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The Small Group Context: Designated District Court Judges in the U.S. Courts of Appeals

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Decision making in the U.S. courts of appeals occurs primarily in three-judge panels. A substantial number of cases are decided by panels that include a judge who is a district court judge serving temporarily on the appeals bench. This means that court of appeals decision making is often a function of small groups with temporary members. Here, we examine whether designated district court judges behave differently than their court of appeals colleagues when they cast their votes in cases they are deciding as members of three-judge appellate panels. In doing so, we suggest a profitable direction for theory building vis-à-vis judicial decision making. Our analysis of the ideological direction of the votes judges cast, as well as the variance in those votes, indicates that judges on three-judge panels are influenced by the preferences of their fellow panelists, and that designated district court judges, while no more variable than their court of appeals colleagues, are more susceptible to the influence of their peers than are regular members of the courts of appeals in a nontrivial number of cases.

I. Introduction

The identity of a decisionmaker affects the decisions that are made. Scholars have amassed considerable evidence in support of this contention, whether the focus is on political elites (e.g., Mansbridge 1999), street-level bureaucrats (e.g., Keiser et al. 2004), or ordinary citizens (e.g., Campbell et al. 1960). But decisionmakers do not act in a vacuum and scholars cognizant of this fact have directed our attention to the confluence of individual identities and group contexts that jointly result in political decisions (Caldeira et al. 1993;

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Hare et al. 1965; Verba 1961). They argue, in short, that decisions are a function of both *who* decisionmakers are and *with whom* decisionmakers make their decisions. Scholars focused on strategic behavior explicitly recognize this sort of interdependence in conceptualizing the decision calculi of judges on collegial courts.[1] Left largely unexplored, however, are the less strategic and more psychological aspects of the interaction of identities and context for appellate judges rendering collective decisions.[2] In particular, members of collegial courts differ in the roles they play (both formally and informally defined) and those roles may have meaningful behavioral manifestations that are conditioned by the small group of which they are members. Yet, the importance of the status and identities of group members for understanding decision making by small groups—so well established in other contexts (e.g., Dorff & Steiner 1981; Manley 1969)—remains largely absent from the contemporary scholarship on judicial decision making by collegial courts.

Two particular features of decision making on the U.S. courts of appeals provide a unique opportunity to examine how the identities of judges and the small group context within which they operate can jointly shape behavior. First, the U.S. courts of appeals process the vast majority of their workload with the use of rotating three-judge panels (Cohen 2002:72; Howard 1981:188–92; Songer et al. 2000:8). The chief judge of each circuit is responsible for constructing both the three-judge panels and the calendar of cases, though in practice the chief judge delegates these tasks to the court's administrative staff (Brown & Lee 2000; Feinberg 1984). The composition of each panel is generally random[3] and, with rare exception, the assignment of cases to particular panels is likewise random.[4] Hence, court of appeals judges make most of their decisions in temporary small groups.

Second, a substantial proportion of court of appeals cases is decided by panels that include a judge who is not a regular court of appeals jurist but is, instead, a district court

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[1]Hettinger et al. describe strategic behavior as follows: "[T]o achieve the outcome most compatible with their policy preferences, judges consider the impact of other judges' likely actions as well as their own. Depending on the preferences of other relevant actors and how those actors are likely to behave, a strategic judge might act differently than if his behavior was driven by attitudinal considerations alone" (2006:74). Strategic accounts of judicial behavior are numerous in the context of the U.S. Supreme Court (e.g., Hammond et al. 2005; Maltzman et al. 2000), state courts of last resort (e.g., Hall & Brace 1999; Langer 2002), and the U.S. courts of appeals (e.g., Cross & Tiller 1998; Van Winkle 1997).

[2]There are exceptions, of course, including Beiser (1974), Danelski ([1960] 1989), Murphy (1966), Ulmer (1971), Walker (1973a, 1973b), and Wrightsman (1999, 2006).

[3]Though random assignment is not a function of statutory command, random assignment is the generally accepted norm and, indeed, is necessitated by circuit rules in some courts of appeals (Brown & Lee 2000). There is evidence to suggest, however, that random assignment has not always been the norm (Atkins & Zavoina 1974). Charges of "panel stacking," such as in the case of the panel assigned to hear the University of Michigan affirmative action cases, *Gratz v. Bollinger*, 539 U.S. 244, and *Grutter v. Bollinger*, 539 U.S. 306, continue to surface on occasion (Hettinger et al. 2006:136 n.17; Liptak 2003).

[4]The most notable exception is for cases that are closely related in substantive terms; for example, cases that deal with the exact same issue of law. Such cases "may be assigned to the same panel in an effort to avoid unneeded repetition of effort and to avoid potential intracircuit conflicts" (Cohen 2002:72). Cohen further notes that case assignments may be influenced by the desire to maximize equitable distribution of caseload, with attention paid to systematic differences in how time consuming different kinds of cases are (2002:72).

judge serving temporarily on the court of appeals bench. These district court judges, who are said to be serving by designation, occupy a unique position on three-judge circuit court panels. They are officially fungible with the regularly sitting court of appeals judges on the panel (Green & Atkins 1978). They enjoy formal decision-making equality with their fellow panel members, can and do author panel decisions, and possess the same prerogatives as the regularly sitting court of appeals judges with regard to the decision to concur or dissent. But, district court judges serving by designation remain district court judges; judges who, though familiar with federal law, normally serve in a very different capacity as a trial court judge than they do when called to (temporarily) serve as an appellate court judge.[5] This has led a number of legal commentators to argue that, in fact, designated district court judges are not fully fungible with their court of appeals brethren (e.g., Brudney & Ditslear 2001; Cohen 2002; Saphire & Solimine 1995).[6]

Our immediate purpose in this article is twofold. First, we contribute new evidence with regard to the behavior of district court judges serving by designation, thereby helping inform the continuing policy debate over their usage. Second, we attempt to advance our theoretical understanding of judicial behavior by applying a small group perspective to decision making on the U.S. courts of appeals (Martinek 2009, 2010). To do so, we use the U.S. Courts of Appeals Database compiled by Songer (1999) to examine the decision to cast a liberal or conservative vote by judges participating on three-judge panels. Though the ideological direction of judges' votes is by no means the only meaningful or substantively important type of judicial behavior,[7] it is often the subject of both popular[8] and scholarly analysis.[9] Further, though behavioral differences between designated district court judges and regular court of appeals judges may manifest themselves in numerous ways, differences in ideological vote choice are an especially apt locus of analysis for an important reason related to theory building. To wit, the dominant empirical model of judicial behavior is the attitudinal model, which focuses explicitly on the ideological direction of the votes cast by

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[5]As Carrington succinctly asserts: "The use of district judges does present a special problem with respect to its impact on the quality of review, since the qualities that make a good trial judge are somewhat different from those [sic] which make a good appellate judge" (1969:565).

[6]Both court of appeals and district court judges themselves recognize important differences in the roles they play and the skills needed to fulfill their respective roles (Cohen 2002:192–99; Howard 1981:134–38).

[7]For example, in previous considerations of designated district court judges, scholars have examined judge votes, majority opinion writing, separate opinion writing, and lower court reversal (e.g., Brudney & Ditslear 2001; Benesh 2006).

[8]Even a casual perusal of newspaper coverage associated with presidential transitions yields numerous stories related to what appointments by a new president will mean for the ideological balance on the federal courts and the types of decisions that can thereby be anticipated. Moreover, the frequency of stories having to do with the ideological predilections of potential new appointees runs quite high with every expected and actual vacancy on the U.S. Supreme Court in particular. Recent examples from the popular media abound. See, e.g., Liptak (2009), Mauro (2009), Ponnuru (2009), and Savage (2009).

[9]Seminal work in the scholarly literature includes that of Pritchett (1948) and Schubert (1965), with recent examples from the truly sizable body of extant research including Clark (2006), Edelman et al. (2008), and Keele et al. (2009).

judges (Segal & Spaeth 1993, 2002). The extent to which ideological influences differ depending on the identity of judges represents an important limitation on the utility of the attitudinal model. Accordingly, here we examine whether the decisions of designated district court judges serving on such panels are more or less conditioned by the ideological preferences of their panelmates when compared to regularly sitting, active-duty court of appeals judges. Additionally, we examine the variance associated with the vote choice of such judges to ascertain whether they manifest more or less consistency when compared to their regular court of appeals judge colleagues. We begin by providing some necessary background about designated district court judges and synthesizing what scholars have uncovered thus far about their behavior.

II. U.S. District Court Judges in the U.S. Courts of Appeals

Pursuant to 28 U.S.C. § 292 (1988), the chief judge of a circuit has the authority to designate a district court judge to serve in a temporary capacity as a court of appeals judge.[10] This practice preceded statutory codification and has been a fact of judicial life in the courts of appeals from the time these courts were created under the Evarts Act of 1891 (Saphire & Solimine 1995:360). Designated district court judges may serve temporarily on the courts of appeals but the service they provide is substantial. For example, from October 1989 through September 2008, anywhere from 250 to 375 district court judges provided service annually on the courts of appeals (Administrative Office of the U.S. Courts various years:Tab. V-2).[11] Considered in terms of case participations[12] instead of judges, in that same period, designated district court judges provided from 3,284 to 4,232 case participations per fiscal year (Administrative Office of the U.S. Courts various years:Tab. V-2). Thus, for example, for the 12-month period ending September 30, 2008, designated district court judges accounted for approximately 5 percent of total case participations for the period and, as a result, were participants in at least 10 percent of all cases decided on the merits by the courts of appeals (Administrative Office of the U.S. Courts various years:Tabs. S-2, V-2). Though such service might be beneficial as an educational tool—facilitating the socialization of newly appointed district court judges (Note 1963:878; Saphire & Solimine

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[10]Under this statutory authority, chief judges can also seek the assistance of district court judges from other circuits, but those district court judges can so serve only with the approval of the Chief Justice of the United States. A court of appeals judge from another circuit may also be "designated" to temporarily serve on a circuit other than his or her own home circuit but this is quite rare and, as with district court judges from outside the circuit, such designation requires the approval of the Chief Justice of the United States.

[11]This includes service provided by active-duty and retired district court judges. The majority of these district court judges were active duty.

[12]Each judge participating in a case yields one case participation. Hence, a three-judge panel yields three case participations. Each en banc proceeding yields one case participation for each court of appeals judge in the circuit (assuming each participates in the en banc proceeding) or, in the case of the Court of Appeals for the Ninth Circuit, one case participation for each of the 15 judges who participates in the mini en banc proceeding used in that circuit.

1995:361–62; Wasby 1980–1981:378)—the primary motivation for the circuits' reliance on designated district court judges is to facilitate the processing of the increasing workload faced by the courts of appeals (Green & Atkins 1978:359–60; Saphire & Solimine 1995:362–63).[13] The challenges to prompt adjudication facing the U.S. courts of appeals due to these burgeoning workloads are intensified by the persistent vacancies on these courts, which have resulted from the contention attendant with the contemporary confirmation process (Citizens for Independent Courts 2000; Scherer 2005).

The use of designated district court judges has been the subject of severe criticism. Some judges have suggested that, rather than ameliorate workload pressures, designated district court judges might actually exacerbate the workload facing court of appeals judges. They have the potential to do so since the regular court of appeals judges might feel compelled "to retain the important cases because they perceive that it would weaken the authority of an important rule if it were written by a visiting judge" (Cohen 2002:196). Further, their lack of familiarity with circuit procedures may require visiting district court judges to impose on their panel colleagues for consultation and guidance (Cohen 2002:197; Wasby 1980–1981). Finally, designated district court judges continue to have district court work of their own that requires their time and attention, forcing them to juggle the demands of both their district court and circuit court workloads (Cohen 2002:197).

Several legal scholars have also expressed reservations about the use of designated district court judges because they see the practice as having the potential to compromise the legitimacy of court of appeals decisions in the eyes of litigants, attorneys, and judges, as well as the larger legal and political community (Alexander 1965; Note 1963:879). Interviews of circuit judges in the U.S. Court of Appeals for the Ninth Circuit conducted by Wasby (1980–1981) in the late 1970s and more recently by Cohen (2002:191–201) indicate that at least some of these judges do, in fact, worry that this practice will devalue the legitimacy of the courts of appeals.

Two of the most troubling criticisms of the reliance on designated district court judges are, first, that their use can compromise the quality of appellate review because such judges do not behave as independent members of appellate panels and, second, that this practice can compromise the consistency of the law because such judges act as wild cards in the panel decision process.[14] Both claims, if substantiated by the empirical evidence, are especially disquieting because each relates to the essential functions of appellate courts.

Appellate courts use groups of judges, a practice that "permits the collective decision-making essential to appellate adjudication without engendering excessive duplication of

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[13]In his account of the Court of Appeals for the Second Circuit under Chief Judge Learned Hand, Schick (1970) suggested one more reason for using designated judges: vacation planning. Schick quotes Congressman Frank Bow as arguing that the New York theatre season was correlated with California judges serving by designation in New York (1970:78-19 n.12). Schick also reports that the chief judge of the Court of Appeals for the Third Circuit suggested that getting judges to serve by designation in Philadelphia was easier "when the Phillies had a better baseball team" (1970:79).

[14]These dual criticisms are like Scylla and Charybdis in that designated district court judges may be too deferential (and hence jeopardize the quality of appellate deliberations) or may not be deferential enough (and hence induce inconsistency in the law).

judicial effort" (Note 1963:877–78). The operative principle is that appellate review requires the collective deliberation of more than one judge to avoid (or at least minimize) appellate error by either failing to correct a wayward trial court judge or, alternatively, reversing a trial court judge who was correct in his or her judgment (Drahozal 1998). To the extent that designated district court judges are deferential to the regular sitting, active-duty court of appeals judges with whom they are deciding cases, that ideal of appellate deliberation is compromised.

> District judges who serve for only short periods may view themselves and may be viewed as subordinate to their appellate counterparts. It may be difficult to set aside, even temporarily, the necessarily hierarchical nature of the relationship between the permanent and temporary judges. If so, the district judge may be deferential to his circuit counterparts and reluctant to vote differently in the form of concurring or dissenting opinions. Perhaps mindful that his own decisions are reviewed periodically, the district judge may be hesitant to depart from the vote of the two permanent circuit panel members. (Saphire & Solimine 1995:376)

Indeed, there is some evidence of this sort of deference on the part of district court judges in the extant literature. For example, both Brudney and Ditslear (2001) and Hettinger et al. (2006:Ch. 3) found designated district court judges less likely to dissent. Further, some court of appeals judges have indicated that district court judges serving by designation are inappropriately deferential. As one of the judges interviewed by Cohen observed, "a lot of them defer to the circuit judges. You have to have circuit judges working with circuit judges with the same power and the same power structure" (2002:198).

Further, to achieve the social benefit of correcting error in the sense of deviations from "socially desirable decisions" (Shavell 2006:2),[15] appellate courts seek to promote stability and consistency in the law. Such consistency is requisite if citizens are to effectively conform their behavior to the requirements of the established legal order.[16] Consistency is also necessary for attorneys: "Uncertainty in doctrine, while undoubtedly of interest to academics and theoreticians, is an anathema to the practitioner whose sound counsel is dependent upon the stability that doctrinal stability affords" (Sullivan 2002:810; see also Carrington 1969).[17]

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[15]See also Shavell (1995). In addition, error correction can take the form of inducing lower court compliance (Hettinger et al. 2006:21). The "error" in this sense of error correction is deviation by lower court judges from the preferred policy positions of superior court judges.

[16]Of course, there is ample evidence that neither politicians nor citizens are always particularly motivated to conform their behavior to the law as articulated by the courts. Rosenberg's (1991) seminal book makes this all too clear (see also Gibson 1989; Gould 2001; Taggart 1989). Even judges themselves are not always compliant with the decisions of their superiors in the judicial hierarchy, as illustrated by the defiance of Alabama Supreme Court Chief Justice Roy Moore of orders issued by federal courts to remove a monument of the Ten Commandments from the state judicial building (Hart 2004; Hoffman 2004). Legal consistency on the part of judges and courts is, however, a necessary (though not sufficient) condition for actors to determine if they are in compliance with the law, regardless of whether they wish to be law-abiding or law-defying.

[17]The importance of consistency is reflected in the commitment of common-law legal systems to the principle of stare decisis, the axiom that similar cases should be treated alike. Some legal scholars, however, urge a less rigid adherence to legal consistency as represented by stare decisis (Coons 1987; Peters 1996).

District court judges serving by designation, however, have the potential to undermine consistency in the law: "Because a visitor [including a district court judge sitting by designation] is not a regular member of the court and does not sit on en banc proceedings, he introduces an element of instability on the panel on which he serves" (Carrington 1969:565). A similar sentiment was voiced by one of the court of appeals judges interviewed by Cohen: "A district judge is supposed to make them [i.e., decisions] individually, and a court of appeals is supposed to make them collectively. That facilitates stability in the law, moderation, and predictability" (2002:192). In sum, district court judges sitting by designation may threaten consistency in the law because they are temporary members, temporary members with a different mindset who may be either less committed to consistency in circuit law or less equipped by virtue of experience to contribute to consistency in circuit law (Cohen 2002:198).

There are, then, very real concerns about how the use of designated district court judges may affect the quality of the appellate process. The answer to the question of whether such judges manifest behavioral differences when compared to the regular sitting court of appeals judges has meaningful policy consequences and, for that reason alone, the question merits investigation. But, an examination of the behavior of designated district court judges can also contribute to theory building vis-à-vis judicial behavior.

III. Designated District Court Judges and Theory Building

For quite some time, the preeminent empirical theory of judicial decision making has been the attitudinal model (Segal & Spaeth 1993, 2002).[18] In essence, the attitudinal model asserts that the votes of judges are the product of their ideological preferences: liberal judges vote liberally; conservative judges vote conservatively. To date, the most impressive evidence in support of the attitudinal model has been amassed by Segal and Spaeth (1993, 2002) for justices occupying the U.S. Supreme Court bench. However, there is also a substantial body of research demonstrating the utility of the attitudinal model for understanding decision making on the U.S. courts of appeals (e.g., Goldman 1966, 1975; Songer & Haire 1992) and the U.S. district courts (e.g., Carp & Rowland 1983; Rowland & Carp 1980, 1983; Ringquist & Emmert 1999; but see Rowland & Carp 1996), as well as state courts of last resort (e.g., Brace & Hall 1997; Hall & Brace 1996). There is also a small body of scholarship that supports the idea that the attitudinal model travels beyond the U.S. context (e.g., Ostberg & Wetstein 2007).

Though reference to judicial attitudes and their influence is now de rigeur in the majority of current empirical scholarship devoted to judicial decision making, several

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[18]To say that the attitudinal model has been preeminent is not to say that it has been without its critics. See, for example, the articles that appeared in the November 1996 issue of the *American Journal of Political Science*. See also Ashenfelter et al. (1995) and Sisk et al. (1998) for evidence that calls into question the operation of judicial attitudes, and Richards and Kritzer (2002) for evidence that suggests the key influence of the law.

prominent scholars see the emerging hegemon as the strategic model (e.g., Epstein & Knight 2000).[19] While both the attitudinal and the strategic model start from the assumption that judges are policy-minded actors, the strategic model considers judges as forward-thinking individuals who take into account the interdependent nature of their decisions. The evidence in support of a strategic theory of judicial behavior is ubiquitous. With regard to the U.S. Supreme Court, perhaps the most compelling case in favor of the utility of the strategic model has been made in a series of articles and a book authored by Maltzman et al. (2000; Spriggs et al. 1999; Wahlbeck et al. 1998, 1999).[20] The evidence regarding the strategic nature of decision making by state court of last resort judges is likewise abundant (e.g., Brace & Hall 1990, 1995; Hall & Brace 1992, 1999; Langer 2002).

The evidence in the case of the U.S. courts of appeals, however, is neither as extensive nor as persuasive. Compare, for example, Van Winkle (1997) and Hettinger et al. (2004) with regard to dissent as a strategic tool for signaling the circuit en banc. Further compare Cross and Tiller (1998) and Hettinger et al. (2006:Ch. 4) regarding signaling the Supreme Court via the use of separate opinions. This conflicting evidence may well be a function of the realities of the decision-making context in which court of appeals judges are operating. Simply put, the strategic model lacks verisimilitude in the context of the U.S. courts of appeals given their tremendous workloads; that is, given the fact that court of appeals jurists do not have the necessary time to engage in strategic calculations in any but the most limited of circumstances. Further, the strategic model is narrow in its sole focus on securing preferred policy outcomes. It ignores—as does the attitudinal model—the fact that judges also care about and are influenced by their working environments and the colleagues with whom they work (Baum 2008). Of course, court of appeals judges care about policy outcomes. That is much too well established a fact to be gainsaid. But court of appeals judges, who virtually always dispose of cases in multijudge panels, are also cognizant of the identities and roles of the other judges with whom they work. Further, those identities and roles can and do matter for behavior within that group, a proposition that is supported by a small but informative body of research.

Early work by Atkins (1973), Ulmer (1971), and Walker (1973a, 1973b), among others, all profitably viewed decision making through the prism of small group theory. Common to this body of scholarship is the idea that the status of group members matters for their behavior. Some members of collegial courts are better able, by virtue of formal authority or dint of personality, to exercise leadership (e.g., Ulmer 1971). In addition, those with higher levels of status may be advantaged in terms of securing support from other members of the collegial body of which they are members (Walker 1973b). Conversely, those with lower status (e.g., lower state court judges serving on the Washington

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[19]Epstein and Knight (2000) go so far as to characterize what they see as the shift toward strategic approaches in the study of judicial behavior as a "sea change" that is leading to a veritable revolution in the field. Hall and Brace (1999) are more guarded in their evaluation, though they, too, see the development of strategic approaches as beneficial and are cautiously optimistic about its advancement.

[20]Other notable works include Boucher and Segal (1995), Brenner (1982), Brenner and Krol (1989), Epstein and Knight (1998), Gely and Spiller (1990), and Hammond et al. (2005). Of course, all of the contemporary work owes a significant intellectual debt to Murphy's puissant book, *Elements of Judicial Strategy* (1964).

State Supreme Court) may be deferential to the permanent members of the bench (e.g., regular state supreme court justices) (Walker 1973a).

District court judges serving by designation are, by definition, temporary members of the small group constituted by the three-judge panel on the courts of appeals. As noted previously, there is reason to assume that they may see themselves (and are seen by others) as possessing a different (lower) status than the regularly sitting, active-duty judges with whom they are rendering decisions. They, then, afford us an opportunity to evaluate whether and how a particular small group member—the designated district court judge—is influenced by his or her particular status in the group as well as by fellow panel members.

In particular, we, first, consider the extent to which the decision making of designated district court judges is influenced by their panel colleagues. Recall that some legal observers (e.g., Saphire & Solimine 1995) have voiced concerns that designated district court judges may be unduly deferential to the regularly sitting, active-duty circuit court judges on the panel (and hence not full partners in the deliberative process). Indeed, there is empirical evidence consistent with that contention (e.g., Brudney & Ditslear 2001; Hettinger et al. 2006:Ch. 3). Accordingly, we should expect to see the vote choices of designated district court judges conditioned by the preferences of their panel colleagues. Stated formally: the more liberal [conservative] a designated district court judge, the more likely that judge is to cast a liberal [conservative] vote but the likelihood of a liberal [conservative] vote will be diminished the more conservative [liberal] the other judges on the three-judge panel.

We also assess the consistency of the voting behavior of district court judges serving by designation by examining the variance associated with the ideological direction of the votes cast by members of three-judge appeals panels. As discussed previously, some students of the courts (e.g., Carrington 1969)—and even some judges (see, e.g., Cohen 2002)—have suggested that designated district court judges will introduce uncertainty in the law because of the temporary nature of their service. Considering the variance in the ideological voting of designated district court judges is one means of evaluating the extent to which they are more variable in their voting behavior. Accordingly, we hypothesize as follows: designated district court judges will exhibit less consistent voting behavior as compared to court of appeals judges. Stated differently, the variance surrounding the ideological vote choice of a judge will be greater if that judge is a district court judge serving by designation than if that judge is a regularly sitting, active-duty appeals court judge.

The empirical evidence we bring to bear below on these hypotheses will be informative both with regard to the utility of a small group perspective for understanding decision making on the U.S. courts of appeals and the debate over whether designated district court judges behave in meaningfully different ways from regular court of appeals judges.

IV. Data and Methodology

To subject the two primary hypotheses articulated above to empirical testing, we utilize data from 1970 to 1996 available from the U.S. Courts of Appeals Database (Songer

1999). Because our hypotheses are at the individual level, we transformed Songer's database such that the judge-vote is the unit of analysis, rather than the case, using code developed by Collins (2008a). Our analysis is limited to three-judge panels and, thus, we exclude en banc decisions.[21] Our dependent variable indicates the ideological direction of each judge's vote, scored 1 for a liberal vote and 0 for a conservative vote. In cases involving the rights of the criminally accused, a liberal vote supports the criminal defendant, while a conservative vote is in favor of the government. In civil rights and liberties cases, a liberal vote supports the litigant alleging a violation of his or her civil rights or liberties, while a conservative vote is the opposite thereof. In economic cases, a liberal vote supports the interests of labor, the government, or the economic underdog, while a conservative vote is pro-business.

Since we hypothesize influences on both the mean and variance of the individual judge's votes, we employ a heteroskedastic probit model.[22] The heteroskedastic probit model relaxes the assumption that the variance in a judge's vote is constant, and instead allows the variance to alter with respect to predictor variables. The log likelihood function for the heteroskedastic probit model is as follows:

$$\log L = \sum_{i=1}^{n}\left(y_i \log \Phi\left(\frac{X_i\beta}{\exp(Z_i\gamma)} \right) + (1 - y_i)\log\left[1 - \Phi\left(\frac{X_i\beta}{\exp(Z_i\gamma)} \right) \right] \right),$$

where β represents the parameter estimates for the independent variables (X) in the choice model, γ represents the parameter estimates for the independent variables (Z) in the variance model, and Φ represents the standard normal (probit) distribution. Thus, the primary distinction between the more familiar homoskedastic probit model and the heteroskedastic probit model is the inclusion of the variance model ($\exp(Z_i\gamma)$) in the denominator of the heteroskedastic model (Alvarez & Brehm 1995:1062). As such, the unrestricted (i.e., the heteroskedastic) model produces two categories of estimates: those related to the causes of liberal or conservative voting (i.e., involving the mean of the distribution of the dependent variable) and those related to the causes of consistent or inconsistent voting (i.e., involving the variance of the distribution of the dependent variable). If the error variance is constant, the model reduces to the standard, homoskedastic probit model. If, as we hypothesize, the error variance in a judge's voting behavior is nonconstant, we can reject the null hypothesis of homoskedasticity and conclude that the model is systematically heteroskedastic. To control for the nonindependence of observations—in that judges

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[21]En banc decision making also involves a small group, though it is obviously a larger small group than that represented by a three-judge panel. Our decision to exclude judge-votes from en banc proceedings is predicated on the fact that en bancs have unique dynamics (George 1999) and designated district court judges do not participate in them.

[22]Since Alvarez and Brehm (1995) introduced the heteroskedastic probit model to a general social science audience in their analysis of ambivalence in attitudes toward abortion policy, the heteroskedastic probit model has been used to excellent effect to study a variety of phenomenon, including presidential assessments of nominees for the U.S. Supreme Court (Szmer & Songer 2005), congressional agenda setting (Krutz 2005), militarized conflict (Clark & Nordstrom 2005), and Supreme Court decision making (Collins 2008b).

appear more than once in the data—we estimate the model using robust standard errors, clustered on judge (see, e.g., Giles & Zorn 2000).[23]

Two additional notes about the data are appropriate before proceeding. First, the U.S. Courts of Appeals Database consists of a sample of cases by circuit and year. Specifically, for the period of time under analysis here, the sample includes 30 cases per circuit per year. This sampling procedure facilitates longitudinal analysis while retaining a sufficient number of cases per circuit such that the resulting sample permits analysis that is also broadly representative of the circuits. We employ the weights reported in the database to account for the sampling composition.

Second, the sampling frame (and hence the sample of cases included in the database) consists of published decisions only,[24] but not all court of appeals decisions are published;[25] rather, court of appeals judges determine whether their opinions are published and choose nonpublication over publication in a majority of their cases (Merritt & Brudney 2001; Wasby 2004). In making the publication decision, circuit judges are guided by a 1973 report of the Committee on the Use of Appellate Court Energies of the Advisory Council on Appellate Justice and their individual court's local rules. In general, these guidelines and rules limit publication to those opinions that are consequential for the development of federal law.[26] Certainly, not all unpublished opinions lack important substantive content or precedential value (see, e.g., Songer 1988; Siegelman & Donohue 1990). The rules and norms governing the publication decision suggest, however, that published decisions will be those that are substantively most important from the perspective of policy and precedent, ceteris paribus.

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[23]Because a given case represents a single set of stimuli for each of the judges participating in that case, an alternative to clustering on judge is to cluster on case. While clustering on judge conceptualizes votes as nested by judge, clustering on case conceptualizes votes as nested by panel. In either case, the purpose is to take into account the multilevel nature of the data. To ensure that the results we report in Table 1 are not an artifact of clustering on judge, we reestimated the model clustering on case. The results remained substantively unchanged. An alternative approach to clustering, whether on judge or on case, is hierarchical linear modeling (HLM). However, neither clustering nor HLM "is a panacea for the problems related to multilevel data" and clustering "is an easy-to-implement methodology that requires fewer assumptions than the alternative [that is, HLM] technique" (Primo et al. 2007:456).

[24]The sampling frame consists of all decisions reported with opinions published in the *Federal Reporter*.

[25]Though an opinion may be unpublished, it is nonetheless likely to be available from electronic databases regularly relied on by attorneys (e.g., Westlaw, Lexis-Nexis). Debates over no-citation rules for unpublished opinions and their use as precedent ultimately prompted Federal Rule of Appellate Procedure 32.1, which states, in part: "A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as unpublished, not for publication, nonprecedential, not precedent, or the like; and (ii) issued on or after January 1, 2007" (Fed. R. App. P. 32.1).

[26]The Ninth Circuit's local rule on point is illustrative: "A written, reasoned disposition shall be designated as an OPINION only if it: (a) Establishes, alters, modifies or clarifies a rule of law, or (b) Calls attention to a rule of law which appears to have been generally overlooked, or (c) Criticizes existing law, or (d) Involves a legal or factual issue of unique interest or substantial public importance, or (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression" (9th Cir. R. 36-2).

Further, recent empirical work demonstrates that attitudinal considerations in court of appeals decision making are minimized in unpublished as opposed to published opinions (see, e.g., Keele et al. 2009). Hence, the sample of cases on which we rely here consists of those cases that are most likely to be consequential and in which ideological influences on judges' decisions are most likely to be in operation (see Atkins 1992). These two factors make this sample particularly suited for our purposes, though we hasten to add they do impose limitations on the inferences that we can draw (i.e., we will not be able to generalize to all court of appeals cases, only to those that are published).

To measure each judge's IDEOLOGY, we use the scores created by Giles et al. (2002). Based on Poole's (1998) first-dimension common space scores, this variable captures the dynamics of the appointment process—for both designated district court and court of appeals judges—by considering the preferences of each judge's appointing president and home state senators. If senatorial courtesy is absent (i.e., the home state senators do not share the same party affiliation as the president), this variable takes on the president's common space score. If one senator from the home state delegation shares the president's party affiliation, this variable takes on that senator's ideal point score. If both home state senators share the party affiliation of the president, this variable takes on the mean value of the two home state senators' scores. This variable ranges from −0.66 to +0.66, with higher scores reflecting more conservative ideologies. Accordingly, we expect that this variable will be negatively signed, indicating that judges with conservative ideologies are less likely to cast liberal votes than liberal judges.

To evaluate interpersonal influence on three-judge panels, we include a measure of IDEOLOGICAL INFLUENCE. For each judge serving on a panel, this variable takes on the mean IDEOLOGY score of the other two judges serving on that panel. We expect that this variable will be negatively signed, indicating that the more conservative the other panelists with whom a judge is making a decision, the less likely that judge is to cast a liberal vote.[27] To consider whether district court judges are especially susceptible to this form of influence (as some critics have argued, thereby suggesting that they are not co-equal in panel deliberations), we include a DISTRICT COURT JUDGE variable in the model, scored 0 for court of appeals judges and 1 for district court judges serving on a panel by designation. We then interact this variable with our measure of IDEOLOGICAL INFLUENCE to determine if district court judges are distinctively influenced by their appeals court counterparts. Since the parameter estimate associated with this interaction term cannot be interpreted as an unconditional marginal effect (Ai & Norton 2003; Brambor et al. 2006), it is necessary to calculate the marginal effect and confidence intervals for this interaction term, conditional on the value of IDEOLOGICAL INFLUENCE, holding all other variables at their mean or modal values. To do this, we adapt the method created by Brambor et al. (2006) for use with the heteroskedastic probit model.

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[27]To investigate whether court of appeals jurists respond to the preferences of district court judges as well as those of other regularly sitting, active-duty court of appeals judges, we estimated the model with an alternative operationalization of the IDEOLOGICAL INFLUENCE variable by excluding the ideologies of district court judges in that variable's creation. We obtained substantively identical results, suggesting that court of appeals judges are influenced by the preferences of both other circuit court judges and district court judges sitting by designation on a panel.

An important control variable in the model of vote choice (i.e., liberal or conservative vote) is litigant resources (Galanter 1974; Songer & Sheehan 1992; Songer et al. 1999, 2000). To take litigant resources into account, we include two variables in the model that capture the perceived resources of the litigants urging liberal and conservative decisions. Following Songer et al. (1999:824), we create these variables by ranking litigants according to increasing resources as follows: individuals = 1, businesses = 2, state governments = 3, and the federal government = 4. LIBERAL LITIGANT RESOURCES represents the resource score of the party advocating a liberal outcome, while CONSERVATIVE LITIGANT RESOURCES captures the resources of the party seeking a conservative decision. Accordingly, we expect that the former variable will be positive in direction, while the latter variable will be negatively signed, indicating that a judge is more likely to support a litigant that ranks high on the resource scale.[28]

Since the courts of appeals sit below the Supreme Court in the federal judicial hierarchy, it is likewise important to control for the preferences of the Supreme Court to capture the extent to which court of appeals judges follow the ideological proclivities of their supervisory court (e.g., Benesh 2002; Haire et al. 2003; Songer et al. 1994). To do this, we include a SUPREME COURT IDEOLOGY variable, adopted from Epstein et al. (2007), who provide ideological surrogates for the Supreme Court on the identical metric we utilize to capture the ideologies of designated district court judges and court of appeals judges.[29] This variable ranges from –0.103 to +0.185, with higher scores reflecting more conservative Supreme Courts. As such, we expect this variable will be negatively signed, indicating that as the median justice on the Supreme Court becomes more conservative, so, too, will the decision-making patterns of judges serving on court of appeals panels (i.e., they will be less likely to vote liberally).

Just as it is important to control for the preferences of the Supreme Court, so, too, it is imperative to consider the preferences of the circuit to account for the possible influence of circuit norms on court of appeals decision making (e.g., Giles et al. 2006; Solimine 1988; Zarone 2000). Since the circuit as a whole can convene en banc and rehear the decisions rendered by three-judge panels (Giles et al., 2006, 2007), this creates a strong incentive on the part of the panel members to conform to the circuit's preferences to avoid reversal (Van Winkle 1997; but see Hettinger et al. 2004). To evaluate the extent to which the panel judges follow the ideological preferences of the circuit as a whole, we include a CIRCUIT IDEOLOGY variable. This variable takes on the value of the Giles et al. (2002) ideology score corresponding to the median member of the circuit, as determined by Epstein et al. (2007).

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[28]As an alternative to this measure, we also employed proxies for the perceived resources of the litigants' attorneys, scored such that 1 = pro se counsel, 2 = court-appointed counsel or public defender, 3 = private counsel, 4 = interest group counsel, 5 = state or local government counsel, and 6 = federal government counsel. Those variables correlate with our litigant resources variables at 0.87 (CONSERVATIVE LITIGANT RESOURCES) and 0.81 (LIBERAL LITIGANT RESOURCES), thus making the inclusion of all four variables in the model inappropriate (see Lewis-Beck 1980:60). When we use the counsel resources variables in place of the litigant resources variables, the results do not substantively differ from those reported in Table 2.

[29]These scores are a tangent-based transformation of Martin and Quinn's (2002) ideal point estimates for the median member of the Supreme Court, mapped onto the same dimension as the Giles et al. (2002) scores.

Since higher scores on this variable represent more conservative circuits, we expect that this variable will be negatively signed, indicating that a judge is less likely to cast a liberal vote if the median member of the circuit is conservative.[30]

To control for the fact that court of appeals panels overwhelmingly affirm lower court decisions (e.g., Hettinger et al. 2006; Howard 1973; Songer et al. 2000), we control for the ideological direction of the lower court decision. This enables us to account for the expectation that, all else equal, a judge is more likely to cast a liberal [conservative] vote if the lower court rendered a liberal [conservative] decision. We constructed this variable based on the ideological direction of the decision of the court of appeals panel and the circuit court's treatment of the case.[31] If the court of appeals rendered a liberal [conservative] decision that affirmed the lower court, the lower court is assumed to have decided the case in the liberal [conservative] direction. If the court of appeals handed down a liberal [conservative] decision that reversed the lower court, the lower court is assumed to have rendered a conservative [liberal] decision. LOWER COURT DIRECTION is scored 1 if the lower court handed down a liberal decision and 0 if it rendered a conservative decision. Accordingly, we expect that this variable will be positively signed, indicating that a judge is more likely to cast a liberal vote if the lower court reached a liberal disposition.

We also control for whether the case involves a criminal appeal. Judges are less likely to cast liberal votes in criminal cases because such cases are overwhelmingly legally inconsequential but must be heard due to the mandatory docket of the U.S. courts of appeals (Howard 1981). Despite their tremendous importance to the individual litigants involved, such cases simply do not raise important legal issues and are less likely to garner judicial support (see, e.g., Howard 1981:174–75; Songer et al. 2000:114–15). Accordingly, because votes in favor of the criminally accused or convicted are defined as liberal, our expectation is that judges will vote conservatively in criminal cases. To test this proposition we include a variable—CRIMINAL CASE—that is scored 1 if the case involved a criminal appeal, and 0 otherwise.[32]

Thus far, our focus has been on the choice of the judge to vote liberally or conservatively. In the choice model described above, we are primarily interested in whether district court judges serving by designation are any more or less influenced by the

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[30]The CIRCUIT IDEOLOGY and SUPREME COURT IDEOLOGY variables are correlated at 0.41, suggesting that it is quite reasonable to include both variables in the model since r falls well below the conventional 0.8 threshold (e.g., Lewis-Beck 1980:60). Further, inclusion of both does not result in the classic symptom of problematic collinearity (i.e, flipped signs on the parameter estimates).

[31]To construct this variable, we treat cases that were affirmed and those in which the petition was denied or appeal dismissed as affirmances. Reversals include cases that were reversed, reversed and vacated, reversed and remanded, or vacated and remanded, as well as those affirmed in part and reversed in part. To ensure that our results with regard to lower court treatment were not an artifact of treating split decisions (affirmed in part and reversed in part) as reversals, we also coded cases that were affirmed in part and reversed in part as affirmances and reestimated the model. None of the results decidedly altered from those reported in Table 2.

[32]Auxiliary analyses controlling for other kinds of issue areas, such as diversity and habeas corpus cases, produce substantially identical results to those reported in Table 2. In addition, we also estimated issue-specific models for civil rights, criminal, and economics cases, obtaining findings largely consonant with those reported here.

ideological preferences of their panel colleagues than regularly sitting, active-duty court of appeals judges are. Recall, however, that we are also concerned with evaluating whether district court judges serving by designation are any more variable in their voting behavior than their circuit court colleagues are. To this end, we include the DISTRICT COURT JUDGE variable in the variance vector. If the variance in voting is positively related to the fact that a given judge-vote is cast by a designed district court judge, then we have evidence of voting instability among such judges, which has implications for legal consistency. We also include the CRIMINAL CASE variable in the variance portion of the model. We expect this variable will be positively signed, indicating that, due to the frivolous nature of the vast majority of these cases, judges will rely less on their attitudes in evaluating criminal appeals, resulting in more variant ideological voting behavior.

Table 1 reports descriptive statistics (mean, standard deviation, minimum value, maximum value) for all variables included in our model. These summary statistics are reported for the complete set of observations as well as broken down by type of judge (court of appeals judge, district court judge sitting by designation). As Table 1 makes clear, the distribution of values across the variables is virtually identical for the set of observations corresponding to votes cast by court of appeals judges and the set of observations corresponding to votes cast by district court judges.

V. RESULTS

Table 2 reports the results from the heteroskedastic probit model that forecasts the probability of observing a judge cast a liberal vote in a court of appeals case with a published decision.[33] The model correctly predicts 68 percent of votes for a percent reduction in error of 17 percent. Importantly, note that the results reveal the presence of systematic heteroskedasticity (though, as discussed further below, that heteroskedasticity is not related to designated district court judges). Evidence of this is provided by the heteroskedasticity test that compares the unrestricted (i.e., heteroskedastic) model to the homoskedastic model by way of the likelihood ratio test, where L_0 is the log likelihood for the homoskedastic probit model, L_H is the log likelihood for the heteroskedastic probit model, and k is the number of estimated parameters in the variance portion of the model (Alvarez & Brehm 1995:1063). The likelihood ratio is $LR = 2 \times (L_H - L_0)$, which is distributed by χ^2 with k degrees of freedom. As this test statistic signifies, we can reject the null hypothesis of homoskedasticity, indicating that the heteroskedastic probit model provides a better fit than the restricted model.[34] To facilitate interpretation, we discuss the marginal effects of

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[33]To check the robustness of our results in light of the fact that the heteroskedastic probit model is fragilely identified, we estimated a model drawing 1,000 bootstrapped samples to recalculate the standard errors of the parameter estimates, as suggested by Keele and Park (2005). The results of the model with bootstrapped standard errors remain consistent with those reported here.

[34]This is confirmed by the use of the asymptotically equivalent Wald test statistic (Wald χ^2, $\sigma^2 = 13.1$, significant at $p < 0.01$).

Table 1: Descriptive Statistics

	Full Sample				*Court of Appeals Judges*				*District Court Judges*			
Variable	*Mean*	SD	*Min*	*Max*	*Mean*	SD	*Min*	*Max*	*Mean*	SD	*Min*	*Max*
Dependent variable	0.382	0.486	0	1	0.383	0.486	0	1	0.373	0.484	0	1
Ideology	–0.008	0.350	–0.660	0.656	–0.004	0.349	–0.660	0.607	–0.057	0.359	–0.623	0.656
Ideological influence	–0.007	0.257	–0.598	0.591	–0.007	0.258	–0.598	0.591	–0.008	0.252	–0.573	0.582
District court judge	0.079	0.270	0	1	0	0	0	0	1	0	1	1
Ideological influence × District court judge	–0.001	0.071	–0.573	0.582	0	0	0	0	–0.008	0.252	–0.573	0.582
Circuit ideology	0.025	0.244	–0.524	0.567	0.0254	0.245	–0.524	0.567	0.0158	0.229	–0.524	0.567
Supreme Court ideology	0.057	0.080	–0.103	0.185	0.0580	0.080	–0.103	0.185	0.0513	0.083	–0.103	0.185
Liberal litigant resources	1.903	1.464	1	5	1.903	1.463	1	5	1.900	1.463	1	5
Conservative litigant resources	3.388	1.523	1	5	3.390	1.520	1	5	3.362	1.558	1	5
Lower court direction	0.307	0.461	0	1	0.306	0.461	0	1	0.311	0.463	0	1
Criminal case	0.362	0.480	0	1	0.361	0.480	0	1	0.364	0.481	0	1

Table 2: Heteroskedastic Probit Model of Voting on the U.S. Courts of Appeals

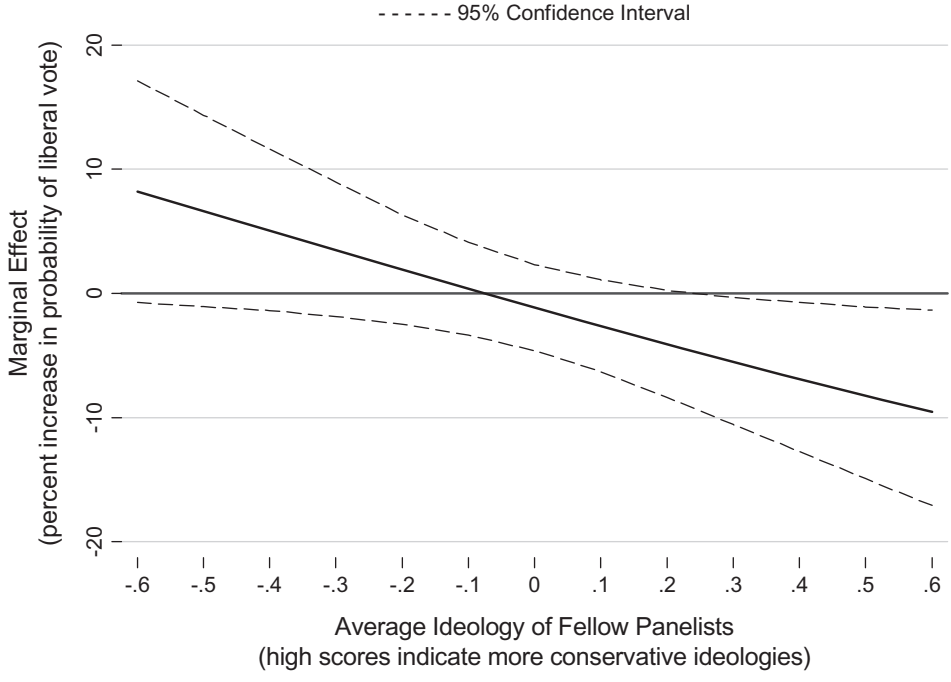
Predictor	*Parameter Estimate*	*Marginal Effect*
	Choice Model	
Ideology	−0.225 (0.049)***	−6.3 [−8.8 : −3.3]
Ideological influence	−0.108 (0.065)*	−2.2 [−4.3 : −0.04]
District court judge	−0.032 (0.049)	−1.3 [−7.2 : +0.05]
Ideological influence × District court judge	−0.391 (0.177)*	see Figure 1
Circuit ideology	−0.272 (0.072)***	−5.3 [−7.9 : −2.4]
Supreme Court ideology	−0.205 (0.177)	−1.3 [−3.4 : +0.83]
Liberal litigant resources	0.141 (0.010)***	+16.2 [+13.2 : +17.2]
Conservative litigant resources	−0.011 (0.011)	−1.4 [−3.8 : +1.05]
Lower court direction	0.328 (0.036)***	+13.0 [+9.7 : +15.5]
Criminal case	−1.09 (0.201)***	−26.1 [−32.7 : −20.7]
Constant	−0.448 (0.050)***	
	Variance Model	
District court judge	−0.006 (0.081)	
Criminal case	0.516 (0.142)***	
	Model Diagnostics	
N	18,333	
Wald χ^2	565.7***	
Heteroskedasticity test ($\chi^2_{df=2}$)	2,550.2***	
Percent correctly predicted	68.3	
Percent reduction in error	16.9	

NOTE: Dependent variable indicates the ideological direction of the individual judge's vote (1 = liberal, 0 = conservative). Numbers in parentheses indicate robust standard errors, clustered on judge. Numbers in brackets indicate 95 percent confidence intervals for marginal effects. Marginal effects were calculated altering the variables of interest from 0 to 1 for dichotomous variables and from one standard deviation below the mean to one standard deviation above the mean for continuous variables, holding all other variables constant at their mean or modal values. Marginal effects are significant whenever the upper and lower bounds of the 95 percent confidence intervals are both above (or below) zero. *$p < 0.05$; **$p < 0.01$; ***$p < 0.001$ (two-tailed tests).

each variable, which were calculated altering the variables of interest from 0 to 1 for dichotomous variables and from one standard deviation below to one standard deviation above the mean for continuous variables, holding all other variables constant at their mean or modal values, as appropriate. Table 2 also reports the 95 percent confidence intervals for the marginal effects, which are significant whenever the upper and lower bounds of the confidence intervals are both above (or both below) zero (Gill 1999).

Turning first to the mean vector, the results provide strong—though not surprising—support for the role of ideology in shaping decision making on the courts of appeals in published decisions. In substantive terms, a change from one standard deviation below to one standard deviation above the mean in the IDEOLOGY variable decreases the likelihood of observing a liberal vote by about 6 percent. Further, a change from the minimum to maximum value of this variable decreases the chances of observing a liberal vote by 12 percent (95% confidence interval: −6 to −16). In addition to a judge's ideology, the model also provides evidence that the ideology of the other members of a panel influences judicial decision making. The constituent term, IDEOLOGICAL INFLUENCE, reports the influence of the other two panel members on a court of appeals judge (i.e., when DISTRICT COURT JUDGE = 0). A change from one standard deviation below to one standard deviation above

Figure 1: The marginal effect of district court judge status on the probability of voting liberally (conditional on the ideology of a judge's fellow panelists).



the mean in the ideology of the other two panel members decreases the likelihood of observing a court of appeals judge cast a liberal vote by 2 percent, while the minimum to maximum change in this variable decreases that probability by 5 percent (95% confidence interval: −0.1 to −10). Thus, it is clear that the ideology of the other panel members plays a meaningful role in shaping decision making on the courts of appeals, at least in published opinions. This is consistent with Sunstein's assertion that individuals' judgments are predicted not only by their own beliefs and attitudes, but also by the beliefs and attitudes of those who surround them (2003:166).

Because the parameter estimate associated with the interaction term, IDEOLOGICAL INFLUENCE × DISTRICT COURT JUDGE, cannot be interpreted directly to determine whether district court judges are any more or less prone to influence by their panel peers when compared to the susceptibility of regular sitting circuit court judges to the influence of their fellow panelists (Ai & Norton 2003; Brambor et al. 2006), Figure 1 plots this effect. The sloped solid line in Figure 1 indicates the change in the predicted probability of observing a district court judge cast a liberal vote as his or her fellow judges become more conservative, as compared to a court of appeals judge. The significance levels are represented by the 95 percent confidence intervals drawn around this line. Figure 1 reveals that in the majority of cases under analysis, district court judges are no different than regular sitting court of

appeals jurists when it comes to the influence of their fellow panelists. The marginal effect of fellow panel members' ideology is not statistically different for designated district court judges compared to appeals court judges except when the other panel members' average ideology score is quite conservative, greater than 0.25. Stated differently, for those situations in which the other panel members' average ideology score is less than 0.25, the influence of a district court judge's fellow panel members' ideology is not statistically different from that effect on court of appeals judges, as indicated by the fact that the confidence intervals straddle zero (Gill 1999). Since the average ideology score of the other panel members is greater than 0.25 in only 17 percent of cases in which designated judges served, this indicates that in the majority of cases (83 percent), district court judges mimic regularly sitting court of appeals judges in responding to the ideological proclivities of their panel colleagues.

Importantly, however, in the 17 percent of cases in which there is a statistically significant difference between designated judges and their court of appeals counterparts, the influence of the ideology of fellow panel members on a designated district court judge is more than three times the effect of the ideology of fellow panel members on regular court of appeals judges. For example, compared to a case in which the mean ideology of the other two judges is 0.3, when this increases to 0.6, a district court judge is 4 percent (95% confidence interval: 1.1 to 6.4) more likely to cast a conservative vote, while a court of appeals judge is 1.3 percent (95% confidence interval: 0.02 to 2.5) more likely to cast a conservative vote. Thus, there is a considerable difference between designated district court judges and court of appeals judges in a nontrivial number of cases. While district court judges are no more or less receptive to the influence of their fellow panelists than court of appeals judges in approximately four out of five cases, they are much more susceptible to the influence of their fellow panelists in the remaining one out of five of cases. In short, designated district court judges are deferential, and hence not fully fungible with court of appeals judges, in a significant minority of cases.[35] This finding is consistent with existing literature demonstrating that district court judges are deferential to their court of appeals colleagues when serving on the appellate court bench (e.g., Brudney & Ditslear 2001; Cohen 2002; Hettinger et al. 2006; Saphire & Solimine 1995).

In addition to a judge's own policy preferences, and those of the judge's fellow panelists, the ideology of the circuit also influences decision making on the U.S. courts of appeals. In particular, a change from one standard deviation below to one standard deviation above the mean in the ideology of the median judge on the circuit (i.e., in the conservative direction) decreases the probability of observing a liberal vote by about 5 percent. The minimum to maximum change in this variable decreases the likelihood of a liberal vote by 12 percent (95% confidence interval: −5 to −17). Thus, all else equal, we can expect to observe fairly significant alterations in the voting behavior of judges serving on three-judge panels in published opinions as the ideology of the median member of the

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[35]It may be that those cases represent a situation in which a judge simply "gives in" when faced with an extreme united front. It is interesting, however, that this is only the case with an *extreme and conservatively united front* and not with an *extreme and liberally united front.*

circuit changes. However, our results indicate that the ideological preferences of the Supreme Court do not constrain the decision making of judges serving on court of appeals panels. This is a particularly interesting finding as it reveals that the fear of reversal by the Supreme Court does not motivate panel decision making (see also Klein & Hume 2003), while the fear of en banc reversal has the potential to influence judicial choice on the courts of appeals (see also Van Winkle 1997).[36]

The results provide mixed support for the role of litigant resources in shaping decision making in the courts of appeals. On the one hand, the resources available to the litigant urging a liberal decision have a significant impact on judicial behavior. For example, compared to an individual litigant, when the federal government advocates for the liberal position, a judge is 16 percent (95% confidence interval: 14 to 17) more likely to cast a liberal vote. On the other hand, the resources of the litigant arguing for a conservative decision do not appear to influence court of appeals decision making. This anomalous finding is likely at least partially due to the fact that judges serving on court of appeals panels tend to vote in the conservative direction. For example, in the cases under analysis here, 62 percent of votes were conservative in nature. With this in mind, it appears that since court of appeals judges have a strong inclination toward supporting the litigant advocating the conservative disposition, the resources available to such litigants do not enhance the extent to which judges are willing to cast conservative votes.

Table 2 also illustrates that the ideological direction of the lower court decision plays an important role in court of appeals decision making in published opinions. In particular, compared to a case in which the lower court rendered a conservative decision, in a case in which the lower court disposed of a case in the liberal direction, a judge is 13 percent more likely to cast a liberal vote. This is consistent with the fact that judges serving on court of appeals panels tend to affirm lower court decisions. In addition, the results demonstrate that judges are more likely to cast conservative votes in criminal cases, thus substantiating the supposition that many of these cases are legally inconsequential, save for the litigants involved, but nonetheless must be heard as a function of the mandatory docket of the U.S. courts of appeals.

Turning now to the variables in the variance vector, two important findings emerge. First, district court judges are *not* more variable than their court of appeals counterparts. Thus, while district court judges are more susceptible to the influence of their fellow panelists in a nontrivial number of cases, their decision making is neither more nor less consistent than that of the regularly sitting, active-duty circuit court judges. Second, the results reveal that judges' voting behavior is less consistent in criminal cases. This comports with the results reported in the mean model. That is, not only are judges more likely to modify their behavior in these types of cases, but these alterations systematically affect the extent to which we can anticipate ideologically consistent decision making. More

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[36]The variables capturing the ideology of the courts, judges, and decisions of the lower courts under analysis are, in theory, correlated. However, in no case was the bivariate correlation between any two of these variables higher than 0.41, suggesting that multicollinearity is not an issue. However, mindful of the possibility of collinearity among multivariate combinations of these variables, we estimated a series of alternative model specifications, excluding each ideological variable in turn; the results of these auxiliary regressions are consistent with those reported in Table 2.

specifically, the results regarding the CRIMINAL CASE variable reveal that judges are more conservative in these cases (as seen in the choice model) and that this influences the error variance associated with their choices (as seen in the variance model). As such, this indicates that judges rely less on their attitudes in criminal cases, as compared to other issue areas, resulting in less predictable voting behavior.

VI. Conclusion and Discussion

In this article, we set out to simultaneously examine an empirical question with important public policy implications and suggest a profitable direction for theory building with regard to judicial behavior. Designated district court judges have become integral to the decision-making process in the U.S. courts of appeals. The ever-increasing workloads faced by these major intermediate appellate courts in the federal system (Administrative Office of the U.S. Courts various years:Tab. S-1; Songer et al. 2000:14–15), coupled with increasingly lengthy vacancies on the lower federal bench (Citizens for Independent Courts 2000; Scherer 2005), mean that the courts of appeals have had to develop new strategies to meet their obligations. The use of designated district court judges is one such strategy.[37] Some judges, legal observers, and academics, however, have not viewed the increasing use of this strategy with sanguinity. They have raised concerns that such judges may, among other things, threaten the appellate process by being too deferential to the court of appeals judges with whom they work and compromise the consistency of the law due to their status as outsiders on the court. The empirical evidence we offer in this article provides mixed support for these contentions. On the one hand, in the majority of cases with published opinions examined here (83 percent), designated district court judges behave the same as regular sitting court of appeals judges in terms of responding to the preferences of their panel colleges. However, they are far more deferential to their court of appeals colleagues in an important number of cases (17 percent). On the other hand, in terms of the consistency of their behavior, designated district court judges are no more or less likely to demonstrate inconsistency in their voting behavior than the court of appeals judges with whom they render decisions. Though these findings are limited in that they cannot be generalized to unpublished decisions, they are nonetheless important given that the bulk of the legally and politically consequential decisions made by the courts of appeals are accompanied by published opinions.

To be sure, ideological voting and variance in ideological voting are not the only phenomena of interest when it comes to the participation of district court judges. For example, researchers have established that permanent newcomers to the bench (i.e., new court of appeals judges) evidence a reluctance to file separate opinions (Hettinger et al. 2003). The same may be true for designated judges, who are temporary newcomers to the

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[37]Other strategies include reducing the number of cases granted oral argument (Chapper 1982–1983), limiting opinion publication (Dragich 1995; Wasby 2004), and increasing the use of staff attorneys for case screening (Haire & Lindquist 1997).

bench. Indeed, Brudney and Ditslear's (2001) work suggests that this is true. Further, designated district court judges may write fewer majority opinions and be more likely to be given opinion-writing responsibilities in certain kinds of cases (e.g., those whose dispositions are "easy" in the sense of being routine applications of settled points of law). Moreover, in addition to any behavioral differences between designated district court judges and regular circuit court judges, there may well be consequences for the legitimacy of the courts involving the use of designated district court judges (Cohen 2002; Saphire & Solimine 1995).

Two particularly important questions left unaddressed by the research reported in this article relate to the potential for designated district court judges to be differentially sensitive to particular influences in their decision making. First is the question of whether designated district court judges are more (or less) attentive to the influence of the U.S. Supreme Court. As Hurwitz and Stefko (2004) have demonstrated, "freshmen" on the Supreme Court are more likely to conform to precedent, an effect that tapers off as the justices' tenure in office progresses. Designated district court judges may likewise be more attentive to the legal direction provided by the Supreme Court. As district court judges accrue more experience serving by designation on appeals panels, their relative attentiveness to the Supreme Court may vary in a systematic fashion. Of special interest in this regard is whether designated district court judges are equally attentive to both circuit law and Supreme Court precedent and, if not, whether their fealty to the Supreme Court (relative to their fealty to the courts of appeals) changes as they gain experience as designated district court judges.[38]

The second question relates to the efficacy of litigant resources in determining who wins and who loses. Some 30 years ago, Galanter explored the limits of "using the [legal] system as a means of redistributive (that is, systemically equalizing) change" (1974:95).[39] In this article, Galanter examined the "architecture of the legal system" (1974:95) with a particular focus on the nature of the litigants. His well-known typology of parties is based on the distinction between so-called one-shotters ("those claimants who have only occasional recourse to the courts") and repeat players (those claimaints "who are engaged in many similar litigations over time") (1974:97). Though Galanter was careful to note that the definition of repeat player is not co-extensive with the "haves" and the definition of one-shotter is not equivalent to that of a "have not," in practice (at least in the United States) repeat players do constitute the "haves" in the sense of enjoying the benefit of

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[38]District court judges are certainly cognizant of the fact that they operate in the context of a particular circuit, that they are not regular contributing members to the development of circuit law in the same sense that jurists on the appeals court bench are and, hence, may not have the same psychological commitment to that circuit law, especially if it is inconsistent with Supreme Court precedent or at least ambiguous vis-à-vis the rulings of that court. If this is the case, then designated district court judges might serve a whistle-blowing function à la Cross and Tiller (1998), alerting the Supreme Court to circuit panel deviations from Supreme Court doctrine.

[39]Galanter's article inspired a wealth of subsequent research (e.g., Wheeler et al. 1987; Haynie 1994, 1995; McGuire 1995; Songer et al. 2000). A representative sampling of recent entries in this vein of research appears in Issue 4 of Volume 33 of the *Law & Society Review*—which reprinted Galanter's original article accompanied by eight articles, two research notes, and four commentaries.

resources (power, wealth, status) that can enhance the prospects of winning in court. This insight, buttressed by the extensive empirical evidence that litigant resources matter for understanding who wins and who loses in court (e.g., Collins 2004; Lindquist et al. 2007; Sheehan et al. 1992; Songer et al. 1999, 2000), prompted us to control for litigant resources in our model to ensure that our findings were not simply an artifact of a correlation between resources and the type of litigants before the court.

In further considering Galanter's distinction between one-shotters and repeat players, however, we wonder about the extent to which that status (which translates only approximately into the resource variables included in our model) might operate differently as an influence on designated district court judges than as an influence on regular serving circuit court judges. A key advantage repeat players have is the ability to secure high-quality legal representation (McGuire 1995). No doubt a large part of the benefit of having high-quality legal representation comes from the skills and abilities of that legal counsel. However, part of the advantage also comes from the reputation of that counsel, a reputation that attorneys develop through repeated appearances before a particular court. As noted above, however, not all designated district court judges are equivalent in terms of their experience serving on appeals panels and those with less experience will, therefore, have less exposure to particular attorneys who may have developed reputations on which they can rely to advantage their clients when participating in adjudication before the courts of appeals. This suggests the need for future research to determine if the advantage repeat players are said to enjoy is conditional not only on the experience of the litigant, but also on the experience of the judge.

The analysis that we have presented in this article does, however, speak to the usefulness of taking a small group perspective to theory building in the study of judicial behavior, especially with regard to the U.S. courts of appeals (Martinek 2009, 2010). The key finding in this regard supports our contention that designated district court judges show a special sensitivity to the preferences of their circuit judge colleagues on a panel, at least in a nontrivial minority of cases. Further, our finding that the ideology of fellow panelists matters for the decisions rendered by regular circuit court judges indicates that context (read: the small group context) matters. Accordingly, we encourage future researchers to investigate the applicability of other aspects of small group decision making. For example, one might apply the basic logic outlined here to examine whether judges on collegial courts are especially influenced by jurists who presumably occupy high-status positions (Walker 1973a, 1973b), such as chief judges on the courts of appeal and the Chief Justice on the Supreme Court. We are confident that a resurgence of high-quality scholarship applying small group theory to judicial decision making will increase our understanding of the choices judges make.

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