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# On the Relationship between Public Opinion and Decision Making in the U.S. Courts of Appeals

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## Abstract

The authors explore whether the federal courts act as countermajoritarian institutions by investigating the influence of public mood on decision making in the U.S. Courts of Appeals from 1961 to 2002. The results indicate that public opinion affects courts of appeals decision making indirectly through judicial replacements and institutional constraints from Congress, but the authors fail to uncover evidence that courts of appeals judges respond directly to changes in public opinion. They conclude that, absent membership turnover in the circuit or in Congress, the courts of appeals are not responsive to the will of the public.

## Keywords

judicial decision making, countermajoritarian, democratic, institutional visibility, public mood

Federal judges occupy a peculiar position in the American political system. Like members of Congress and the president, they have substantial policy-making powers. However, unlike their legislative and executive counterparts, they are not subject to popular will through elections. The electoral independence of the federal courts, coupled with their ability to make public policy (inclusive of the use of judicial review), has long fanned the flames of the debate regarding the proper role of the federal judiciary in the American polity. Scholars are acutely aware of the tension between judges' roles as policy makers and the actuality that federal judges are unelected, leading them to question whether the federal courts operate as countermajoritarian institutions or follow the mood of the public (e.g., Bickel 1962; Dahl 1957; Flemming and Wood 1997; Friedman 2009; Giles, Blackstone, and Vining 2008; Marshall 2008; McGuire and Stimson 2004; Mishler and Sheehan 1993; Norpoth and Segal 1994).

Indeed, the fear that a relatively small number of unelected judges can—and do—substitute their own will for that of duly elected public officials has motivated some to advocate for changes in federal judicial selection, ranging from setting term limits for federal judges (e.g., Calabresi and Lindgren 2006) to calling for their direct election (e.g., Clark 1903). While there are significant normative concerns stemming from the role of federal judges as unelected policy makers (e.g., Comiskey 2009; Friedman 2009), our understanding of the countermajoritarian nature of the federal courts can also be furthered

through the empirical analysis of the relationship between public opinion and judicial decision making.<sup>1</sup> Simply put, if federal judges are responsive to changes in public opinion, this might mitigate the significance of the fact that these actors are unelected (e.g., Comiskey 2009; Marshall 2008). The purpose of this research is to contribute to the debate regarding the undemocratic nature of the federal courts by exploring whether public opinion shapes decision making on the U.S. Courts of Appeals.

An examination of the relationship between public opinion and the decisions courts of appeals judges make is significant for a number of reasons. First, this research contributes to our understanding of the countermajoritarian nature of the federal courts. Although there is a substantial literature devoted to this paradigm, it almost exclusively focuses on the role of the U.S. Supreme Court (but see, e.g., Cook 1977; Giles and Walker 1975; Kritzer 1979; Manning and Carp 2005; Manning, Kuersten, and Carp 2001; Massie 2002; Peltason 1971). While the U.S. Supreme Court is a tremendously consequential venue, the almost exclusive focus on this institution threatens the generalizability of our understanding of the possible

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influence of public opinion on judicial decision making. Second, this research is important in that it furthers our understanding of decision making on the courts of appeals. Though the study of these courts has flourished recently (e.g., Benesh 2002; Hettinger, Lindquist, and Martinek 2006; Klein 2002; Songer, Sheehan, and Haire 2000), there are still a host of questions regarding these bodies that demand attention, including these courts' responsiveness to public opinion (Benesh 2002, 141n63). Furthermore, the fact that the overwhelming majority of appeals in the federal judiciary are terminated in these courts makes the courts of appeals the *de facto*, if not the *de jure*, courts of last resort in the federal system (Hettinger, Lindquist, and Martinek 2006, 13). Put succinctly, the significance of understanding these venues in their own right cannot be overstated. Third, analyzing the possible influence of public mood on courts of appeals decision making is noteworthy since it allows us to examine not only whether these courts respond to changes in national mood but also whether these institutions react to changes in regional mood. Because courts of appeals judges are both national and regional actors (e.g., Richardson and Vines 1970; Songer, Sheehan, and Haire 2000), a more nuanced understanding of the relationship between public opinion and judicial decision making is provided by looking at these considerable policy-making venues. Finally, this research is significant in that it sheds light on how institutional visibility shapes the judiciary's responsiveness to public will. By examining the influence of public preferences on courts of appeals decision making, this article offers insight into the extent to which a court's responsiveness to public mood is conditioned by that court's visibility to the public.

### **Public Opinion and the U.S. Courts of Appeals**

The framers of the U.S. Constitution recognized the need for an independent judiciary. To ensure that federal judges were not overly sensitive to the changing will of the public, the Constitution charges the president with appointing federal judges, with the advice and consent of the Senate, and further establishes that Article III judges "shall hold their Offices during good Behavior." In part, the framers' motivation for granting federal judges life tenure and insulating the federal courts from electoral politics stemmed from the recognition that the federal judiciary could serve as a check on efforts by the majority to suppress the interests of unpopular minorities. In addition, the federal courts enjoy the power of judicial review—the ability to declare policies enacted by the elected branches of government unconstitutional. Through this policy-making power, and those of federal courts more

broadly, federal judges are enabled to substitute their judgment for that of their elected counterparts at the local, state, and national levels (cf. Whittington 2005). These two features create a significant tension regarding the democratic nature of the federal courts in the American polity.

This tension has certainly not escaped the attention of scholars. Indeed, it is fair to say that there is a veritable cottage industry devoted to examining the countermajoritarian nature of the federal courts. On one hand, some posit that because federal judges are not subject to electoral or political accountability as a function of their life tenure, they should not be responsive to changes in public opinion (e.g., Norpoth and Segal 1994; Segal and Spaeth 2002). On the other hand, others argue that federal court judges will be responsive to changes in public mood because of the process by which they are nominated and confirmed, their inability to enforce their decisions, and these judges' everyday interactions with the populace (e.g., Dahl 1957; Epstein and Knight 1998; Giles and Walker 1975). Below, we outline our expectations for why decision making on the courts of appeals might be influenced by public opinion, indirectly through the federal judicial selection process and executive and legislative constraints as well as directly through changes in public opinion at the national and regional levels.

The first link between public opinion and decision making on the courts of appeals involves the indirect influence of public opinion as it relates to the means by which courts of appeals judges are selected. Like Supreme Court justices, courts of appeals judges are nominated by the president and confirmed by the Senate. As such, through judicial replacements, the legislative and executive branches, reflecting public opinion on the basis of having been elected, select judges who share their ideological orientations (e.g., Dahl 1957; Funston 1975). In other words, federal judges tend to share the ideological preferences of the citizenry because the citizenry elects the federal officials who in turn select federal judges. Moreover, the role of senatorial courtesy in the selection of courts of appeals judges provides for the opportunity for home state senators to have substantial influence on the selection of judges, thus further reinforcing the link between the citizenry and courts of appeals judges. Under the norm of senatorial courtesy, presidents may defer to the preferences of senators from the home state in which there is a judicial vacancy, provided the home state senators share the party affiliation of the president. This compels the president to carefully consider the preferences of home state senators in making judicial appointments to the courts of appeals (e.g., Giles, Hettinger, and Peppers 2001; Goldman 1967, 199; Songer, Sheehan, and Haire 2000, 155n1; Songer 1972; Wilson 2003). Consistent with this explanation for the indirect influence of public opinion

on the decisions of federal court judges, we expect that courts of appeals decision making will be influenced by the preferences of the actors in the federal judicial selection process.

The second indirect link between public mood and decision making involves a strategic characterization of judicial behavior. With neither the purse nor the sword, the federal courts must rely on the goodwill of the citizenry to follow their decisions and that of the executive branch to enforce those decisions (e.g., Collins 2004, 813; Giles, Blackstone, and Vining 2008; Mishler and Sheehan 1993, 1996; McGuire and Stimson 2004). If the federal courts step too far out of line of public mood, their institutional legitimacy can become threatened by an executive branch that refuses to enforce judicial decisions. Furthermore, courts of appeals judges might also fear that, if they ignore the will of the public, Congress might react by legislatively overruling judicial decisions, freezing judges' salaries, or removing the ability of the federal courts to hear certain types of cases through jurisdiction-stripping efforts.

While congressional responses to judicial decisions most commonly involve Supreme Court rulings that subvert the will of the public (Eskridge 1991), there are myriad examples of attempts by Congress to exercise its power to rein in the courts of appeals (e.g., Curry 2005; Hooper 2005; Lindquist and Yalof 2001; Redish and Woods 1975; Rotunda 1975; Scott 2004). For example, in response to the Ninth Circuit's decision in *Newdow v. U.S. Congress* (2002), in which the three-judge panel determined that the inclusion of the words *under God* in the Pledge of Allegiance constituted a violation of the First Amendment's prohibition on the establishment of religion, Congress reacted in two ways within six months of the decision. First, Congress passed Public Law 107-293, chastising the Ninth Circuit's decision and reaffirming the desirability of the words *under God* in the pledge. Second, Representative Todd Akin (R-MO) introduced the Pledge Protection Act, which would have stripped the jurisdiction of the federal courts to hear First Amendment challenges to the Pledge of Allegiance (Hooper 2005).<sup>2</sup> Taken as a whole, the above discussion provides the foundation for a strategic explanation for why courts of appeals judges might be indirectly responsive to public mood through executive and legislative constraints.<sup>3</sup>

Finally, public mood is directly linked to courts of appeals decision making because of the possibility that, like other Americans, courts of appeals judges' attitudes might shift, knowingly or not, as public mood changes (e.g., Epstein and Knight 1998; Giles, Blackstone, and Vining 2008; Mishler and Sheehan 1996). This view asserts that courts of appeals judges are susceptible to the influence of public opinion as a function of their everyday

interactions with the public. That is, circuit court judges obtain information about public opinion in the same manner as other citizens—through media outlets, such as newspapers, magazines, radio, and television, as well as periodic exchanges with their neighbors (Epstein and Knight 1998, 145). Predating even the legal realists (Tamanaha 2007), this perspective asserts that it is unreasonable to expect judges to shed their personal biases, which may be colored by changes in public opinion, when judges don their black robes to adjudicate legal controversies. The influence of public mood on judicial decision making might occur unconsciously as judges alter their preferences to reflect those of the public, a perspective endorsed by Judge John R. Brown (1959, 145) of the Fifth Circuit: "Lifetime tenure insulates judges from anxiety over worldly cares for body and home and family. But it does not protect them from the unconscious urge for the approbation of their fellow men." Alternatively, judges might consciously follow changes in public mood. Judge LeBaron Colt (1903, 675) of the U.S. Court of Appeals for the First Circuit expressed this position quite succinctly in a pre-legal realist age:

The purpose and end of law are the welfare of society and the happiness of the people. The law should always be viewed from the standpoint of society, and not from the standpoint of the law itself. . . . The law is made for society, and not society for the law. The interests of society are primary; the interests of the law secondary. Society is the master, and law its handmaiden. The law must march with society; the constitution must march with the nation.

When theorizing about the direct link between public mood and decision making on the courts of appeals, it is vital to recognize that circuit court judges are both national and regional actors (Richardson and Vines 1970; Songer, Sheehan, and Haire 2000). On one hand, circuit court judges are clearly federal officials. Like other high-ranking executive branch appointments, they are confirmed by the Senate. Furthermore, the salaries of courts of appeals judges are appropriated by Congress, most recently under §225 of the Federal Salary Act of 1967. Moreover, in their capacity as federal officials, courts of appeals judges are charged with promoting the consistency of federal law. As a means of achieving this goal, courts of appeals judges meet with judges from outside of their circuit at periodic sessions of the Judicial Conference of the United States.

On the other hand, courts of appeals judges are regional actors. The precedents of circuit courts are binding only on federal district courts and other courts of appeals panels within the circuit (e.g., Klein 2002, 5). Furthermore,

their jurisdiction is geographical, meaning that the courts of appeals can hear only cases arising within their circuit. Carp (1972, 407) describes the regional nature of the courts of appeals concisely in noting that “the circuit is a semi-closed system, a nearly self-contained organizational unit within which there is considerable interaction among its members and almost no interaction between the members of one unit (circuit) and another” (also see Howard 1981). Moreover, the reality that courts of appeals judges are regional decision makers has not escaped the attention of Congress. In addition to the norm of senatorial courtesy discussed above, which gives home state senators substantial input with regard to the selection of courts of appeals judges, 28 U.S.C.A. §44 requires that, with the exception of the District of Columbia Circuit, courts of appeals judges must be residents of their circuits and further provides for the representation of at least one judge from each state in the circuit. Even without this statutory requirement, the fact remains that courts of appeals judges are products of their circuits. Courts of appeals judges are overwhelmingly born and raised within their circuits, the majority have attended law school within their circuits, and most have been employed in their circuits prior to their ascension to the courts of appeals (Gryski and Zuk 2009; Richardson and Vines 1970, 72). In addition, courts of appeals judges are prominent members of their local communities, participating in a wide range of civic and political activities that enable them to keep in touch with the cultural norms and mood of the regional public (e.g., Slotnick 1984).

The reality that courts of appeals judges operate as both national and regional actors suggests that these judges might be influenced by both national- and circuit-level public mood. First, in their capacity as federal officials, we expect they will be susceptible to the influence of national mood. Inasmuch as courts of appeals judges are charged with promoting the coherency of federal law, they should be particularly in tune with the will of the American citizenry to ensure that federal law, and its interpretation, represents the mood of the public as a whole. Second, in their role as regional actors, we expect that courts of appeals judges will be responsive to changes in circuit-level opinion. Circuit court judges are required to live within the circuits on which they serve, augmenting their ability to keep in touch with circuit-level public opinion. Furthermore, since their opinions are binding law only within their own circuits, this enhances the importance of rendering decisions that do not step too far out of line with the mood of the circuit. Accordingly, we examine whether both national-level public opinion and circuit-level public opinion directly shape decision making on the courts of appeals.

## Data and Method

To determine whether public opinion influences decision making on the U.S. Courts of Appeals, we utilize data on these courts’ decisions extracted from the Songer (2009) and Kuersten and Haire (2009) databases. The merger of these databases allows us to examine the influence of public mood on the courts of appeals from 1961 to 2002.<sup>4</sup> Each of these data sets contains information on a random sample of thirty cases per year from each of the courts of appeals, with the exception of the Federal Circuit.<sup>5</sup> Because regional measures of public mood for the District of Columbia Circuit are lacking, our empirical models exclude this circuit.<sup>6</sup> As such, our data set contains information on the decision-making patterns of the First through Tenth Circuits from 1961 to 2002 and for the Eleventh Circuit from 1982, the first full year it was in operation, through 2002. To maximize the information on the decision-making proclivities of the circuits under analysis, our analysis includes cases heard by both three-judge panels and en banc panels.<sup>7</sup>

The unit of analysis in our data is the circuit–year (i.e., each observation represents a federal circuit in a given year). Our dependent variable measures the percentage of liberal decisions rendered by each circuit per year, as identified in the Songer (2009) and Kuersten and Haire (2009) databases. For cases involving the rights of the criminally accused, a liberal decision favors the criminal defendant, while a conservative decision favors the government. In the realm of civil rights and liberties, a liberal decision favors the litigant claiming a violation of its civil rights or liberties, while a conservative decision supports restrictions on those rights or liberties. For cases involving economic activity, a liberal decision favors the interests of labor, the government, or the economic underdog, while a conservative decision is probusiness.

The cross-sectional and time-series components of our data set suggest the use of fixed effects panel data time-series analysis techniques.<sup>8</sup> However, fixed effects regression models are incapable of accounting for the sampling composition of the Kuersten and Haire (2009) and Songer (2009) databases. Given this, we report the results of two model specifications. First, we pool all observations and use an ordinary least squares (OLS) regression model, which enables us to include the weights reported in the Kuersten and Haire (2009) and Songer (2009) databases. Second, we use a fixed effects regression model that does not account for the sampling composition of our data. Significantly, the nearly identical results regardless of model specification (i.e., OLS vs. fixed effects regression) corroborate the robustness of our findings and further indicate that there are no time-specific effects influencing

the relationships between the independent and dependent variables in the models. What is more, neither autocorrelation nor heteroscedasticity is present in the OLS model, suggesting that there is no need to employ generalized least squares estimates.

As noted above, there are three primary paths by which the courts of appeals might be influenced by public mood: indirectly through the federal judicial selection process (e.g., Dahl 1957), indirectly through constraints from the legislative and executive branches (e.g., Epstein and Knight 1998), and directly via responsiveness to contemporary changes in public mood (e.g., McGuire and Stimson 2004). To operationalize the first indirect influence of public mood, we include a *circuit preferences* variable that measures the ideology of the median judge serving on each circuit, based on the Giles, Hettinger, and Peppers (2001) scores, as compiled by Epstein et al. (2007). These scores are particularly suitable for capturing the indirect influence of public mood in that they account for the dynamics of the federal judicial selection process as it relates to the role of senatorial courtesy. The Giles, Hettinger, and Peppers scores are coded as follows. When neither of the home state senators share the president's party affiliation, the judge is assigned the president's Common Space score (Poole 1998). When only one of the home state senators is a member of the president's political party, the judge is given that senator's Common Space score. If both of the home state senators share the president's party affiliation, the judge is assigned the mean of the two senators' Common Space scores. Because higher values correspond to more conservative ideologies, if there is an indirect influence of public mood on courts of appeals decision making, this variable will be negatively signed.<sup>9</sup>

The second indirect link between public mood and courts of appeals decision making involves legislative and executive constraints on these institutions. Above, we have posited that the courts of appeals might be shaped by public opinion because, should these courts step too far out of line with public opinion, Congress might retaliate by overriding courts of appeals decisions, freezing judges' salaries, or stripping these courts of their jurisdiction to hear certain types of cases. Likewise, the president might react by indifferently enforcing courts of appeals decisions. To more closely parse out the causal process by which courts of appeals might respond to public mood, it is necessary to account for the preferences of these actors. Accordingly, we include a *congressional preferences* variable, which is composed of the Common Space score (Poole 1998) of the median member of Congress. Our model also includes a measure of *presidential preferences*, which represents the Common Space score of

the president. Since higher scores on these variables indicate more conservative ideologies, if the courts of appeals are constrained by their elected counterparts, these variables will be negatively signed.

Two variables based on Berry et al.'s (1998, 2007) state-level indicators of public mood operationalize the direct influence of public mood.<sup>10</sup> Our first variable, *circuit mood*, captures public mood at the circuit level. This variable is based on the population weighted circuit-level aggregation of Berry et al.'s state-level indicators of public mood, lagged one year. Since higher scores on this variable correspond to liberal policy moods, we expect this variable will be positively signed. Our second variable, *national mood*, captures public mood at the national level. This variable is based on the population weighted national-level aggregation of Berry et al.'s state-level proxies for public mood, lagged one year.<sup>11</sup> If courts of appeals judges respond to changes in national public mood, this variable will be positively signed. We have lagged our mood variables to avoid contaminating our empirical results from the decision to measure courts of appeals policy outputs that come partially before and partially after changes in public mood, which are measured on an annual basis (e.g., McGuire and Stimson 2004, 1028). Thus, while it is still theoretically appropriate to expect courts of appeals judges to respond to contemporaneous public mood, it makes good empirical sense to lag our mood variables by one year to control for the temporal relationship between public mood and decision making on the courts of appeals.<sup>12</sup>

We have opted to use the Berry et al. measure, as opposed to alternative proxies for state-level public opinion (e.g., Brace et al. 2004; Erikson, Wright, and McIver 1993), for three reasons. First, the Berry et al. measure most closely approximates public mood, the concept of which has been directly linked to examining the relationship between public opinion and policy outputs (e.g., Stimson 1999), including those of courts (e.g., Flemming and Wood 1997; McGuire and Stimson 2004; Mishler and Sheehan 1993, 1996; Norpoth and Segal 1994). In other words, the Berry et al. measure captures policy mood, as compared to symbolic ideology (e.g., Berry et al. 2007, 124), which is represented by measures of ideology that rely on survey respondents' self-identifications as to their political orientations and have been most closely linked to policy attitudes rather than policy outputs (e.g., Brace et al. 2004; Erikson, Wright, and McIver 1993).<sup>13</sup> Second, Berry et al. calculate public mood using the American state as the level of analysis, which allows for easy aggregation of state-level mood to the circuit and national levels. Thus, the Berry et al. measure allow us to test for whether courts of appeals are responsive to both regional

(i.e., circuit-level) and national changes in public mood based on the same metric (e.g., Berry et al. 2007, 124-25). Finally, the Berry et al. measure is desirable since it provides annual policy mood estimates for each of the American states over a substantially longer time period than alternative measures of state-level public mood. This maximizes our ability to conduct a longitudinal analysis of the relationship between public mood and decision making on the courts of appeals.<sup>14</sup>

While the primary purpose of this article is to explore the relationship between public mood and courts of appeals decision making, we also control for other factors that might shape the decision making patterns of courts of appeals judges. We account for the ability of the Supreme Court to reverse the courts of appeals by including a *Supreme Court preferences* variable. This variable takes on the Judicial Common Space score of the median justice on the Supreme Court and thus maps the median justice into a common ideological space as our circuit preferences variable (Epstein et al. 2007) as well as the variables capturing the preferences of Congress and the president. Because higher values correspond to more conservative Supreme Courts, if the Supreme Court is capable of constraining the decision making of courts of appeals panels, this variable will be negatively signed. We also control for fact that the courts of appeals overwhelmingly affirm criminal appeals, resulting in conservative outcomes (e.g., Howard 1981). While these cases are extremely important to the individual appealing his or her conviction, from the standpoint of the courts of appeals they tend to raise legally inconsequential issues resulting in a lack of judicial support, but nonetheless must be heard because of the courts of appeals' mandatory jurisdiction. To capture the reality that the courts of appeals under analysis varied with respect to the number of criminal appeals decided, both over time and in comparison to one another, we include a *percentage of criminal cases* variable that represents the percentage of all cases under analysis involving criminal appeals, per circuit-year. Because of the courts of appeals' prodigious tendency to affirm these appeals, resulting in conservative outcomes given the coding of our dependent variable, we expect this variable will be negatively signed, indicating that a court of appeals with a relatively large criminal docket will render more conservative decisions than a court of appeals with a smaller criminal docket.

Finally, in the OLS regression model, we include dummy variables for each circuit in the data, save one, to account for circuit-specific differences that might be attributable to regional norms and additional differences in the courts of appeals' dockets that might shape judicial decision making (e.g., Songer, Sheehan, and Haire 2000).<sup>15</sup> The inclusion of these circuit dummies also allows us to

isolate the effects of circuit-level public mood given the pooled nature of our data thus reducing possible bias in our results (e.g., Green, Kim, and Yoon 2001).

## Empirical Results

Table 1 reports the results of the OLS and fixed effects regression models that estimate influences on the percentage of liberal decisions handed by each circuit per year.<sup>16</sup> The OLS regression model includes dummy variables for each of the circuits, save one, enabling us to utilize the weights reported in the Kuersten and Haire (2009) and Songer (2009) databases and to simulate a fixed effects regression model. An  $F$  test for the OLS regression model confirms that the unrestricted model (with circuit dummy variables) is appropriate, indicating that the model is influenced by variation at the circuit level ( $F = 3.75, p < .01$ ). This is further substantiated by the statistically significant  $F$  test for the fixed effects model ( $F = 2.50, p < .01$ ). Thus, both sets of statistics corroborate that the circuit-level indicators are jointly significant, and if we were to exclude them from the OLS regression model, the results would be biased and inconsistent. Because the direction, significance, and magnitude of the coefficients of the independent variables are virtually indistinguishable regardless of whether we employ an OLS regression model or a fixed effects regression model, we interpret the results of the OLS regression model for the sake of parsimony.

Table 1 assesses both the indirect and direct effects of public opinion on courts of appeals decision making. Recall that the first indirect linkage hypothesis posits that voters elect presidents and senators who share their ideological preferences. They, in turn, appoint and confirm federal judges who share their own preferences. This argument is tested via the circuit preferences variable. The relationship, as evidenced by the statistically significant and negative circuit preferences coefficient is as hypothesized: as the ideology of the circuit becomes more conservative, the percentage of liberal decisions declines. More substantively, a one standard deviation increase in the conservatism of the circuit corresponds to 3.7 percent decrease in liberal decisions by circuit-year. In short, Table 1 provides strong evidence that public opinion influences courts of appeals decisions indirectly through the federal judicial selection process.<sup>17</sup>

The second indirect linkage between public opinion and courts of appeals decision making involves the ability of Congress and the executive to constrain these institutions. While we fail to find evidence that the courts of appeals respond to presidential preferences, Table 1 does provide evidence that Congress is capable of constraining courts of appeals decision making: as Congress becomes

**Table 1.** The Influence of Public Opinion on Courts of Appeals Decision Making, 1961–2002

Variable	Ordinary least squares (OLS) regression		Fixed effects regression	
<b>Indirect influence</b>				
Circuit preferences [-]	-15.77	(2.74)*	-14.57	(3.64)*
Congressional preferences [-]	-20.13	(5.19)*	-17.24	(4.42)*
Presidential preferences [-]	0.84	(1.18)	1.33	(0.70)
<b>Direct influence</b>				
Circuit mood [+]	-0.06	(0.15)	-0.14	(0.14)
National mood [+]	0.15	(0.23)	0.21	(0.20)
<b>Controls</b>				
Supreme Court preferences [-]	-1.43	(4.22)	0.01	(3.59)
Percentage of criminal cases [-]	-0.35	(0.05)*	-0.34	(0.06)*
Constant	42.33	(9.20)*	46.82	(8.68)*
R <sup>2</sup>	.31		.23	
F test	11.71*		18.89*	
Breusch–Pagan heteroscedasticity test <sup>a</sup>	16.45			
Breusch–Pagan fixed effects test <sup>b</sup>			17.11*	
N	440		440	

The unit of analysis is the circuit–year. The dependent variable is the percentage of courts of appeals decisions decided in the liberal direction. Entries in parentheses are robust standard errors. The expected direction of the parameter estimates of the independent variables appears in brackets. The OLS model includes ten circuit dummy variables to control for circuit-level effects (results not shown). The data in the OLS model are weighted to account for the sampling composition of the Kuersten and Haire (2009) and Songer (2009) databases. The Durbin–Watson test (1.63) for the fixed effects model falls within the zone of indifference, although by only a few one-hundredths of a point. We report the noncorrected coefficients and note that there are no substantive differences in the fixed effects, AR1 model. Dropping the insignificant variables from the model serves only to enhance the significance of the statistically significant variables.

<sup>a</sup>A statistically insignificant Breusch–Pagan test indicates that heteroscedasticity is not present in the data.

<sup>b</sup>A statistically significant Breusch–Pagan test indicates that a fixed effects model is appropriate and that there are no time-specific effects in the data (Baltagi 2008, 70). In other words, a random effects model is not appropriate with these data.

\* $p < .05$ , two-tailed.

more conservative, the percentage of liberal cases decided by the U.S. Courts of Appeals declines.<sup>18</sup> More specifically, a one standard deviation increase in the conservatism of the median member of Congress corresponds to a 2.0 percent decrease in the percentage of liberal decisions rendered by the courts of appeals.<sup>19</sup> While the magnitude of this impact is relatively modest compared to the influence of the federal judicial selection process, this is nonetheless an important finding. Although the courts of appeals are less visible than the U.S. Supreme Court, they are certainly not immune from congressional actions that can potentially weaken their institutional legitimacy, and it appears that courts of appeals judges consider the possibility of congressional responses when rendering their decisions, thus supporting a strategic characterization of judicial behavior. Moreover, this is a particularly interesting finding in that it indicates an often overlooked indirect link between public opinion and judicial decision making. That is, since Congress is capable of shaping decision making on the courts of appeals, and since the public elects members of Congress, this suggests that the direct election of members of Congress provides an additional indirect link between public opinion and courts of

appeals decision making. In short, the public elects Congress, and these results indicate that Congress is capable of marginally constraining the courts of appeals.<sup>20</sup>

The direct effects of public opinion on courts of appeals decision making are captured through the national (national mood) and circuit-level (circuit mood) indicators of public mood. Table 1 reveals that neither of the direct measures of public mood achieves statistical significance, leaving us to conclude that courts of appeals judges are not influenced directly by public preferences. These findings not only contrast with our theoretical expectations for the responsiveness of the courts of appeals to public mood but also are distinct from recent research indicating that the Supreme Court is directly responsive to public mood (e.g., Flemming and Wood 1997; Giles, Blackstone, and Vining 2008; McGuire and Stimson 2004). This suggests that the mechanisms that influence the decision making of justices on the Supreme Court are different from those that influence judicial choice on the U.S. Courts of Appeals (e.g., Martinek 2009).

Turning now to the control variables, we fail to find evidence that the courts of appeals are shaped by the ideological preferences of the Supreme Court.<sup>21</sup> The model

does, however, indicate that courts of appeals decision making is influenced by the percentage of criminal cases rendered by each circuit, per year, in the data. The percentage of criminal cases variable has a negative and statistically significant impact on circuit court liberalism, indicating that circuits with larger criminal dockets tend to render more conservative decisions. Substantively, a 10 percent increase in a court's criminal docket leads to a 3.5 percent decrease in the percentage of cases decided in a liberal direction. This corroborates extant research indicating that the vast majority of criminal cases are affirmed by the courts of appeals, resulting in conservative outcomes (e.g., Howard 1981).<sup>22</sup>

## Conclusions

Political and legal scholars have long been attentive to the peculiar role occupied by federal court judges. Though unelected, these judges have substantial policy-making powers and thus can potentially behave as counter-majoritarian actors, substituting their own wills for that of their duly elected counterparts. This reality has motivated scholars to investigate the extent to which public opinion might influence judicial choice. While there is a voluminous body of scholarship devoted to this paradigm, it is overwhelmingly focused on the U.S. Supreme Court. This article makes a notable contribution to the literature on judicial responsiveness to public opinion by investigating the mechanisms by which public opinion shapes decision making on the U.S. Courts of Appeals.

The analysis provides strong evidence that public opinion indirectly influences courts of appeals judges through the federal judicial selection process. The public elects presidents and senators who work together in the selection of courts of appeals judges who share their ideological preferences. Through this mechanism, the public's preferences are indirectly transferred to the courts of appeals. Although this link between public mood and the courts of appeals is only indirect, it is vital to recognize that public opinion is regularly transmitted to the courts of appeals via judicial replacements. During the time period under analysis here (1961–2002), presidents have successfully appointed an average of nine courts of appeals judges per year (Gryski and Zuk 2009). As this figure indicates, presidents, with the advice and consent of the Senate, have substantial capacity to shape the ideological tenor of the courts of appeals in a manner that is commensurate with the will of the electorate.

In addition, our results also demonstrate that the ideological preferences of Congress marginally shape judicial choice on the courts of appeals, thus providing evidence of a second indirect link between public opinion and judicial decision making. This finding is noteworthy as it

corroborates strategic characterizations of judicial choice. Given the preliminary support that Congress can constrain the courts of appeals, future research should explore the mechanisms by which courts of appeals judges might fear retaliation by Congress and the circumstances under which Congress can most effectively constrain the circuit courts.

Our results failed to provide evidence that courts of appeals judges respond directly to changes in public mood, whether measured at the circuit or national level. Despite our expectations that circuit court judges respond directly to changes in public mood, we believe that the absence of a direct link can be explained on two grounds. First, the Constitution dictates that federal judges are appointed, not elected. This puts federal judges in a position in which they have no need to respond to public opinion for electoral reasons, distinct from members of Congress and state court judges who are selected via election mechanisms. Indeed, the framers of the Constitution saw the need to insulate judges from elections, fearing that if they were elected they might be unduly influenced by the will of the public. In part, the framers were motivated to do so to enable federal judges to protect the rights of unpopular minorities from the tyranny of the majority.

Second, though the U.S. Courts of Appeals are enormously consequential venues, acting as the *de facto* courts of last resort in the federal judiciary (Hettinger, Lindquist, and Martinek 2006, 13), the fact remains that they are not highly visible institutions. Not only are the courts of appeals among the least understood courts in the federal system, they are also some of the least conspicuous (e.g., Howard 1981; Martinek 2009). Songer, Sheehan, and Haire (2000, xiii) articulate this point in no uncertain terms: "The courts of appeals exist at the very edge of the average American's consciousness if at all." Because the courts of appeals are not on the radar of the American citizenry, this is suggestive that these judges may not genuinely fear that the institutional legitimacy of the courts of appeals will be threatened if their decisions subvert the will of the citizenry. Simply put, if the public is largely unaware of the day-to-day business of the courts of appeals, circuit court judges may not perceive that the public will react negatively by failing to comply with circuit court decisions, should these courts step too far out of line from public mood. Put in perspective with research demonstrating that the Supreme Court is directly responsive to public opinion (e.g., Flemming and Wood 1997; Giles, Blackstone, and Vining 2008; McGuire and Stimson 2004; Mishler and Sheehan 1993, 1996), this intimates that institutional visibility plays a key role in conditioning the judiciary's responsiveness to public mood. Highly visible institutions, such as the U.S. Supreme Court, are sensitive to the will of the public, while less visible institutions, such as the U.S. Courts of Appeals, need not

respond to public preferences since the public at large is generally oblivious to their decisions.

Though the citizenry is largely unaware of the courts of appeals, it is clear that these courts occasionally capture the attention of the national media, thus raising their profiles in the eyes of the public. Highly salient decisions, such as the aforementioned Pledge of Allegiance case, are undoubtedly capable of attracting the eyes of the American public. If concerns about institutional legitimacy and compliance are real for courts of appeals judges, public opinion might influence itself most strongly in particularly salient cases (e.g., Giles, Blackstone, and Vining 2008). While the current research cannot speak to this possibility, analyzing the influence of public opinion in salient and nonsalient cases will be a fruitful avenue for future research. We also encourage researchers to address whether the courts of appeals are influenced by public opinion in particular issue areas, which will provide a more nuanced view of the undemocratic nature of these courts.<sup>23</sup> Taken as a whole, this research is an important first step at better understanding the countermajoritarian nature of these highly significant policy-making venues, and we are certain that future research on the democratic nature of the U.S. Courts of Appeals will contribute to our comprehension of the politics of judicial choice.

Note: We also ran our empirical models for each circuit in the data. The only circuit that exhibited a statistically significant response to either mood variable was the Sixth Circuit, which responded negatively to national mood and positively to circuit mood. However, because these variables are highly collinear in the Sixth Circuit ( $r = .680$ ), when one or the other is excluded from the model, the other mood variable falls out of statistical significance, indicating that no circuit responds directly to public mood.

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### Notes

1. We use the terms *public opinion* and *public mood* interchangeably when referring to the mean ideological orientation of the public on a liberal–conservative dimension (e.g., Berry et al. 1998, 327; Stimson 1999, 37). As such, this research focuses on aggregate changes in the public’s ideological orientation as opposed to specific public opinion polls on particular decisions, such as those used by Marshall (2008).
2. The Ninth Circuit’s decision in *Newdow* was reversed by the Supreme Court on the grounds that *Newdow* did not have prudential standing to bring the suit. Although the Supreme Court’s majority declined to rule on the constitutionality of the words *under God* in the pledge, congressional attempts to strip the federal courts of the jurisdiction to hear such challenges continued (Hooper 2005). Subsequently, *Newdow* secured standing and filed a second suit. In March 2010, a three-judge panel of the Ninth Circuit determined that the words *under God* do not run afoul of the First Amendment’s Establishment Clause. *Newdow* has indicated that he intends to request that the Ninth Circuit rehear the case en banc and appeal the decision to the Supreme Court (Williams 2010).
3. We recognize that courts of appeals judges might also fear reversal by the Supreme Court (e.g., Klein 2002) and that the Court may engage in poll correction—reversing lower court decisions to bring policy more in line with majority preferences (Marshall 2008). We account for the possible influence of the Supreme Court on courts of appeals decision making in our empirical models through the inclusion of a variable capturing the preferences of the Supreme Court.
4. While the Songer (2009) database contains information on courts of appeals decisions dating to 1925, because our measures of public opinion begin in 1960, and because we employ a one-year lag of public opinion (discussed below), we analyze the 1961–2002 time period.
5. Because of missing information in the Songer (2009) and Kuersten and Haire (2009) databases on the ideological direction of the courts of appeals’ decisions, our data contain an average of 25.2 cases per circuit–year. To validate that our results are not unduly sensitive to the number and composition of cases per circuit–year, we ran our model using biannual data, thus doubling the number of cases represented by each observation in the data. Those results corroborate the analyses appearing herein.
6. To ensure our results are not affected by the decision to exclude the District of Columbia Circuit, we estimated the influence of national public mood on a data set inclusive of this circuit. We obtained substantively identical results as those reported below.
7. To check the robustness of our results in light of the decision to include en banc cases, we ran our empirical models

- excluding en banc panels, the results of which are consistent with those reported here.
8. We tested to determine whether a random effects regression model is proper given the makeup of our data. The statistically significant Breusch–Pagan test, which indicates that there are no time-specific effects for these data, confirms that the fixed effects model is appropriate (Baltagi 2008, 70).
  9. We recognize that the Giles, Hettinger, and Peppers (2001) scores are limited in that they oversimplify the complex nature of the selection process for appeals court judges and fail to incorporate changes that have occurred over time in the selection of these judges (e.g., Scherer and Miller 2009). While the Giles, Hettinger, and Peppers scores have the virtue of recognizing that presidents do not have a completely free hand in selecting appeals court judges when they must deal with a home state senator of their own party, they may mischaracterize the relative strength of the president and home state senators in terms of the negotiation over circuit court appointments (e.g., Sisk and Heise 2005, 784–85). For example, there is evidence that, at least since the Reagan administration, presidents have had more influence than home state senators on the selection of appeals court judges (e.g., Goldman 1997, chap. 8; Songer, Sheehan, and Haire 2000, 28). Despite these limitations, the Giles, Hettinger, and Peppers (2001) scores have become the most frequently used measure of judicial ideology in contemporary published studies of appeals court judges (e.g., Giles 2008). To ensure our results are not unduly dependent on the limitations of the Giles, Hettinger, and Peppers scores, we ran an alternative model that replaced the Giles, Hettinger, and Peppers score for the median circuit judge with the Common Space score for the president who appointed the median judge, the results of which are consistent with those reported in Table 1.
  10. Berry et al. (1998, 2007) calculate yearly public mood for each of the American states using four facets of information: interest group ratings of a state’s congressional delegation, estimated ideology scores of the incumbent congresspersons’ challengers, election results that reflect the ideological cleavages in the state electorate, and the size of the congressional districts in the state.
  11. We also conducted an analysis with Stimson’s (1999) measure for national public mood (in place of our national mood variable). The results corroborate those reported in Table 1.
  12. While the use of a one-year lag has become standard in studies that examine the influence of public mood on judicial decision making (e.g., Flemming and Wood 1997; Giles, Blackstone, and Vining 2008; McGuire and Stimson 2004; Norpoth and Segal 1994), we recognize that judges may respond to contemporaneous changes in public opinion or exhibit a delayed response to it. Accordingly, we ran alternative models using contemporaneous measures of public mood (i.e., measures of public mood representing the same year as the decisions under investigation) and measures of public opinion lagged two years, the results of which corroborate those reported here.
  13. To illustrate, Berry et al. (2007, 125) compare biannual “national” versions of the state-level measures of public opinion discussed above to Stimson’s (1999) national estimate of public mood from 1976 to 1998. They find that the Berry et al. measure correlates with Stimson’s public mood index at .85, far exceeding the correlations for the other measures tested, which range from  $-.26$  to  $.18$ .
  14. While we are confident that the Berry et al. (1998, 2007) measure of public mood is most theoretically appropriate for our purposes, we have estimated an alternative model specification using the Erikson, Wright, and McIver (1993) proxy for state symbolic ideology (aggregated and population weighted to the circuit level). These scores are based on the percentage of respondents identifying themselves as liberal in CBS News/*New York Times* polls and are available for 1977–2002. Substituting the Berry et al. measure of public mood with the Erikson, Wright, and McIver proxy produces results similar to those reported in Table 1.
  15. Circuit-specific differences are accounted for in the fixed effects regression model in that circuits are the panel variables and years are the temporal variables.
  16. While we recognize that public mood is theoretically translated into the ideological preferences of Congress and the executive through elections and to the federal courts via the selection process, this linkage does not present a problem for the current research as there is minimal evidence of multicollinearity (i.e., none of the variables are correlated higher than  $.36$ ).
  17. In addition to reflecting the indirect influence of public opinion through membership change on the courts of appeals, this variable may also capture changes in the ideological tenor of sitting circuit court judges that occur over time (e.g., Kaheny, Haire, and Benesh 2008).
  18. To be sure, the congressional preferences variable captures a very different phenomenon than the circuit preferences variable, which accounts for the actors in the federal judicial selection process. In fact, the correlation between these two variables is an anemic  $.14$ .
  19. While multicollinearity precludes us from jointly including variables representing the Common Space scores of the median members of the House and Senate, when we replace the congressional preferences variable with variables capturing the ideology of the median members of the House and Senate in separate model specifications, we obtain similar results, statistically and substantively, in both the ordinary least squares and the fixed effects regression models.
  20. Because we include two variables capturing the direct influence of public mood, we are confident this finding indicates that Congress can constrain the courts of appeals, as opposed

to the possibility that circuit court judges take their cue of public opinion from the prevailing ideology in Congress.

21. Our (non)finding, indicating that the courts of appeals are not responsive to the ideology of the Supreme Court, is consistent with recent research by Bowie and Songer (2009), Hettinger, Lindquist, and Martinek (2006), and Klein (2002), who also find that courts of appeals judges do not fear reversal by the Supreme Court.
22. We recognize that, in addition to public opinion, a variety of case-specific factors shape decision making on the courts of appeals, including litigant resources (e.g., Songer, Sheehan, and Haire 2000), legislative intent (e.g., Randazzo, Waterman, and Fine 2006), organized interests (e.g., Collins and Martinek 2010), and precedent (e.g., Luse et al. 2008). Because of the aggregate nature of the data under analysis, we were unable to control for these case-specific influences on judicial choice in the courts of appeals.
23. In making these statements, it is important to recognize that the Kuersten and Haire (2009) and Songer (2009) databases alone are likely not appropriate for tackling these questions. That is, while the random sampling composition of these data sets is capable of providing a generalizable investigation into the influence of public opinion on courts of appeals decision making, the fact that each circuit is represented by thirty cases per year suggests that parsing out cases on the basis of their salient or nonsalient nature, and issue area, will result in too small a number of cases from each circuit to generalize findings in meaningful ways. Accordingly, future research devoted to this question will be best served by augmenting these databases with additional cases or collecting original data on specific issue areas (e.g., Benesh 2002; Sunstein et al. 2006).

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