.g., Joseph Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61, 81 (2002).

78. See, e.g., Hettinger, *Comparing Strategic and Attitudinal Accounts*, *supra* note 34, at 134; Klein & Hume, *supra* note 12.



VII. APPENDIX

EXPECTATIONS FOR DESIGNATION DECISIONS ON UNIFIED PANELS UNDER THE WATCHDOG MODEL

| <b>Unified Liberal Panel</b> |                     |  |   |  |
|------------------------------|---------------------|--|---|--|
|                              |                     | <b>Circuit/Supreme Court Oversight</b> |   |  |
|                              |                     | <i>Liberal</i>                         |   | <i>Conservative</i>                    |
| <b>Chief Judge</b>           | <i>Liberal</i>      | Either                                 | $\leftrightarrow (\beta_2) < 0$           | Liberal                                |
|                              |                     | $\updownarrow (\beta_1) = 0$           |   | $\updownarrow (\beta_1 + \beta_3) > 0$ |
|                              | <i>Conservative</i> | Either                                 | $\leftrightarrow (\beta_2 + \beta_3) > 0$ | Conservative                           |

| <b>Unified Conservative Panel</b> |                     |  |   |  |
|-----------------------------------|---------------------|--|---|--|
|                                   |                     | <b>Circuit/Supreme Court Oversight</b> |   |  |
|                                   |                     | <i>Liberal</i>                         |   | <i>Conservative</i>                    |
| <b>Chief Judge</b>                | <i>Liberal</i>      | Liberal                                | $\leftrightarrow (\beta_2) > 0$           | Either                                 |
|                                   |                     | $\updownarrow (\beta_1) > 0$           |   | $\updownarrow (\beta_1 + \beta_3) = 0$ |
|                                   | <i>Conservative</i> | Conservative                           | $\leftrightarrow (\beta_2 + \beta_3) < 0$ | Either                                 |

Note: Cells denote the ideology of the expected designee under the watchdog perspective. Arrows between cells denote the corresponding contrasts in Equation (1). Note that the expectations imply  $\beta_3 > 0$  for liberal panels and  $\beta_3 < 0$  for conservative ones. This proposition is discussed more fully above in Section III. A-B.

TABLE 1: EXPECTED INFLUENCE OF CHIEF JUDGE AND CIRCUIT/SUPREME COURT IDEOLOGY ON THE PROBABILITY OF DESIGNATING A LIKE-MINDED DISTRICT COURT JUDGE

| Variable/<br>Influence   | Split<br>Panels          | Unified Panels   |                            |                              |                            |
|--|--------------------------|------------------|----------------------------|------------------------------|----------------------------|
|  | Policy<br>Influ-<br>ence | Watchdog         |                            | Administrative<br>Efficiency |                            |
|  |                          | Liberal<br>Panel | Conserva-<br>tive<br>Panel | Liberal<br>Panel             | Conserva-<br>tive<br>Panel |
| Conservative<br>Chief Judge  | < 0                      | = 0              | = 0                        | < 0                          | > 0                        |
| Conservative<br>Circuit /<br>Supreme Court                                 | < 0                      | > 0              | < 0                        | = 0                          | = 0                        |
| Conservative<br>Chief Judge ×<br>Conservative<br>Circuit/<br>Supreme Court | > 0                      | > 0              | < 0                        | = 0                          | = 0                        |

TABLE 2: RANDOM-EFFECTS PROBIT MODELS OF DISTRICT COURT JUDGE DESIGNATION

| Variables  | Circuit Oversight  |                         |                     |                     | Supreme Court Oversight |                     |                     |                     |
|--|--------------------|-------------------------|---------------------|---------------------|-------------------------|---------------------|---------------------|---------------------|
|  | All Panels         |                         | Unified Panels      |                     | All Panels              |                     | Unified Panels      |                     |
|  | Split Panels       | Unified Panels          | Republican Majority | Democratic Majority | Split Panels            | Unified Panels      | Republican Majority | Democratic Majority |
| (Constant)   | 0.262<br>(0.190)   | -0.062<br>(0.140)       | -0.008<br>(0.342)   | -0.035<br>(0.205)   | 0.129<br>(0.309)        | 0.147<br>(0.217)    | 0.331<br>(0.540)    | 0.245<br>(0.327)    |
| Workload   | 0.004<br>(0.003)   | -0.001<br>(0.003)       | -0.004<br>(0.004)   | 0.006<br>(0.005)    | 0.003<br>(0.003)        | -0.001<br>(0.003)   | -0.006<br>(0.004)   | 0.006<br>(0.005)    |
| Republican Chief Judge                                     | -0.756*<br>(0.337) | -<br>0.667**<br>(0.266) | -0.815*<br>(0.465)  | -0.470<br>(0.481)   | -0.694*<br>(0.413)      | -1.797**<br>(0.351) | -1.878**<br>(0.614) | -1.959**<br>(0.669) |
| Republican Circuit Majority                                | -0.810*<br>(0.389) | -0.104<br>(0.291)       | -0.327<br>(0.570)   | 0.045<br>(0.517)    | -                       | -                   | -                   | -                   |
| Republican Chief Judge × Republican Circuit Majority       | 1.661**<br>(0.640) | 1.434**<br>(0.451)      | 1.823**<br>(0.719)  | 0.389<br>(1.134)    | -                       | -                   | -                   | -                   |
| Republican Supreme Court Majority                          | -                  | -                       | -                   | -                   | -0.470<br>(0.612)       | -0.533<br>(0.437)   | -0.993<br>(1.012)   | -0.584<br>(0.672)   |
| Republican Chief Judge × Republican Supreme Court Majority | -                  | -                       | -                   | -                   | 1.649*<br>(0.853)       | 4.185**<br>(0.708)  | 4.610**<br>(1.166)  | 3.753**<br>(1.439)  |
|  |                    |                         |                     |                     |                         |                     |                     |                     |
| $\sigma_e$   | 0.833**<br>(0.072) | 0.765**<br>(0.071)      | 0.630**<br>(0.092)  | 1.102**<br>(0.132)  | 0.836**<br>(0.073)      | 0.695**<br>(0.070)  | 0.503**<br>(0.092)  | 1.069**<br>(0.141)  |
| Valid <i>N</i>   | 1632               | 1688                    | 887                 | 801                 | 1632                    | 1688                | 887                 | 801                 |

Note: Response variable is whether (=1) or not (=0) the designated district court judge was Republican. Numbers in parentheses are coefficient estimates; standard errors are in parentheses. One asterisk indicates  $p < .05$ , two indicate  $p < .01$  (one-tailed). This proposition is discussed more fully above in Section V.

FIGURE 1: U.S. COURT OF APPEALS DESIGNATION PROCESS

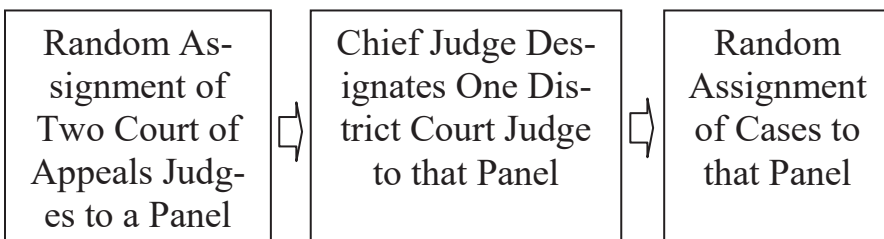
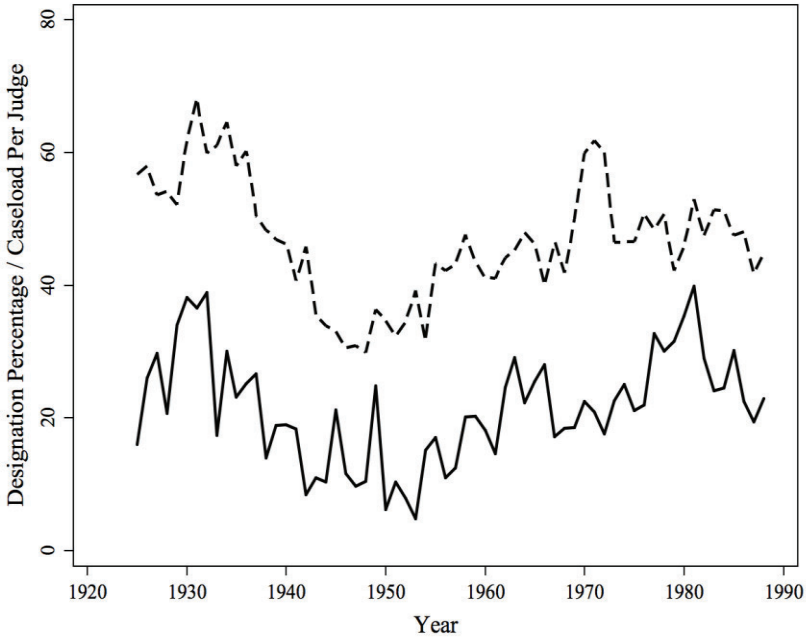
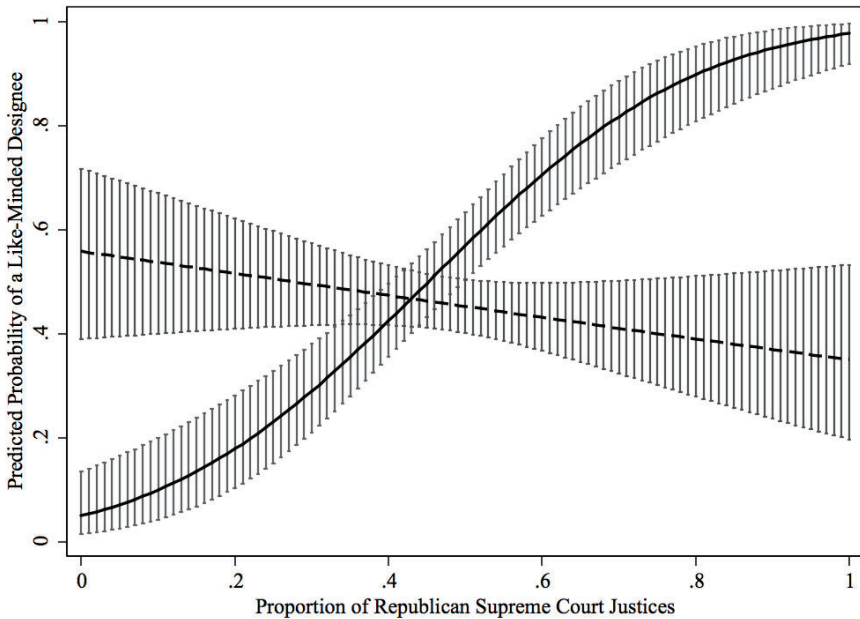


FIGURE 2: PERCENTAGE OF COURT OF APPEALS CASES WITH DISTRICT COURT JUDGES SITTING BY DESIGNATION AND COURT OF APPEALS WORKLOAD, 1925–1988



Note: Dashed line plots the mean number of cases decided per active judge in each year; smooth line is the annual percentage of cases in which a district court judge sat by designation in the U.S. courts of appeals. Estimates are based on Songer's (1997) data. This proposition is discussed more fully above in Section III. C.

FIGURE 3: PREDICTED PROBABILITIES OF A SAME-PARTY DESIGNEE, BY CHIEF JUDGE AND SUPREME COURT PARTISANSHIP



Note: Lines indicate predicted probabilities, holding *Workload* and the random effects constant at their means; bars denote 95% confidence intervals. Solid line is for panels overseen by a Republican chief judge; dashed line is for a Democratic chief judge. Results are for a unified panel (column seven in Table 2). This proposition is discussed more fully above in Section V.