

Strategic Bargaining on the United States Courts of Appeals

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September 14, 2009

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Abstract

We employ never before used archival data to provide the first, systematic examination of the conditions under which federal circuit court judges craft legal opinions. We undertake this analysis in the context of judges' responses to opinion drafts. We examine every private record maintained by former D.C. Circuit Judge J. Skelly Wright (1962-1988). Our results provide strong support for ideological, contextual, and institutional components to the development of law. We find that law evolves as a result of judges seeking their personal policy goals, tempered by contextual and institutional features. At the same time, our results offer insight to policy makers seeking to address caseload management problems and those seeking to predict the quality of judicial nominees.

“After writing and circulating [the draft majority opinion] . . . there is nothing left for me to do but hope that I have met the expectations of my colleagues and either reflected their views faithfully or persuaded them that the draft contains better ones” (Coffin 1994, 191).

On November 19, 1964, the United States Court of Appeals for the District of Columbia opined that drug addiction, like insanity, might serve as a legal defense that absolves criminals from guilt due to their lack of mental competence when committing a crime.¹ Defendant James Castle argued that his conviction for possession of heroin should be overturned because his addiction overtook his mind and made his actions involuntary. He could not, therefore, be guilty of a crime since he lacked the requisite capacity to form the criminal intent to commit it. The three circuit court judges randomly assigned to hear Castle’s appeal—future Chief Justice of the United States Warren E. Burger, J. Skelly Wright, and Carl E. McGowan—agreed to affirm the jury’s conviction by a brief one or two sentence unpublished order. Nevertheless, Judge Wright took it upon himself to write and circulate a potentially dramatic draft opinion in which he penned the following:

“The testimony . . . provided a basis from which the jury, under proper instructions, could have found a causal relationship between appellant’s drug-related abnormality and the criminal behavior charged . . . The jury could have concluded that appellant had a mental disability which caused the acts charged.”

After receiving Wright’s draft, Judge Burger responded immediately, pouncing on it as a stealthy attempt to create a new legal defense for criminals. Burger fired off a memorandum to both Wright and McGowan (who had since concurred in Wright’s draft) and took Wright to task for a host of blunders. He then offered an alternative opinion to which he hoped Judge McGowan would defect. Seeking to protect his opinion, Wright quickly responded, asserting that he was “unable to agree with [Burger’s] objections . . . I think my draft makes crystal clear that drug addiction as a defense is for the jury.” Burger remained unfazed. He followed up by again accusing Wright of sneaking language into the opinion that

¹*Castle v. United States*, 347 F.2d 492 (D.C. Cir. 1964).

would eviscerate criminal guilt by allowing drug addicted criminals to elude conviction.² The following day, Wright reacted coldly, “I think [my] draft speaks for itself. And so does this exchange of memoranda.” Indeed, with McGowan’s vote in hand, Wright refused to alter his draft, forcing Burger to file a separate opinion in which he framed Wright’s majority opinion narrowly so as to prevent future litigants from pursuing an addiction defense.

Why did Burger react as he did to Wright’s opinion? What can exchanges such as these tell us about the creation and evolution of law in the federal circuit courts?

When judges write opinions, they make choices about law. And, when they make choices about law, they are making decisions about policy. Judges know this fundamental truth. Precisely because this is so, they set their sights on opinions to further their goals. Indeed, Wright’s statement about Castle’s mental awareness was more than a statement about Castle; rather, it was a statement upon which he hoped future litigants might rely. Judge Burger recognized this, which explains why he moved so quickly and forcefully to try to blunt Wright’s grab for power. The central question thus comes down to this: How do judges craft legal opinions and, thus, make policy?

We employ never before used archival data to provide the first, systematic examination of the conditions under which federal circuit court judges craft legal opinions. We undertake this analysis in the context of judges’ responses to opinion drafts. We examine every private record maintained by former D.C. Circuit Judge J. Skelly Wright (1962-1988), which yields nearly five thousand observations across roughly 2500 cases. We obtain three important findings. First, we find that circuit court judges respond to draft opinions in an ideological fashion. Second, we find that contextual and institutional features influence

²Burger believed Wright tried to make addiction fall under the circuit’s *Durham* rule. Pursuant to *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), the D.C. Circuit would not hold an accused guilty if his or her actions were caused by a mental disease or defect, i.e., “any abnormal condition of the mind which substantially affects mental or emotional processes.” See *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962).

their pursuit of policy. And finally, we find results that may be of interest to policy makers; namely, that visiting judges may not be a quick fix for overburdened circuit court judges and that ABA ratings may not be valid indicators of judicial qualifications.

Crafting Legal Opinions on the Federal Circuit Courts

“The [federal] circuit courts play by far the greatest legal policymaking role in the United States judicial system” (Cross 2007, 2). The circuit courts are intermediate courts, sitting above the trial courts but just below the United States Supreme Court.³ They review decisions of federal trial courts and administrative agencies to determine whether those decisions accord with the law. If they determine that those decisions are correct, as they typically do, they affirm them. If, on the other hand, they determine the decisions below to be in error, they can reverse them and order the lower tribunal to proceed differently. In this reviewing capacity, the circuits are themselves subject to review by the United States Supreme Court.

At least two features make circuit courts powerful: They rule on nearly every issue that comes before the federal judiciary and they are rarely audited by the Supreme Court, making them the *de facto* courts of last resort in federal appellate litigation. Federal circuit courts review nearly every issue that enters the federal judicial system. According to the Administrative Office of the United States Courts, in 2008 courts of appeals participated

³There are twelve circuit courts organized geographically, plus a circuit court for the federal circuit which has national jurisdiction and hears disputes regarding patents, trademarks, and other specialized legal issues. Each circuit, save for the federal and D.C. circuits, has jurisdiction over a specific geographic location that is bounded by states. Thus, when a circuit court renders a decision, it has a binding effect on all federal courts within its geographic boundary. For some courts, such as the Ninth Circuit which oversees the federal courts in nine states and two territories, this reach is broad.

in 89,436 cases.⁴ In 1997, these numbers were nearly as high, with the circuits handling 78,324 cases. With this large number of appeals comes a variety of legal issues upon which circuit courts can make their mark (Banks 1999). What is more, circuit court decisions nearly always constitute final law. The Supreme Court “rarely reviews, much less reverses [circuit court] decisions, [thus] the circuit courts provide the final forum” for most disputes over federal law (Kaheny, Haire and Benesh 2008, 491). Indeed, as Brudney and Ditslear (2001) show, the Supreme Court reviewed roughly 0.2% of circuit court decisions in 2000 (568). Since the 1980s, this number has never exceeded one half of one percent (Id.). Circuit court judges, of course, know this. Stated one judge:

I think last year we decided somewhere between two thousand and three thousand cases. The number that were certified [by] the Supreme Court was somewhere around 10. So, we can see that very, very few out of three thousand cases [were decided by the Supreme Court]...” (Cohen 2002, 44)

Because circuit courts rule on many contemporary pressing issues and know that the Supreme Court reviews only a small percentage of their cases, they are free to rule with little fear of override (Bowie and Songer Forthcoming; Klein and Hume 2003). And, as the buck largely stops with them, these judges become powerful policymakers (Cross 2007).

Circuit judges make policy by crafting legal opinions. When a party files an appeal with the clerk of the circuit court that possesses jurisdiction over the legal dispute, the court clerk docket the case and randomly assigns it to a panel of three judges who will oversee and rule on the appeal (Breyer 1990, 29).⁵ The parties then submit briefs to the three-

⁴Cases terminated on the merits after oral hearings or submission on briefs. See <http://www.uscourts.gov/judbususc/judbus.html>.

⁵In rare cases, a dispute will be heard or reheard en banc by the full complement of judges sitting on the circuit. (Giles, Walker and Zorn 2006; George 1999). The Ninth Circuit, due to its large size, is authorized to engage in mini en bancs, with fewer than the full complement sitting en banc.

judge panel. If the court determines that the dispute would benefit from oral argument, the litigants each receive 15 to 20 minutes to present their cases.⁶ At the end of the day in which oral arguments are held, the judges meet in brief “impression conferences” (Coffin 1994, 129) to discuss the day’s cases, during which time they state their positions in order from junior to senior judge (Wald 1992, 177). The author then drafts an opinion which should reflect the disposition—if any—reached at conference.⁷ Once the judge completes the opinion, which can take from as little as one day to over a year, she sends it to the other judges on the panel for their review and acceptance. Hoping that she has written an opinion that will gain unanimity quickly—or at least a majority—the opinion writer awaits responses.

Judges receiving the opinion draft can respond numerous ways (Maltzman, Spriggs and Wahlbeck 2000). Judges can join unequivocally in the opinion or make unconditional suggestions to improve it. They can tell the opinion writer that they will await responses from other judges before making a decision. They can offer to join the opinion conditional on the writer making changes to the draft. Finally, they can signal opposition by writing and circulating a separate opinion or stating an intent to do so (*See generally*, Maltzman, Spriggs and Wahlbeck 2000, 63-69).

The most supportive response a judge can offer is a joinder (Coffin 1994; Maltzman,

⁶On the D.C. Circuit, for example, Rule 34(a)(2) states that oral argument shall be allowed in any case unless the appeal is frivolous, the dispositive issue has been authoritatively decided, or the case would not be aided significantly by oral argument. Panels on the D.C. Circuit meet for oral argument approximately four days every month for three to four hours a day (Wald 1992). Panels on the First Circuit hear arguments the first full week of every month with each judge sitting for three days (Breyer 1990).

⁷Occasionally, after conducting research to prepare for writing, an author will determine that he cannot write an opinion supporting the disposition reached at conference. In such a case, that judge can either submit the opinion to his colleagues hoping to acquire a majority, or submit it as a dissenting opinion and suggest another judge write him the majority opinion.

Spriggs and Wahlbeck 2000). The judge signifies that she has read the draft, agrees fully with it, and has no suggestions or changes to it. When circulating the majority opinion, judges desire this most supportive response. Perhaps not surprisingly, joinders are brief supportive expressions. For example, after Judge Kenneth Starr circulated his draft opinion in *Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C. Cir. 1985)(84-1180), he was greeted with the following responses from his colleagues: Judge Mikva stated, “Happy to concur,” while Judge Wright replied, “I am pleased to concur.”

A judge can also offer suggestions to the opinion writer on how to improve the opinion. A judge offering suggestions will tell the opinion writer that she joins the opinion but thinks the author should—but *need* not—make changes to it. The number and type of suggestions vary dramatically. Some suggestions are grammatical or stylistic. For example, after Judge Silberman circulated his draft opinion concerning EPA’s rules on fuels in *Union Oil Co. v. U.S. EPA*, 821 F.2d 678 (D.C. Cir. 1987)(85-1326), Judge Bork responded:

“I concur. Good, crisp op[inion]. On [page 2] you might want to indicate that it is combustion of lead gasoline that creates pollution & that the correlation of elevated blood levels is with that. It sounds odd that leaded gasoline itself so correlates.”

Other times, judges make more foundational suggestions to help the majority opinion writer improve the opinion. For example, in *United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985)(84-1239), Judge Ginsburg wrote:

“I am pleased to concur in your comprehensive opinion. You called my attention to [a rationale in the opinion draft] and I do have a strong reservation at that point. It is unnecessary for us to get into the matter. . . I would delete the observation and say instead [suggested language offered here]. A few other suggestions are marked on the attached copy.”

When faced with an opinion about which they are unsure, judges occasionally inform the author that they plan to await their colleagues’ responses before taking a position. Such a wait statement signals to the opinion author that the judge has potentially serious

reservations with the draft. For example, after Judge Wilkey circulated the draft majority opinion in the en banc case *Council for the Blind v. Regan*, 709 F.2d 1521 (D.C. Cir. 1982)(81-1389), Judge Wright stated:

“It is my understanding that [Judge Robinson] is going to circulate [an] op[inion] proposing [a] disp[osition] other than that proposed in [the] op[inion] circulated by [Judge Wilkey]... Under [the] circ[umstances], I shall wait until I see that op[inion] before taking [a] final position in this case.”

Since the opinion writer seeks to lock up a majority in support of his draft as quickly as possible, a wait statement may force him to seek out the responding judge and inquire as to what changes, if any, he could make to the opinion in order to obtain the responder’s vote. In such a case, then, the responder could use the wait statement as leverage to impose changes in the majority opinion.

Other times, judges will signal perhaps stronger apprehension with the opinion by responding with a threat. The judge may demand that the writer make certain changes to the opinion before she joins it. A threat, then, imposes conditions upon joining the draft. Judge Wilkey’s responses to Judge Scalia’s opinion in *Dana Corp. v. United States*, 703 F.2d 1297 (D.C. Cir. 1983)(82-1022) serve as a good example. Scalia circulated an opinion that addressed the standard of review courts should apply when reviewing agency decisions. Wilkey generally accepted Scalia’s draft opinion but thought it broke with precedent on the standard of review question. He responded with a threat:

“On initial review, while I agreed with most of AS’s [Judge Scalia’s] op[inion] & with [the] result, I was & remain unable to concur with parts of it... I hope we can work something out along these lines [described earlier by Wilkey], because I simply can’t accept AS’s rationale either as [a] matter of logic or on precedent. If we cannot, I shall write [a] dissent along [the] lines of this memo, summoning to my support judicial precedent authored by Harlan, Friendly... and others.”

For his part, Scalia disagreed with Wilkey’s characterization of his opinion, believing instead that it merely synthesized a shift in law. He thus challenged Wilkey’s demands. Wilkey then responded with yet another threat:

“I respectfully suggest that by now AS should realize that no matter how many memos he writes he is not likely to convert either JSW or me to his point of view on this standard of review. If he persists in insisting on his particular point of view, he will be writing alone.”

Judges may also state an intent to write a separate opinion or actually circulate such an opinion. When a judge claims that she will author a separate opinion, she is stating her disapproval with (at least parts of) the opinion. For example, in *Durns v. Bureau of Prisons*, 804 F.2d 701 (D.C. Cir. 1986)(85-5704), Judge Silberman circulated his draft opinion for the majority in which he determined that prisoners were not entitled to copies of their presentencing reports. Judge Wright disagreed with the opinion, believing that prisoners were entitled to such information. Wright stated: “As [the draft] op[inion] takes [the] opposite position [of mine], I will circulate [a] dissent.”

Of course, judges can skip the step of telling their colleagues that they will write a separate opinion and simply write and circulate one. Writing a separate concurring or dissenting pinion, especially given circuit judges’ crushing workload, is a strong signal of disapproval with the majority opinion and tells the writer precisely what those problems are. Because the separate opinion spells out the rationale the judge would use in the case it allows the majority opinion writer—should she choose—to address and overcome these specific weaknesses.

For example, in 1963 the National Labor Relations Board struck down portions of union bargaining agreements under the National Labor Relations Act. The unions appealed to the United States Court of Appeals for the District of Columbia. Judges Wright and Bazelon decided to reverse the Board’s order. Shortly thereafter, Judge Wright circulated the draft opinion. Judge Washington, normally a Wright ally (Banks 1999), remained skeptical. Nearly two months after Wright circulated his draft opinion, Washington finally responded—but with a proposed dissent. Within days, Judge Wright suggested to Washington that he was willing to accommodate some of his concerns. Washington pushed further and circulated another draft dissent, leading Wright eventually to accommodate all of his concerns.

Theory and Hypotheses

As the examples provided above make clear, judges understand that when they craft legal opinions they make decisions about policy. These policy decisions impact not only the immediate parties before them, but also actors throughout society. The focal point of policy's creation, then, resides squarely on the opinion crafting process. To explain this process, we begin with the theoretical starting point that circuit court judges are strategic policy actors who seek to obtain their policy goals within broader contextual and institutional constraints. That is, judges will respond to opinion drafts so as to improve the policy those opinions make. Judges who believe that the existing opinion suits their policy goals will impose little to no impediments upon the opinion author. On the other hand, a judge who dislikes the policy content of the opinion will respond by trying to leverage the opinion writer into altering the opinion to make more favorable policy. She will take advantage of the institutional rule that requires majority support to make an opinion precedential.

We expect ideology to drive judges' responses to opinion drafts. Judges overwhelmingly pursue their policy goals when making decisions (Goldman 1966, 1975; Songer 1982; Benesh 2002). For example, Songer and Haire (1992) analyze the effects of political attitudes on judges' votes in obscenity cases, finding that judges appointed by liberal presidents were more likely to cast liberal votes, while judges appointed by conservative presidents were less likely to cast liberal votes (see also Songer and Davis 1990). Similarly, Hettinger, Lindquist and Martinek (2006) find that judges are more likely to publish separate opinions the more ideologically distant they are from the majority opinion writer. These and other studies provide evidence to suggest that circuit court judges are ideological actors.

The empirical evidence supporting our theoretical claim that judges are policy seekers is further corroborated by comments from judges themselves. Judge Patricia Wald once stated: “[T]he values by which judges make choices in areas of discretion will more often than not be in sync with that section of the political spectrum they inhabited in their former lives” (Wald 1992, 180). Likewise, between 1969 and 1971, Howard (1981) interviewed 35

appellate court judges sitting on three different circuits. Nearly every judge expressed that his or her personal views of justice played a significant role in how they decided cases. Indeed, they acknowledged that when law was unclear, their personal views of justice trumped the closest relevant circuit ruling (*cited in* Brudney and Ditslear 2001, 569).

Our own data are replete with examples of ideological clashes that belie policy driven behavior. For example, *Collins v. Cameron*, 377 F.2d 945 (D.C. Cir. 1967) (No. 20371) provided a bitter exchange among ideological rivals. The liberal Judge Bazelon accused Judges Prettyman and Burger of creating an “open invitation to Dist[ri]ct C[ourt] judges to subvert & sabotage recent decisions of this court.” Burger circulated the following response:

“I have DLB’s memo of 3/27 in which, with excessive subtlety, he charges that EBP & I are seeking to ‘subvert & sabotage recent decisions of this Court’ & ‘covertly undercut’ [the] same. He adds that I do this all by gratuitous dictum. Such subtlety encourages me to be quite candid: 1. From [the] all-time champion of gratuitous commentary and technique of ‘planted dictum’ for use in future cases these observations are somewhat amusing. 2. DLB is not [a] member of [the] sitting Div[ision] in [this case] & has not honored me with [a] visit or discussion of [the] subject, but he has busily lobbied against my opinion with others...”

Collins is one of many examples from among our data which give our theory face validity. Simply put, we expect circuit judges to respond to opinion drafts in ideological fashions. A judge who is ideologically close to the majority opinion writer should be more likely to join the draft than those farther from the author. On the other hand, as the ideological distance between the judge and the opinion writer increases, the judge should become more likely to make suggestions, threats, wait statements, will write statements, or circulate a separate opinion.

Policy Hypothesis: As the ideological distance increases between a judge and the majority opinion writer, the judge will become less likely to join and will become more likely to make suggestions, issue a wait statement, threat, will write statement, or circulate a concurrence or dissent.

While we expect ideology to serve as a strong driver of response, we acknowledge that

a host of contextual and institutional factors also may influence a judge's response. One of these factors is case complexity. The issues or presentation of some cases are harder than others to understand. Writing opinions and arriving at consensus in such cases often takes a significant amount of work (Coffin 1994). In cases that are complex, judges might not agree on the relevant issues, how to interpret and apply the law in them, and, thus, the correct language to insert into the opinion. With easy cases, however, judges can be expected to dispose of them quickly with an eye towards the precise issues at stake, and without the need for bargaining.

Complexity Hypothesis: A judge will be less likely to join and more likely to make suggestions, issue a wait statement, threat, will write statement, or circulate a concurrence or dissent in a complex case.

At the same time, some cases are more salient than others. Circuit judges become quite adept at determining which cases are important and which ones are not. Indeed, one of the first things a judge does with a case is to engage in "rational triage" to determine which cases are "light," "moderate," and "heavy" (Coffin 1994, 172-175). Judges must, after all, have "a sense of the relative importance of cases," lest they "lavish time and care on every case" to their detriment (Coffin 1994, 175). As institutional actors suffering under extreme time and resource constraints, judges should be most likely to make demands in cases with the broadest distributional consequences. That is, judges will seek to maximize their policy goals when the impact from doing so is greatest. In these cases, judges should be more likely to try to leverage the opinion writer to make the law more closely reflect their policy goals.

Salience Hypothesis: A judge will be less likely to join and more likely to make suggestions, issue a wait statement, threat, will write statement, or circulate a concurrence or dissent in a salient case.

Institutional position also may influence a judge's response and how others respond to her opinion. New judges on the court may exhibit behavior that is different from their seasoned colleagues. A fairly long history of studies on United States Supreme Court justices suggest that freshman justices go through an acclimation period. Scholars have argued

that new justices face a steep learning curve during which time their policy preferences are unstable and their knowledge about their new institutions are shallow (Hagle 1993; Howard 1965). Empirical studies suggest that circuit judges also go through an acclimation period. Hettinger, Lindquist and Martinek (2003a) find that freshman effects are strong on the courts of appeals. Indeed, since most appellate judges come to the court with no previous appellate court experience (unlike their counterparts on the Supreme Court), these judges are particularly susceptible to acclimation effects, especially since caseload pressures are intense and circuit judges sit on rotating three-judge panels where they often preside with particular judges for the first time.

Our own archival data suggest that freshman judges may stumble. For example, in *United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984)(No. 81-1036) Judge Scalia circulated the first draft of his majority opinion only to those judges in the conference majority, contrary to circuit norms, which held that all judges should receive a copy. Responding to criticism for his error, Scalia stated:

“I had been under [the] impression that it was practice to circulate [the] en banc op[inion] in a case to which there were dissenters to majority members 1st, in order that they might agree on a version before others had to address it. Having been advised that this is not the case, & in order to expedite this matter, I hereby provide those of you who did not vote with [the] majority [a] copy of my proposed op[inion]”

Similarly, in *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119 (D.C. Cir. 1986)(Nos. 85-5602, 85-5569, 85-5660), Judge Buckley responded to Judge Harry Edwards’s draft opinion thusly:

“If it is our intention to not-so-sub *silencio* overrule or modify *Keene*, should we not do so explicitly? If so, what are [the] in-house problems of comity that would need to be addressed? *I am still too new hereabouts to have [a] feel for our folkways...*” (Emphasis Supplied)

Freshman status may also come into play depending on the who the opinion writer is. If the opinion writer is a new judge, his or her colleagues may be less inclined to respond

favorably. That is, experienced judges may be less likely to join a freshman judge's opinion, as these junior judges have not yet become immersed in the circuit's precedent and norms. Conversely, they may be more likely to engage that author by making suggestions, threats, will write statements, wait statements, and circulating separate opinions.

Freshman Responder Hypothesis: A freshman judge will be more likely to respond positively to an opinion draft by joining or making suggestions and less likely to respond negatively to a draft opinion by issuing a wait statement, threat, will write statement, or by circulating a separate opinion.

Freshman Author Hypothesis: A judge will be more likely to respond positively to a freshman judge's opinion draft by making suggestions but will be less likely, given the author's inexperience, to join that opinion unequivocally. At the same time, the judge will be less likely to respond negatively to a draft opinion by issuing a wait statement, threat, will write statement, or by circulating a separate opinion.

Visiting district court judges often sit on circuit court panels to ease the workload pains for busy circuit court judges. Federal law allows Chief Judges in each circuit to assign federal district court judges to three-judge circuit court panels when the Chief determines there is a need for additional judges.⁸ In the last 30 years or so, visiting district court judges presided in nearly 20% of cases decided on the merits in the federal circuit courts (Brudney and Ditslear 2001, 565). Circuit courts invite these judges to sit because "there are not nearly enough active and senior appellate judges to meet the demands of" ever increasing appellate court case loads (Id.). That is, visiting judges are invited to sit on appellate courts to assist circuit court judges as they navigate through thousands of cases.

While the purpose behind allowing district court judges to sit on circuit court panels is largely to assist circuit judges to deal with their massive dockets, empirical research suggests

⁸28 U.S.C §292(a) states: "The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit."

that these judges, by and large, contribute little to the process and may, in fact, diminish the overall quality of panel decisions. In one of the few systematic empirical analyses of visiting judge behavior, Brudney and Ditslear (2001) find that visiting judges are less likely to write majority opinions and overwhelmingly fail to challenge opinion authors by writing dissents.⁹ The authors examined 1224 circuit court decisions involving unfair labor practice claims between 1986 and 1993. When compared to appellate court judges, visiting district court judges were “less likely to author signed majority opinions, or to dissent from majority opinions...” (581). Given the finding that “district court guests” appeared to act “comfortable with the role of filling out panel composition while not necessarily assuming coequal voice or responsibilities” (Brudney and Ditslear 2001, 598), we expect visiting judges to be more likely to respond to draft opinions with joinders, and less likely to make suggestions, wait statements, threats, will write statements, or circulate separate opinions.

Visiting District Court Judge Hypothesis: A visiting District Court judge will be more likely to respond to a draft opinion by joining and less likely to respond by making suggestions, issuing a wait statement, threat, will write a statement, or by circulating a separate opinion.

Senior judges play a special role in the federal circuits (Feinberg 1990) and their experience and lighter caseloads may impact how they respond to draft circulations. When an Article III judge reaches the age of pension eligibility (when she is at least 65 and has no less than 10 years of service), she has the option of remaining an active judge, retiring, or opting for “senior status” (Yoon 2005). Judges elect to take senior status for a host of reasons. By taking senior status, a judge can determine the number of cases in which he would like to participate, determine the issue area of cases in which he would like to

⁹Lee (2000) provides an overview of the assignment process among appellate court judges but avoids examining how chief judges select district court judges. In perhaps the most systematic analysis of assignments, Peppers, Vigilante and Zorn (2008) find that Chief Judges strategically designate lower court judges to panels in order to achieve favorable ideological outcomes.

participate, and can block off months in which he wishes to avoid sitting (Yoon 2005). At the same time, senior judges receive the same rate of compensation as active judges, are entitled to all pay raises Congress legislates for active judges, and are exempt from federal taxes on their annual compensation (Yoon 2005).¹⁰

Given their experience, their ability to select issue areas, and their lighter workloads, senior judges may have the time and motivation to research the law more extensively than active judges. If this is the case, they may be more likely to respond with threats and separate opinions (But see Hettinger, Lindquist and Martinek 2006). Thus we expect:

Senior Judge Hypothesis: A Senior Judge will be less likely to respond positively to a draft opinion by joining or making suggestions, and more likely to respond negatively to a draft opinion by issuing a wait statement, threat, will write statement, or by circulating a separate opinion.

Unlike other circuit judges, Chief Judges have “internal” and “external” functions beyond decision-making that keep them busy (Wasby 2003). To be sure, Chief Judges must preside over cases and render decisions. They also, however, must attend to the needs of the circuit, supervise staff, preside over the Judicial Conference, oversee the district courts within the circuit, and engage in a host of additional administrative functions (Wasby 2003; Hettinger, Lindquist and Martinek 2003*b*). These separate obligations tend to take away from the judge’s time to devote to cases and research. With less time to conduct research, these judges may be more likely simply to go along. At the same time, such institutional work with other Chief Judges and members of the Judicial Conference leads Chiefs to be more sensitive to concerns of collegiality (Hettinger, Lindquist and Martinek 2006). Accordingly, Chief Judges might be less likely to respond negatively to draft opinions.

Chief Judge Hypothesis: A Chief Judge will be more likely to respond positively to a draft opinion by joining or making suggestions, and less likely to respond

¹⁰Perhaps not surprisingly, judges increasingly have elected to take this attractive option. Indeed, as Yoon (2005) shows, 84% of all active judges finished their careers by taking senior status (518).

negatively to a draft opinion by issuing a wait statement, threat, will write statement, or by circulating a separate opinion.

In addition, we believe that judicial quality will matter. The American Bar Association (ABA) Standing Committee on the Federal Judiciary evaluates prospective judicial nominees and issues summaries as to those nominees' qualifications for serving on the federal judiciary (Vining, Steigerwalt and Smelcer N.d.). The committee evaluates nominees' professional competence, their integrity, and their judicial temperament. After an analysis, the ABA provides a single rating to identify the nominee's quality. (During the time period under study the ABA provided four ratings—exceptionally well-qualified, well-qualified, qualified, or not qualified.) “The Committee’s goal is to support and encourage the selection of the best-qualified persons for the federal judiciary.”¹¹ We expect that opinions written by high-quality judges should see more joiners, and fewer suggestions, threats, wait statements, will write statements, concurrences, and dissents than opinions written by less qualified nominees. Similarly, we expect higher-quality judges to engage opinion authors more frequently.

Qualified Author Hypothesis: A judge will be more likely to respond with a joiner and less likely to respond with suggestions, wait statements, threats, will write statements, concurrences, and dissents when the draft opinion is written by a judge determined by the American Bar Association to be well-qualified or exceptionally well-qualified.

Qualified Judge Hypothesis: A judge determined by the American Bar Association to be well-qualified or exceptionally well-qualified will be less likely to respond to draft opinions with joiners, and more likely to respond with suggestions, wait statements, will write statements, concurrences, and dissents.

We control for a host of additional variables as well. We control for whether the judge had previous appellate court experience, whether the tribunal that heard the case below was a federal trial court or administrative agency, the average caseload of the circuit (number

¹¹See ABA Standing Committee on the Federal Judiciary website, which can be found at <http://www.abanet.org/scfedjud/>.

of judge divided by number of opinions per year), and the race and sex of the responding judge.

Data

To analyze the conditions under which judges respond to opinion draft circulations, we engaged in a massive undertaking in which we collected and coded every record in the private archives of Judge J. Skelly Wright of the District of Columbia Circuit (1962-1988). Wright retained all the records from every case in which he sat. These records provide thorough explanations of nearly every facet of the opinion crafting stage. Among other important data contained in these records, are data describing dates of events, conference dispositions, when opinions were assigned to judges, the responses of every judge in a case, the author’s response(s) thereto, and *sua sponte* behavior by judges. In total, we obtained usable data on over 2500 circuit court cases, yielding 4909 observations.

We chose to focus on the D.C. Circuit both for practical reasons and for theoretical reasons. On a practical level, we had unfettered access to the files of Judge Wright and since his tenure stretched across time periods in which the circuits underwent interesting changes (Songer, Sheehan and Haire 2000), his papers promised to explicate numerous interesting phenomena on the circuit. On a theoretical level, we opted to examine the D.C. Circuit both for its similarities with and differences from other circuits. Like all circuits, the D.C. Circuit hears oral arguments in cases and its judges bargain and negotiate over opinion content. At the same time, because the D.C. Circuit hears appeals directly from federal agencies, its agenda is slightly more “national” than the other circuits (Banks 1999). Further, it is composed of judges who generally are thought to be more prestigious. Indeed, the D.C. Circuit is often considered “an on-deck circle for high-court nominees” (Groner June 21, 1993)¹² and

¹²Given the now prevalent norm of prior judicial experience for nominees to the United States Supreme Court (Epstein, Knight and Martin 2003), we believed that studying judges

“has emerged as a contemporary leader... among the family of federal courts” (Banks 1999, 1).¹³

Our dependent variable is each judge’s response to a first draft opinion in a case. A judge’s response can take one of the seven different categories described above: join, make a suggestion, submit a wait statement, make a threat, issue a will write statement, circulate a concurrence, or circulate a dissent. A judge receives a value of 1 if her first response to the circulated draft opinion was to join it. She receives a value of 2 if her first response was to make a suggestion; 3 if she made a wait statement; 4 if she made a threat; 5 if she responded with a will write statement; 6 if she circulated a concurrence; and 7 if she circulated a dissent. Table 1 provides a descriptive breakdown of a judge’s first response to the majority opinion.

Response	Frequency	Percent
Join	3678	74.86
Suggest	608	12.38
Wait	22	0.45
Threat	53	1.08
Will Write	21	0.43
Concur	126	2.56
Dissent	405	8.24
<i>Total</i>	4913	100.0

Table 1: Judges’ first responses to the initial circulation of a draft majority opinion.

We code our independent variables in the following manner. *Ideological Distance* examines the distance between the opinion writer and the responding judge. We located estimates of judges’ ideal points from the Judicial Common Space (JCS) (Epstein et al. 2007). The JCS uses the coding method suggested by Giles, Hettinger and Peppers (2001), who argued that when the norm of senatorial courtesy applies to a judge’s appointment, that on the D.C. Circuit might also explicate interesting features about nominations to the Supreme Court.

¹³Other scholars have focused on single circuits as well (see, e.g., Giles, Walker and Zorn 2006).

judge’s ideal point estimate mirrors the home state senators’ preferences. The estimate for such a judge is thus her home state senators’ Poole and Rosenthal first dimension Common Space scores.¹⁴ When senatorial courtesy does not apply to the judge’s appointment, the judge’s ideal point estimate is the president’s first dimension Common Space score. Since the District of Columbia has no representation in the Senate and, hence, no home state senators, the ideal point estimates for these judges mirrors their nominating president’s JCS score. Our measure of ideological distance, then, is the absolute value of the difference in JCS scores between the opinion writer and the responding judge.¹⁵

Case Complexity. We tap into case complexity by examining three separate features—the number of pre-draft memos circulated by the judges in a case, whether the docket was consolidated with other dockets, and whether the court allowed the parties to offer oral argument in the case. Anecdotal evidence suggests that complex cases often provoke more circulated memos among the judges prior to the first opinion draft circulation. For example, in *Finley v. Hampton* (No. 71-1063) the appellant sought a hearing on certain information contained in his personnel files that he believed was inaccurate and precluded him from government security clearance and employment advancement. After conferencing on the case, the judges could not agree on a disposition. Judge Robb wanted to affirm but Judges Leventhal and Wright were unsure. The judges circulated a host of memos to each other in an effort to come to terms on this difficult case. One such memo, from Judge Leventhal to Judge Wright, highlights the difficulty they experienced:

¹⁴If there are two home state senators from the president’s party, the point estimate is the mean of the two; if only one senator hails from the president’s party, we use that senator’s score.

¹⁵These scores certainly have their limitations but as of this writing, they are the best measures available. It should be noted that the authors of the study recently received an NSF grant true estimate the ideological preferences of circuit court judges using an alternative methodology.

This is [the] ‘old case’ on which I have been struggling, as I told you the other day. Somehow, it doesn’t seem to write for reversal, notwithstanding my best efforts...I would at least like to see [the] path you think could go in another direction before I ‘commit’ myself. I should appreciate your comments.”

After a series of exchanges among the judges, Leventhal finally circulated his draft opinion. We argue that in cases where the judges circulate increased numbers of pre-draft memos, the case is likely to be more complex. Accordingly, *Pre-Draft Memo* is a count of the number of substantive memos the judges circulated in each case prior to the circulation of the first opinion draft.¹⁶ Our expectation is that as this number increases, so too will the likelihood a judge responds by engaging the opinion author.

Our next attempt to examine case complexity analyzes whether the case received oral argument. During the time period under study, the D.C. circuit employed internal rules that allowed it to determine whether the case required oral argument. The court could dispose of cases without a hearing when it determined that the appeal was frivolous, the dispositive issue(s) had already been authoritatively decided, or where the facts and legal arguments were adequately presented to the court such that oral argument would not significantly aid it. We believe that, on average, cases without oral argument are likely to be less complex than those with oral argument. Judges should be more likely to join draft opinions in such cases and less likely to engage the opinion author. To code this dynamic, we turned to Judge Wright’s papers. Wright recorded whether each case before him had a hearing or not.¹⁷ We coded *Orally Argued Case* as 1 in all cases receiving oral argument and 0 in those cases submitted on briefs.

¹⁶We examine only memos in which the judges discuss the substance (i.e. their views) of the case. Judges frequently circulate memos to one another in which they summarize conference outcomes or motions filed by the parties. We do not believe that such memos tap into complexity.

¹⁷He did so by noting “summary,” “Rule 11(d),” or “Rule 11(e)” on the first page of his notes.

We also believe that consolidated cases may tap into case complexity. When numerous dockets touch on the same underlying legal issues, the court will unify them into a single legal action. The very act of consolidating cases, we argue, shows that the judges understand and can identify the legal facts of the cases. Thus, we argue that consolidated cases are less complex. Judges in such cases should be more likely to join majority opinion drafts and less likely to engage the author. We code *Consolidated Case* by examining the number of cases with which the docket is joined.

Case Salience. To operationalize case salience, we examined two phenomena—whether the court heard the case en banc and whether an intervenor or amicus curiae participated in the case. En banc cases typically involve issues of greater salience than the standard 3-judge panel. En Banc cases are exceptional (Ginsburg and Falk 1991). They involve issues that can split circuits and invoke interest throughout the country (George 1999). Indeed, their rarity signifies their importance. We argue that cases heard en banc are more salient than cases heard by a regular panel. Thus, we code for whether the circulated draft was in an en banc case. If so, *En Banc Case* takes on a value of 1; 0 otherwise.

We also examined whether additional actors participated in the case. An intervenor is an actor who joins an existing lawsuit because s/he has a direct interest in its subject matter and outcome. That is, after a case is filed, an actor with an interest in the case's outcome can join it and operate just as a party to the dispute. The rationale for allowing intervention is that some cases hold consequences for actors who should have the right to be heard. In other words, intervention highlights the broader distributional consequences a case holds and gives some of the people who will be affected by it the opportunity to influence its outcome.¹⁸ Amicus curiae activity is another way in which an interested actor can become involved in a case. Individuals and organized interest groups can file amicus curiae (“friend

¹⁸Indeed, even the Supreme Court recognizes the importance of intervention as case law suggests that under certain conditions intervenors may seek Supreme Court review of a lower court merits judgment (Stern et al. 2002, 385).

of the court”) briefs which offer additional information that the parties may have overlooked or information that underscores arguments already made by the parties (Owens and Epstein 2005; Spriggs and Wahlbeck 1997). Given the costs associated with filing such briefs, their presence signals the importance of the dispute (Collins 2008). We code whether the docketed case observed an intervenor or an amicus curiae. If so, *Intervenor* equals 1; 0 otherwise.

Freshman Responder and *Freshman Author*. We examined whether the responding judge was a freshman at the time the opinion draft circulated. Following standard practice (Hettinger, Lindquist and Martinek 2006, 2003a), we code a freshman judge as one who served less than two years at the time of the draft circulation. To determine whether the judge was a freshman, we examined the Federal Judicial Center Biographical Directory of Federal Judges and analyzed the date on which the judge began her tenure.¹⁹ If the responding judge began her tenure less than two years as of the date of the draft circulation, *Freshman Responder* takes on a value of 1; 0 otherwise. We also examined whether the judge authoring the opinion was a freshman when she circulated her first draft in the case. If she served less than two years as of the date she circulated her draft opinion, *Freshman Author* takes on a value of 1; 0 otherwise.

Chief Judge. To determine whether the responding judge was a Chief Judge, we returned to the FJC website and coded the identity of the Chief Judge of the District Court from 1962 to 1988.²⁰ If the responding judge was Chief on the date the draft first circulated, the variable *Chief Judge* takes on a value of 1; 0 otherwise.

Senior Status. To determine whether the responding judge had senior status, we

¹⁹Online access to the FJC website can be found at <http://www.fjc.gov/public/home.nsf/hisj>.

²⁰The following judges served as Chief Judges during the time period under study: Wilbur K. Miller (1960-1962); David L. Bazelon (1962-1978); J. Skelly Wright (1978-1981); Carl E. McGowan (1981); Spottswood W. Robinson, III (1981-1986); and Patricia M. Wald (1986-1991).

examined the FJC website to determine whether the sitting judge took senior status before the circulation of the draft opinion. If so, *Senior Status* takes on a value of 1; 0 otherwise.

Visiting Judge. To examine whether the responding judge hailed from another court, we again examined the FJC Biographical Directory. If the responding judge had a seat in a court other than the D.C. Circuit at the time of the first draft circulation, *Visiting Judge* equals 1; 0 otherwise.

Well Qualified Author and *Well Qualified Judge.* To determine whether the draft opinion writer or the responding judge were well qualified judges (according to the ABA), we visited the Attributes of U.S. Federal Court Judges Database compiled by Zuk, Barrow, Gryski, and Goldman.²¹ The database provides information on a host of features regarding federal court judges, chief of which, for our purposes, is the judge's ABA rating. Following Hettinger, Lindquist and Martinek (2006), *Well Qualified Author* and *Well Qualified Judge* take on values of 1 if the ABA rated the judge as exceptionally well-qualified or well-qualified, and 0 if she received a rating of qualified or not qualified.

We also analyzed the FJC Biographical Directory to determine whether the responding judge was African American, whether she had appellate court experience, and the race and sex of the responding judge. We relied on Wright's papers to determine whether the tribunal that heard the case below was a federal trial court or administrative agency. Finally, we examined LEXIS to determine workload by calculating the number of judges divided by the number of opinions per year.²²

Methods and Results

Given our dependent variable and the underlying data generating process, we estimate a stereotype logistic regression model. When a dependent variable is polychotomous, such

²¹See <http://www.cas.sc.edu/poli/juri/auburndata.htm>.

²²This measure is likely to understate workload, since many cases are unpublished.

as ours here, the researcher often will estimate either an ordinal or multinomial model (Long and Freese 2006). Our data, however, do not meet the exacting demands of these models' underlying statistical assumptions. The data fail to satisfy the assumptions of ordinal models because they violate the parallel regression assumption (Long and Freese 2006, 197-200). The parallel regression assumption holds that the relationship between the “layers” of categories is the same. Applied to our model, the assumption would force us to argue that the effect of, say, ideology on the difference between joining and making suggestions is that same as the effect of concurring versus dissenting.²³ Nor can we estimate a multinomial logit model because the data violate the assumption of the independence of irrelevant alternatives (IIA). This assumption means that adding or deleting alternatives does not increase or decrease the odds of picking the remaining alternatives. For example, if judges have the choice of joining an opinion or circulating a dissent, and the odds of joining compared to circulating a dissent are 1:1, adding the alternative of making a threat should not change these existing odds. It goes without saying, however, that the addition of such an alternative is quite likely to change existing odds.

To circumvent these limitations, we employ a stereotype logistic regression model (SLM).²⁴ The stereotype logistic regression model requires neither the parallel regression

²³Of course, since we have no *ex ante* reason to believe that some responses are more supportive than others— is a wait statement less supportive than a threat?—using the ordinal model would have other fundamental problems.

²⁴While the alternative-specific multinomial probit (“ASMP”) model does not require the parallel regression assumption or IIA, it does require at least one variable measured at the alternative level. For example, when employing the alternative-specific multinomial model to examine individual vote choice in elections with more than three or more outcomes (i.e. for which party did the voter vote?) Alvarez and Nagler (1998); Quinn, Martin and Whitford (1999) are able to examine the ideological distance between a voter and each party-candidate. Unfortunately, no such analogue exists for the choice model here, thus making the ASMP

assumption nor IIA (Long and Freese 2006). The SLM represents a cross between ordinal and multinomial regression models and is appropriate for use with a categorical dependent variable. In particular, the SLM is useful when the dependent variable is ordered but (1) the relative ordering of the categories is unclear and/or (2) there might be some overlap among the individual categories. Estimation occurs via maximum likelihood and, much like an ordered model, yields a single set of parameter estimates along with scale parameter estimates (i.e., cutpoints) for the various categories.

Figures 1 and 2 present our results.²⁵ We find evidence to suggest that law is created, applied, and altered as a function of ideology, but also that it is a function of contextual and institutional features. Figure 1 shows strong ideological trends among the data. Judges are more likely to bargain with the opinion author when they are ideologically distant from him. Look first at judges' decisions to respond with a joinder. The predicted probability that a judge will outright join an opinion is greater than 80% when the author and responder are ideological allies. When, however, the two judges are ideological opponents, that probability drops to nearly 60%.²⁶ That is, when a judge becomes ideologically opposed to the opinion writer, she is less likely to grace the writer with a brief note of acceptance. These judges become more likely to try and leverage the opinion writer into crafting more favorable law. The results for other responses also follow an ideological trend. Ideological allies offer suggestions to the opinion author nearly 11% of the time but ideological foes do the same nearly 15% of the time. Ideology also drives judges' responses when they issue wait statements, threats, will write statements, concurrences, and dissents. Indeed, the effect of ideology on circulating concurrences and dissents as first responses is marked. Ideological foes are two to three times more likely to respond with a separate opinion than ideological allies. These

model inapplicable. For an example of how scholars can use the ASMP model to examine Supreme Court decision-making, see Black and Owens (2009).

²⁵We provide the table of results in the appendix.

²⁶All of the changes in predicted probabilities discussed here are statistically significant.

predicted probabilities are exactly what we would expect if judges follow their policy goals when making and applying law.

Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981)(No. 80-1124) provides an example of how ideology influences judges' responses to majority opinion drafts. In *Wright v. Regan*, the court reviewed the government's decision to allow tax exemptions to private schools that were claimed to have operated on a racially discriminatory basis. Judge Ruth Bader Ginsburg's draft majority opinion found that the parties challenging the schools' policies had legal standing to pursue their claims and that there could be no tax exempt status for such schools. Judge Wright, an ideological ally, responded to Ginsburg's opinion with a joinder the day after it circulated. Judge Tamm—who was more conservative than both Ginsburg and Wright—took 42 days to respond to the opinion, and when he finally did, he circulated a proposed dissent.²⁷

²⁷The ideological distance between Ginsburg and Tamm (0.166) was seven times the distance between Ginsburg and Wright (0.023) (Epstein et al. 2007).

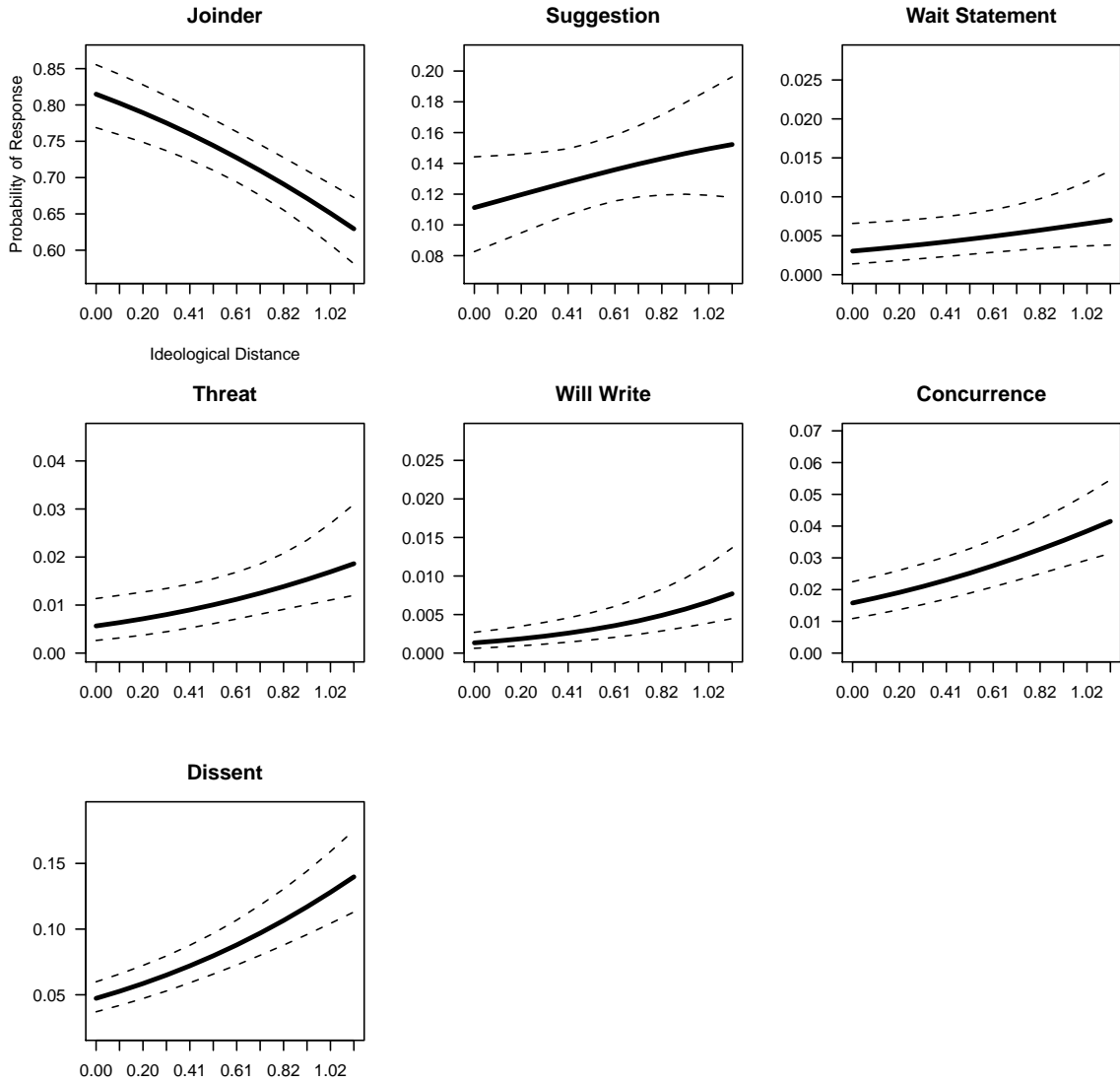


Figure 1: Predicted probability of joining, suggesting, making wait statement, making threat, issuing will write statement, or circulating concurrence or dissent as a first response to the circulation of a majority opinion. The solid lines represent 95 percent confidence intervals around the point estimates (the dots). All other variables were held at their median values.

While ideology plays a strong role, we also argued that contextual factors are also likely to influence how judges respond to majority draft opinions. We argued, first, that due to their complex nature, some cases would observe increased levels of jockeying among the judges. We hypothesized that three separate features might tap into case complexity.

We argued that pre-draft memoranda would be associated with increased bargaining (and decreased levels of joinders). The data provide support for this argument. As Figure 2 shows, as the number of substantive pre-draft memos in a case increases, judges become less likely to issue joinders and more likely to engage the author using every other response. The baseline probability a judge joins a case (with the modal number of pre-draft memos equal to 1) is 0.761 [0.725, 0.798]. When the judges circulate the maximum number of memos in the data, however, that predicted probability drops to 0.700 [0.659, 0.742]. Conversely, the baseline probability a judge circulates a dissent as a first response is 0.071 [0.059, 0.087] but increases to 0.102 [0.081, 0.129] as the number of pre-draft memos increases to its maximum. The results for our other measures of complexity also follow our predictions. We argued that when the court chooses to dispose of a case without oral argument, the case is less complex and should observe little bargaining. Figure 2 bears this out. Judges are roughly 8% more likely to join in cases lacking oral argument than in cases where the parties presented such arguments. At the other end of the spectrum, they were nearly twice as likely to circulate dissents in cases with oral arguments. We also argued that consolidated cases would be less complex, as the judges were able to identify the relevant issues up front to consolidate the case. The data suggest this as well. Judges were more likely to join and less likely to engage the author in consolidated cases. In short, case complexity is a strong contextual component to legal development and circuit court decision making. The more complex the case, the more judges bargain and negotiate over opinion content.

We also argued that, on average, judges should be more likely to engage the opinion author in salient cases. We coded salience in two ways: whether the case was decided en banc and whether intervenors participated. Our results yield strong support for our argument regarding en banc cases but no support for the claim that judges are more likely to engage the author in cases with intervenors or amici. As Figure 2 shows, the baseline predicted probability of joining a standard 3-judge panel case is 0.761 [0.725, 0.798]. That probability decreases to 0.643 [0.562, 0.724], however, when the case is decided en banc. At the same

time, the probability that the judge will engage the opinion author increases in en banc cases. Judges in such cases are more likely to make suggestions, issue wait statements, make threats and will write statements, and circulate separate opinions. The baseline predicted probabilities, for example, that a judge makes a threat or circulates a dissent are 0.009 [0.005, 0.014] and 0.071 [0.059, 0.087], respectively. Yet, when the case is an en banc decision, those probabilities jump to 0.017 [0.010, 0.028] and 0.133 [0.087, 0.203]. These results, we argue, show that in cases where the issues are of heightened salience, judges are more likely to engage the opinion author in an effort to leverage better outcomes.

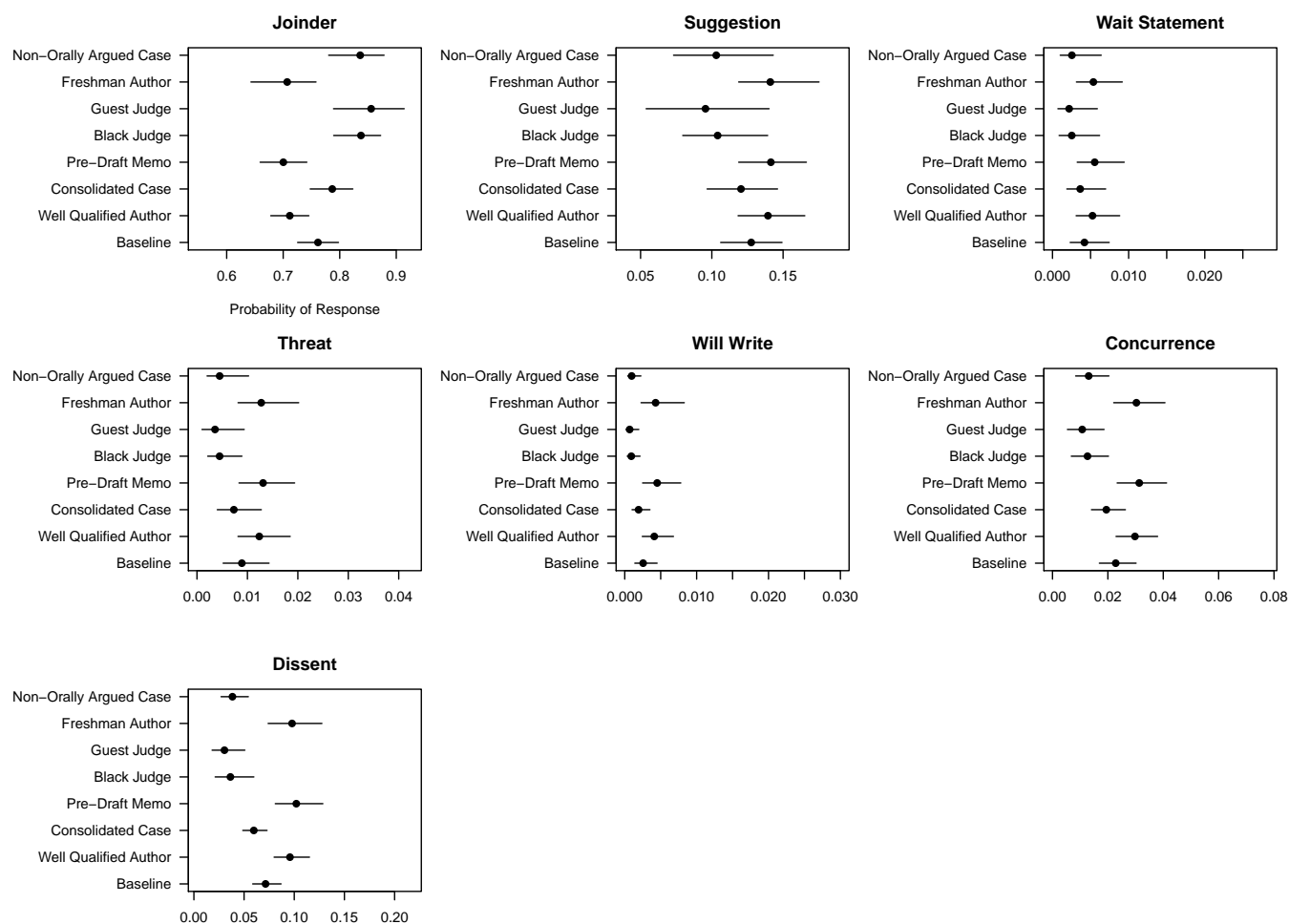


Figure 2: Predicted probability of joining, suggesting, making wait statement, making threat, issuing will write statement, or circulating concurrence or dissent as a first response to the circulation of a majority opinion. Baseline value is case with oral argument, one substantive pre-draft memo with no consolidated dockets, a non-freshman, non-high quality author, non-senior judge, non-freshman responder, non-chief, white male who is not well-qualified. The solid lines represent 95 percent confidence intervals around the point estimates (the dots). All other variables were held at their median values.

We further hypothesized that judges’ institutional positions would influence responses. On this point, our results are mixed. We find evidence to suggest that visiting judges behave differently than home-court judges and that freshman authors evoke unique responses; however, we find no support for our freshman judge, chief judge, or senior judge hypotheses. Starting first with the visiting judge hypothesis, we argued that visiting district court judges

would be less likely to engage in any activities that required an investment of resources. Our data strongly support this claim. Visiting judges were more likely to join opinions without requesting or demanding any changes. The baseline probability a judge joins the draft circulation was 0.761 [0.725, 0.798]. That probability, however, increased to 0.856 [0.789, 0.914] when the responding judge was a visitor. What is more, these judges were *always less likely* than home-court judges to engage the opinion author. Comparing the predicted probabilities of visitors versus home-court judges, there is a decreasing 25% change in probability that a visiting judge makes suggestions, a 50% change in the probability of making a wait statement, a 56% change in the probability of making a threat, and a 67% change in the probability of issuing a will write statement. When it comes to circulating separate opinions, the results continue to show that visiting judges contribute little to the opinion crafting process. A home-court judge had a predicted probability of 0.023 [0.017, 0.030] of circulating a separate concurrence and 0.071 [0.059, 0.087] of circulating a dissent. The probability that a visitor would respond in such manners, however, was 0.011 [0.005, 0.019] and 0.030 [0.018, 0.051].

These findings support Brudney and Ditslear (2001), who found that visiting district judges on circuit panels offer little. Simply put, “designated district judges play the part of dutiful followers . . .” (Brudney and Ditslear 2001). These findings should give policy makers pause. Visiting judges are frequently touted as quick fixes to address the problem of growing circuit court caseloads. Nevertheless, the data suggest that these judges simply go along with the other two panelists. Since judging on a collegial court requires debate and active participation, it is quite likely that law does not develop as “effectively” as it could when visiting judges sit on panels. Indeed, these judges may simply allow the two circuit judges to further their own policy preferences with little fear of whistle-blowing (Cross and Tiller 1998).

At the same time, we find evidence to suggest that judges treat opinions written by freshman judges differently than opinions written by non-freshman judges. Judges were less

likely to join freshman opinions and were more likely to seek changes in those opinions. The probability a judge joined a non-freshman opinion was 0.761 [0.725, 0.798] but 0.707 [0.643, 0.758] for freshman opinions. Conversely, the predicted probability of engaging a freshman author is always greater than when non-freshmen author the opinion.²⁸

The data also suggest that minority judges are more hesitant to engage the opinion author than non-minorities. We hesitate to push this argument too far, however, since the findings appear to be driven in large part by the behavior of Judge Spottswood W. Robinson. Judge Robinson was one of only 8 minority judges in our data and accounted for 66% of the 446 minority judge observations.

Finally, we retrieved unexpected results for our Quality Judge hypotheses. We argued that high quality judges, as determined by the ABA, should be leaders on the court. That is, we expected that opinions written by such esteemed judges would be more likely to observe joiners than opinions written by less qualified judges and that their opinions would be less likely to evoke suggestions, threats, will write statements, concurrences, and dissents. Along the same lines, we expected high-quality judges to engage opinion authors more frequently. Holding all else equal, we expected such judges to respond by making suggestions, wait statements, rats, will write statements, and separate opinions more frequently. The data failed to support these arguments. Indeed the data suggest that judges are *less* likely to join opinions written by high-quality judges and, instead, are more likely to engage such opinion authors. There is a 9% change in the predicted probability of joining if the opinion is written by a quality judge versus a non-quality judge, a 25% change when issuing wait statements, a 33% change when making threats and will write statements, a 30% change when circulating a concurrence, and a 35% change when circulating a dissent. At the same time, we find no

²⁸We argued that this dynamic occurs because freshman are still new to the folkways of the court and its precedents and procedures. An alternative argument, but one we cannot test here, is that freshman authors are more likely to make changes requested by colleagues than non-freshman judges, creating an incentive to engage them.

evidence to suggest that highly ranked judges engage opinion authors more frequently than less qualified judges.

What does these findings suggest? One argument is that the ABA ratings themselves do not accurately measure judges' latent judicial abilities and thus are inappropriate yardsticks to use when predicting how qualified a nominee is to serve. Recent studies indicate that the ABA's evaluations of federal circuit court nominees are biased. Vining, Steigerwalt and Smelcer (N.d.) argue that Democrat/liberal nominees are more likely to receive "well qualified" ratings from the ABA than Republican/conservative nominees. The authors examined judges who were identical in all respects save for party of appointing president. They found that identical judged were roughly 22% more likely to receive a well qualified rating if nominated by a Democrat rather than a Republican president. Our data cannot speak to this dynamic—nor do we have an axe to grind in the debate—but our results do suggest that the ABA's indicia of quality may not be valid indicators of judicial quality.

Conclusion

D.C. Circuit Judge Harry T. Edwards once stated: "[t]here is simply no significant statistical support for [the argument] that judicial results invariably flow from judges' politics, rather than from legal principles" (Edwards 1991, 854). Now there is. We undertook the first systematic empirical examination of opinion crafting on the circuit courts. We examined every case record maintained by Judge J. Skelly Wright, analyzing nearly 5000 observations across roughly 2500 cases. We obtained three important findings. First, we find strong support for the ideological component to the development of law. The data showed clear ideological patterns. As judges became more ideologically distant from the majority opinion writer they were more likely to engage the author of that opinion and try to leverage better outcomes. That is, when the opinion casts favorable policy, judges are more likely to accept those opinions. When the opinion presents unfavorable policy, however, ideologically distant

judges will use the tools at their disposal to try and leverage better outcomes from the opinion writer. Precisely because judges understand the importance of legal opinions, they have a strong incentive to bargain and negotiate over the content of them.

Second, we found that law evolves as a byproduct of judges seeking their policy goals within broader contextual and institutional parameters. The complexity and salience of cases impacts judges' responses to opinion drafts. In such cases, judges are more likely to engage the opinion author, leading to a more free-flowing opinion crafting process. Institutional positions matters as well. We found strong evidence to suggest that guest judges operate in a unique manner and that freshman opinion authors provoke responses that their more senior counterparts do not.

Third, our data yield results that policy makers might find interesting. For example, visiting judges are often touted as a “cheap” way of aiding circuit court judges in overcoming workload problems. The data, however, suggest that these judges add little to the decision making process. Instead, their “go along” attitude may simply allow the two circuit judges to further their own preferences with little fear of whistle-blowing (Cross and Tiller 1998). That is, the provision for visiting district court judges may actually lower the threshold for “principled” decision making. Additionally, we found that judges who received high marks from the American Bar Association were less likely to offer opinions that received unequivocal support from their colleagues and these judges were not any more likely to engage opinion authors than their less qualified colleagues. Both of these outcomes were unexpected and question whether the ABA ratings are valid measures of projected judicial competence.

Appendix

Variable	Coefficient	Robust S.E.
Ideological Distance	1.195*	0.133
En Banc Case	0.796*	0.214
Orally Argued Case	0.712*	0.197
Freshman Author	0.390*	0.172
Senior Judge	-0.106	0.219
Freshman Responder	-0.152	0.151
Visiting Judge	-0.967*	0.262
Chief Judge	0.063	0.149
Female Judge	-0.281	0.238
African American Judge	-0.773*	0.318
Well Qualified Judge	0.195	0.243
Average Judge Workload	-0.000	0.011
Case Comes from District Court	0.143	0.116
Judge Has Appellate Experience	0.080	0.519
Pre-Draft Memo	0.441*	0.087
Consolidated Case	-0.053*	0.010
Intervenor	-0.188	0.163
Well Qualified Author	0.362*	0.107
Scale Parameters		
ϕ_1 (Join)	1.000	–
ϕ_2 (Suggestion)	0.569*	0.167
ϕ_3 (Wait)	0.174	0.331
ϕ_4 (Threat)	-0.090	0.295
ϕ_5 (Will Write)	-0.507*	0.237
ϕ_6 (Concur)	0.081	0.139
ϕ_7 (Dissent)	0.000	–
Item Intercepts		
θ_1 (Join)	3.685*	0.429
θ_2 (Suggestion)	1.331*	0.340
θ_3 (Wait)	-2.604*	0.612
θ_4 (Threat)	-2.202*	0.530
θ_5 (Will Write)	-3.995*	0.517
θ_6 (Concur)	-1.021*	0.265
θ_7 (Dissent)	0.000	–
Observations	4909	
Log Likelihood	-4077.527	

Table 2: Stereotype Logistic regression model of judges' initial response to majority draft opinions. Unit of analysis is justice-response. * denotes $p < 0.05$ (two-tailed test). Robust standard errors clustered on docket reported in in the right hand column.

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