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Political Disparities in Federal Criminal Appeals

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**Abstract**

We conduct the first empirical investigation of the close to all universe of criminal appeals in the Circuit Courts, both published and unpublished, examining a dataset of about two hundred thousand criminal appeals during the period 1980-2020. We find that panels with more Democratic judges (i.e., judges appointed by Democratic Presidents) are associated with outcomes that are more prodefendant. I also find that this association is driven by both the stand-alone preferences of judges and the peer effect due to which judges are influenced by the preferences of the other judges on their panel.

The pattern we identify is pervasive across criminal offenses, as well as decades within our examined period. The pattern is also present in both appeals brought by the criminal defendant and appeals brought by the government. Finally, this pattern is found in both cases with published opinions and cases with unpublished opinions, though it is more pronounced in the former. Our results identify a significant way in which the political appointments of federal judges affect outcomes in the federal criminal justice system.

Keywords: Circuit Courts, criminal appeals, federal courts, courts of appeals, judicial decisions, political appointment of judges.

JEL Classification: D72, J15, J16, K41, K42

I. Introduction

This study empirically investigates how the political composition of Circuit Court panels is associated with their decisions in criminal appeals. Our investigation uses a large and rich dataset on more than 200,000 Circuit Court decisions in criminal appeals from District Court decisions during the years 1980 to 2020 (including).

I find that political composition is indeed associated with how Circuit Court panels decide criminal appeals. Democratic judges (judges appointed a Democratic President) display different tendencies than Republican judges (judges appointed a Democratic President). The more Democratic judges (judges appointed a Democratic President), the more likely a prodefendant outcome of the appeal – i.e., approval in the event that the appeal is initiated by the individual criminal defendant or rejection in the event that the appeal is initiated by the government. This association is present across types of offenses, across the four decades in the examined period, in both cases with published and unpublished opinions, and in both cases in which the criminal defendant and the government initiate the appeal.

The paper seeks to contribute to the large literature on how political affiliations are associated with judicial outcomes. Two early and influential studies are by Sunstein et al. (2004) and Sunstein et al. (2006), both of which focused on Circuit Courts. Subsequent studies, that focused on the association between the political affiliations of Circuit and their decisions, include Farhang and Wawro (2004), Cox and Miles (2008), Chew and Kelley (2009), Boyd et al (2010), and Hall (2010). Studies that focused on the association between the political affiliations of District Court judges Circuit and their decisions include Kulik et al (2003), Schanzenbach and Tiller (2007, 2008), Tiede, Carp, and Manning (2010)), Fischman and Schanzenbach (2011), Schanzenbach (2015), and Cohen and Yang (2019).[[2]](#footnote-2)

Within this literature, two studies, Sunstein et al. (2006) and Hall (2010) examined criminal appeals using the same small sample of 5,000 cases with published opinions from the years 1995-2004 and without controls for judge characteristics other than their political affiliations. The dataset that I have put together enable me to carry out an analysis that goes substantially beyond what was done in those papers. First, because my dataset includes about 50,000 published cases from 1980-2020 and contains information about the individual characteristics of all panel members, I am able to carry out an analysis of the association in published cases between political composition and outcomes that is empirically more adequate, reliable, and comprehensive. Second, while the literature has long suggested that the published cases might well be unrepresentative of all cases, the use of samples with only published cases did not enable the literature to study empirically in what ways exactly do unpublished cases differ. Because my dataset includes about 150,000 unpublished cases, I am able to shed light on unpublished cases, conducting a full empirical analysis of such cases and to identify how they differ and not differ from published cases.

The remainder of this paper is organized as follows. Section II discusses the institutional background. Section III discusses my data sources, and provides summary statistics. Section IV presents my empirical analysis. Section V concludes.

II. Institutional Background

1. *The Circuit Courts of Appeal*

The federal courts system, which adjudicates all criminal cases brought by the government under federal law, has three main levels. The first level is made of the District Courts in which criminal trials are conducted. As of the end of 2020, there were 670 district court judges holding trials in 94 districts.

The second level is that of the Circuit Courts, the federal courts of appeal. The 94 districts courts are organized into 12 regional Circuit courts of appeal. In addition, the court of appeal for the Federal circuit has nationwide jurisdiction to hear appeals in certain types of cases. As of the end of 2020, there were 180 active and 120 Senior Circuit Court judges. The Circuit Courts hear all appeals on criminal trials held at the federal District Courts.

The third level is that of the Supreme Court, the highest court of the land. The Supreme Court hears some selected appeals on decisions of Circuit Courts. Only a very tiny number of criminal cases reach the Supreme Court each year. Thus, the vast number of criminal appeals are decided at the Circuit Courts, and the focus of this paper is on these appeals.

1. *Criminal Appeals*

The Circuit Courts handle several types of cases, with civil cases and criminal cases being the larger group. This paper focuses only on criminal cases, which represents about one-fifth of the cases handled by the Circuit Courts.

When a criminal case is concluded at the District Court, the defendant may be found guilty or not guilty. If the defendant is found not guilty, the government may not appeal, and the defendant has no reasons to appeal, so all the criminal cases reaching the Circuit Courts are ones where the criminal defendant was found guilty at the District Court. In such cases, the criminal defendant may appeal the conviction. In addition, both the criminal defendant and the government may appeal the sentence; the defendant may appeal seeking a lighter sentence, and the government may appeal seeking a more sever sentence. In cases with plea bargaining, the defendants agrees to a conviction at the District Court, and thus the conviction may not be appealed by the defendant, but both sides may appeal with respect to the sentence set by the District Court. The party who initiates the appeal is known as the appellant**,** and the other party opposing the appeal is referred to as the appellee.

1. *Panels*

Most of the cases in the court of appeals are heard by a panel of three judges. In rare cases, appeals cases are heard at the outset or reheard after a panel decision by the entire circuit court (*en banc*), that is, by all the active judges that serve at the Circuit Court. This study focuses only on decisions made by three-judge panels, which represent the vast majority of Circuit Court cases.

The working premise of the empirical literature on Circuit Court, as well as of my analysis, is that judges are randomly assigned to panels, and cases are randomly assigned to panels. Examples of the many studies that are based on this working premise are Tiller and Cross (1999), Sunstein et al (2004, 2006), Sunstein and Miles (2009), Epstein et al (2011), Kastellec (2011), and Chen and Sethi (2018). Judges and practitioners also commonly view the assignment to cases and panel members as random.

Some recent papers have sought to examine whether case and panel assignments are strictly random. Chilton and Levy (2015) suggest several legitimate technical, practical factors that could cause deviations from a strictly randomized process.[[3]](#footnote-3) Levy and Chilton (2015) and Levy (2017) test random assignments empirically and find small deviations in four out of the twelve Circuits. Note that for random assignment to be an adequate working premise, deviations from strict randomly are acceptable as long as they are due to technical factors that are generally independent of the political affiliations of judges. Studying some of the assignment practices in the Ninth Circuit, Fischman (2011) concludes that “the characteristics of the cases assigned to a particular panel [are] independent of the [preferences] of the judges on that panel,” and as long as this is the case random assignment is an adequate working premise to allow causal inference.

1. *Panel Members and Decisions*

All federal judges, including judges of the Circuit Courts, are nominated by the President and confirmed by the Senate. Federal judges are appointed for life. They serve until they resign or retire (or in rare cases removed by impeachment). When judges retire, in many circumstances they may and often choose to become Senior judges, continuing part-time to participate in panels.[[4]](#footnote-4)

Circuit Court panels are in many cases not fully filled with active Circuit Court judges, but rather with such judges supplemented by Senior Circuit Court judges and in some cases also by judges sitting by designation and coming from either the different District Courts or from other special trial courts, After the number of active Circuit Court judges stopped expanding around 1990, Circuit Courts have sought to encourage older judges to take on a senior status to increase the number of judges that can hear cases. Judges who take on a senior status have to work at least a quarter of an active judge’s workload, are eligible to maintain their chambers and staff, and are provided considerable financial benefits.[[5]](#footnote-5)

Parties in criminal appeals may not introduce new evidence, and Circuit court panels make their decisions solely based on the trial court’s record. The burden of showing that a legal error affected the district court’s decision is borne by the appellant. The appellant makes a legal argument in written brief and the appellee makes such an argument in a reply brief. A substantial majority of cases are decided solely on the basis of the submitted written briefs and the remaining minority are decided following an oral argument. The panel issues a written decision, which is in many cases accompanied by an opinion explains the reasons for the decision.

The panel’s decision is determined by a majority rule. Most cases are 3-0, with all three members of the panel join the decision of the panel. A minority of cases is 2-1, with one member of the panel opposes the panel’s decision and such a judge may write a dissenting opinion.

Once a panel has ruled on an issue, the panel decides whether to “publish” or not to “published” its opinion. In early years almost of cases heard by the Federal Court of Appeal issued a published opinion. However, responding to a growing case load, in 1964 the Judicial Conference of the US decided that Circuit Courts should publish only opinions that are of general precedential value.[[6]](#footnote-6) In 1972, the Conference fortified its mandate and required each circuit to develop a publication plan.[[7]](#footnote-7)

Only a minority of decisions in the four decades of my study were published, with a substantial majority unpublished. Many studies in the literature have suggested that cases with published opinions are likely to be unrepresentative sample of all cases (see, e.g., Carlson et al. (2020)).[[8]](#footnote-8) The empirical literature on the association between political affiliations and decisions on Circuit Courts has thus examined only cases with published opinions (indeed, only a small subset of such cases). Thus, a significant advantage of the dataset that I put together is that it includes the full universe of Circuit Court decision in criminal appeals, including all unpublished cases. The use of this dataset thus enables obtaining an improved picture of what happens in the universe of criminal appeals in the Circuit Courts.

III. Data Sources and Summary Statistics

1. *Data*

Although there is literature on Circuit Court decisions, this literature has largely focused on analyzing samples with a small subset of published cases put together by hand coding.[[9]](#footnote-9) Some of the studies have used the dataset put together by Sunstein et al. (2006), which contains about 6000 published cases.[[10]](#footnote-10) Some other studies in the literature have used the dataset put together by the Songer Project, which contains about 22,000 published cases.[[11]](#footnote-11) Two recent exceptions are the studies by Carlson et al. (2020) and Ash et al. (2020), which put together much large datasets but none of them focused on the questions examined by this paper.

I use in this paper a new large-scale dataset of Circuit Court decisions. In putting together this dataset, I used three data sources.

The first source is PACER (Public Access to Court Electronic Records). PACER is an electronic public access service for US Federal Court documents, managed by the Administrative Office of the United States Courts. This dataset includes detailed information on most of the cases considered the different US federal courts. For Circuit Court decisions, this dataset provides rich information including docket number, circuit, district court, dates, outcome, case type, whether there was a dissent or concurring opinion, whether there was an *en banc*, etc. However, although PACER provides such detailed information about cases, it does not provide information on who were the three judges that made up each judge.

Because this paper focuses on criminal appeals, I extracted from PACER only the cases that were coded in it as Criminal.

The second source of data that I used is LexisNexis, which I used to obtain information about the judges that served on the panel in each Circuit Court case. LexisNexis is provided by the RELX corporation that sells data analytics products and databases. As of 2006, the company had the world’s largest electronic database for legal and public-records-related information. I obtained from LexisNexis all Circuit Court cases that were considered during the past four decades.

The third source was data from the FJC (Federal Judicial Center). Although LexisNexis provided me with information about the names of the members of each panel, I used FJC data to obtain information about the characteristics of these judges. The FJC provides significant information on judge characteristics, including information about gender, race, age, tenure, President who nominated the judge, and date of nomination. I matched the information from the FJC data with the judge names obtained from LexisNexis.[[12]](#footnote-12)

Merging PACER with LexisNexis had a success of about 50% match. The 50% of cases appearing in PACER that I was not able to match with data from LexisNexis were mostly cases for which the termination of the appeal was on procedural grounds (e.g., late filing). These are largely cases for which PACER also does not have information on the decision in the case and the opinion. For the cases in which PACER reported decisions, I was able to merge about 85% of them with LexisNexis data.

Altogether, I started with 254,403 criminal appeals from PACER during the examined period 1980-2020. For 83% of these cases I was able to identify the three judges on the panel.[[13]](#footnote-13)

The paper focuses on cases decided by a panel of three judges.[[14]](#footnote-14) Our final data contains 209,544 circuit court criminal decisions for which we have information on each of the three judges of the panel. Because I focus on decisions by three-member panels, these are the cases that I examine below.

1. *Summary Statistics*
2. *Political Composition*

Table 1 reports the number of judges and the percentages of Republican and Democratic judges in all circuits at the start of each of the decades in my period and at the end of the period. The first three Columns of Table 1 provides this information for active judges, and the last three columns provide this information for senior judges.

As noted above, both active judges and senior judges participate in Circuit Court panels. As Columns (1) and (3) of the Table indicate, while the number of active judges was stable over the past 30 years, the number of senior judges has almost triple itself.[[15]](#footnote-15)

Table 1: Political composition of the circuit courts

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  | Active | | | Senior | | |  |
| Year | Count | % Rep | %Dem | Count | % Rep | %Dem | Total |
| 1980 | 128 | 35% | 65% | 49 | 49% | 51% | 177 |
| 1985 | 160 | 53% | 47% | 62 | 52% | 48% | 222 |
| 1990 | 163 | 69% | 31% | 76 | 49% | 51% | 239 |
| 1995 | 168 | 66% | 34% | 91 | 46% | 54% | 259 |
| 2000 | 154 | 49% | 51% | 101 | 60% | 40% | 255 |
| 2005 | 166 | 58% | 42% | 107 | 64% | 36% | 273 |
| 2010 | 165 | 55% | 45% | 115 | 68% | 32% | 280 |
| 2015 | 169 | 45% | 55% | 112 | 63% | 38% | 281 |
| 2020 | 180 | 55% | 45% | 120 | 67% | 33% | 300 |

As Table 1 indicates, there are large fluctuations in the political composition of the Circuit Courts over time. For active judges, the percentage of Republicans was 35% in 1980, rose to 69% at 1990, and subsequently declined somewhat, fluctuating between 45% and 58% in this decade, and ending the examined period at 55%. As to senior judges, the percentage of republicans has been trending upward during the examined period, reaching 60% in 2000 and 67% in 2020.

Turning from the political affiliation of individual judges to the political composition of panels, Table 2 provide information about the political composition of the panels during the examined period. I denote a panel of three Republican judges by RRR, a panel with two Republican judges and one Democratic judge as RRD, a panel with one Republican Judge and two Democratic judges by RDD, and a panel consisting of only Democratic judges by DDD.

As the Table indicates, “mixed panels” – panels with both Republican and Democratic judges are present in 70% of all the cases during the examined period. “Pure panels” of Republic-only or Democratic-only judges were present in 21% and 9% of the cases, respectively. Overall, 61% of the cases during the examined period had a majority-Republican panel (RRR or RRD) and 31% had a majority-Democratic panel.

Table 2: Political composition of Circuit Court Panels

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Period | Count | RRR | RRD | RDD | DDD |
| 1980-1990 | 16,906 | 15% | 38% | 35% | 12% |
| 1991-2000 | 55,854 | 25% | 45% | 25% | 5% |
| 2001-2010 | 71,504 | 24% | 41% | 29% | 7% |
| 2011-2020 | 65,280 | 20% | 36% | 32% | 12% |
| Total/Mean | 209,544 | 21% | 40% | 30% | 9% |

1. *Other Judge Characteristics*

Table 3 reports on whether and how panels with different types of political composition – RRR, RRD, RDD, and DDD – differ in terms of gender, race, and age. Column (1) indicates that the percentage of panels with no female members is related to the panel type. The percentage of such panels is at a high level of 60% in RRR panels and at a much lower of 32% in DDD panels. Column (2) displays a similar pattern with regard to the percentage of panels with no minority judge (by minority I refer to either Africa-American or Hispanic judges. The percentage of panels with no minority representation is at a high level of 81% in RRR panels but at a much low level of 46% in DDD panels. Finally, with respect to the mean age of the members of a panel, Column (3) finds no significant differences among the four types of panels.

Table 3: Gender, Race, and Age Characteristics

|  |  |  |  |
| --- | --- | --- | --- |
| Panel | No Female | No Minorities | Mean Age |
| RRR | 60% | 81% | 63 |
| RRD | 51% | 66% | 64 |
| RDD | 42% | 53% | 64 |
| DDD | 32% | 46% | 65 |
| Total | 49% | 64% | 64 |

1. *Political Composition and Prodefendant Outcomes*

Sunstein et al. (2006) hypothesized that panels with more Democratic judges should be expected to be more likely to side with the criminal defendant – that is, produce a prodefendant outcome – but found that the hypothesis was not supported by the evidence in the small sample of 1,000 cases this study examined. Table 3 below provides summary statistics on how the four types of panels differ in terms of the percentage of prodefendant outcomes.

I defined outcome as prodefendant in the following way. If the criminal defendant is the appellant, whether the appeal is over the conviction and/or sentence, a prodefendant outcome is one in which the defendant’s appeal is accepted. If the government is the appellant, which is the case when the government seeks to overturn the sentencing decision of the trial court, a prodefendant outcome is one in which the government’s appeal is accepted. [[16]](#footnote-16)

Table 4 provides summary statistics on how the four types of panels differ with respect to the percentage of prodefendant outcomes. Panel A of the Table reports such summary statistics for all the cases in our large sample. The Table indicates that, during the examined period as a whole as well as in each of the four examined decades, the percentage of prodefendant outcomes is higher for panels with more democratic judges. Indeed, for the whole period, the percentage of prodefendant outcomes in DDD panels, 14%, is much higher than the percentage of such outcomes in RRR cases, 8%. Panel A also indicates the possible presence of a time trend: for all types of panels, the percentage of prodefendant outcomes decreases over time. Therefore, in the empirical analysis of the subsequent Section I control for time trends.

Panels B and C of the Table 4 provide such summary statistics separately for cases with published opinions and cases with unpublished opinions. These Panels B and C indicate that the in both published and unpublished there is a presence of the first pattern discussed above – that the percentage of prodefendant outcomes is higher for types of cases with more Democratic judges. However, the time trend with respect to the fraction of prodefendant outcomes are different for published cases and unpublished cases. In particular, for the different types of panels, while the fraction of prodefendant outcomes declines over time in the set of all cases , it substantially increases over time in the subset of published cases.

Table 4: Politics and odds of Defendant Win

Panel A: All Cases

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Period | All | RRR | RRD | RDD | DDD |
| 1980-1990 | 18% | 18% | 17% | 19% | 21% |
| 1991-2000 | 13% | 12% | 12% | 14% | 18% |
| 2001-2010 | 13% | 11% | 12% | 14% | 16% |
| 2011-2020 | 11% | 8% | 10% | 12% | 14% |
| All | 14% | 12% | 13% | 15% | 18% |

Panel B: Unpublished cases

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Period | All | RRR | RRD | RDD | DDD |
| 1980-1990 | 9% | 11% | 8% | 9% | 11% |
| 1991-2000 | 8% | 7% | 7% | 8% | 11% |
| 2001-2010 | 10% | 9% | 9% | 11% | 12% |
| 2011-2020 | 8% | 6% | 7% | 9% | 11% |
| All | 9% | 8% | 8% | 9% | 11% |

Panel C: Published cases

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Period | All | RRR | RRD | RDD | DDD |
| 1980-1990 | 22% | 21% | 21% | 23% | 25% |
| 1991-2000 | 27% | 23% | 25% | 31% | 37% |
| 2001-2010 | 25% | 21% | 23% | 30% | 36% |
| 2011-2020 | 26% | 18% | 23% | 31% | 41% |
| All | 25% | 21% | 23% | 29% | 35% |

IV. Empirical Analysis

1. *The Universe of All cases*

Table 5 presents the results of OLS regressions on all observations in my sample of all criminal appeals. The dependent variable () is a dummy equal to 1 if the panel sides with the defendant and to 0 otherwise.

As to the independent, explanatory variables, all the key variables of interests reflect ways of measuring the extent to which the panel leans democratic. In Column (1) of Table 4, the independent variable of interest is the number of Democrat judges in the panel. In Column (2), the independent variable of interest is a dummy equal to 1 if the panel has a Democratic majority and to 0 otherwise. In Column (3), the independent variables of interest are three dummies: RRD which is equal to 1 if the panel has 1 Democratic member and 2 Republicans and 0 otherwise; RDD which is equal to 1 if the panel has 2 Democratic judges and 1 Republican judge and to 0 otherwise; and DDD which is equal to 1 if the panel has 3 Democratic judges and no Republicans and to 0 otherwise.

Columns (4) and (5) use the same specification as column (3) but each applies it just to a subset of all cases. Column (4) restricts the data to include only cases in which the defendant is the appellant initiating the appeal (and in which a prodefendant outcome is a full or partial overturning of the decision below). By contrast, Column (5) restricts the data to include only cases in which the government is the one who initiated the appeal the appellant initiating the appeal (and in which a prodefendant outcome is a full or partial overturning of the decision below.

In all columns, we also use additional variables as controls. Such variables are the number of women on the panel, the number of minority judges on the panel,

The results of Table 5 are largely consistent with the hypothesis that panels with more Democratic judges are more likely to side with the defendant and produce a prodefendant outcome. In Column (1), the coefficient of the key variable of interest – the number of Democratic judges -- is positive and statistically significant at the 1% significance level. The magnitude of the coefficient is 0.015. Compared to the level of 11% (0.11) of prodefendant outcomes in RRR panels, each additional democratic judge increases the odds of a prodefendant outcome by a meaningful 14%.

Similar results are obtained in Column (2) in which the key variable of interest is a dummy indicating whether the panel has a Democratic majority. The coefficient has a magnitude of 0.024 and is again statistically significant at the 1% level. Compared with a level of 0.11 for prodefendant outcomes in Republican-majority panels, a switch to a Democratic-majority panel from a Republican-majority panel increases the odds of a prodefendant outcome by a large 22%.

Column (3) provides similar but more detailed results as to how the odds of prodefendant outcome increases as Democratic judges are added to the panel. Compared to the default of Column (3) which is an RRR panel, a move to RRD panel (adding just one Democratic judge and retaining a Republican majority) the coefficient is positive but is small and not statistically significant; a move to an RDD panel (adding two Democratic judges and shifting the panel to Democratic majority) has a much larger coefficient of 0.024 that is statistically significant at the 1% level; and a move to a DDD panel (shifting the panel to Democratic-judges-only) further doubles the coefficient to 0.048% and retains a 1% significance level. To get a sense of the magnitude, compared to the level of a 0.11 fraction of prodefendant outcomes RRR panels, a switch to a DDD panel increases the odds of a prodefendant outcome by a very large 44%.

Table 5: Defendant Win and Panel Political Composition

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) | (5) |
|  |  |  | Defendant | Government |
| All Cases | All Cases | All Cases | Initiated | Initiated |
| Number Democrats | 0.015∗∗∗ |  |  |  |  |
|  | (0.002) |  |  |  |  |
| Majority Dem |  | 0.024∗∗∗ |  |  |  |
|  |  | (0.003) |  |  |  |
| RRD |  |  | 0.005 | 0.005 | 0.014 |
|  |  |  | (0.004) | (0.004) | (0.021) |
| RDD |  |  | 0.024∗∗∗ | 0.022∗∗∗ | 0.074∗∗∗ |
|  |  |  | (0.004) | (0.005) | (0.023) |
| DDD |  |  | 0.048∗∗∗ | 0.047∗∗∗ | 0.075∗ |
|  |  |  | (0.007) | (0.007) | (0.038) |
| No. Female | -0.004∗∗ | -0.003*t* | -0.004∗∗ | -0.004∗ | -0.005 |
|  | (0.002) | (0.002) | (0.002) | (0.002) | (0.013) |
| No. Minority | 0.002 | 0.004∗ | 0.002 | 0.003 | -0.003 |
|  | (0.002) | (0.002) | (0.002) | (0.002) | (0.014) |
| Mean Age of Panel | 0.001∗∗∗ | 0.001∗∗∗ | 0.001∗∗∗ | 0.001∗∗∗ | -0.000 |
|  | (0.000) | (0.000) | (0.000) | (0.000) | (0.001) |
| Constant | 0.054∗∗∗ | 0.057∗∗∗ | 0.057∗∗∗ | 0.055∗∗∗ | 0.336∗∗∗ |
|  | (0.012) | (0.013) | (0.012) | (0.012) | (0.091) |
| Circuit X Year | ✓ | ✓ | ✓ | ✓ | ✓ |
| Offense Type | ✓ | ✓ | ✓ | ✓ | ✓ |
| District | ✓ | ✓ | ✓ | ✓ | ✓ |
| N | 205,492 | 205,492 | 205,432 | 200,637 | 4,755 |
| *Adj.R*2 | 0.0456 | 0.0455 | 0.0458 | 0.0440 | 0.1511 |
| Mean | 0.1256 | 0.1256 | 0.1256 | 0.1256 | 0.1256 |

Note: Standard errors are in parenthesis and are clustered by year. Stars denote the level of statistical significance *t p <* 0*.*15 ∗ *p <* 0*.*1, ∗∗ *p <* 0*.*05, ∗∗∗ *p <* 0*.*01.

Columns (4) and (5) indicates that the patters we observe for all cases in columns (1)-(3) also hold separately for each of the two subsets – cases in which the criminal defendant initiated the appeal, and cases in which the government initiated the appeal. Because the cases in which the criminal defendant is the appellant are the large majority of all criminal appeals, it is unsurprising that the coefficients in Column (4) are similar in magnitude and significance to the coefficient of Column (3). For the minority of cases in which the government is the appellant, seeking to make the sentence from below more severe, the effects of increasing Democratic presence on the panel is much larger. In particular, moving to a Democratic-majority panel has coefficients that are much larger in magnitude than those in Column (3). The evidence indicates that a switch from a Republican-majority panel to a Democratic majority panel makes the panel substantially less receptive to governmental attempt to make the sentence more severe.

*B. Driven by Limited Subsets?*

I now turn to examine whether patterns identified above are driven largely by some subsets of the large sample of cases I examine and are not present in other subsets. Below I discuss subsets based on whether the decision was published or unpublished, the decade in which the case was decided, and the type of offense that was involved. The analysis does not identify any significant subsets in which an association between political composition and prodefendant outcomes is totally lacking. However, in terms of magnitude, we find that the association is substantially stronger in published cases than unpublished cases.

*1. Published and unpublished*

As noted earlier, the literature has expressed concern that r published cases could be unrepresentative of all cases, and that results obtained based on samples of published cases could well not hold for the universe of cases as a while. This severity of this concern has been increasing over time because the fraction of cases that have published opinion has been declining substantially over the last three decades. In 2020, only about 16% of all cases had published opinions, with a large majority of 84% of the cases being unpublished.

Although this concern is widely accepted, and some studies sought to document empirically that unpublished opinions are likely different, there has been little empirical study of the exact ways in which unpublished cases were different. This was due to empirical researchers largely using samples consisting only of published cases and thus not having in their sample unpublished cases that could be analyzed. Because my dataset has the universe of all cases, including the majority of cases that are unpublished, I am able to identify empirically in what ways the outcomes are unpublished cases are different.

Table 6 reports the results of regressions that use our main specification (Table 5, Column 3) and that are run separately for published and unpublished cases.

Table 6: Unpublished and Published

|  |  |  |
| --- | --- | --- |
|  | (1) | (2) |
| Unpublished | Published |
| RRD | 0.001 | 0.020∗∗∗ |
|  | (0.004) | (0.006) |
| RDD | 0.010∗∗ | 0.057∗∗∗ |
|  | (0.004) | (0.008) |
| DDD | 0.025∗∗∗ | 0.105∗∗∗ |
|  | (0.007) | (0.010) |
| N | 155,327 | 50,088 |
| *Adj.R*2 | 0.0470 | 0.0478 |
| Mean | 0.0854 | 0.2503 |

Note: We also control for the characteristics of the panel, and for [Circuit]x[Year], District, and Offense type Fixed Effects. Standard errors are in parenthesis and are clustered by year. Stars denote the level of statistical significance *t p <* 0*.*15 ∗ *p <* 0*.*1, ∗∗ *p <* 0*.*05, ∗∗∗ *p <* 0*.*01.

Table 6 shows that the identified association exists in both types of cases. For both published cases and unpublished cases, moving from an RRR panel to an RDD panel, and even to a great extent to a DDD panel, is associated with an increase that is statistically significant.

Whereas the association exists in both types of cases, however, its magnitude is much larger for published cases than for unpublished cases. The coefficients in Column (2) are much larger than the corresponding coefficients in Column (1) and in some cases they are also more statistically significant. In particular, the increase in the odds of a prodefendant outcome that is associated with a move from RRR to DDD is about four times larger for published cases than for unpublished cases.

A question that subsequent work might want to examine is the reason for the identified difference between published and unpublished cases. One possible explanation is that, because prodefendant outcomes commonly involve overturning the decision of the trial below, panels that overturn are much more likely to issue an opinion that explains in detail the reasons for their decision, and once such an opinion is written panels tend to publish it. Another possible explanation is that DDD or RDD panels are more interested in publishing opinions in cases in which they reach a prodefendant outcome because they prefer to move the body of precedent in a prodefendant direction.

*2. Different Decades*

We now turn to examine whether the pattern we identify is driven by some part of the examined period. Table 7 reports the results of regressions following our main specification that are run separately for each of the four decades. Panel A reports the per-decade results for the universe of all cases, Panel B does so for the subset of unpublished cases, and Panel C does so for the subset of published cases.

Panel A indicates that, when focusing on the universe of all cases, the identified association between political composition and prodefendant outcomes is present in each of the four decades. The coefficient of RDD is positive and large in each decade, and is statistically significant at the 1% level in three out of the four decades. The coefficient of DDD is even larger in magnitude in all four decades, and is significant at the 1% level in each of the decades.

Next Panel B shows that the identified association weakens when focusing only on unpublished cases. The coefficients of RDD and DDD are smaller in magnitude, and in two decades not even statistically significant, each of the four decades.

Finally, Panel C indicates that, as before, the identified association is more pronounced when focusing on the subset of published cases. For each of the decades, the coefficient of RDD and DDD is larger than the corresponding coefficients in Panel A. Furthermore, the coefficients of RDD and DDD are all statistically significant at the 1% level in each of the four decades.

Table 7: Different Decades

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) |
| Panel A – All | 1980-1990 | 1991-2000 | 2001-2010 | 2011-2020 |
| RRD | 0.000 | 0.009 | 0.004 | 0.004 |
| RDD | (0.007)  0.022∗∗∗ | (0.006)  0.036∗∗∗ | (0.008)  0.014*t* | (0.004)  0.022∗∗∗ |
| DDD | (0.006)  0.050∗∗∗ | (0.007)  0.079∗∗∗ | (0.009)  0.040∗∗ | (0.006)  0.037∗∗∗ |
|  | (0.011) | (0.011) | (0.016) | (0.008) |
| N | 16,507 | 54,476 | 70,423 | 64,018 |
| *Adj.R*2 | 0.0351 | 0.0336 | 0.0610 | 0.0408 |
| Mean | 0.7986 | 0.8656 | 0.8645 | 0.8903 |
| Panel B - Unpublished Opinions |  |  |  |  |
| RRD | -0.029∗∗∗ | 0.003 | 0.005 | -0.001 |
|  | (0.008) | (0.004) | (0.009) | (0.003) |
| RDD | -0.031∗∗∗ | 0.017∗∗∗ | 0.009 | 0.012∗∗ |
|  | (0.010) | (0.005) | (0.009) | (0.005) |
| DDD | -0.014 | 0.041∗∗∗ | 0.026*t* | 0.021∗∗ |
|  | (0.018) | (0.008) | (0.016) | (0.007) |
| N | 4,782 | 39,403 | 57,370 | 53,754 |
| *Adj.R*2 | 0.0461 | 0.0195 | 0.0747 | 0.0370 |
| Mean | 0.9042 | 0.9259 | 0.9000 | 0.9197 |
| Panel C – Published |  |  |  |  |
| RRD | 0.015 | 0.026∗∗ | 0.012*t* | 0.030∗ |
| RDD | (0.011)  0.043∗∗∗ | (0.012)  0.070∗∗∗ | (0.008)  0.045∗∗ | (0.016)  0.075∗∗∗ |
| DDD | (0.011)  0.076∗∗∗ | (0.013)  0.120∗∗∗ | (0.019)  0.088∗∗∗ | (0.022)  0.150∗∗∗ |
|  | (0.015) | (0.019) | (0.022) | (0.029) |
| N | 11,702 | 15,071 | 13,048 | 10,257 |
| *Adj.R*2 | 0.0335 | 0.0491 | 0.0493 | 0.0658 |
| Mean | 0.7553 | 0.7078 | 0.7080 | 0.7360 |

Note: We also control for the characteristics of the panel, and for [Circuit]x[Year], District, and Offense type Fixed Effects. Standard errors are in parenthesis and are clustered by year. Stars denote the level of statistical significance *t p <* 0*.*15 ∗ *p <* 0*.*1, ∗∗ *p <* 0*.*05, ∗∗∗ *p <* 0*.*01.

*3. Different Types of offenses*

Finally, we turn to examine whether our results are driven by a subset of the types of crimes. To this end, we divide all cases into eight categories of offenses: Violent, Property, Sex-Family, Immigration, Drug, Firearm, and Other. And we run the regressions using our main specifications separately for each of the types of offenses.

Table 8 reports the results of these regressions. As before, Panel A provides the results based on the universe of all cases. Panel B provides the results based on the sample of only unpublished cases, and Panel C provides the results based on the sample of only published cases.

Panel A shows that, in the universe of all cases, an economically meaningful and statistically significant association between political composition and outcomes is present in all the eight types of offenses. Panel C shows that, focusing solely on published cases, the results regarding this association become substantially stronger in magnitude in each of the eight type of offenses. Panel B shows that, focusing only on unpublished cases, the results remain statistically significant but weaken in magnitude in six of the eight types of offenses, but lose statistical significance in two types of offenses.

Table 8: Different Types of Offenses

Panel A: All case

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) |
| Violent | Property | Fraud | Sex-Family | Immigration | Drug | Firearm | Other |
| RRR | -0.011t | 0.006 | 0.007 | -0.005 | -0.006 | -0.007\* | -0.008t | -0.014\* |
|  | (0.007) | (0.011) | (0.007) | (0.016) | (0.008) | (0.004) | (0.005) | (0.008) |
| RDD | 0.016\* | 0.020 | 0.015\*\* | 0.034\*\* | 0.014\*\* | 0.020\*\*\* | 0.021\*\*\* | 0.020\*\*\* |
|  | (0.009) | (0.015) | (0.007) | (0.016) | (0.005) | (0.003) | (0.005) | (0.007) |
| DDD | 0.041\*\* | 0.043\*\* | 0.062\*\*\* | 0.041t | 0.031\*\*\* | 0.044\*\*\* | 0.055\*\*\* | 0.034\*\*\* |
|  | (0.017) | (0.021) | (0.012) | (0.026) | (0.008) | (0.007) | (0.012) | (0.011) |
| N | 9,479 | 4,623 | 21,390 | 2,995 | 47,411 | 79,773 | 25,990 | 13,623 |
| *Adj.R*2 | 0.0586 | 0.0458 | 0.0393 | 0.0449 | 0.0531 | 0.0516 | 0.0506 | 0.0649 |
| Mean | 0.1354 | 0.1516 | 0.1652 | 0.1285 | 0.1228 | 0.1112 | 0.1341 | 0.1256 |

Note: We also control for the characteristics of the panel, and for [Circuit]x[Year], District, and Offense type Fixed Effects. Standard errors are in parenthesis and are clustered by year. Stars denote the level of statistical significance t *p <* 0*.*15 \* *p <* 0*.*1, \*\* *p <* 0*.*05, \*\*\* *p <* 0*.*01.

Panel B: Unpublished Cases

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) |
| Violent | Property | Fraud | Sex-Family | Immigration | Drug | Firearm | Other |
| RRR | -0.007 | -0.002 | 0.004 | -0.022 | -0.007 | 0.001 | 0.001 | -0.007 |
|  | (0.008) | (0.015) | (0.006) | (0.016) | (0.008) | (0.003) | (0.005) | (0.008) |
| RDD | 0.016∗ | -0.012 | 0.010 | 0.010 | 0.001 | 0.011∗∗∗ | 0.010∗∗ | 0.016∗∗ |
|  | (0.009) | (0.017) | (0.009) | (0.020) | (0.005) | (0.003) | (0.005) | (0.007) |
| DDD | 0.033∗∗ | -0.022 | 0.040∗∗∗ | 0.023 | 0.020∗∗ | 0.025∗∗∗ | 0.022∗∗ | 0.022∗ |
|  | (0.015) | (0.023) | (0.012) | (0.025) | (0.008) | (0.005) | (0.010) | (0.012) |
| N | 6,478 | 2,900 | 14,380 | 2,003 | 37,400 | 61,850 | 19,499 | 10,475 |
| *Adj.R*2 | 0.0515 | 0.0442 | 0.0414 | 0.0497 | 0.0577 | 0.0491 | 0.0596 | 0.0639 |
| Mean | 0.0884 | 0.0991 | 0.1061 | 0.0910 | 0.0868 | 0.0746 | 0.0943 | 0.0931 |

Note: We also control for the characteristics of the panel, and for [Circuit]x[Year], District, and Offense type Fixed Effects. Standard errors are in parenthesis and are clustered by year. Stars denote the level of statistical significance *t p <* 0*.*15 ∗ *p <* 0*.*1, ∗∗ *p <* 0*.*05, ∗∗∗ *p <* 0*.*01.

Panel C: –Published Cases

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) | (5) | (6) | (7) | (8) |
| Violent | Property | Fraud | Sex-Family | Immigration | Drug | Firearm | Other |
| RRR | -0.061∗∗∗ | 0.036 | 0.013 | 0.046 | -0.010 | -0.037∗∗∗ | -0.032∗∗ | -0.030 |
|  | (0.021) | (0.029) | (0.016) | (0.038) | (0.012) | (0.010) | (0.015) | (0.023) |
| RDD | 0.019 | 0.058*t* | 0.021 | 0.101∗∗ | 0.047∗∗∗ | 0.039∗∗∗ | 0.051∗∗∗ | 0.023 |
|  | (0.022) | (0.038) | (0.015) | (0.044) | (0.012) | (0.009) | (0.014) | (0.023) |
| DDD | 0.070∗∗ | 0.097∗∗ | 0.090∗∗∗ | 0.204∗∗∗ | 0.061∗∗∗ | 0.089∗∗∗ | 0.155∗∗∗ | 0.074∗ |
|  | (0.028) | (0.037) | (0.022) | (0.065) | (0.021) | (0.012) | (0.032) | (0.037) |
| N | 2,915 | 1,596 | 6,960 | 893 | 9,978 | 17,887 | 6,458 | 3,072 |
| *Adj.R*2 | 0.0760 | 0.0833 | 0.0498 | 0.0774 | 0.0338 | 0.0596 | 0.0588 | 0.0737 |
| Mean | 0.2386 | 0.2441 | 0.2875 | 0.2060 | 0.2577 | 0.2378 | 0.2543 | 0.2350 |

Note: We also control for the characteristics of the panel, and for [Circuit]x[Year], District, and Offense type Fixed Effects. Standard errors are in parenthesis and are clustered by year. Stars denote the level of statistical significance *t p <* 0*.*15 ∗ *p <* 0*.*1, ∗∗ *p <* 0*.*05, ∗∗∗ *p <* 0*.*01.

From the tables above we get that our results are not being driven by one type of offense or another. The magnitude of the effects are quite similar across the different types of offenses, with the exemption of Sex-Family type (important to note that the number of such cases is quite small relative to the other types of offenses).

*C. Decisions by Individual Judges*

Thus far, I have examined decisions at the panel level, using as a dependent variable a dummy of whether the panel chose a prodefendant outcome. However, a panel decision is a product of the decisions of each of the three individua judges on the panel. When a panel chooses a prodefendant outcome, this implies that at least two of the panel members voted for such an outcome. It might be that all three voted in favor of this outcome, or that two voted in favor of the outcome, and the third dissented and voted against it.

My dataset includes for each Circuit Court decision information on whether one of the judges on the panel dissented from the decision. This enabled me to identify the voting decision of each panel member, for or against a prodefendant outcome, in each of the cases. And Table 9 reports the results of regressions based on set of all individual judge decisions. The dependent variable in all the regressions is a dummy variable equal to 1 if the judge voted for a prodefendant outcome and 0 otherwise. Columns (1), (4), and (7) are run on the full sample of all cases. Columns (2), (5), and (8) are run on the set of unpublished cases. And the remaining columns of (3), (6), and (9) are run on the set of published cases.

The key independent variables are all related to the political affiliations of the judge making the decision and those of the other panel members. For the individual judge making the decision, columns (1) – (3) use a dummy variable that is equal to 1 if the judge is Democratic and 0 otherwise; and Columns (4) – (9) use fixed effects for each of the numerous individual judges in the dataset. For the other members of the panel, each of the nine columns has a dummy variable equal to 1 if there is one Democratic judge among the other two members of the panel and 0 otherwise, and a dummy variable equal to 1 if both of the other members of the panel are Democratic and 0 otherwise. In addition to these variables with respect to the other panel members, Columns (7) –(9) also include interactions terms for whether the individual judge is democratic and the dummies regarding the political affiliations of the other panel members. In addition to the above independent variables of interest, all regressions have an array of other independent variables as controls, both individual judge characteristics and fixed effects for the Circuit Court and the year.

The identified association between panel political composition and the odds of prodefendant outcome is a product of (i) the stand-alone prodefendant tendencies that an individual judge might have even if other panel members have no such tendencies, and (ii) the peer effects on the judge that come from prodefendant tendencies of one or the two other panel members. The results in Table 9 enable me to disentangle between these two factors (i) and (ii). The results show that both factors play an economically and statically significant role.



V. Conclusion

My analysis of a vast number of Circuit Court decisions in criminal appeals indicates that how a criminal defendant fares depends significantly on the luck of the draw – in particular, on the composition of the panel to which the appeal in the defendant’s case will be randomly assigned. The more Democratic judges are on a panel, the more likely a prodefendant outcome. The more Republican judges are on the panel, the less likely a procedural outcome. Thus, my results identify and analyze a significant way in which the political appointments of federal judges affect outcomes in the federal criminal justice system.

References

Ash, Elliott, Daniel L. Chen, Arianna Ornaghi (2020), “Gender Attitudes in the Judiciary: Evidence from U.S. Circuit Courts,” *Center for Law & Economics Working Paper Series* 2019(02)

Ashenfelter, Orley, Theodore Eisenberg, and Stewart J. Schwab (1995) “Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes,” *Journal of Legal Studies*, Vol. 24, pp 257.

Boyd, Christina, Lee Epstein, and Andrew D. Martin2(010), “Untangling the Causal Effects of Sex on Judging,” *American Journal of Political Science*, Vol. 54, pp: 389–411.

Carlson, K., Livermore, M. A., & Rockmore, D. N. (2020). The Problem of Data Bias in the Pool of Published U.S. Appellate Court Opinions. *Journal of Empirical Legal Studies*, Vol. 17, pp: 224-261

Choi, S. J., Gulati, M., & Posner, E. A. (2012). What Do Federal District Judges Want - An Analysis of Publications, Citations, and Reversals. *Journal of Law, Economics and Organization*, Vol. 28, pp: 518-549

Cohen and Yang (2019), “Judicial Politics and Senteincg Decisions,” *American Economic Journal:Economic Policy*, Vol 11. No. 1, pp: 160-1991

Cox B. Adam, and Thomas J. Milles (2008), “Judging the Voting Rights Act,” 108 Columbia Law Review 1, pp:1:54

Farhang, Sean, and Gregory Wawro, (2004), “Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making,” *Journal of Law, Economics, and Organization*, Vol. 20, pp: 299–330.

Fischman, B. Joshua, & Max M. Schanzenbach (2011) “Do Standards of Review Matter? The Case of Federal Criminal Sentencing,”40 *23* 405.

Grunwald, B. (2018). Strategic Publication. *Tulane Law Review*, Vol. 92, pp: 745-776.

Hall Mathew (2010), “Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals,” *Journal of Empirical Legal Studies*, Vol. 7, Issue 3, pp: 574-589.

Jolls, Christine (2022), “The Administrative Procedure Act and the Supreme Court,” Working Paper

Kastellec Jonathan (2011), “Hierarchical and collegial politics on the U.S. Courts of Appeals,” *The Journal of Politics*, Vol. 72, no.2, pp: 345-361.

Keele, D. M., Malmsheimer, R. W., Floyd, D. W., & Zhang, L. (2009). An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions. *Journal of Empirical Legal Studies*, Vol. 6, pp: 213-239

Law, D. S. (2005), “Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit,” *Immigration and Nationality Law Review,* Vol. 26, pp: 275-32

Lee Epstein, William M. Landes, and Richard A. Posner (2013), “The Behavior of Federal Judges: A Theoretial and Empirical Study of Rational Choice,” in *The Behavior of Federal Judges*, pp: 25–64. Harvard University Press.

Levy K., Marin, and Adam S. Chilton (2015), “Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals,” *Cornell Law Review*, Vol. 101, issue 1. Available at: <http://scholarship.law.cornell.edu/clr/vol101/iss1/1>

Levy K., Martin (2017), “Panel Assignment in the Federal Court of Appeal,” *Cornell Law Review*, Vol. 103, 65-116.

Levy K. Martin (2021), “The Promise of Senior Judges,” *Northwestern University Law* Review, Vol. 114, No. 4, pp: 1227-1260.

Lie Chelsea (2020), “Judge Political Affiliation and Impacts of Croporate Enviornmental Litigation,” *Journal of Corporate Finance*, Vol. 64

Siegelman, P., & Donohue III, J. J. (1990). Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases. *Law & Society Review*, Vol. 24, pp: 1133-1170

Posner, R. A. (1993), “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does),” *Supreme Court Economic Review,* Vol. 3, pp: 1-41

Schanzenbach, Max M. (2015), “Racial Disparities, Judge Characteristics, and Standards of Review in Sentencing.” *Journal of Institutional and Theoretical Economics*, Vol. 171 (1) pp: 27–47.

Schanzenbach, Max M., and Emerson H. Tiller (2007), “Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence,” *Journal of Law, Economics, and Organization*, Vol. 23 (1), pp: 24–56.

Schanzenbach, Max M., and Emerson H. Tiller. (2008), “Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform,” *University of Chicago Law Review*, Vol. 75 (2), pp: 715–60.

Songer, D. R. (1990). Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality. *Judicature*, Vol. 73, pp: 307-313

Sunstein, Cass R., David Schkade, & Lisa Michelle Ellman (2004) “Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation,” 90(1) *Virginia Law Review* 301.

Sunstein, Cass R., David Schkade, Lisa Michelle Ellman, & Andres Sawicki (2006), “Are Judges Political? An Empirical Analysis of the Federal Judiciary,” Washington, DC: Brookings Institution Press.

Tiede Lydia, Robert Carp and Kenneth L Manning (2010), “Judicial Attributes and Sentencing-Deviation Cases: Do Sex, Race, and Politics Matter?,” *Justice System Journal*, Col. 31, Issie 3, pp: 249-272

Tillman, E. A., & Hinkle, R. K. (2018). Of Whites and Men: How Gender and Race Impact Authorship of Published and Unpublished Opinions in the US Courts of Appeals. *Research and Politics*, 1-7.

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2. For broad discussions of the subject, see Sunstein et al. (2006) and Epstein, Landes, and Posner (2013)). [↑](#footnote-ref-2)
3. These factors include the need to accommodate vacation schedules, to space judicial assignments so that no judge has several week-long sittings in arow), to honor the scheduling preferences of senior judges (whose service provides much-needed support), to honor recusals for disqualification, health, or other valid reasons. With no single federal rule governing the subject, each circuit adopted different legitimate factors and methodologies to form panels. [↑](#footnote-ref-3)
4. A Circuit Court judge may leave regular active service and become a senior judge if the judge satisfies two conditions: (1) judge’s age must be sixty-five or older, and (2) judge’s age plus judge’s years of service in the circuit court exceed 80. [↑](#footnote-ref-4)
5. See Levy (2021) for more detail on all the perks of senior judges at the court of appeal. [↑](#footnote-ref-5)
6. Reports of the Proceedings of the Judicial conference of the United States: 1964 Annual Report of the Director of the Administrative Office of the Unites States Courts 11 (1965) [↑](#footnote-ref-6)
7. Reports of the Proceedings of the Judicial conference of the United States: 1972 Annual Report of the Director of the Administrative Office of the Unites States Courts 33 (1973) [↑](#footnote-ref-7)
8. Siegelman and Donohue (1990), in a study of employment discrimination cases, already showed that published and unpublished cases do differ significantly. Songer (2000) suggested that focusing only on published opinions “… no longer makes sense as a strategy for answering many of the questions that public law scholars have typically asked.” Keele et. Al (2009) find that the publication decision is not independent of the political affiliation of judges on the panel, and reports that Democratic panels are more likely to issue published opinionss in decision with liberal outcome. Choi and Gulati (2012) and Grundwald (2018) suggest that circuit court judges are strategic with respect to issuing unpublished opinions. Law (2005) and Berdejo (2013) Finally, Carlson, Livermore, and Rockmore (2020) present evidence indicating that published cases are unrepresentative of the pool of all cases. [↑](#footnote-ref-8)
9. Studies using such small samples include, for example, Kastellec (2013), Boyd, Epstein & Martin (2010), Epstein, Landes & Posner (2011), Glynn & Sen (2015), Sen (2015), Szmer, Songer & Bowie (2016), Schorpp & Reidd (2017). [↑](#footnote-ref-9)
10. The sample of Sunstein et al (2006) is based on published decisions with respect to a number of specified legal fields that were chosen because of their focus on issues where political ideology is salient. [↑](#footnote-ref-10)
11. The Songer project is named for Donald Songer who initially directed the construction of the database and was later expanded by Kuersten and Haire. The databased includes a sample of about 22,000 during the long period of 1925-2002, with cases randomly selected from all the Circuit Courts. [↑](#footnote-ref-11)
12. As describes in the preceding Section, three types of judges sit on panels: Federal Circuit Court active judges; Federal Circuit Court Senior Judges; and judges who sit in the panel by designation coming from a Federal District Courts or from Special Trial Courts such as Immigration, Patent, and/or Bankruptcy courts. In the case of judges sitting by designation from courts other than the Circuit Court, I searched for information about the judge in the FJC data about judges on the court from which the judge came. [↑](#footnote-ref-12)
13. For 11% of the cases, I was unable to identify the name of any judge. For 3% of the cases, I was able to identify a number of judge names that was either lower or higher than three. [↑](#footnote-ref-13)
14. Although we do identify the judges on enbanc cases , I chose not to include them in the analysis since these cases affect only a small number of cases and they tend to differ substantially from the consideration that the three-judge panels confront. [↑](#footnote-ref-14)
15. For a count of the number of federal appellate Judgeships and whenever they were added, see

    Chronological History of Authorized Judgeships – Court of Appeals, [https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals] [↑](#footnote-ref-15)
16. The OUTCOME variable in PACER has various values including (1) *Affirmed*, if the panel approved the entire judgment in the trial court, (2) *Reversed*, if the panel overturned the judgment of the trial court, (3) *Reversed in part and affirmed in part*, if the panel approved part of the judgment and overturned the remainder of the judgment of the trial court; (4) *Dismissed*, if the panel dismissed the appeal on grounds that no genuine issue arose in the appeal; and (5) Remanded, if the panel returned the case back to the trial court to reexamine in accordance with instructions from the panel. We consider an appeal to be successful if the OUTCOME variable takes one of the values (2), (3), and (5) above, An outcome is thus prodefendant is an appeal by the criminal defendant is successful or an appeal by the government is unsuccessful. [↑](#footnote-ref-16)