

ORGANIZATIONS, COMPLEXITY, AND DECISION MAKING

IN THE U.S. COURTS OF APPEALS

by

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(Under the Direction of Susan B. Haire)

ABSTRACT

By all appearances, United States Courts of Appeals represent a unified front in creating national legal policy. Yet these twelve circuits differ substantially with respect to a number of organizational characteristics and practices that influence the legal outcomes they render. Because the majority of cases heard by the Courts of Appeals will not be heard by another court, these differences may impact thousands of litigants every year if they influence judicial decision making processes. This dissertation examines whether and how the variation in organizational characteristics of the circuits influences the clarity and consistency of legal outcomes in the United States Courts of Appeals. I am particularly interested in how such organizational characteristics serve to mitigate or exacerbate complexity in the circuits' decision making environment. The findings suggest that the theoretical perspective offered by the bounded rationality account is useful in aiding our understanding of judicial behavior in the Courts of Appeals, especially when considered alongside other models of cognition and decision making.

INDEX WORDS: U.S. Courts of Appeals, judicial decision making, federal courts, organizational theory, complexity, judges

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A Dissertation Submitted to the Graduate Faculty of The University of Georgia in Partial
Fulfillment of the Requirements for the Degree

DOCTOR OF PHILOSOPHY

ATHENS, GEORGIA

2008

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DEDICATION

To Ray, for his patience and understanding, and to my family, big and small, for their enduring love and support.

ACKNOWLEDGEMENTS

Many people provided support, assistance, and friendship to me during the writing of my dissertation. I am especially indebted to Susan Haire, whose constant advice and feedback helped me stay on track, and to my committee: Damon Cann, John Maltese, Hal Rainey, and Jeff Yates. Arnie Fleischmann also helped me through the early stages of my project, wrote letters on my behalf, and was generous with his friendship and his advice. The late Susette Talarico introduced me to a body of literature that became essential to the project, and was unshakable in her enthusiasm and encouragement during my entire time at Georgia. Hester Nguyen, Geneva Bradberry, and the Daley-Bailey family helped me coordinate my trips to Athens to present early versions of my project and assisted me in pulling the many pieces of my project together. Steve Wasby and Joan Grafstein assisted me in securing interviews with appeals court judges, and the Graduate School provided me with funds through the Dean's Award for Social Sciences that allowed me to conduct interviews and make site visits to federal courthouses. I also received the benefit of software and travel support from the Department of Political Science and the Clute-Nigro Fund. Finally, I would like to acknowledge the Graduate School for their support through the Dissertation Completion Award, which enabled me to devote an entire academic year to working on my research.

TABLE OF CONTENTS

	Page
ACKNOWLEDGEMENTS	v
CHAPTER	
1 INTRODUCTION	1
2 REVIEW OF THE LITERATURE	17
3 CIRCUIT BEHAVIOR.....	40
4 PANELS	89
5 APPELLATE ADVOCACY	147
6 JUDGES.....	164
7 CONCLUSIONS AND DIRECTIONS FOR FURTHER STUDY	214
BIBLIOGRAPHY	237
APPENDICES	257
A TABLE OF CONCEPTS, VARIABLES, INDICATORS AND HYPOTHESES	257
B INTERVIEW PROTOCOL	272

Chapter 1: Introduction

“By virtue of jurisdiction and administrative independence, no two Courts of Appeals are alike.”

—J. Woodford Howard (1981, 8)

On October 12, 1977, the United States Supreme Court heard oral arguments in *Bakke v. Regents of California*, the first case before the court to address directly the issue of affirmative action policies in higher education admissions. Allen Bakke, a thirty-five-year-old white male, had been rejected twice in his applications for medical school at the University of California at Davis and believed that he was sufficiently highly qualified to be admitted. His suit challenged the admissions practice of the medical school, which separated applicants into either a general admissions pool or a special admissions pool, the latter of which had lower academic standards and was for non-white applicants only. The university argued that it reserved sixteen out of the one hundred places in the entering class for minority students in order to address long-standing societal discrimination that had kept minorities from becoming doctors.

The Supreme Court announced its ruling in the case eight months later, in June 1978. The opinion was badly fragmented, with six different justices filing opinions and none of those opinions garnering more than four votes. Justice Louis Powell’s plurality opinion struck down the California program as unconstitutional, rejecting the rationale that addressing broad societal discrimination could be a compelling interest sufficient to

warrant differential treatment under the Equal Protection Clause of the Fourteenth Amendment. However, his opinion did suggest that the goal of diversity in higher education might pass constitutional muster, so long as there were no fixed quotas and race was viewed as a “plus” factor in admissions.

Two decades later, similar challenges by white plaintiffs to public law school admissions practices appeared in the lower federal courts. In *Hopwood v. Texas* (78 F.3d 932, 5th Cir. 1996), the University of Texas law school denied admission to Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers, four borderline applicants who argued they would have been admitted had they been considered under the standards for minority applicants. The Fifth Circuit sided with the plaintiffs and ruled that “any consideration of race or ethnicity by the law school for the purposes of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment” (78 F.3d. at 944). In other words, the court rejected the state’s argument that Justice Powell’s statement on diversity as a compelling interest was, in fact, controlling precedent.

Four years after *Hopwood*, another group of white plaintiffs denied admission to the University of Washington law school sued, claiming discrimination under the Equal Protection Clause. However, in *Smith v. University of Washington* (233 F.3d 1188, 9th Cir. 2000), the U.S. Court of Appeals for the Ninth Circuit rejected the plaintiffs’ claims and accepted diversity as a permissible rationale for an affirmative action admissions policy. Noting that *Bakke* had yet to be overruled, the panel concluded: “at our level of the judicial system, Justice Powell’s opinion remains the law” (233 F.3d at 1201).

This conflict between the circuits was settled three years later in the companion cases, *Gratz v. Bollinger* (539 U.S. 244) and *Grutter v. Bollinger* (539 U.S. 306).

However, the Supreme Court is not able to resolve all such conflicts across the circuits, given the tremendous volume of litigation dealt with by the federal courts of appeals.

The implications of this are quite immense: simply put, litigants who raise the same legal questions may receive a different answer depending on which circuit they ask. Examples like the aftermath of *Bakke v. Regents of California* beg the question, how do we account for differences in legal outcomes across circuits?

A cursory examination of the Fifth and Ninth Circuits during the time of their opinions yields some interesting observations. In *Hopwood*, the panel that issued the decision was comprised of three Republican nominees, all of whom were white men: Jerry Smith, Jacques Wiener, and Harold DeMoss, Jr. While a majority of judges in the Fifth Circuit voted against rehearing en banc, seven judges joined in a vigorous dissent from the failure to grant rehearing. These dissenters included a white woman, a Hispanic man, and an African-American man, and six of the seven were appointed by Democratic presidents (Carter and Clinton). In comparison, the Ninth Circuit panel that decided *Smith* was comprised of two Carter appointees and a George H.W. Bush appointee, Ferdinand Fernandez, who wrote the opinion of the panel. However, Judge Thomas Reavley, one of the two Carter appointees, was actually a senior judge from the Fifth Circuit sitting in designation. (He had not participated in the *Hopwood* vote for rehearing en banc because of his senior status.)

Aside from the judges who make up each circuit, several other factors distinguish the working environment of the two courts. For instance, the Ninth Circuit's

jurisdictional boundaries span the West Coast and beyond, including the states of California, Arizona, Nevada, Idaho, Montana, Oregon, Washington, Alaska, and Hawaii. After the Fifth Circuit was split in 1980 to create the new Eleventh Circuit, its jurisdiction was reduced to include only the three southern states of Texas, Louisiana, and Mississippi. Though both courts are among the busiest of the circuits, almost twice as many appeals were filed in the Ninth Circuit than in the Fifth Circuit during the 1990s. The Ninth Circuit also has the highest number of judges of any court of appeals, including the Fifth.

These comparisons highlight only a few aspects of the differential court environments in which appeals court judges decide cases. To get a fuller sense of the implications of these differences, it is instructive to understand the origins of the Courts of Appeals in the federal judicial system. I turn to that task next.

1.1 A Brief History of the U.S. Courts of Appeals

The United States Courts of Appeals were established pursuant to Article III, section I of the Constitution, which says that “the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Carp and Stidham (1998) divide the history of the U.S. Courts of Appeals into three distinct eras: 1789-1801, 1801-1891, and 1891 to the present. The earliest of these eras is marked by the passage of the Judiciary Act of 1789, which established so-called “circuit” courts for diversity cases, most federal criminal cases, and for civil suits where the United States was the plaintiff; these courts also were given appellate jurisdiction over civil suits originating in the U.S. district courts (<http://www.fjc.gov>). Each circuit was comprised of a district judge, who set up the

court's workload, and two Supreme Court justices, who had to "ride circuit" (via horse and carriage) to hear cases twice a year. Understandably, the justices were not terribly enamored with the burdensome practice of traveling to each circuit, in addition to the extensive traveling required by their service on the Supreme Court in Philadelphia. However, Federalist attempts to reduce the circuit responsibilities of Supreme Court justices in the so-called "midnight judges act" were eventually overcome by the Jeffersonian Republicans, who saw proposals for separate circuit court judgeships as a power grab for the national government (Carp and Stidham 1998, 37-8).

In the second era, under Thomas Jefferson's administration, Supreme Court "circuit riding" was restored, and district judges were given control to preside over the circuit courts, which meant that they possessed both original and appellate jurisdiction in practice (Carp and Stidham 1998, 38). By 1801, six judicial circuits had been established, and as more states were added to the Union, Congress expanded the number of circuits as well, up to nine in 1869. After the Evarts Act transferred the circuit courts' appellate jurisdiction to the courts of appeals in 1891, the U.S. circuit courts continued on as trial courts (often duplicating the work of the federal district courts) until they were abolished by the Judicial Code of 1911 (<http://www.fjc.gov>).

The U.S. Courts of Appeals were designed so that cases would be heard by a panel of three judges, and until sufficient appellate judgeships were created in the 1920s, district judges (and before 1911, circuit court judges) regularly sat to hear cases at this level. The power of these courts increased as legislation increasingly limited the kinds of cases that could routinely be heard by the Supreme Court, but expanded the jurisdiction of the courts of appeals (<http://www.fjc.gov>). New regional and specialized circuits were

also created to cope with increasing caseload demands [see Table 1.1]. In 1948, the Judicial Code altered the title of the federal appellate courts to the U.S. Court of Appeals for the respective circuit (<http://www.fjc.gov>). Today, the regional courts of appeals hear appeals from the federal district courts, administrative agencies, tax court, and removal court, while the Court of Appeals for the Federal Circuit¹ oversees the Court of Veterans Appeals, Court of International Trade, and the Court of Federal Claims (Baum 2001, 26).

1.2 Similar Yet Different

By all appearances, the U.S. Courts of Appeals represent a unified front in creating national legal policy; they are governed by uniform rules of federal appellate procedure, Supreme Court precedent, Congress' determinations about circuit size and jurisdiction, and legal norms of the adversarial and appellate process. Yet these twelve circuits differ substantially with respect to a number of organizational characteristics and practices that influence the legal outcomes they render. As J. Woodford Howard wrote in his 1981 study of the Courts of Appeals, “[b]y virtue of jurisdiction and administrative independence, no two Courts of Appeals are alike” (8). Similarly, Lindquist observes that “a judge on the Ninth or Eleventh Circuit, for example, experiences a substantially different set of constraints than does a judge on the First or Tenth Circuit” (2007, 134).

One quite obvious difference among the circuits that is often highlighted in calls to break up the Ninth Circuit is court size. The number of judges assigned to each circuit varies widely, from a low of four judges in the First Circuit to a high of 28 judges in the

¹ I exclude altogether the Federal circuit from this dissertation study because of comparability problems with the other regional circuits. The Federal circuit's jurisdiction is defined by subject matter, rather than by geography, making meaningful comparisons difficult.

Ninth Circuit during the time period of 1982 to 2002. As caseload pressures have increased over time, Congress has adjusted the number of judgeships allotted to each circuit in order to keep up with the mounting workload. However, the decision to add judgeships is also a political one, since presidents have increasingly recognized the importance of life-tenured lower court judges in achieving their policy goals (Haire 2006). As the appointment process has become more contentious (see, e.g., Goldman 2003), nominees to the appellate bench have experienced longer confirmation processes, leading to longer vacancies in the courts. Obviously, such vacancies pose a greater problem for smaller circuits than larger circuits, which can absorb the additional work more easily. The number of judges in a circuit also has implications for communication and coordination of efforts, which is another common criticism often raised against larger circuits like the Ninth.

Court size can also be considered in terms of where cases are heard within a circuit. For example, the Ninth Circuit, the largest circuit in terms of judgeships, also utilizes four courthouses in San Francisco (the headquarters), Portland, Seattle, and Pasadena. In contrast, the Seventh Circuit hears cases exclusively at its courthouse in downtown Chicago.²

However, this is not to say that judges in circuits with only one courthouse all retain home chambers in that city. For example, Cohen (2002, 154-5) observes that only five of the ten active judges in the Seventh Circuit have their home chambers in Chicago,

² According to McKenna, Hooper, and Clark (2000), a number of circuits utilize courthouses in other cities from time to time. For example, the Eighth Circuit regularly hears cases in St. Louis (MO) and St. Paul (MN) and the Eleventh Circuit hears oral arguments in Atlanta (the circuit seat), Montgomery (AL), Jacksonville (FL), and Miami. Others include the First, the Third, and the Tenth. The Court of Appeals for the Second Circuit does not have panels sit in other locations, but does utilize video-conferencing for oral arguments in many cases.

where the circuit seat is located, while the other five judges sit in Wisconsin and Indiana. First Circuit judges are similarly scattered across Puerto Rico, New Hampshire, Massachusetts, Maine, and Rhode Island. Despite this dispersion, however, Cohen asserts that all circuits, save the Ninth,³ arrange frequent gatherings at which all judges are present. In addition, technology has become increasingly important as a means to bridge geographic dispersion (Wasby 1987, Cohen 2002). But even when they all work in the same building, judges do not necessarily interact with each other more than if they worked in distant cities: “Judges on both the compact D.C. Circuit and the dispersed Ninth Circuit indicated that they rarely had face-to-face discussions about cases even with judges who maintain chambers in the same building” (Cohen 2002, 157). It is for this reason that Cohen’s judges seem to consider geographical dispersion to be a “wash” with respect to its practical consequences for circuit business.

In terms of external perceptions of the circuits, there is also much variation with regard to circuit reputation. Solimine (2005, 1341) observes that the Second Circuit and the DC Circuit have been recognized in the past as possessing high “prestige and influence,” though the Seventh Circuit has also risen in this regard of late. (The DC Circuit has also garnered a reputation as a stepping stone for future Supreme Court nominees.) Solimine also cites Klein’s (2002) interviews with circuit judges as an indication that other circuits are disinclined to cite the Ninth Circuit because of its reputation as being too liberal.

³ Because arguments are held in the four courthouses in the Ninth Circuit, all the judges are not together at the same time in the same place, as they are in other circuits. Cohen does note that all the Ninth Circuit judges do gather occasionally for judicial conferences, however (2002, 155). This assertion was supported by the comments of a Ninth Circuit judge interviewed for this study, who stated that her circuit interacted “at conferences, at seminars, [and] court meetings” and talked on the phone “all the time.”

In the day-to-day functioning of the circuits, norms develop that are particular to each institution. McKenna, Hooper, and Clark (2000) catalogue a number of these unique differences in case management practices in their white paper for the Federal Judicial Center.⁴ For example, all circuits except for the Third, Fifth, and Tenth utilize staff attorneys to screen cases into either argument or non-argument tracks.⁵ Circuits also differ in how they calculate whether a majority of judges is in favor of en banc review of a particular case and the effect of a decision to grant en banc (i.e. whether it vacates the panel opinion or just the judgment). Some circuits (Third, Fourth, Sixth, Tenth, and DC) require panels to circulate their opinions to the other judges prior to filing, in order to enhance consistency of decisions; in contrast, the Ninth Circuit circulates opinions post-filing.

The proliferation of circuit-specific rules and norms can present significant difficulties for attorneys and large, national entities encounter litigation in multiple circuits (Sisk 1997). Furthermore, until 2007, there was significant variation across the circuits in terms of the precedential value of unpublished decisions.⁶ Sisk (1997, 13-14) bemoans the inconsistency on this point:

“The Third Circuit hedges somewhat, stating that it “historically has not regarded unpublished opinions as precedents that bind the court,” and therefore “the court by tradition does not cite to its unpublished opinions as authority.” Thus, while the court discourages counsel from citing an unpublished opinion lacking precedential value,

⁴ The white paper by McKenna, Hooper, and Clark (2000) is one of the best analyses of case management practices across all the circuits; however, the data used in their paper are not available for the entire period of this dissertation study and thus are not able to be included in the quantitative models.

⁵ The Tenth Circuit relies exclusively on judges to do all the screening for cases. In contrast, judges in the Third Circuit screen only counseled cases, but do not sit on separate screening panels, and the Fifth Circuit judges decide whether oral argument is appropriate in certain case types (McKenna, Hooper, and Clark 2000, 9).

⁶ As of January 1, 2007, Federal Rule of Appellate Procedure (FRAP) 32.1 (28 U.S.C. 2006) laid out guidelines for attorneys’ citation of unpublished opinions issued in 2007 or later; this rule left citation of unpublished dispositions issued prior to 2007 up to individual circuits’ rules (Reagan 2007). However, this change in appellate procedure comes five years after the time period for this dissertation study (1982-2002) had concluded.

counsel is not prohibited from doing so. The Eighth, Tenth, and Eleventh Circuits similarly declare that their unpublished opinions are not binding precedents, but then authorize citation of such decisions for their "persuasive" value.

Still other circuits are dangerously ambiguous about the precedential effect of their unpublished dispositions and consequently uncertain in their direction to counsel regarding reference to these dispositions. In the Fourth Circuit, for example, citation of the court's unpublished decisions is "disfavored," but, along with the Sixth Circuit, that court permits citation when counsel believes that the unpublished opinion "has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well." Perhaps the greatest confusion follows the Fifth Circuit's new rule, under which unpublished opinions issued by that court before January 1, 1996, are precedential, while those issued after that date are denied precedential effect, but may still be cited as 'persuasive' authority.

Because the majority of cases heard by the Courts of Appeals will not be heard by another court (Davis and Songer 1989), these differences may affect thousands of litigants every year if they influence judicial decision making processes.

1.3 The Dissertation Study

In a common law system such as that of the United States, a judge's ruling does not merely resolve a dispute between two parties, nor is it decided in isolation from similar kinds of cases. Because every case is considered in light of what has been decided before, a judge makes law not only for the litigants in the case in front of her but also for those who come later, raising similar claims. A crucial assumption of such a system is that it will create predictability and coherence in the law. However, in order for a body of law to be coherent, judges' decisions must be clear (i.e. speak with one voice)

and consistent (i.e., not in conflict with other decisions).⁷ This is especially pertinent for judges in intermediate appellate courts, like the U.S. Courts of Appeals, who must monitor the trial courts and administrative agencies under their jurisdiction for compliance with the rule of law. Returning to the example about affirmative action in the beginning of this chapter, we can see how fragmented opinions, like the Supreme Court's ruling in *Bakke*, can frustrate the attempts of lower court judges to discern just what governing precedent actually is in an area of law. Moreover, in our comparison of the various circuits in the previous section, we saw a number of significant differences exist that may very well shape the decision making environment in a circuit, and consequently, affect a court's ability to generate a clear and coherent body of law.

This dissertation examines whether and how the variation in organizational characteristics of the circuits influences the clarity and consistency of legal outcomes in the United States Courts of Appeals. I am particularly interested in how such organizational characteristics serve to mitigate or exacerbate complexity in the circuits' decision making environment. Complexity, much like obscenity, is easier to identify by sight than it is to define, so it is for this very reason that I employ both quantitative and qualitative approaches to measuring my variables.

In my quantitative work, I rely upon the Auburn attributes of federal court judges dataset (Zuk, Barrow, and Gryski 1997; Gryski and Zuk 2006), the Multi-User Databases on the U.S. Courts of Appeals (Songer 1997; Haire and Kuersten 2006), the Federal Judicial Center, Lexis-Nexis, and the Administrative Office of the Courts. Because I am interested in variation across circuits over time, I utilize a cross-sectional time series

⁷ This is not to say that the law should be, or is, inflexible to change, but merely that having two or more conflicting decisions on the same point reduces the ability of a judge, or the general public, to know what the law is and to follow it.

design, starting in 1982 after the establishment of the Eleventh Circuit and ending in 2002. While I would ideally like to include the District of Columbia circuit in all my analyses, I am forced to limit my focus to the eleven numbered circuits in some places due to the availability of data. In addition, in order to model issue framing at the case level, I utilize a sample of litigant briefs filed in the Seventh Circuit between 2000 and 2003 and in the Eleventh Circuit between 1994 and 1997.⁸

However, datasets can only tell us part of the story. Aside from the limitations associated with the use of each of these databases,⁹ they lack the richness and detail of firsthand descriptions of the courts' processes. For this reason, I also conducted interviews with circuit court judges—both sitting and retired—from the Ninth and Eleventh Circuits. Six judges participated, providing me with valuable insights to supplement the results from my quantitative models.

By providing a more comprehensive account of factors that influence legal outcomes, this study connects and expands upon earlier studies of the U.S. Courts of Appeals (Lindquist, Hettinger, and Martinek 2006; Cohen 2002; Klein 2002; Songer, Sheehan, and Haire 2000; Howard 1981; Schick 1970). Furthermore, it seeks to contribute to a better understanding of how organizational and structural features in the decision-making environment affect the function of political institutions in general, and

⁸ Electronic availability of briefs is a relatively new phenomenon, and as such, only four circuits currently offer electronic access to their briefs. The Seventh Circuit provides free access to briefs via its website, while the Eighth, Tenth, and Eleventh Circuits provide electronic versions of briefs via the fee-based PACER service. I am grateful to Susan Haire for sharing her data from the Eleventh and Seventh circuits with me.

⁹ For example, the Multi-User Database includes only a probability sample of 30 published opinions per circuit, per year. Given the variability across the circuits in terms of publication rates, this particular feature of the database limits our ability to generalize results across all cases. However, circuit rules dictate that publication should generally be reserved for opinions with precedential value (for a more thorough discussion of this point, see Green 2006, 1507-8). As long as results are carefully qualified as to their scope, this and other similar databases can provide important and useful insights into the judicial process.

judicial institutions in particular. While the results by no means answer these questions once and for all, a few important themes do emerge.

First, theoretical approaches that explicitly account for the cognitive limitations of decision makers can be useful tools in understanding the work of appeals court judges, which is characterized by high workload, low discretion, and group decision making structures. As part of modeling the working environment of the court, it is especially important to recognize the multi-dimensional nature of case complexity. By using multiple measures of this concept, I am able to tease out the relationships between various kinds of case complexity and panel dynamics, as well as the ways in which case complexity can condition the effect of a judge's ideology in the decision making process.

Secondly, my findings suggest that the concept of legal clarity, as viewed from the perspective of those trying to follow a circuit's law, appears to be shaped in significant ways by the institutional structures and norms of the Courts of Appeals as a collegial court. Moreover, I find evidence that explicitly accounting for the heterogeneity of judges within a circuit, in terms of ideology, race, and gender, can help us better understand the development of norms in a collegial court like the U.S. Courts of Appeals. By moving away from more commonly made arguments about substantive representation by women and minority judges, I provide a fuller picture of the ways in which judicial diversification may affect the dynamics of decision making and ultimately, legal outcomes.

I proceed in the following manner. Chapter two summarizes the relevant existing research and develops my theoretical approach and expectations for the study. Chapters three and four use a quantitative approach to model, respectively, circuit-level and case-

level influences on the decision making environment. Chapter five examines the role of appellate advocates in framing issues before the court, highlighting the implications of issue framing for judicial decision making in complex cases. Chapter six models the decision making process at the individual judge level, incorporating elements from the preceding chapters to capture contextual effects. To follow up on the quantitative analyses about the effects of organizational characteristics on legal outcomes, chapter six also incorporates interviews with circuit judges to demonstrate how judges characterize the influences on their decision-making environment in their own words. Finally, chapter seven offers conclusions from the present study and where these results might lead future research endeavors.

This project seeks to make a strong contribution to the judicial behavior literature by expanding our current understanding of decision making on the U.S. Courts of Appeals. Though its focus is solely on federal appellate courts, its findings will likely be generalizable to other collegial court settings, both in the American states and in other common law countries.

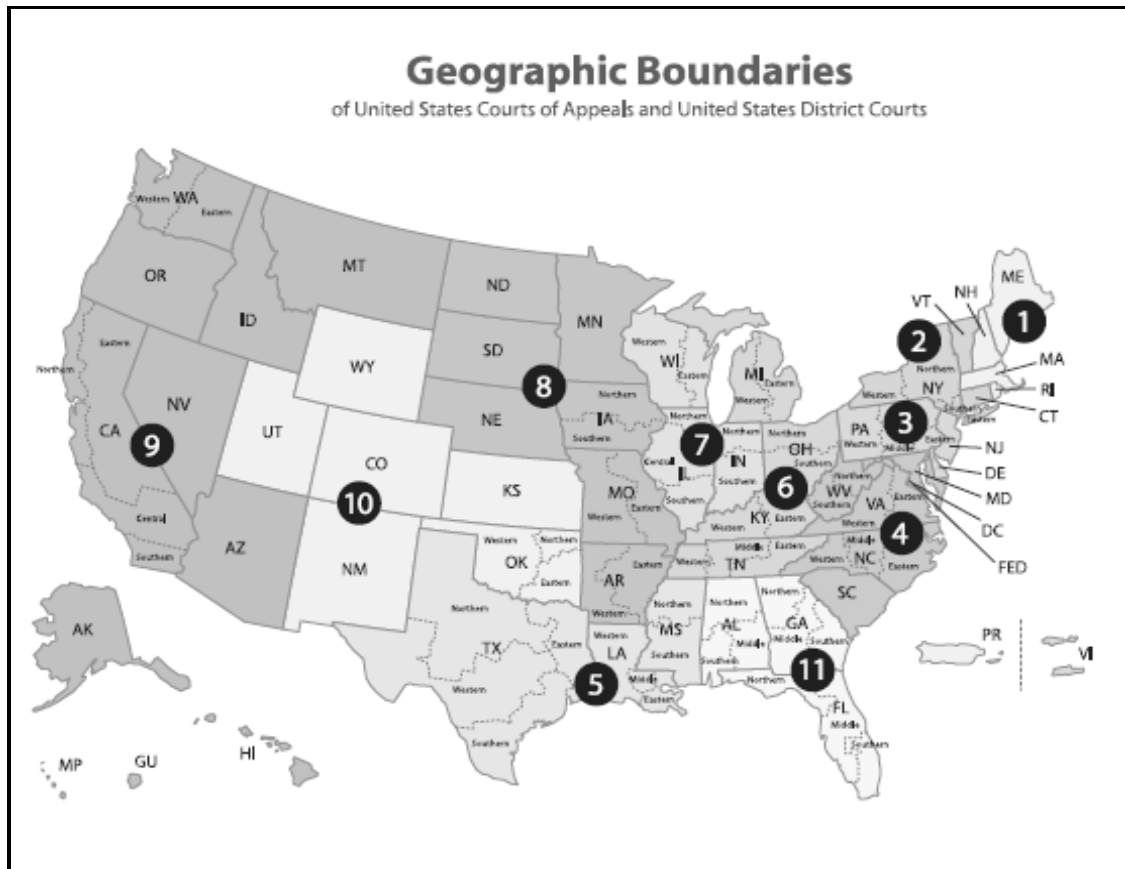
Table 1.1: Describing the Numbered Circuits of the U.S. Courts of Appeals

Circuit	Year estab.	States in jurisdiction (as of 2002)	Location of circuit seat (as of 2002)	Average total yearly filings (1983-2002)	Median yearly no. of active judges (1983-2002)
First	1891	Massachusetts, Maine, New Hampshire, Rhode Island, Puerto Rico, U.S. Virgin Islands	Boston, MA	1333	6
Second	1891	New York, Vermont, Connecticut	New York, NY	3888	13
Third	1891	Delaware, Pennsylvania, New Jersey	Philadelphia, PA	3190	13
Fourth	1891	Maryland, N. Carolina, S. Carolina, Virginia, West Virginia	Richmond, VA	3880	10
Fifth	1891*	Louisiana, Mississippi, Texas	New Orleans, LA	6087	16
Sixth	1891	Kentucky, Michigan, Ohio, Tennessee	Cincinnati, OH	4229	15
Seventh	1891	Illinois, Indiana, Wisconsin	Chicago, IL	2939	11
Eighth	1891**	Arkansas, Iowa, Minnesota, Missouri, Nebraska, N. Dakota, S. Dakota	St. Louis, MO	2794	11
Ninth	1891	Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, N. Mariana Islands	San Francisco, CA	7610	28
Tenth	1929	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming	Denver, CO	2377	11
Eleventh	1981	Alabama, Florida, Georgia	Atlanta, GA	5292	12

*The Fifth Circuit was divided to create the U.S. Court of Appeals for the Eleventh Circuit in October 1980, pursuant to the Fifth Circuit Court of Appeals Reorganization Act.

**The Eighth Circuit was divided to create the U.S. Court of Appeals for the Tenth Circuit in February 1929, pursuant to 45 USC 1346.

Figure 1.1: Geographic Boundaries of the Federal Appellate Courts



Source: <http://www.uscourts.gov/courtsofappeals.html>

Chapter 2: Review of the Literature

This project approaches the study of judicial behavior with the uncontroversial assumption that the environment in which judges make decisions structures the nature of the legal outcomes produced. This is not to say that environmental factors are solely determinative, or that they are necessarily the most influential factor in every case, but rather that they do matter and in significant ways. A simple illustration of how institutional structure shapes judicial outcomes can be seen in a comparison of the federal district courts with the appellate courts above them; while district court judges sit alone to decide cases, the U.S. Supreme Court and the Courts of Appeals are collegial courts, requiring judges and justices to engage in negotiation and compromise to generate a majority opinion (Wahlbeck, Spriggs, and Maltzman 1998; Hettinger, Lindquist, and Martinek 2006). Howard quotes a former trial judge who had been elevated to circuit court judge as noting the difficult transition because of the “autocratic position” of the district court judge: “He [the trial judge] is the sole decider. He decides as he sees fit, and files the decision in a form as he sees fit. A Court of Appeals decides by committee” (1981, 135).

Because empirical scholarship requires us to build models, and models are necessarily simplistic representations of real life phenomena, there is much detail that we omit for the sake of parsimony. Yet it is a fair criticism that some of what we assume away in such models may be driving the outcomes that we seek to measure. This

research takes as its point of departure Baum's (1997, 145) suggestion that research on the impact of court situations has potential to broaden our understanding of judicial behavior. While questions about the consequences of court characteristics certainly have implications for judicial management, from a practitioner's perspective, the present study is primarily focused on the implications for the academic study of judicial decision making.

2.1 The Judicial Decision Making Literature

In the existing literature, there is an implicit recognition that structure matters for judicial outcomes, at least at the margins, as scholars "control" for court structure by focusing on one type of court at a time. However, the environment in which judges decide cases is generally been seen as less important than the motivations for, or reasons behind, judicial behavior. Differing conceptions of what reasons matter have led to several major schools of thought, most of which primarily focus on explaining decision making on the U.S. Supreme Court.

The first of these, the legal model, posits that the decisions that judges render are attributable to legal texts, precedents, and jurisprudential philosophies they use. This perspective is the one most often taken by judges themselves, and, broadly defined, is also ascribed to by many legal scholars (see, for example, Rosenberg 1994; Dworkin 1988; Ackerman 1991). In contrast, the attitudinal model explains judicial decision making through reliance on the extra-legal factor of judges' policy preferences (Schubert 1965, Rohde and Spaeth 1976). As described by Segal and Spaeth, justices decide "disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of

the justices” (2002, 86). Law, under this conception, is merely a post-hoc justification for preference-driven behavior.¹ While the debate between attitudinalists and advocates of the legal model is often framed as a conflict between quantitative and qualitative methodologies, there is also a significant body of quantitative research that takes seriously the claim that “law” matters in judicial outcomes (e.g. Corley, Howard, and Nixon 2005; Richards and Kritzer 2002; Songer and Lindquist 1996; Segal and Spaeth 1996).

Both the attitudinal and legal perspectives allow some role for institutional considerations to affect decision making. In the legal model, judges rely on legal texts, precedents, and particular interpretive approaches to make decisions—but only within the context defined by court procedures and rules.² In comparison, the attitudinal model, as described by Segal and Spaeth, explicitly acknowledges the role that institutional structure plays on the justices’ ability to act in furtherance of their policy preferences. For instance, because the Supreme Court as an institution gives justices broad discretion in deciding which cases to hear, justices will be most likely to select cases that they find to be highly salient, which will in turn tend to heighten justices’ tendency to vote consistent with their ideological preferences.

A third theoretical perspective, the strategic model, gives a great deal more weight to the role of institutional characteristics in its conception of judicial decision making. Under this model, judges do have policy preferences but are constrained by political institutions, legal norms and practices, the law, the political environment, and the public.

¹ It should be noted that Segal and Spaeth (1993, 2002) have been criticized for poorly conceptualizing the legal model in order to disprove it more easily (Gillman 2001; Smith 1994; Rosenberg 1994).

² Law, here, can be seen as either a constraint upon judicial discretion and decision making (i.e. structuring outcomes), or as a goal which judges pursue (much in the same way that the attitudinal model says justices act to achieve their policy goals).

Strategic models employ a variety of methodological approaches to test their propositions, including game theory (Schubert 1965; Marks 1989; Eskridge 1991; Clinton 1994), quantitative analyses (Boucher and Segal 1995; Epstein and Knight 1998; Wahlbeck and Maltzman 1998), and qualitative approaches (Murphy 1964).

In particular, the work of Epstein and Knight (1998) pays close attention to the ways that institutions structure interactions and influence outcomes. The authors define “institutions” to mean “sets of rules,” which includes norms (e.g. precedent, opinion assignment), formal rules (e.g. Rule of Four, Rule 10), and the Constitution. The theoretical paradigm that they rely upon conceptualizes justices as goal-oriented actors who “must take account of these . . . sets of rules if they are to accomplish their goal of creating legal standards for society” (1998, 115). It is worth noting here that this perspective sees the justices as acting intentionally, fully aware of how the institutions color their behavior.

2.2 Decision Making in the U.S. Courts of Appeals

Though much of the scholarship on judicial decision making has originated at the Supreme Court level, there is a large and growing body of work that examines how decision making operates in the lower federal courts. There are a number of reasons why theories developed to explain the behavior of Supreme Court justices may provide little or no theoretical leverage when applied to judges in the Courts of Appeals. First, circuit judges lack the discretion that Supreme Court justices have in determining their dockets, as appeals are a matter of right at the circuit level. Segal and Spaeth (2002) argue that docket control has important consequences for the decisions Supreme Court justices

render because they can eliminate meritless cases from consideration and choose to decide cases that allow them to vote their policy preferences. Circuit judges lack this luxury, though they may exercise discretion in deciding whether or not to publish opinions or hear oral arguments in cases appealed to them. (These discretionary tools do not, however, reduce the federal appellate caseload with anywhere near the effectiveness of the Supreme Court's certiorari process.)

Secondly, while both federal appellate judges and Supreme Court justices are appointed for life tenure via the Article III confirmation process, justices arguably may act to further their policy goals because "they lack electoral or political accountability, have no ambition for higher office, and comprise a court of last resort that controls its own caseload" (Segal and Spaeth 2002, 92). Because circuit judges may aspire to higher offices,³ can only establish controlling precedent within their own circuit, and may be overruled by the Supreme Court, their ability to shape judicial policy to their personal preferences is more limited.

Moreover, though both the Courts of Appeals and the Supreme Court are collegial courts in the sense that cases are decided by multiple judges, cases at the lower federal appellate level are heard by rotating panels of three judges, while Supreme Court cases are heard by the same nine justices each time (barring vacancy, recusal, illness, or death on the court). The principle of random assignment⁴ of judges to panels at the circuit level is meant to ensure impartial decisions (Howard 1981); however, empirical research has

³ However, the motivation for higher office may be less for a circuit judge than for a district court judge, simply due to the odds of promotion (Posner 1985, 17).

⁴ Despite the ideal of impartial justice underlying the panel rotation practice, Howard (1981, 9) points out that "few circuits have escaped suspicion of panel packing to steer results." See Atkins and Zavoina (1974) for a probability analysis of the "panel packing" criticism of the Fifth Circuit in civil rights cases during the early 1960s.

also suggested that the particular mix of judges selected influences the ideological tenor of the opinions rendered (Cross and Tiller 1998; Tiller and Cross 1999).

Because of these institutional differences, judicial scholars have turned to integrated models to explain judicial decision making at the Courts of Appeals level. Such models are “integrated” in the sense that they incorporate multiple goals from models often seen as competing in research on Supreme Court decision making, such as the attitudinal and legal models. In these integrated accounts of judicial behavior, judges either “differ in their hierarchies of operative goals” or “act on the basis of many goals” (Baum 1997, 24).

A host of studies has identified judges’ personal characteristics as important predictors of behavior. First and foremost of these characteristics is the ideological predisposition of circuit judges. While scholars may disagree on how to measure this concept,⁵ its influence is consistently a significant factor in explaining circuit judges’ votes (see, for example, Songer and Davis 1990, Goldman 1975). (It should be noted that many, if not most, judges dispute this characterization of their decision making processes, as it seems to fly directly in the face of legal norms emphasizing apolitical, objective judging.) As a cognitive shortcut, ideology provides a frame for organizing and processing information and is generally assumed by judicial scholars to be comprised of a single, liberal-to-conservative dimension. Thus, it is more accurate to think of a judge’s ideology as a lens through which she reads and interprets the law (consciously or not), rather than something she uses *instead of* the law to help her decide a given case.

⁵ Common proxies for judge ideology include the party of the appointing president (Songer and Davis 1990) and the preferences of home state senators when senatorial courtesy is present (Giles, Hettinger, Peppers 2001). Obviously, neither of these is a perfect measure of a judge’s ideological position, but in the absence of reliable information from judges themselves (see Carp and Stidham 1998, 338), they are generally regarded in the literature as acceptable substitutes.

Because of the panel structure in the Courts of Appeals, the ideological mix of judges seated together on a given case also has been shown to influence the ideological direction of decisions rendered (e.g. Cross and Tiller 1998). This finding has even provoked some scholars to call for reforms requiring that all panels be ideologically mixed, in order to improve the quality of justice by eliminating “extreme” outcomes (Tiller and Cross 1999).

Carp and Stidham have noted that “there is clearly an overlap between the attitude theorists and those who study judicial background. The difference is that the latter want to know *from what source* the justices acquired their values, whereas the attitude theorists concentrate on measuring the effects of judges’ values—regardless of their origin—on collegial decision making” (1998, 338). Compared to ideological preferences, however, other personal characteristics, such as sex, race, seniority, and regional background, have not been shown to exert consistent, large-magnitude effects on circuit judge voting behavior. To the extent that any of these effects have been uncovered, they tend to occur under specific conditions in which we might expect these attributes to become salient and shape a judge’s actions. For example, there is growing evidence that a judge’s gender is related to votes for plaintiffs in employment discrimination cases (Songer, Davis, and Haire 1994; Peresie 2005; Crowe 1999). The influence of personal attributes has been hypothesized to operate on a conscious level, as judges may act to benefit the groups of which they are a part, as well as on a subconscious level, where judges would behave in certain ways as a result of shared socialization with other members of a particular attribute group.⁶

⁶ Alternatively, some feminist scholars point to psychological research that they argue supports the notion that men and women process information differently (e.g. Gilligan 1982). However, in general, research on

In addition to personal characteristics, scholars of the circuit courts have found evidence that judges' decisions are influenced by the law and legal goals (Klein 2002; Randazzo, Waterman, and Fine 2006; Giles, Walker, and Zorn 2006) as well as precedent (Songer 1987; Songer and Sheehan 1990; Songer, Segal, and Cameron 1994). These findings are not surprising, given the intermediate position in the judicial hierarchy occupied by the Courts of Appeals. As agents of the Supreme Court, circuit courts are bound by Supreme Court precedent and risk being overruled if they depart significantly from precedent; they are also responsible for monitoring district courts for adherence to circuit and Supreme Court precedent. Furthermore, as alluded to earlier, judges are usually the first to profess that they "follow the law" in order to come to the decisions they do. For example, one circuit court judge notes, "Lots of times I write and just hate the opinion, but if it's what the statute, regulation, Supreme Court or [my] Circuit requires, I can't do anything about it" (Klein 2002, 21).

However, the "law" is not always a clear determinant in helping judges come to a decision (and indeed, may not necessarily lead any three judges to the same conclusion). Statutory, constitutional, regulatory, and even precedential language can be vague, even ambiguous, and requires interpretation; consequently, reasonable people may disagree on whether and how to apply "the law" to a particular set of case facts at hand. Such uncertainty can lead judges to look beyond "the law" for guidance. Numerous studies at the Supreme Court and circuit court levels have documented judges' tendency to defer to certain types of litigants, such as the solicitor general (e.g. Caldeira and Wright 1988, McGuire 1998) and "repeat player" litigants (Galanter 1974). This tendency to "trust"

personal attributes and judging tends to focus on socialization (i.e. nurture) rather than innate differences (i.e. nature) as the reason for differing behavior among individuals.

certain litigants has been explained by ideological congruence between judges and litigants, or when a “reliable” source (such as the solicitor general) takes a position ideologically counter to his usual policy goals (Bailey, Kamoie, and Maltzman 2005); it also has been explained by the comparative advantage certain litigants have in terms of financial resources and litigation experience (Songer and Sheehan 1992, Songer, Sheehan, and Haire 1999). Circuit judges may also be responding to attorney expertise (Haire, Lindquist, and Hartley 1999) and issue framing in the parties’ briefs.

2.3 Models of Decision Making From Other Fields

Outside of the judicial politics literature, scholars have developed a number of different models to explain the ways in which decision making occurs in various organizational settings. Several of these models in particular have promising applications for modeling the influence of organizational characteristics on legal outcomes in the circuit courts. The concept of complexity figures prominently in these approaches, and consequently requires some elucidation before moving on to the models themselves.

Complexity has been defined and measured in a number of ways by organizational theorists and psychologists. Anderson characterizes complexity as “a structural variable that describes both organizations and their environments” (1999, 216). Organizational complexity refers to the number of subsystems or components within an institution, while environmental complexity means “the number of items or elements that must be dealt with simultaneously by an organization” (Scott 1992, 230). Similarly, in management science, complexity has been measured as the number of units per time and the amount of information per unit (Miller 1960). In public policy studies, definitions of

complexity tend to relate to the presence of multiple, competing values and interests, but also acknowledge that complexity is connected to the amount of available information and the number of possible alternatives from which to choose (see Weis 1982, 69-70).

For the purposes of this project, I am primarily interested in environmental complexity, since I argue that clarity and consistency of legal outcomes are, in part, driven by the organizational context in which decision making takes place. Specifically, I believe that organizational characteristics may have the effect of exacerbating complexity in the decision making process, or of mitigating it. At a micro level, the concept of environmental complexity should also include characteristics of cases, while still accounting for the larger organizational context. To illustrate, we might compare two appellate panels, both of which who are deciding a very complicated securities case. The decision making environment for those panels will be very different if panel A is part of a very large circuit, with high caseload and an especially diverse group of cases, and panel B is situated in a smaller, less busy circuit with a more homogeneous docket.

In the context of decision making, complexity can be considered at both the input and output phases. Early theorists (e.g. Spencer 1897) proposed a simple, linear function to describe individuals' information processing function in relation to the complexity of input. Experimental studies testing this model provided tentative support, as results indicated that rising complexity of information input led to increased capacity of information handling in both individuals and groups, but to an asymptotic level (Miller 1960). After this point, however, inputs began to be omitted or placed in a queue, and Miller (1962) found that the utilization of information also began to decrease in quality and quantity, suggesting a curvilinear relationship. However, other studies have not

confirmed Miller's finding about a non-linear relationship between input complexity and system output (see Driver and Streufert 1969).

Schroder et al. (1967) argue that information processing systems can be described in terms of differentiation (how many parts) and integrative complexity (the amount of interconnection between parts),⁷ and that it is only the integrative complexity in output that is related to input complexity. In a review of the literature on integrative complexity, Driver and Streufert conclude that if systems are constantly overloaded, they are likely to regress to less complex levels of integrative complexity over time (1969, 281).⁸

Applying these conclusions about “outputs” to the circuit court context, we might imagine that, in circuits where judges' workload is especially high, the quality of opinions may be poorer than in less overloaded circuits because judges have less time to consider each individual case carefully. However, there is some reason to believe that not all “high” caseloads are created equally. For example, Lindquist (2007) finds that circuits whose dockets have large proportions of criminal appeals and prisoner petitions exhibit lower rates of reversal, oral argument, and publication, supporting the contention that such case types are relatively “easy.” This is consistent with Posner (1996), who makes a distinction between “workload” and “caseload” in measuring pressure on circuit court judges. Posner, a circuit judge himself, even goes so far as to construct what he terms “effort indices” as a measure of the kinds of subject matter areas that require more

⁷ Suedfeld and Tetlock (1977) describe integrative complexity as “a dimension of information processing characterized at one pole by simple responses, gross distinctions, rigidity, and restricted information usage, and at the other, by complexity, fine distinctions, flexibility, and extensive information search and usage.”

⁸ Some work has tested hypotheses related to integrative complexity in a variety of political institutions and international conflict scenarios (see, e.g., Tetlock 1981, Guttieri, Wallace, and Suedfeld 1995). It should also be noted that, within the fields of psychology and management, there is a growing literature on decision making under conditions of uncertainty that often uses experimental research to study humans' information processing responses.

effort or that are more difficult (1996, 230-1). (These will be discussed in more detail in Chapters 3 and 4.)

Furthermore, we might expect that in high-workload circuits that hear a wide variety of case types, judges will have less frequent experience with more complex cases. The following quotes from circuit judges in Klein (2002) illustrate this assumption well:

“In anti-trust I don’t have enough to feel command of it. Search and seizure we have too much—I wish I would never see it again.”

“Every circuit is involved with [search and seizure]. Forty percent of our cases, if not more, are criminal; almost every one has some element involving a Fourth Amendment issue.”

“Just flat-footed, the thing that strikes terror in my heart is antitrust—when I hit one of those cases I will have to learn a lot. I’d need to do almost as much for an environmental case. I know much more about search and seizure.”

These statements also seem to highlight the idea that most criminal appeals are “routine” and not considered to be “complex” issue areas, particularly compared to more technical areas of law like antitrust.

In the judicial context, “inputs” in any given case are structured by the litigants in the appellate briefs, as judges rely on the briefs to determine the issues on appeal (Coffin 1994; Cohen 2002; Haire 2000). Therefore, the number and substance of issues raised by litigants in an appeal will be one factor in explaining the number and substance of issues raised by judges in an opinion. While scholars of the Supreme Court have devoted some attention to the concept of issue fluidity, in which the justices reshape the cases before them so they can advance their policy preferences (McGuire and Palmer 1995, 1996; Epstein, Segal, and Johnson 1996), the concept of issue complexity has received little attention, particularly at the Courts of Appeals level. Issue complexity, when defined as the number of issues raised, may make judges more likely to file a concurring opinion

than to join the majority and is negatively related to the likelihood of votes for reversal (Hettinger, Lindquist, and Martinek 2006).⁹ Issue complexity may also lead judges to rely more heavily upon litigants' framing of the issues (Haire 2000), and in highly technical areas of law, compel judges with less expertise and experience to look to other, more experienced judges when deciding whether to adopt a legal rule (Klein 2002). However, all of these analyses tend to view complexity as a control variable rather than a factor of central importance.

Two models that explicitly account for complexity's role in decision making processes are the bounded rationality and "garbage can" models from organizational theory. In using these perspectives to explain variation in legal clarity and consistency in the federal appellate courts, I am proceeding from the assumption that courts are, in fact, organizations. While I am not alone in this characterization (e.g. Fiss 1983; Seron 1986; Posner 1995; Cohen 2002; Lindquist, Haire, and Songer 2007), others, like Mohr (1976), prefer to conceptualize courts as decision-making systems, rather than as organizations.¹⁰ However, I follow Rainey (1997, 15) in defining an organization as "a group of people who work together to pursue a goal[,] do so by attaining resources from their environment," and use tasks and technologies to achieve effective performance of their goals. Under these general criteria, the federal courts may be considered to be organizations.

⁹ Hettinger, Lindquist, and Martinek (2006) propose two measures of case complexity that may cause judges to file separate opinions: the number of issues raised and the presence of a cross-appeal. However, cross-appeals are not significantly related to the probability of writing a separate opinion (concurring or dissenting), though they are significantly positively related to votes for reversal. In a 2007 work on mixed outcomes, the authors build on these conceptualizations and also create an index of complexity based on the number of issues raised and opinion length in pages. These alternative measures will be considered in subsequent chapters, as primary independent variables of interest rather than as merely controls.

¹⁰ Along similar lines, Heydebrand (1977) has argued that, first, we should look at courts as networks of organized activities rather than as integrated formal organizations or unitary systems, and second, that courts are passive organizations.

The first approach, the bounded rationality model, predicts that decisions will tend to be made by coalitions, rather than by a single individual, because of both individuals' cognitive limitations as well as difficulties in prioritizing and defining goals (Simon 1965). Working with his colleagues Richard Cyert and James March at Carnegie Mellon, Herbert Simon argued that firms did not make decisions as a single entity, as was commonly believed, but rather as many smaller coalitions that engaged in bargaining and collective decision making to combat goal ambiguity and uncertainty in the organizational environment (Rainey 1997, 25). Moreover, Simon's research on administrative decision making was among the first to challenge the prevailing notion held by most economists: that administrative decision making was fundamentally a rational process.¹¹ Under the bounded rationality model, decision makers engage in "satisficing" behavior, or selecting a satisfactory rather than ideal outcome in order to satisfy several goals at once and to satisfy all members of the decision making coalition. They then search in the immediate environment for quick solutions (Daft 2001, 412-413).

Given the practice of deciding cases via three-judge panels, the Courts of Appeals fit the model's description of coalition-based decision making. Based on the infrequency of dissent in the circuits, group decision making processes certainly appear, on their face, to produce norms of consensus and compromise (i.e. satisficing behavior). Finally, with the rapid increases in caseload per judge and caseload per panel (Cohen 2002, 7), judges have an increasingly limited amount of time to conduct extensive searches for information that might influence or strengthen the opinions generated. Posner (1996) contends that, in addition to the rising caseload, the courts' docket has also grown more

¹¹ Subsequent work by Richard Cyert and James March in *The Behavioral Theory of the Firm* (1963) provided empirical support for Simon's account of organizational decision making.

complex in composition.¹² Consequently, if complexity at the circuit leads to satisficing behavior by judges, then we should expect to see more consensus and compromise, as evidenced by fewer separate opinions.

The second kind of decision making model is the so-called “garbage can” model, developed by Cohen, March, and Olsen (1972) to describe decision making processes in organizations characterized by “rapid change and a collegial, non-bureaucratic environment” (Daft 2001, 420). The garbage can model (hereafter, GCM) is perhaps best characterized as a macro-level theory about organizational choice. Some note that the GCM may be best understood as an offshoot of bounded rationality theory (see Bendor, Moe, and Shotts 2001); however, for the purposes of this discussion, they will be treated as distinct theories.

Cohen, March, and Olsen begin their discussion of the garbage can model by talking about organized anarchies.¹³ These “organized anarchies” are “a collection of choices looking for problems, issues and feelings looking for decision situations in which they might be aired, solutions looking for issues to which they might be the answer, and decision makers looking for work” (Cohen, March, and Olsen 1972, 2). Organizations or decision situations that are organized anarchies exhibit the three following features: problematic preferences, unclear technology, and fluid participation. Problematic preferences mean that an organization more closely resembles a loose collection of ideas than a coherent structure, and tends to discover its preferences through action (and not the

¹² Posner (1996, 65-79) defines case complexity as having three components: the diversity of cases on the docket, the difficulty of individual cases, and the degree of unpredictability in what cases might come before the court.

¹³ Bendor, Moe, and Shotts (2001) distinguish between two variants of the GCM laid out in Cohen, March, and Olsen’s (1972) article, which they claim are incompatible. They term the first variant, the “verbal” or “informal” theory, which is to be distinguished from the computer simulation version. Consistent with Olsen’s (2001) reply, I rely on upon the first, or “verbal,” formulation of the garbage can to generate testable hypotheses about circuit judges.

other way around). Unclear technology is explained to mean that the organization's members do not understand its own processes, but instead operate by learning from the past and "pragmatic inventions of necessity" (Cohen, March, Olsen 1972, 1). Finally, fluid interpretation means that participants' involvement and investment varies widely, and the relevant audiences and decision makers for any given kind of choice also change frequently.

Cohen, March, and Olsen never explicitly say how many of these characteristics are necessary in order to classify an organization as an organized anarchy (see Bendor, Moe, and Shotts 2001, 173-4). Further, they argue that the garbage can model may take many forms, each of which is dependent on the load and the organizational structures to influence behavior (Cohen, March, and Olsen 1972, 11).¹⁴

In applying these characteristics to the U.S. Courts of Appeals, two out of the three appear to fit the circuit courts relatively well at first blush. Fluid participation is the most obviously applicable given the practice of rotating panel assignments and the variation in the courts' audiences. Judges' involvement also varies, depending on whether a judge is responsible for opinion assignment on a panel, writing an opinion, or sitting on a motions or other special panel. However, the second criterion of unclear technology also fits insofar as courts, by relying upon precedent, learn from past experiences and "pragmatic inventions of necessity" (Cohen, March, and Olsen 1972, 1).

The other characteristic, problematic preferences, arguably does not apply to the federal appellate courts, as they are certainly a "coherent structure" more than a "loose

¹⁴ One example of the GCM's application to real-world organizations can be found in John W. Kingdon's 1984 book on policymaking, *Agendas, Alternatives, and Public Policy*, in which he argues that the federal government conforms to the "garbage can" typology with some minor modifications. For a countervailing view of the GCM's applicability to public policy questions, see Mucciaroni (1992).

collection of ideas.”¹⁵ That being said, what the GCM describes is essentially an organization that is not hierarchical in its structure, but rather made up of relatively autonomous actors and parts. If we adopt this understanding of problematic preferences instead, the courts of appeals do fit this description in two ways. First, generally speaking, the judges are autonomous actors who operate with relative independence; many if not most have chambers in multiple locations throughout the region, all have their own legal and administrative staff, and they do the work of preparing for cases and writing opinions largely on their own terms. In the second place, circuit court judges operate in a non-hierarchical organizational structure, with no immediate supervisor to sanction them under most conditions.¹⁶ Given these structural characteristics, the U.S. Courts of Appeals share some important commonalities with the organization described by the GCM.

The GCM also argues that decisions are the outcome of several relatively independent streams within an organization. The four streams consist of problems, solutions, participants, and choice opportunities. The “garbage can” moniker is derived from the idea that a choice opportunity is like a garbage can where different problems and solutions are dumped by participants as they are created. Outcomes are dependent upon the combinations of problems and solutions “dumped,” how many garbage cans there are, and how quickly existing garbage is taken away. It is not a rational process by which a problem is identified, possible solutions are considered, and participants make a

¹⁵ Incidentally, Kingdon (1984) makes a similar qualification in his application of the GCM to the federal government, noting that more emphasis should be placed on the “organized” part of the “organized anarchy” descriptor than the “anarchy” part.

¹⁶ To illustrate, the chief judge of the circuit has no power to affect the salaries of the judges in her circuit, since they are determined by Congress and have been adjusted relatively infrequently in recent years. Congress is a distant principal that does very little on a regular basis to monitor individual judges, except in rare instances of judicial misconduct, for example.

choice about the best solution to correct the problem. Indeed, the authors claim that decision makers and problems tend to track each other through choices.

As applied to the circuit courts, we might identify judges and litigants as the participants, and cases and opinion authoring as choice opportunities. Problems, defined by Cohen, March, and Olsen as “the concern of people inside and outside the organization” (1972, 3), in this context refer to broader issues related to interpreting the law and balancing interests in a democratic society; for example, the tension between crime control and individual liberties, or weighing the government’s interest in regulation against economic freedom. Solutions might include legal rules, circuit and Supreme Court precedent, or even new jurisprudential doctrines not yet tried out by judges in a given circuit. Any and all of these examples of solutions may be colored by a judge’s ideological predisposition (i.e. liberal or conservative) and style of jurisprudence (i.e. original intent, plain meaning, etc.). Thus, if circuit courts behave consistent with the GCM, judges develop an affinity for certain kinds of problems and have preformed solutions waiting for when they are chosen to hear a case, or when they author an opinion (majority, concurring, or dissenting). This is not to say that judges have completely made up their minds prior to hearing a case, but rather that they do not come to each case with a blank slate.¹⁷

¹⁷ It may be argued that courts are simply not engaged in the kind of problem solving envisaged by the GCM, since they are too constrained by legal rules and reasoning, or by policy preferences, for any outcome to be possible. Certainly, there are many cases where the application of law to the case facts is relatively straightforward, and all three judges agree on the final disposition; however, even in these cases, each judge may have his or her own ideas about the language and reasoning behind the outcome, in terms of how narrowly or broadly the opinion is written, the interpretive approach used, the citation of particular precedents or legal rules (from the same circuit or outside circuits) in support of a position (e.g. Klein 2002), or even citation of non-legal sources, such as scientific studies. While it is true that the universe of possible decisions that a panel may make is limited by professional and institutional norms, there is nothing in the GCM that specifies that any outcome must be possible for the model to apply to an organization.

Consequently, if complexity at the circuit level leads to a garbage can style of decision making, then the result might be less stability in the law. This could manifest itself as randomness in legal outcomes, leading to an increased number of en banc panels. It might also cause the district courts to make more errors, resulting in a high reversal rate in circuits with high levels of environmental complexity.

2.4 Concluding Comments

Studies on judicial decision making have long benefited from the cross-pollination that has occurred from theories and approaches from disciplines outside of political science (see Baum 1997). Economics, psychology, history, sociology, and the law are just a few such examples. However, organizational theory is one area that has not received much sustained attention in the judicial decision-making literature. The bulk of existing research using the organizational theory approach was conducted in the 1970s and 80s by scholars primarily focused on the criminal process and trial courts (Feeley 1973; Coffey 1974; Eisenstein and Jacob 1977). However, Mohr (1976) argued that the application of organizational theory to the study of the courts could produce fruitful hypotheses if scholars were to focus on (1) decision making in the courts rather than courts as organizations *per se*, and (2) how structure and goals are influenced by environmental factors.¹⁸

In this study, while I do proceed from the assumption that courts are organizations, my focus is on the impact of organizational characteristics and structures on the legal clarity and consistency of decision making outcomes. Clarity and

¹⁸ The work of Heydebrand (1977) on case disposition in the federal district courts is a notable application of this recommendation, as Heydebrand modeled case outcomes as dependent on the environmental profile of the jurisdiction, the complexity of the task structure, and resources.

consistency are especially important in the U.S. Courts of Appeals because for most litigants in federal court, they represent the highest court that will hear their claim, and because their interpretation of federal, statutory, and regulatory law is authoritative, save for Supreme Court reversal (Hettinger, Lindquist, and Martinek 2006).

Legal consistency can assist potential litigants and judges by making an area of the law more predictable (Klein 2002; Merryman 1954; Johnson and Canon 1984). Consistency can be equated with fairness and equal treatment under the law, as “likes are treated alike” by different panels. Furthermore, consistency discourages unnecessary litigation because it reduces “uncertainty about what the law requires or permits” (Hellman 1989, 544). There is some indication that judges value legal consistency as an important goal, as evidenced by this quote from one circuit court judge: “I think that you should measure circuit excellence by the uniformity of the law it promulgates...I evaluate by asking if the circuit stays fairly current and generates a coherent, consistent, cohesive body of law” (Klein 2002, 17).

Legal clarity is conceptually related to consistency in that it provides a greater degree of certainty in the law for both litigants and judges seeking to discern and apply precedent. Moreover, clarity may be considered a necessary but not sufficient condition for achieving consistency in a body of law, since knowing what previous panels have ruled can aid a subsequent panel in following the rule established by those earlier cases.

Legal clarity may increase the judiciary’s legitimacy in the public eye. A court that speaks with one voice minimizes the impression that interpretation of the law is a subjective undertaking, as it lacks the “alternative” interpretations posed in concurrences

and dissents.¹⁹ Unanimity can also be a way for a court to communicate that it has had the “last word” on a particularly vexing legal question and that it has been “settled.”

For example, in *County of Lewis v. Allen* (163 F.3d. 509, 9th Cir. 1998), local Idaho law enforcement officers were called to the Nez Perce Indian reservation to investigate a domestic violence complaint against a tribal member, John Allen. When the officers arrived on the scene, Allen, who was intoxicated, challenged the deputies to a fight and was subsequently arrested on charges of disturbing the peace (for which he was later acquitted). Allen filed suit against the county in tribal court, alleging false arrest and civil rights violations, and was awarded just over \$12,000 in damages by a jury of six Nez Perce tribal members. The county challenged the jurisdiction of the tribal court, arguing that the tribe had made an agreement with the state to consent to state jurisdiction over certain misdemeanor crimes. Because the implications of the tribe’s argument would be to expand greatly tribal court jurisdiction over non-members, the Ninth Circuit reheard the case en banc and issued a unanimous opinion on the allowable bounds of tribal jurisdiction.²⁰ A clear, unified resolution was important in this case, as the court noted that jurisdictional disputes are among “the most complex problems in the field of Indian law” (163 at 513).

Similarly, intracircuit consistency can also boost public perceptions of the legitimacy of law within a circuit (i.e., that a given decision by a panel is due to more than simply “the luck of the draw”). Perceptions about the existence of conflicting panel

¹⁹ In recent times, the Supreme Court has come under fire by some for increasingly failing to speak with one voice (Gerber and Park 1997, Sracic 2000).

²⁰ While it is true that the Ninth Circuit utilizes mini-en banc procedures (in which fewer than all active judges sit to rehear a case), this example is merely illustrative, as unanimous en banc opinions occur in all circuits. However, unanimous en banc opinions do represent a minority of en banc disposition (see Solimine 1988-9, for a discussion of reasons for this phenomenon related to probability and judge ideology).

decisions have repeatedly led to calls for dividing the U.S. Court of Appeals for the Ninth Circuit, driven by concerns about size (i.e., the number of judges) and workload. These concerns have also been echoed by legal practitioners, including circuit judges (Wasby 1979) as well as lower court judges and lawyers. For instance, Arthur Hellman (1989, 543) describes a 1987 survey by the Circuit Executive's Office that found that more than half of all attorneys and a quarter of all district judges interviewed disagreed with the statement: "There is consistency between [Ninth Circuit] panels considering the same issue." However, given the burgeoning caseloads in all twelve regional circuits, and the relative infrequency of en banc review, there is be good reason to suspect that inconsistency afflicts all of the Courts of Appeals to some extent (Wasby 1979).

Institutional features of a court may affect the extent to which the court is able to speak with one voice and create a consistent, coherent body of law. For instance, scholars have observed differences in concurring and dissenting behavior from a judge's service on the U.S. Courts of Appeals compared with his or her service on the Supreme Court (Gerber and Park 1997). While concurrences and dissents are relatively rare in panel decisions in the Courts of Appeals, they are quite common in the Supreme Court, suggesting that institutional norms about unanimity may influence a judge's propensity to write separately.²¹ Moreover, the sheer workload, relatively large number of judges, and rotating panel structure of the Courts of Appeals increases the chances that two or more panel decisions on similar issues may conflict with one another, thus reducing

²¹ It is important, however, to note that the Courts of Appeals' tendency to avoid dissenting and concurring opinions does not necessarily mean that the judges are more ideologically cohesive or rarely disagree. Rather, institutional arrangements (random rotation and high workloads) tend to suppress conflict that would otherwise be expressed as dissensus (Goldman 1975, Atkins and Green 1976).

consistency. In sum, I argue that clarity and consistency of legal outcomes are, in part, driven by the organizational context in which decision making takes place.

Because the relationship between organizational characteristics and legal outcomes likely operates on several levels, I will begin by modeling each of these processes separately at the circuit, panel, and individual judge levels. However, since outcomes at the individual level are also likely conditioned by contextual factors at the panel and circuit levels, I will also take these considerations into account in constructing a hierarchical model and in conducting my interviews with circuit judges. The next chapter will consider how these processes operate in terms of circuit-level outcomes.

Chapter 3: Circuit Behavior

In this chapter, I will consider how organizational characteristics shape legal outcomes in the aggregate, by looking at circuit level processes. In so doing, I follow Lindquist, Haire, and Songer (2007) by examining courts as institutions.

Institutional-level studies of courts in political science have tended to utilize so-called strategic theoretical frameworks to analyze the behavior of institutions as actors. In strategic models, the most commonly asserted motivations for courts' behavior are, in no particular order, self-preservation, public legitimacy, and policy preferences (e.g. Murphy 1964; Marks 1989; Epstein and Knight 1998). Perhaps the most oft-given example of the first of these, self-preservation, is the common explanation of the Supreme Court's decision in *Marbury v. Madison* (but see Clinton 1994). In *Marbury*, the Court recognized that united government under the Jeffersonian Republicans might lead to blatant disregard of a ruling in favor of William Marbury and might even hasten impeachment proceedings against some of the justices. Public legitimacy as a goal can really be seen as a form of self-preservation, for if the citizenry rejects the judiciary and its rulings as illegitimate, and the other branches fail to step in, the judicial institution becomes ineffectual.¹

Finally, the judicial institution has been said to act in furtherance of its aggregate policy preferences or ideological position. As Epstein and Knight (1998) note, however,

¹ For example, Justice Breyer's dissent in *Bush v. Gore* expressed deep reservations about the Court's fractured decision eroding public confidence in the Supreme Court.

the judiciary is not unconstrained in pursuing its most preferred policy outcome; it must consider the preferences of other political institutions, given how the system of checks and balances produces interactions among the branches. Said another way, “they must take account of this institutional constraint by formulating expectations about the preferences of the other relevant actors and what they expect them to do when making their own choices” (Epstein and Knight 1998, 140).

Though the strategic account appears quite intuitive at first glance, a number of limitations exist when it comes to testing its expectations empirically, particularly in the case of models that look at interactions among or between institutions at the same level of government (e.g. Marks 1989; Eskridge 1991; Gely and Spiller 1990). Segal (1997) details a laundry list of complaints about the underlying assumptions of such models in his 1997 empirical test of Brian Marks’ separation-of-powers game.² Among these is the assumption that all players possess complete and perfect information, the assumption of exogenous judicial preferences (when justices are nominated by the President and confirmed by the Senate), the assumption that the Court relies only on statutory bases for its decisions (when it can make it far more difficult for Congress to retaliate by “upping the ante” and deciding a case on constitutional grounds), and finally that Congress is assumed to have limited veto points, to pass legislation without transaction or opportunity costs, and to have the last move in the separation-of-powers games (Segal 1997, 31-33). It should be noted that neither Segal (1997) nor Sala and Spriggs (2004) find empirical support for the Marksian strategic account of inter-institutional behavior.

² Marks’ unpublished 1997 dissertation is frequently cited as the first incorporation of the judiciary into a game theoretic separation-of-powers model.

However, these criticisms do not pose significant problems for my analysis of circuit courts as institutions, since this study does not attempt to model interactions between or among political institutions, but rather variation across one particular type of institution. Furthermore, because the analysis in this section does not attempt to explain individual judge behavior using aggregate measures, it does not fall prey to the ecological fallacy (Babbie 2001), another common pitfall of institution-level analysis.

Rather than approaching the question of institutional behavior from a formal modeling perspective, I argue that circuit courts as organizations and institutions may plausibly behave in a manner consistent with the garbage can model or the bounded rationality (“satisficing”) model. As discussed in chapter 2, several aspects of the GCM seem to fit the Courts of Appeals relatively well. These include fluid participation of decision makers (i.e. random selection of three-judge panels), reliance on past experiences and “pragmatic inventions of necessity” (i.e. circuit precedent and internal operating rules and norms), and the confluence of problems, solutions, participants, and choice opportunities (e.g. certain judges may have particular “solutions” in terms of legal rules, interpretive approaches, or policy preferences that they wish to apply to particular kinds of “problems,” or disputes, and are waiting for the right “choice opportunity” or case to do so).

Alternatively, the Courts of Appeals, as organizations, may behave consistent with the satisficing account, because decisions must be made by a coalition of judges and thus require negotiation and compromise to achieve a majority opinion. Collective decision-making structures characterize not only the work of three-judge panels, but also en banc rehearings and motions and screening panels. Indeed, internal operating

procedures and norms strongly discourage judges from “going it alone.” As one Ninth Circuit judge put it: “[After] the eleven of us...hear an en banc case, we go into the conference room, and you don’t start talking about the case until everybody’s out of the bathroom” (confidential interview, February 2008).

In addition to organizational norms and structures that promote group decision making, workload levels are high enough to limit exhaustive information searches, consistent with the satisficing account of decision makers looking in the immediate environment for quick solutions. Particularly in their published opinions, appeals court judges must contend with the competing values of producing a well-reasoned rationale for their decision *and* the speedy delivery of justice, in spite of the huge numbers of cases. One “coping mechanism” documented by Cohen (2002) and others is the high frequency with which judges delegate research and writing tasks to their law clerks. (With one notable exception, my interviews in Chapter 5 support this characterization as well.) Another such tactic is the bench memorandum pools in the Ninth Circuit (in which the law clerks for all three judges on a panel combine their efforts, rather than writing three separate memos). In these and other ways, judges’ response to their workload in the face of time constraints may produce, at the organizational level, behavior consistent with the bounded rationality account.

Data

To test whether these models of institutional behavior bear out empirically, I utilize data from the Federal Judicial Center and the Administrative Office of the Courts

on the First through Eleventh circuits from 1983 to 2002.³ Again, the variables represent an aggregate level view of the courts and should not be interpreted to reflect on judges' behavior at an individual level.

Dependent variables: legal clarity and consistency

Legal clarity and consistency offer a number of benefits. As Klein (2002, 17) explains, citing Merryman (1954): “[C]onsistency helps not only potential litigants, who can undertake actions with greater certainty about outcomes, but also judges themselves, whose work becomes easier as an area of law becomes more settled.” Indeed, one of Klein’s circuit judges remarks that “[Y]ou should measure circuit excellence by the uniformity of the law it promulgates...There are lots of good judges all over—some who make no effort to get attention, others who do lots to. I evaluate by asking if the circuit stays fairly current and generates a coherent, consistent, cohesive body of law” (Klein 2002, 17). In addition, one might imagine that maintaining a reputation for clarity and consistency would bolster the institutional legitimacy of the courts in the eyes of the public (see Johnson and Canon 1984).⁴

Individual circuits utilize varying practices to promote consistency of the law they promulgate. Table 3.1 outlines some of these different tactics during the late 1990s, as reported by McKenna, Hooper, and Clark (2000). Some of these include identifying pending issues that exist in multiple cases, pre-filing circulation of opinions, and grouping cases that raise similar issues or that are from a related dispute in case

³ I would like to acknowledge Susan Haire, Stefanie Lindquist, and Donald Songer for graciously sharing previously compiled datasets with me.

⁴ For a discussion of intracircuit consistency based on interviews with circuit judges and district court judges in the Ninth Circuit, see Wasby (1979).

assignment. In the literature, Klein's 2000 study is concerned with consistency and coherence, though the focus is primarily on how these concepts relate to the adoption of legal rules. Because I am primarily concerned with how organizational characteristics shape such legal outcomes, I will operationalize legal clarity and consistency somewhat differently, using multiple measures of each concept.⁵

Fragmentation of a court's decision in some way, either in the consensus of the judges or in the court's holding itself, affects the legal clarity of that decision. Hettinger, Lindquist, and Martinek (2006, 19) explain that "[c]onsensual decision making helps promote the perception that law is *not* political in nature—and thus subject to the influence of individual judges—but rather is uniformly and impartially applied." When judges file dissenting opinions, they air their disagreements about the majority's representation of the facts or the law in a case, and implicitly communicate to district court judges and attorneys how the case could have gone another way. To capture this effect, I include a measure for the dissent rate in a circuit, calculated as the raw number of dissenting opinions obtained from Westlaw, divided by the number of merits terminations per circuit per year (Lindquist 2007). Figure 3.1 shows variation in the frequency of dissent across the circuits from the 1980s until 2002.

A second way to look at legal clarity has to do with fragmentation in the holding of the court. A panel's decision to affirm the district court, or to reverse it, sends a strong signal to the lower court about the correctness of its result or its reading of circuit precedent. In contrast, decisions to affirm in part and reverse in part reflect a more nuanced treatment by a panel, requiring other circuit judges and district judges to parse

⁵ I recognize that there are multiple dimensions to the concepts of clarity and consistency, and that the aspects that I have chosen to focus upon are by no means the only way such concepts may be defined.

the opinion carefully to discern which aspect were acceptable and which were not. It is possible that different judges, in interpreting such a holding, may draw the line in a different place. By narrowing a ruling to, for instance, affirm on question A and reverse on question B, a panel's decision may have the effect of attracting more litigation by highlighting ambiguities in the law (e.g. but what happens when question A is paired with question C?). Moreover, a split decision may be ambiguous in the sense that there is no clear winner or loser.⁶ When viewed in the aggregate, courts that frequently render split decisions may not be sending a clear message to district court judges, administrative agencies, and attorneys about what the law is (and is not). To account for this aspect of legal clarity, mixed outcomes are measured as the proportion of published decisions to affirm in part and reverse in part, for each circuit in each year (see Figure 3.2).

For legal consistency, I also use two different proxies. The rate of district court reversal will be measured as the percent of merits terminations that reversed district court judgments in a circuit in one year.⁷ This measure reflects the circuit court's supervisory role in overseeing the lower courts in its circuit for consistency both with circuit precedent as well as Supreme Court precedent. It should be noted here that since 1960, the rate of lower court reversals has been in a steady decline. One explanation for this phenomenon may be the increases in caseload for the circuit courts during this time; under this view, when there is less time, judges may reverse less and affirm more. Another explanation is that the proportion of the courts' docket that is devoted to criminal appeals and prisoner petitions has increased substantially since 1960, and these are often easier to dispose of, since many are meritless (Posner 1996, 58-64). During the period of

⁶ See Lindquist, Martinek, and Hettinger (2007) for a thorough discussion of the advantages of such ambiguity in outcomes.

⁷ This information was obtained from the Administrative Office of the Courts.

this study, the mean reversal rate for all circuits ranged from around 16 percent in the early 1980s falling to closer to 9 percent during the last half of the period.

Individually, the average reversal rate for each circuit range from a low of 8.7 percent in the Second Circuit to a high of 13.8 percent in the Fifth Circuit, with the median circuit value at 11.5 percent. Figure 3.3 shows the yearly fluctuation in lower court reversals for each circuit from 1982-2002, illustrating trends in both circuits and across time. Overall circuits, there is a moderate negative correlation (-.45) between the reversal rate and the proportion of merits terminations that are criminal or prisoner appeals, providing some support for Posner's contention. There is also a weak negative correlation between reversal rates and the number of merits terminations per judge (-.35), which suggests that the overall workload of a circuit may affect its ability, or inclination, to oversee district courts.

The second proxy for consistency is the frequency of en banc review in a circuit in a given year, measured as the number of en bancs out of all merits terminations. En banc review differs from the regular practice three-judge panels because it convenes all active judges in a circuit to rehear a case. According to the Federal Rule of Appellate Procedure 35, en banc review should be granted under any of three conditions: conflict with a Supreme Court decision, conflict with circuit precedent, or an issue of extreme importance. In 1998, the rule was amended to include intercircuit conflict as grounds for en banc review (McKenna, Hooper, and Clark 2000). Clearly, consistency of law is the goal behind en banc review; however, it should be noted that the reality is that it is relatively infrequently granted.⁸

⁸ En banc review requires all active sitting judges to sit together to rehear a case decided previously by a three-judge panel of that circuit. However, the 1978 Omnibus Judgeship Act authorized circuits with more

In Figure 3.4, the box plots show the distribution of en banc rehearings across the circuits. The Ninth Circuit has the widest range, though its median value is actually below those of the Fourth and Fifth circuits and roughly equivalent with the Eleventh Circuit. The First and Second Courts of Appeals utilized en banc rehearings the least during the 1982-2002 era.

Independent variables

Organizational demography of the circuits

In general, increasing diversification of the bench, with respect to gender, race, and ethnicity, characterizes the period of this study, which includes the presidencies of Ronald Reagan, George H.W. Bush, William J. Clinton, and George W. Bush. Spill Solberg (2006) suggests a number of mechanisms by which a circuit may become diversified. Perhaps the two most often studied are the president's appointment goals (e.g. Clinton's pledge to appoint more women and minorities as judges) and the ideological composition of the Senate (both the Judiciary Committee as well as the body as a whole). However, neither of those factors makes a difference in the absence of positions to fill, so the presence of vacancies and the creation of new seats are also important.⁹ For example, Presidents Reagan, G.H.W. Bush, Clinton, and G.W. Bush successfully nominated a total of eight women, two African-Americans (both male), and two Hispanics (both male) to newly created seats (Spill Solberg 2006).¹⁰ In terms of

than fifteen active judges to perform en banc review with fewer than all judges. This exception is currently utilized only by the Ninth Circuit (McKenna, Hooper and Clark 2000).

⁹ Spill Solberg also argues that the political culture and demographic make-up of the circuit's comprising states set the stage for diverse appointments, though favorable conditions may be tempered by the relative prestige of the circuit since "women and minorities may have a more difficult time obtaining seats in more prestigious institutions" (2006, 251).

¹⁰ Broken down by president, the figures for appointments to new seats (not existing seats) are as follows: Reagan (4 white women, 1 Hispanic man), GHW Bush (1 white woman), Clinton (two white women, two

maintaining or increasing overall levels of diversity in existing seats, Presidents Clinton and GW Bush (through 2002) were more successful than either of the Republican presidents of the 1980s.

Critical mass theory argues that when groups that are in the minority of an organization reach a certain proportion,¹¹ they become individuals who are differentiated from one another and can form coalitions to change an organization's culture (Kanter 1977, 209). Likewise, when the proportion of such individuals falls below the critical mass point, these individuals are seen as "tokens" and may be more likely to adopt the behavior of the dominant group in order to fit in with them (Kanter 1977, 933). Studies of legislative bodies have provided some support for this hypothesis (Saint-Germain 1989; Thomas 1991, 1994; but see Bratton 2005).

Applying critical mass theory to the Courts of Appeals, we might expect that, as the composition of a circuit becomes more heterogeneous in terms of gender and race, the decision-making environment may become more "complex" in the sense that white, male judges face a changing organizational culture in which norms and communication-interaction styles may be in flux. However, research from organizational demography provides conflicting expectations with respect to workplace heterogeneity and organizational performance.¹² On the one hand, greater heterogeneity may lead to more

African-American men, one Hispanic man), and through 2002, GW Bush (zero) (Spill Solberg 2006, 257). These numbers include the Federal Circuit in addition to the 11 numbered circuits and the DC circuit.

¹¹ Kanter suggests that the precise number for critical mass may range from fifteen to thirty-five percent; however, most scholars using the critical mass approach tend to choose fifteen percent (e.g. Saint-Germain 1989; Grey 2002; Bratton 2005).

¹² Many of the studies that examine the impact of workgroup heterogeneity are based on experimental research, or alternatively, focus on diversity in private organizations. Consequently, their applicability to the public sector in general, and court organizations in particular, may be limited. For a comprehensive review of the literature and findings on workforce diversity that spans disciplinary boundaries, see Milliken and Martin (1996). In general, the authors find that diversity may at first hamper organizational performance, but over time, these negative consequences may fade as the group becomes more cohesive.

diverse perspectives and fuller deliberation and debate during decision making; on the other, it is argued that homogeneous groups foster trust and cohesion and are better able to facilitate communication among group members during decision making (see Pitts 2005, 618).

To capture the concept of judicial heterogeneity, I measure the racial and ethnic composition of the circuits, as well as the gender composition (see Figures 3.5 and 3.6). For each circuit in each year, I use the proportion of judges who are African-American, Hispanic, or Asian, as well as a separate measure indicating the proportion of active judges who are female. This measure also includes judges on senior status, since they handle significant numbers of cases (on average, during the period between 1982 and 2002, thirteen percent of terminations on the merits involve participations by senior judges) and are likely continue to influence the organizational culture of the circuit (Haire, Holmes, and Spill Solsberg 2006). Figure 3.7 shows the variation in the use of senior judges by circuit during the time period studied.

Ideological composition of the circuit

Another important organizational characteristic of a circuit that likely influences the clarity and consistency of its law is the ideological composition of the circuit (see Table 3.2). A long line of literature has shown that judicial ideology is a relatively consistent predictor of judicial votes in the Courts of Appeals, though it is not the only, or most important, determinant (e.g. Goldman 1975; Songer and Davis 1990). However, for the purposes of this analysis, it is not the ideological direction of a circuit's decision that matters; rather, it is the degree of heterogeneity of the judges in a circuit, with respect to

ideology, that may affect the circuit's outputs. A circuit that has relatively little dispersion in judge ideology (e.g., a predominantly conservative circuit) will likely find it relatively easy to come to consensus and produce clear, consistent law. On the other hand, a circuit with greater variance in ideology may struggle to achieve either clarity or consistency.

Rather than simply using the party of the appointing president as a proxy for ideology, I operationalize a circuit's ideology using the Giles, Hettinger, and Peppers (2001) scores, which take into account a president's ideology as well as the ideology of home state senators when senatorial courtesy is present.¹³ After assigning an ideological score to each judge in a circuit, I calculated the standard deviation for each circuit as a measure of dispersion.

Task routineness

The degree to which a circuit's docket is homogeneous in terms of the cases it hears may affect the clarity and consistency of the law it produces. In his work on organizational technology, Charles Perrow (1973) developed a typology in which tasks were classified on the basis of their predictability and analyzability. Routine tasks are those with high predictability and high analyzability, in terms of the utility of established procedures in dealing with exceptions or variations (see Rainey 1997, 48). Because high levels of task routineness may reduce complexity in decision making, I follow

¹³ Unlike using the party of the appointing president as a proxy for judge ideology, Giles, Hettinger, and Peppers derived this measure from the Poole (1998) common space scores, which allow for variation in ideological preferences. The ideology scores range from -1 (most liberal) to 1 (most conservative) and takes the value of the president's score when senatorial courtesy is absent or the value of the home state senator if senatorial courtesy is present. If there are two senators of the same party as the president, their common space scores are averaged.

Heydebrand (1977) and incorporate a measure for the proportion of different case types represented in published opinions.¹⁴ I expect circuits with lower levels of task routineness to exhibit less clarity and consistency.

Size of circuit

It is commonly asserted in calls for splitting the Ninth Circuit that the large number of judges is unwieldy. For example, in his September 20, 2006, testimony before the Senate Judiciary Committee, John C. Eastman asserted: “Now with 28 active judgeships, there are simply too many cases and too many judges in the Ninth Circuit to effectively administer justice in an effective and cohesive manner” (cited in Lindquist 2007). In fact, Lindquist (2007) does find that, as far as the Ninth Circuit is concerned, its size does appear to affect case processing. Similarly, several of Cohen’s interviews with circuit judges reveal a concern that increasing the numbers of judges reducing the consistency of the law coming out of a circuit (2002, 161-2):

“I think [the large number of judges on the court] makes it harder for us to speak with a coherent voice and to maintain a body of law that is predictable and ascertainable...So the more judges you have, the harder it is to keep everybody on the same sheet of music.”

“I think for the practitioner, having a smaller court is somewhat desirable for predictability.”

“Because we have so many cases coming out so often, it is possible for people to decide [similar] cases the same week...So it is possible in one week to have two cases come down that are absolutely opposite to each other. Or it may have come down last week, and you just haven’t gotten to it. It is such a big circuit that handling your own cases, keeping up on your own cases, is just a huge job.”

Because of the suggestive anecdotal evidence and earlier empirical findings from Lindquist, I include a measure for the number of active resident judges in a circuit,

¹⁴ The Songer and Kuersten and Haire databases include two fields for case types, and this measure utilizes both of these (i.e. I appended CASETYPE2 to CASETYPE1 and then calculated the number of unique case types represented).

excluding senior and visiting judges. In addition, because the effect of the gender, racial, and ideological composition of a circuit may differ depending on the number of judges, I also include multiplicative terms that interact size with the proportion of women, non-white judges, and ideological dispersion.

Workload

As a circuit judge himself, Richard Posner has observed that there is an important distinction between the concept of caseload and that of workload:

“[F]igures on case filings cannot tell the whole story about judicial workload ... Statistics on appellate caseloads are particularly misleading indications of workload because they are based merely on the number of notices of appeals filed. The notice of appeal—which is filed in the district court and simply identifies the parties and the order being appealed—is, as a practical matter, nothing more than a statement of an intention to appeal. Because it requires much less preparation than a complaint, it is a weaker commitment to proceed than the filing of a complaint is... It would be no commitment at all, were it not for the filing fee, which is not refundable if the appeal is abandoned” (Posner 1996, 64-67, footnote 9).

Posner goes on to distinguish between procedural terminations and terminations on the merits, noting that the latter are more time-consuming and perhaps a better proxy for workload than the former (2007, 67-70). For this reason, I rely on the number of terminations on the merits as my measure of circuit workload. The Ninth, Fifth, and Eleventh circuits have the highest number of terminations over the entire period studied, while the First, Seventh, and Tenth have the fewest (see Figure 3.8). However, the effect of a court’s workload is likely dependent on not only the raw number of cases, but rather the number of cases per judge, in order to account for circuit size. In her study of circuits as organizations, Lindquist (2007) does not find a significant relationship between workload and reversal, nor does she find one between workload and dissent rates.

Difficulty of cases

Another aspect of workload that plausibly relates to legal outcomes has to do with the nature of the cases heard by the circuit. Posner notes that a comparison of selected years [1960, 1983, 1992, 1993] over all circuits suggests that “the fraction of consistently difficult cases [admiralty, taxation, antitrust, intellectual property] ... in the docket of the courts of appeals is falling at least when difficulty is measured by likelihood of a case’s being disposed of by means of a signed opinion, while the percentage of easy cases (prisoner cases) is rising” (1996, 77).

To account for the general level of difficulty in a circuit’s docket, I use the proportion of total filings that are criminal appeals and prisoner petitions as a rough measure (see Figure 3.9).¹⁵ Looking at each circuit over the entire period studied, the three circuits with the highest proportions of such cases are the Eleventh Circuit (55 percent), the Fourth Circuit (53 percent), and the Eighth Circuit (50 percent). The First Circuit ranks at the bottom, with only 37 percent of its terminations attributable to criminal appeals and prisoner petitions.¹⁶

Visiting judges

Circuits use active resident judges, senior judges, and visiting judges from outside the circuit (either district court judges sitting in designation or other appellate judges, active or senior status, from other circuits) to dispose of cases. So-called “extra” judges play a central role in the regular disposition of cases because of the circuits’ burgeoning

¹⁵ Other, more precise measures will be used in the subsequent chapters for the panel and individual level analyses.

¹⁶ Looking at each category by itself produces slightly differing results. In criminal appeals alone, the Eleventh Circuit has the highest percentage of terminations in criminal cases (37 percent), while the Third, Fourth, Seventh, and Eighth all have the lowest, around 21 percent. The Fourth Circuit has the highest proportion of prisoner appeals at 31 percent, while the First Circuit only has 10 percent of its merits terminations that are prisoner petitions.

workload; for example, Posner (1996) observes that in 1993, visiting judges sat on 49.6 percent of argued courts of appeals panels. Writing in 2001, Brudney and Ditslear note that district court judges alone “helped decide more than 75,000 cases since 1980” (565-6). Figure 3.10 shows the distribution of visiting judge participations for each circuit.

The increased use of visiting judges, particularly district court judges sitting in designation (either from within a circuit or from another circuit) and circuit judges from other circuits, has provoked strong criticism by legal scholars and practitioners concerned with the implications of this particular solution to high workload (e.g. Saphire and Solimine 1995). Reliance upon visiting judges may undermine uniformity in circuit law (see Saphire and Solimine 1995; Posner 1996, 135-6), exacerbate coordination and communication problems in more geographically dispersed circuits (Wasby 1980-1, discussing the Ninth Circuit), and actually contribute to workload increases in the district court (Benesh 2006, 302). It should be noted that many of these objections do not apply to senior judges sitting in their own circuit, since they are ostensibly familiar with circuit norms and precedents and do not hear appellate cases in addition to a full regular docket of cases in their home courts, as with other visiting, non-senior judges.

However, empirical findings are somewhat mixed on whether visiting judges are a “drag” on circuit court processes. Solimine (1988) finds that, over a two-year span, panels with visiting district court judges were more likely to have their decisions reviewed en banc—a finding consistent with the complaint that visiting judges’ contributions are often of a lower quality than those of judges sitting in their home circuit. In terms of output, two studies of visiting judges in all appeals found that these judges neither shirk nor take on more work than their circuit colleagues (Green and

Atkins 1978; Saphire and Solimine 1995). However, more recent work looking at subsets of appeals (Brudney and Ditslear 2001) and the Ninth Circuit (Benesh 2006) suggests that visiting judges are less likely to author opinions or write separately. Senior judges in the Ninth Circuit, on the other hand, wrote more than their expected share of majority opinions (Benesh 2006, 311). In sum, this evidence suggests that we should expect circuits that rely heavily upon visiting judges to exhibit higher levels of legal inconsistency and lower levels of legal clarity.

Garbage can hypotheses

The garbage can model suggests that higher levels of organizational complexity may produce randomness in legal outcomes, resulting in circuit legal doctrine that is less clear and consistent. This tendency would likely be worse in larger circuits with more judges because of coordination problems, and in circuits that rely heavily on the services of visiting judges. Similarly, the garbage can model leads us to predict that greater heterogeneity with respect to the demographic diversity and ideological spread of judges on a circuit will lead to less legal clarity and consistency. Given the expectations for size, we might expect this tendency to be exacerbated in larger circuits, in which judges have fewer opportunities for interaction together on panels. More variability in the kinds of cases heard as well as higher workloads may also reduce legal clarity and consistency.

Judge-related factors

H₁: Circuits that are more heterogeneous with respect to the gender and racial diversity of judges will have a greater rate of en banc decisions, district court reversals, and mixed outcomes. This effect should be stronger in larger-sized circuits than in smaller courts.

H₂: The ideological dispersion of judges in a circuit will be positively related to en banc decisions, district court reversals, and mixed outcomes, and the effect should be stronger in larger courts than in smaller courts.

H₃: As reliance on visiting judges in a circuit increases, we should see an increase in en banc decisions, district court reversals, and mixed outcomes.

Docket-related factors

H₄: As the task variability increases, we should see an increase in en banc decisions, district court reversals, and mixed outcomes.

H₅: As the workload of active judges increases, we should see an increase in en banc decisions, district court reversals, and mixed outcomes.

H₆: As the relative difficulty of cases in a circuit's docket increases, we should see an increase in en banc decisions, district court reversals, and mixed outcomes

Satisficing hypotheses

The bounded rationality perspective predicts that conditions of high complexity and workload pressure will produce “satisficing” behavior in decision making, as evidenced by greater levels of consensus and compromise. Under its usual formulation, the theory makes no mention of how group composition might affect the tendency to compromise. Indeed, it may be the case that pressure to decide as a group might, in some organizational settings like the Courts of Appeals, overcome differences related to work group heterogeneity. The tendency to favor group decision making may not be constant across courts of all sizes, however. The satisficing account does not give us any particular expectation about the direction of any conditional relationship between court size and judge-related factors. In smaller courts, greater familiarity among the judges might be expected to enhance the tendency to compromise. On the other hand, it could also be argued that larger courts would be more prone to satisficing, since those courts tend to have more cases to contend with and norms may develop that encourage judges to

go along with their colleagues in order to process cases more rapidly. Either way, there are reasons to believe that court size may well condition the effects of court composition under the bounded rationality account.

Judge-related factors

H₇: Circuits that are more heterogeneous with respect to the gender and racial composition of their judges will issue fewer dissenting opinions, and this effect will be conditioned on court size.

H₈: Circuits with greater ideological distance between judges will issue fewer dissenting opinions, and this effect will be conditioned on court size.

H₉: As reliance on visiting judges in a circuit increases, we should see a decrease in dissenting opinions.

Docket-related factors

H₁₀: As the task variability of a circuit increases, we should see a decrease in dissenting opinions.

H₁₁: As the workload of judges in a circuit increases, we should see a decrease in dissenting opinions.

H₁₂: As the relative difficulty of cases in a circuit's docket increases, we should see a decrease in dissenting opinions.

Methods

Analyses that employ cross-sectional, time-series approaches offer a number of advantages for social scientists. Perhaps the biggest advantage is their intuitive fit to many of the questions that social scientists pursue, which often involve elements of both time and space (Stimson 1985). Cross-sectional time series designs may take a number of different forms, varying in terms of the number of units studied (i.e. how many circuits) as well as in the number of time points (i.e. how many years). Generally speaking, cross-sectional time-series designs utilize “stacked” data sets (Brown and

Halaby 1982), in which some fixed unit i is observed across points of time ranging from 1 through t , and is followed by units $i+1, \dots, n$ with its accompanying time points (Stimson 1985, 918).

By pooling many points of data over multiple points of time, the design allows researchers to depart from “snapshot” analyses that are limited by the single point in time chosen. The design also has the comparative advantage of including multiple groups (e.g. nation-states, courts, or organizations), which allows for more generalizable conclusions about the phenomenon studied. However, apart from the advantages related to generalizability, such designs also present special methodological challenges. Foremost of these is the correlation of data across time and space.

In ordinary least squares regression, the residuals for each observation are assumed to represent errors that have independent and identical distributions (known as the i.i.d. errors assumption), but this assumption is violated with panel data models because the observations consist of the same units measured repeatedly (Stimson 1985).

One solution for the correlated errors problem is to utilize Generalized Estimating Equation, or GEE, models. GEE models can be understood as an extension of Generalized Least-squares Models and allow for both unit-specific and individual-observation errors to be estimated. Following Zorn (2001, 475), I utilize a marginal GEE model because I am interested in making comparisons across circuits, rather than exploring the effect of changes in covariates within a particular observation. The model takes the following general form:

$$\Pr(Y_{it}) = g(X_{it}\beta_M)$$

Because GEE requires the researcher to specify the intraclass correlation structure, the specification of the “working” correlation matrix that I use is the exchangeable correlation structure, in which values of Y_i are assumed to covary equally across all observations within a cluster. One significant advantage of the GEE model is that “the asymptotic consistency of β holds even in the presence of misspecification of the ‘working’ correlation structure; thus, GEEs offer the potential of providing asymptotically unbiased estimates of the parameters of primary interest even in cases where the exact nature of the intraclass dependence is unknown” (Zorn 2001, 472). However, misspecifying the correlation structure can produce inconsistency in the variance estimate for β hat, so I use the Liang and Zeger (1986) robust estimate of the variance-covariance matrix. In addition to the robust estimator, I also include dummies variables for the year to control for time-specific effects, using the first year in the analysis (1983) as the baseline.¹⁷

In Stata 9, I use the “xtgee” command for cross-sectional time-series analysis using GEE. The dependent variables, which appear originally as percentages, were transformed using a logit transformation so that they are not bounded by 0 and 1.¹⁸ Because logit transformations cannot be applied to proportions that are exactly equal to zero or one (Fox 1997), I substitute .000001 for any proportion that is equal to zero; there are no proportions that are equal to one. (This fix was needed for the measures of en banc

¹⁷ Because GEE can only deal with either correlation across space or across time, but not both, errors should be clustered on the unit (i.e. either space or time) that is not well-specified by the independent variables in the model. Ideally, in this case, one would cluster on the year; however, the “xtgee” command in Stata 9 only allows the researcher to cluster on the group (here, the circuit).

¹⁸ McDowell and Cox (2004) describe how to transform a dependent variable that is a proportion using the logit transformation: $Y = 1 / 1 + \exp(-XB)$. After the logit transformation, we get the following form: $\text{Ln}(y/(1-y)) = XB$.

review and mixed outcomes review only.) Finally, I specify the link function of the expected value of Y as an identity link and choose the Gaussian distribution of Y.

Results

Table 3.3 presents the results for the three models (all of which are statistically significant at $p < .001$) that test the garbage can hypotheses. In the first model of legal consistency, only the size-percent women interaction term and the size-ideological dispersion interaction term are significantly related to en banc review.

In the second model of consistency, the interaction between size and gender composition just misses significance at conventional levels ($p = .08$), though the interactions between size and ideological composition are both statistically significant. The only variable related to docket composition that is significant in either model is task variability, which is negatively related to the rate of reversal. In the first model of legal clarity (model 3), participations by visiting judge are positively related to the mixed outcomes rate in a circuit, as is the interaction between size and gender composition. A separate analysis, not shown, that excluded the interaction terms found no statistically significant effect for court size in the en banc, reversal, or mixed outcomes models.

To test the bounded rationality hypotheses, models 4 and 5 (Table 3.4) present results for analyses of the dissent rate as an indicator of circuit legal clarity. We see that, in model 4, workload and the proportion of women are negatively related to dissent. Though there is no effect for court size alone, the relative heterogeneity of a circuit's judges may have a different relationship to dissent in courts of different sizes because of the frequency with which judges must sit together on panels. To test whether the effects of heterogeneity are conditioned on the number of judges in a circuit, Model 5 includes

size interactions with the three diversity variables. Again, as in the en banc and mixed outcomes models, the multiplicative term of size and percent women is statistically significant.

However, the coefficients and signs of the significant interaction terms in any of the models are not directly interpretable because the effect is dependent on the values of all the other independent variables in the equation (Norton, Wang, and Ai 2004). In order to ascertain the full interaction effect, the statistical significance of the entire cross-derivative must be calculated. To address this issue, I calculate marginal effects and use the “nlcom” command in Stata to generate standard errors using the Delta method. After graphing these results, we can see the ranges for which the interaction terms are statistically significant and the direction of the relationship.

Consistency

As can be seen in Figure 3.11, the relationship between ideological dispersion and en banc review is positive and weakly significant (at $p < .10$) in medium-size circuits with the mean value of ideological dispersion, when all other values are held at their means. This would tend to suggest that in the average circuit, greater ideological distance between judges increases the need for en banc oversight to reconcile intracircuit inconsistency. However, we should be cautious in reading too much into this finding, given both the small effects on the predicted-Y and the failure to reach conventional levels of statistical significance. Moreover, this relationship is not statistically significant for circuits with the minimum, twenty-fifth percentile, seventy-fifth percentile, or maximum values for dispersion. In substantive terms, there does not appear to be a

macro-level relationship between the ideological dispersion of judges within a circuit and this measure of legal consistency.

Figure 3.12 shows the relationship between ideological dispersion and the reversal rate, as the number of judges in a circuit increases. We can see that for a circuit with the average value for ideological dispersion, the relationship between size and the reversal rate stays relatively flat at 20 percent. However, the direction of the relationship is quite different for circuits with the minimum and maximum values for dispersion. As circuit size increases, we can see that the most dispersed courts reverse more frequently, while the least dispersed courts reverse less frequently. This is at least suggestive that in larger courts where judges are relatively ideologically distant from one another, circuit precedent may not provide a clear guide for district courts. An alternative explanation is that, consistent with a principal-agent model, this result reflects uncertainty on the part of district court judges in knowing what type of panel will review their cases.

The results for racial heterogeneity and reversals are graphed in Figure 3.13, with all values plotted reaching statistical significance at $p < .05$. We can see that as the average circuit (size = 12) becomes increasingly diversified with respect to race, there is a small and positive increase in the predicted reversal rate (from about 20 percent to just over 30 percent). This is consistent with the garbage can account, in that more heterogeneity within a circuit may be associated with less predictability in circuit doctrine.

Clarity

Figure 3.14 shows the effect of size on the rate of mixed outcomes by the proportion of women in a circuit. Overall, there is a negative relationship between size and split decisions for small and medium-size courts, though the line is far steeper in all-male courts than in courts with the median proportion of women. There is no statistically significant effect for any court size when the proportion of women is at its maximum value, however.

The results for the dissent model are more robust (see Figure 3.15). In general, no matter the gender composition of a circuit, it appears that smaller circuits tend to dissent less often than larger circuits. This, by itself, is not altogether surprising, since in smaller circuits judges must interact more frequently on panels, and it might be expected that norms about consensus in group decision-making processes would be stronger in such situations. Perhaps the more interesting finding is that the effect of heterogeneity varies according to court size. In larger courts (above 16 judges), more gender diversified courts have higher dissent rates than less gender diversified courts; in smaller courts, this relationship is reversed, with more heterogeneous courts dissenting less frequently.

Conclusions

It is important to re-emphasize here that these findings represent only aggregate level circuit processes and not the behavior of any one panel or individual judge. Thus, these analyses do not control for factors that affect case-level outcomes, such as the

participation of the U.S. government as a party or the decision of the lower court,¹⁹ since this is not the process being modeled. Nevertheless, some important conclusions can be drawn from the preceding analyses.

First, a circuit's judicial composition has consequences for its legal outcomes, though the effects are largely at the margins. Specifically, the relative homogeneity of judges within a circuit may affect their ability to see cases in similar terms. The ideological composition of judges within a circuit is related to indicators of consistency, particularly reversal rates, suggesting that in larger circuits with greater ideological dispersion, lower courts may find circuit precedent difficult to follow (thus necessitating more reversals by the circuit). Another possibility is that in such circuits, district court judges may be more willing to vote consistent with their own ideological preferences (or in principal-agent terms, to "shirk") because the circuit fails to speak with one voice. Under this scenario, circuit legal doctrine may be more ambiguous and leave more room for different interpretations by district court judges of different ideological stripes. Without including district court preferences in the model, we cannot say for sure which, if any, of these explanations is likely to be the case.

In addition, circuit oversight of district court appears to increase as a court becomes more racially heterogeneous, consistent with the garbage can hypothesis. Another related explanation is that racial diversity (and the increased probability of a racially diversified panel) may be improving deliberation and debate within a circuit, and therefore improving a circuit's ability to monitor the district courts within its jurisdiction.

¹⁹ Case level and judge-level analyses typically account for the high success rate of the U.S. government by including a dummy variable; they also control for the ideological direction of the lower court's decision since appellate panels exhibit a tendency to affirm lower court's rulings.

However, we should be cautious in attributing an increased tendency to reverse to non-white judges, as these data cannot speak to the behavior of individual judges.²⁰

Diversity in terms of a circuit's gender composition also is related to aggregate legal outcomes, consistent with the explanation that greater heterogeneity affects a circuit's organizational culture. Of particular interest is the finding that the effect of gender composition on dissent rates differs according to court size. Circuits with a greater proportion of women dissent more often than circuits with fewer or no women, in larger courts; but among smaller courts, homogeneous circuits dissent more frequently than those courts with the average or maximum percentage of women. As mentioned above, this finding may be due to the frequency with which judges interact with one another on panels, since there are fewer possible combinations of three-judge panels on smaller courts. There may be differences in norms about consensus on smaller courts than larger ones; judges who work together infrequently may be more inclined to write dissents. Anecdotal evidence from interviews with Ninth Circuit judges supports this view: increasing size means "thinner communication among judges, greater difficulty in keeping up with colleagues' opinions and decreased knowledge of other judges because of the long time between sitting with another judge on an argument panel" (Wasby 1989-1990, 92).

Alternatively, socialization effects may be stronger on smaller courts. Research at the case level has found that in some issue areas, such as employment discrimination and sexual harassment, the presence of a woman on a panel increases the likelihood of a vote

²⁰ It should also be noted that this analysis does not control for Supreme Court monitoring of the courts of appeals, and that some research (Haire, Lindquist, and Songer 2003) has indicated that circuit court oversight of lower courts is driven by the extent to which the Supreme Court engages in oversight of the circuit court.

for the plaintiff's position by the other male judges. So while we cannot say that these results indicate that female judges dissent more often than male judges, it may be that the presence of women is affecting the organizational culture in ways that affect aggregate circuit legal outcomes as well. One avenue for further exploration would be to examine the rate of diversification to see if circuits "reset" after an influx of women and minority judges or if they simply adjust and adopt different norms of operation.

However, the measures of gender and racial diversity employed do not account for intersection of the two categories and thus may not fully reflect the nature of heterogeneity within a circuit. In order to evaluate the effects of combined gender and racial heterogeneity, I ran the models again, substituting the Herfindahl index of diversity for the original proportions. The Herfindahl index was originally developed as a measure of the concentration of market shares of firms within an industry, but has been applied in a variety of political science contexts (e.g., Lowery and Gray 1998, Baumgartner, Jones, and MacLeod 2000). The equation for the Herfindahl index is the following:

$$\Sigma p_1^2 + p_2^2 + p_3^2 \dots + p_k^2$$

where p is the proportion of a type of individuals in a given group and k is the total number of groups. Here, p is equal to the proportion of active and senior judges in a circuit who are, respectively, white men, white women, African-American men, African-American women, Hispanic men, Hispanic women, Asian men and Asian women. Possible values range from zero to one, with higher Herfindahl scores indicative of greater homogeneity. For example, a circuit with all of its judges in one category, such as white males, would have a Herfindahl score of 1.0.

However, the Herfindahl index does not shed any additional light on the previous findings, and in one sense, only tends to muddy the waters further. The variable fails to reach significance in the en banc, reversal, or mixed outcomes models (not shown), but in the dissent rate model, homogeneity is positively related to dissent. Given this result, it appears that the results for gender composition are not an artifact of some overall heterogeneity effect.

A second major conclusion of these analyses relates to split decisions. While mixed outcomes in this analysis are used to measure the degree of clarity in the law, they may also represent another aspect of the dynamics among the judges in a circuit. Other work by Lindquist, Martinek, and Hettinger (2007) has argued that panels issue mixed outcomes as a means of accommodation, especially when a panel is not ideologically similar in its composition. The finding that the number of judges is negatively related to mixed outcomes suggests that as a court increases in size, judges engage in less accommodation with one another. However, the effects here are very small (less than half a percent) and only in a very limited range (medium-sized courts with no or few women).

Another possible explanation for the mixed outcomes findings has to do with the rough, aggregate nature of the measure itself. It may be problematic to assume that all cases with mixed outcomes represent policy fragmentation, since such a measure does not distinguish between kinds of split decisions. Some mixed outcomes may actually represent policy cohesion because they resolve inconsistencies (or split decisions) from the lower court decision. Without explicitly accounting for the lower court decision, this possibility cannot be ruled out of consideration.

In terms of docket characteristics, the analyses presented here suggest that norms about consensus are likely affected by the workload faced by each judge; as workload in a circuit increases, the dissent rate tends to decrease. Thus, circuits who present more of a unified front in their decisions may actually be responding to the caseload pressures they face—and have developed norms that favor overlooking disagreement in order to dispose of more cases.

Finally, one aim of this chapter was to test predictions generated by two competing theories of organizational behavior: bounded rationality and the garbage can model. Overall, the results give us little reason to declare one theory superior to the other in terms of explaining the behavior of courts as organizations: neither model clearly outperforms the other. This may, in part, be due to the rough, aggregate measures employed (which would make it hard for any comprehensive account to perform well). Additional data collection, including interviews with former law clerks, could facilitate a more robust test of the GCM by providing information related to specific decision making trends within a circuit as a whole. And because it takes the behavior of individuals situated in groups as its starting point, the bounded rationality account may better explain decision making processes at a sub-organizational level, such as a panel.

In sum, while the findings of this chapter are suggestive, they cannot give us a complete picture of how variation in organizational characteristics shapes the decision-making environment. To account for both macro- and micro-level processes, the next two chapters employ a multilevel approach to explain how circuit characteristics condition case-level and judge-level outcomes.

Table 3.1: Circuit Practices Relating to Intracircuit Consistency, as of 2000

<i>Circuit</i>	<i>Procedures related to consistency and defusing conflict</i>
First	Staff attorneys screening briefs for oral argument or summary affirmance try to identify cases presenting similar issues so that they may be assigned to the same panel or so that other panels may be alerted to the fact that the same issue is being considered simultaneously by multiple panels.
Second	The presiding judge of each panel prepares a list of pending issues to alert other panels to issues that may soon be decided.
Third	For-publication opinions are circulated to all the active judges of the court for an eight-day period before filing. If a majority of nonrecused active judges votes to take the case en banc during the circulation period, the circulating panel opinion is not filed. Although senior judges do not have a vote on whether the court should take a case en banc, a senior judge may choose to receive circulating opinions.
Fourth	All opinions in argued cases, both published and unpublished, are reviewed by the entire court prior to issuance.
Fifth	Generally, neither published nor unpublished decisions are circulated to nonpanel judges. However, a panel opinion that will create a conflict between circuits must be precirculated to all active judges.
Sixth	In addition to circulating for-publication opinions before filing, writing judges indicate in a covering note, when appropriate, the fact that the opinion or decision will initiate or continue a conflict with one or more circuits.
Seventh	Cases in a closely related area of the law but with different issues and different parties may be scheduled for the same day before the same panel of judges. Multiple appeals from the same district court case are usually consolidated for argument, but sometimes they are separately argued on the same day before the same panel. If a case presents the same issue as a case currently pending before the court or before the Supreme Court, the later case is held pending the decision in the controlling case. After the lead case is decided, the court asks parties to file supplemental statements in light of the decision.
Eighth	Neither published nor unpublished opinions are circulated to nonpanel judges before they are issued.
Ninth	Nonpanel judges may suggest amendments to panel opinions, either sua sponte or in response to a petition for rehearing.
Tenth	During the ten-day prefiling circulation of opinions for publication, nonpanel judges may raise questions or suggest changes to the authoring judge. Judges who have opinions pending that are likely to conflict with the circulated opinion may call for an en banc proceeding to avert the conflict.
Eleventh	Judges give priority to reviewing published opinions soon after issuance.

Source: McKenna, Hooper, and Clark (2000).

Figure 3.1: Circuit Dissent Rate, 1983-2002

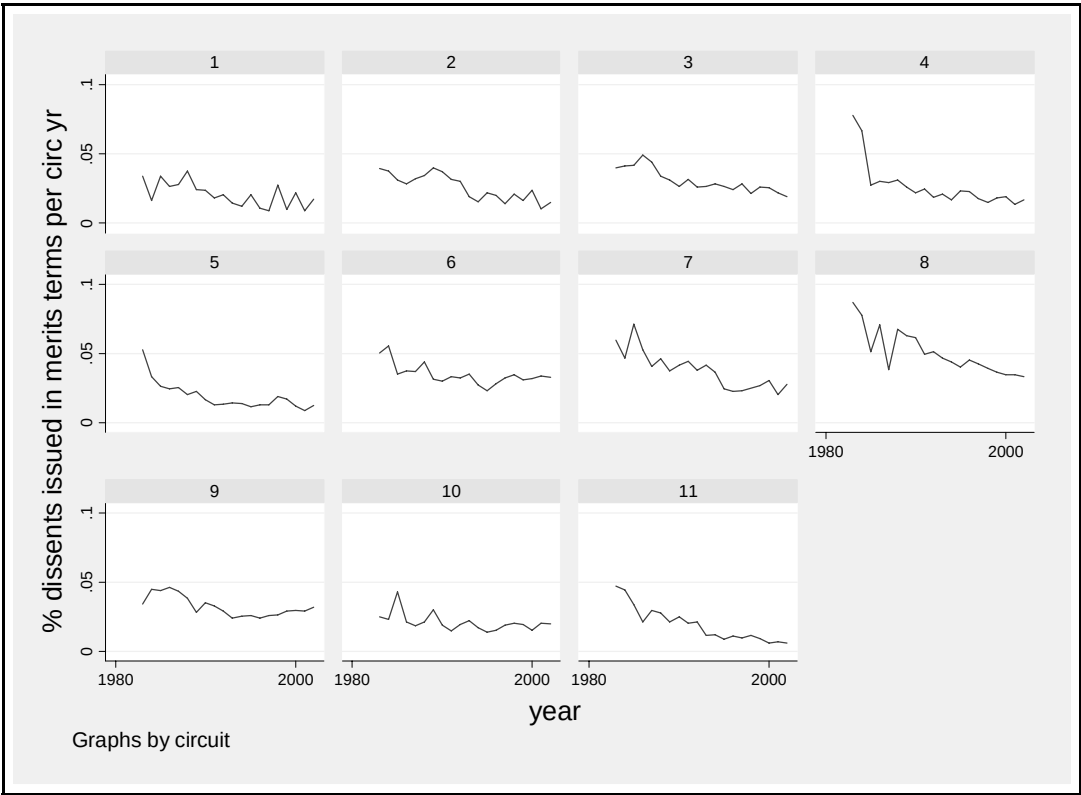


Figure 3.2: Circuit Mixed Outcomes Rate, 1983-2002

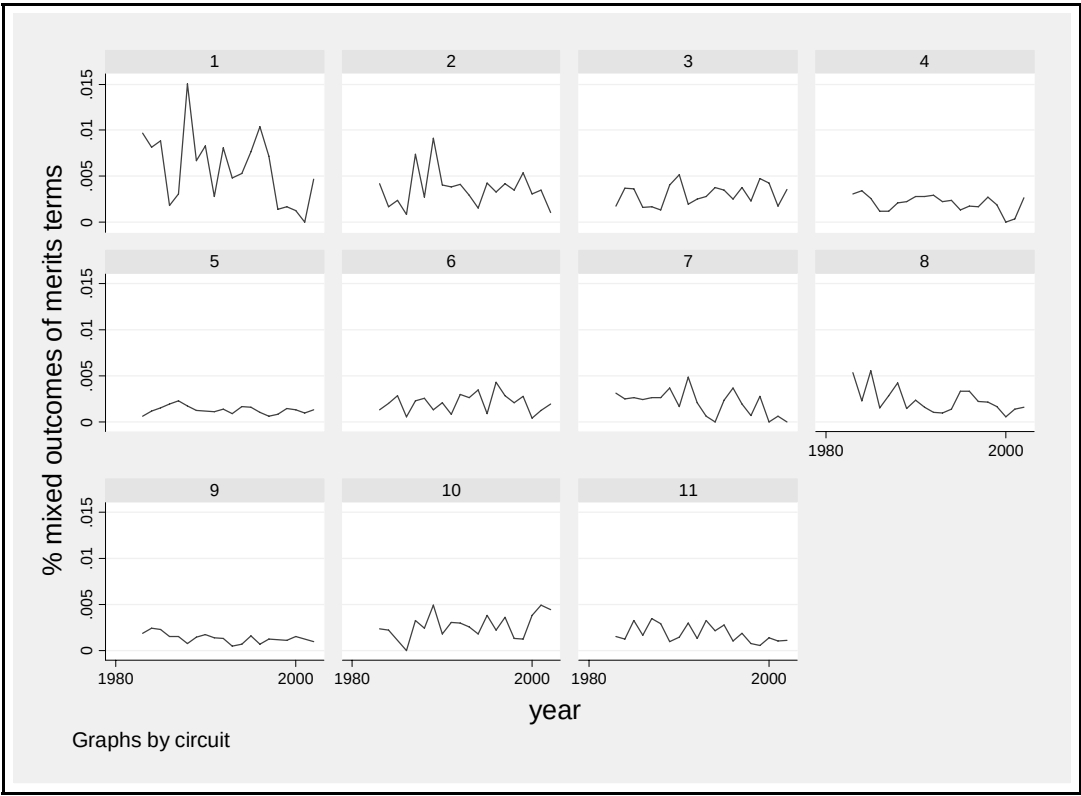


Figure 3.3: Mean Reversal Rate for All Circuits, 1982-2002

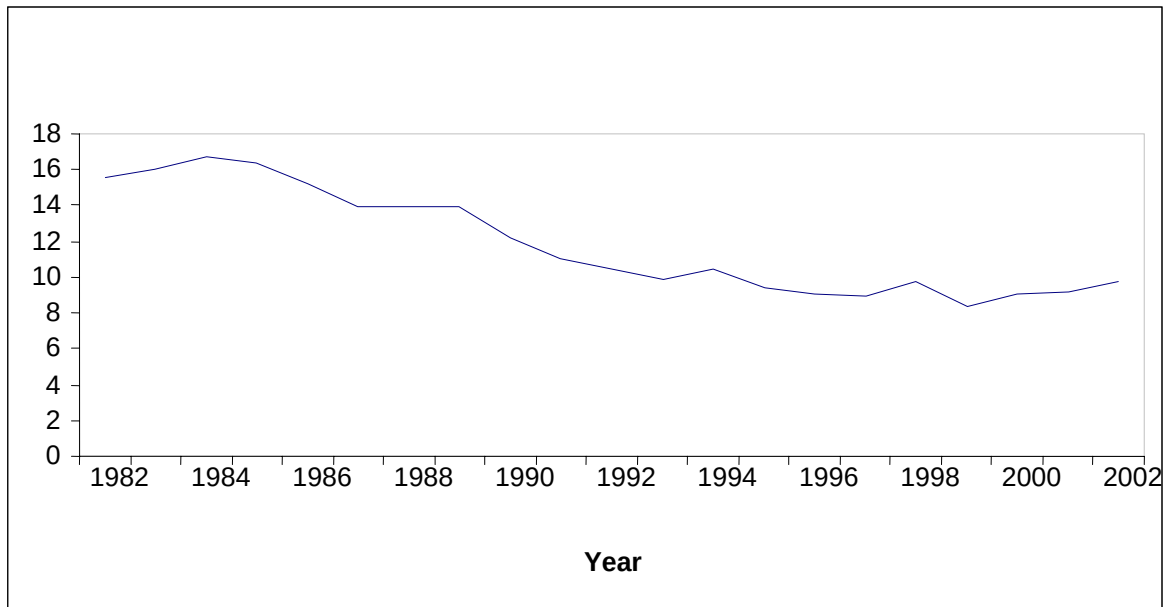


Figure 3.4: Distribution of En Banc Rehearings

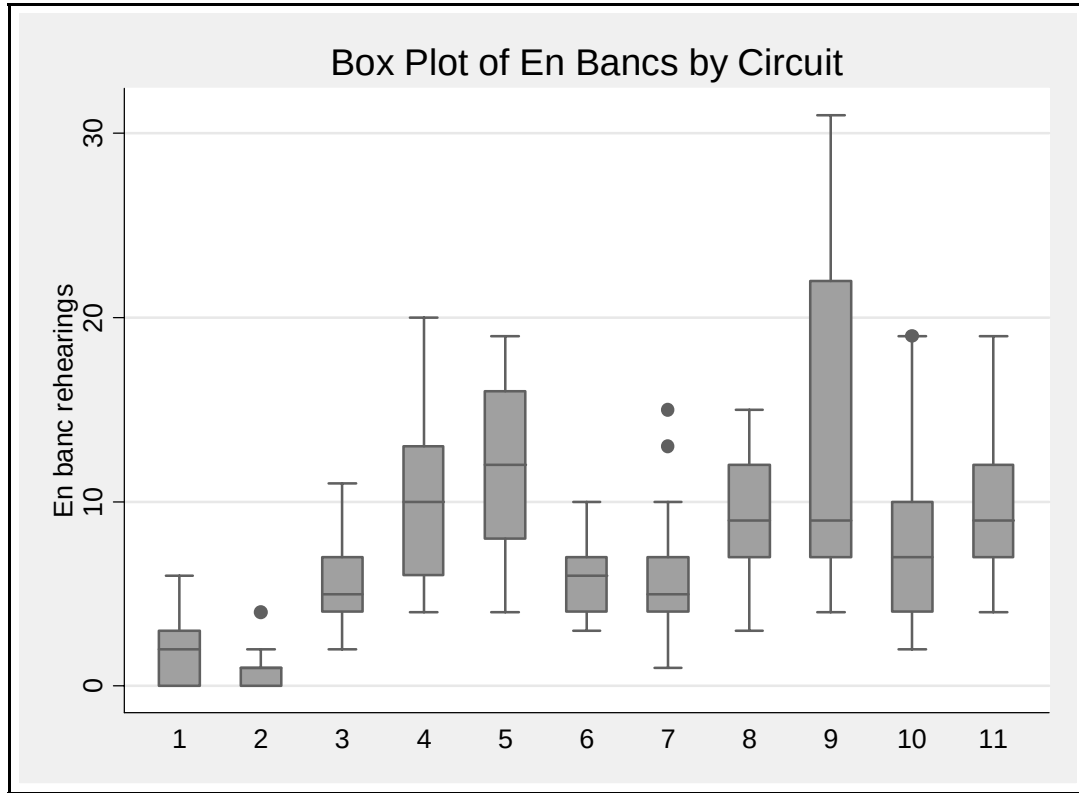


Figure 3.5: Racial Composition of Circuits, 1983-2002

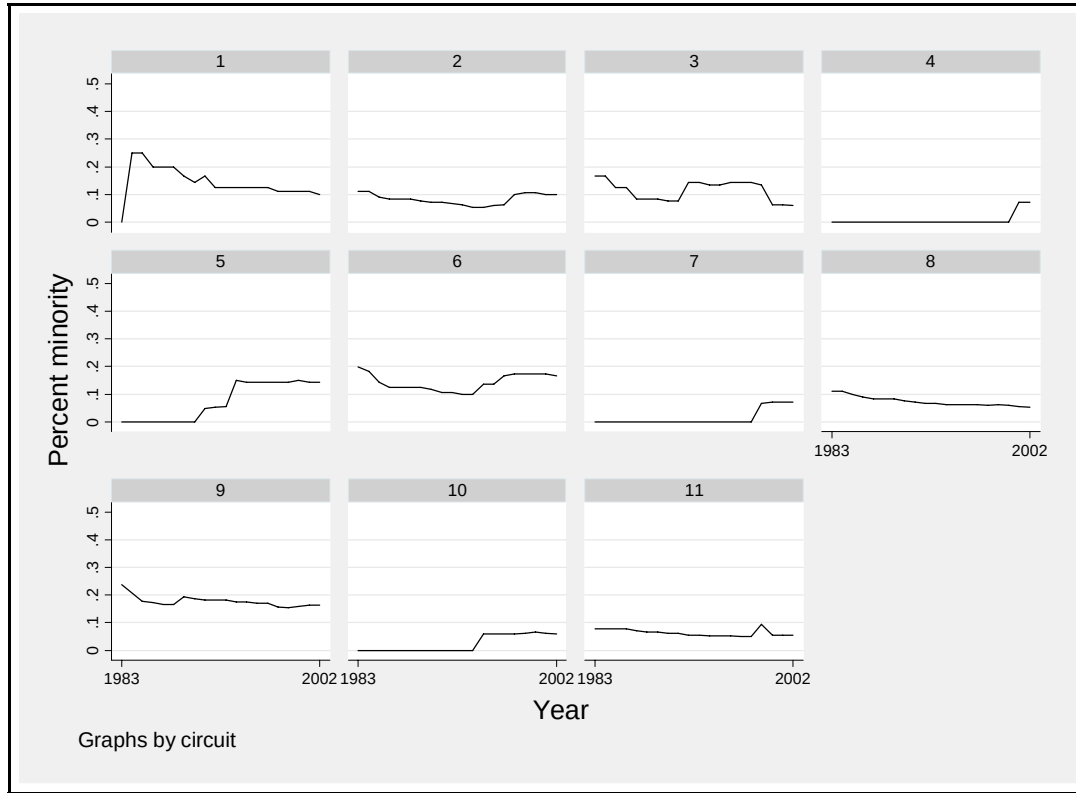


Figure 3.6: Gender Composition of Circuits, 1983-2002

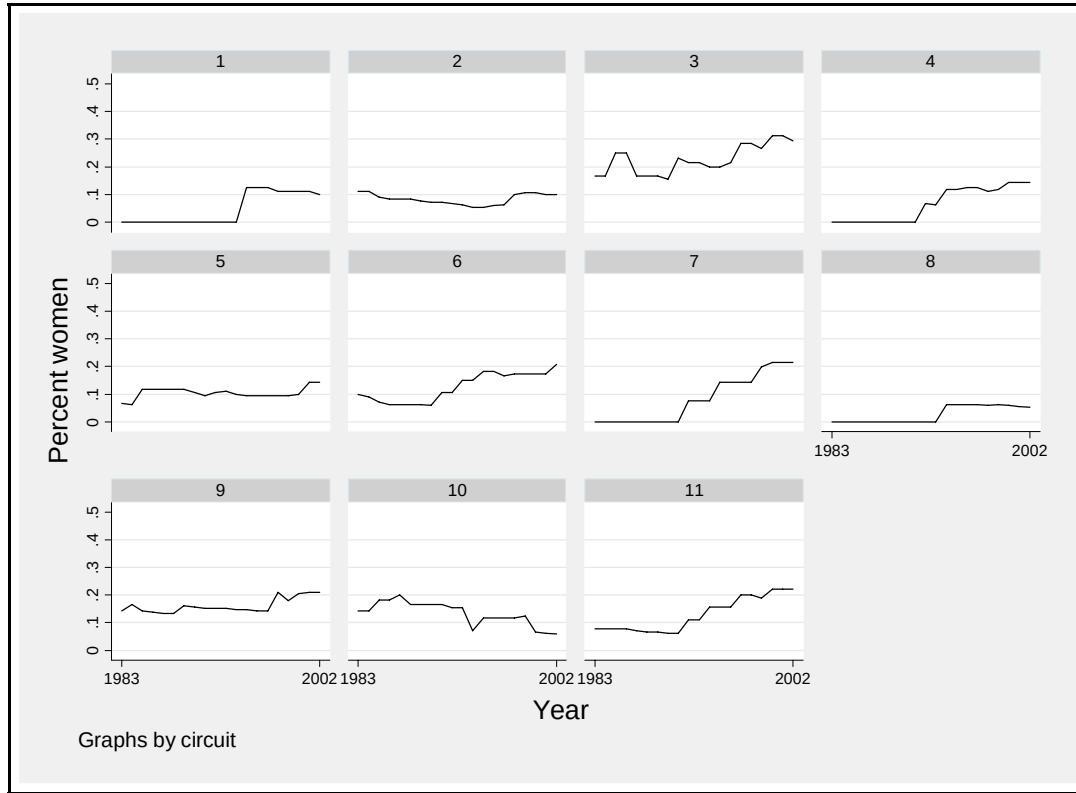


Figure 3.7: Distribution of Senior Judge Participations, by Circuit

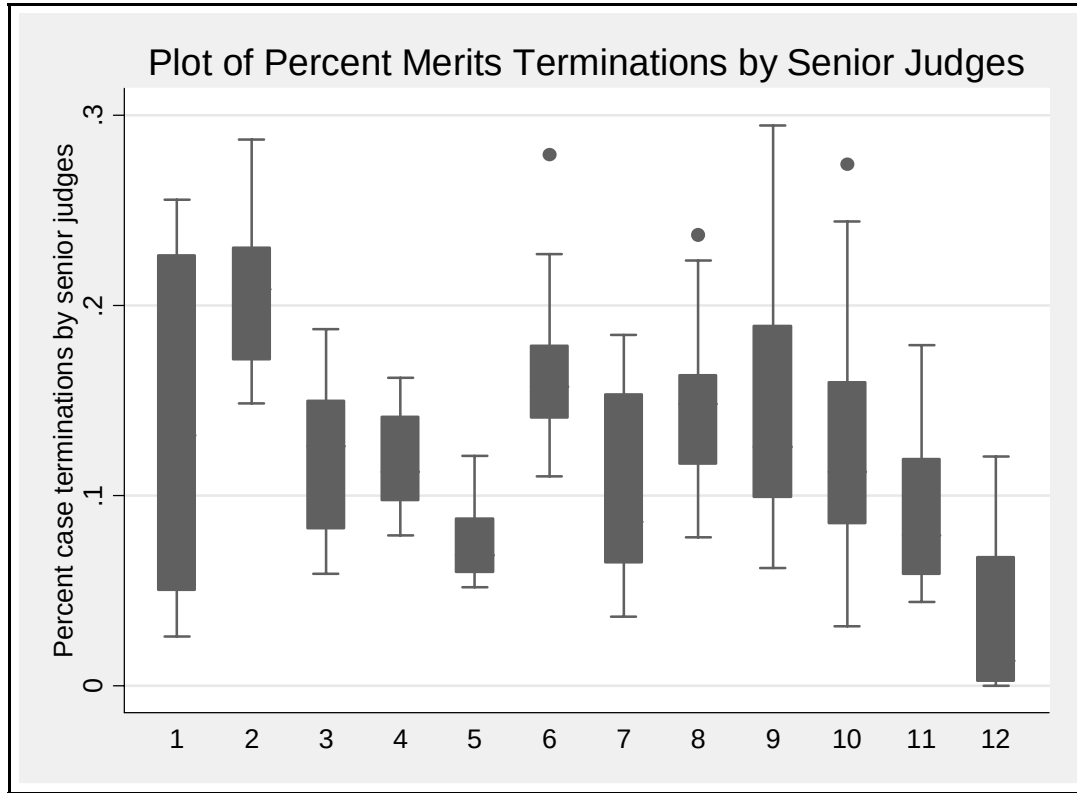


Figure 3.8: Workload, by Circuit

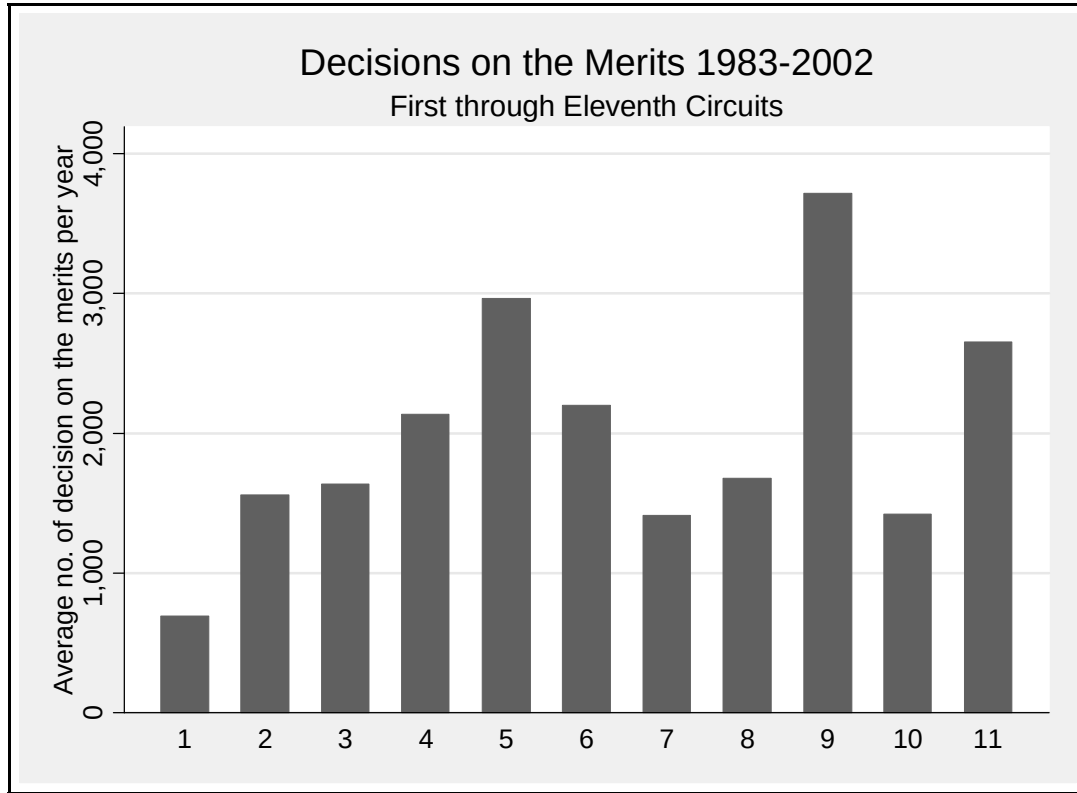


Figure 3.9: Proportion of Criminal Appeals and Prisoner Petitions

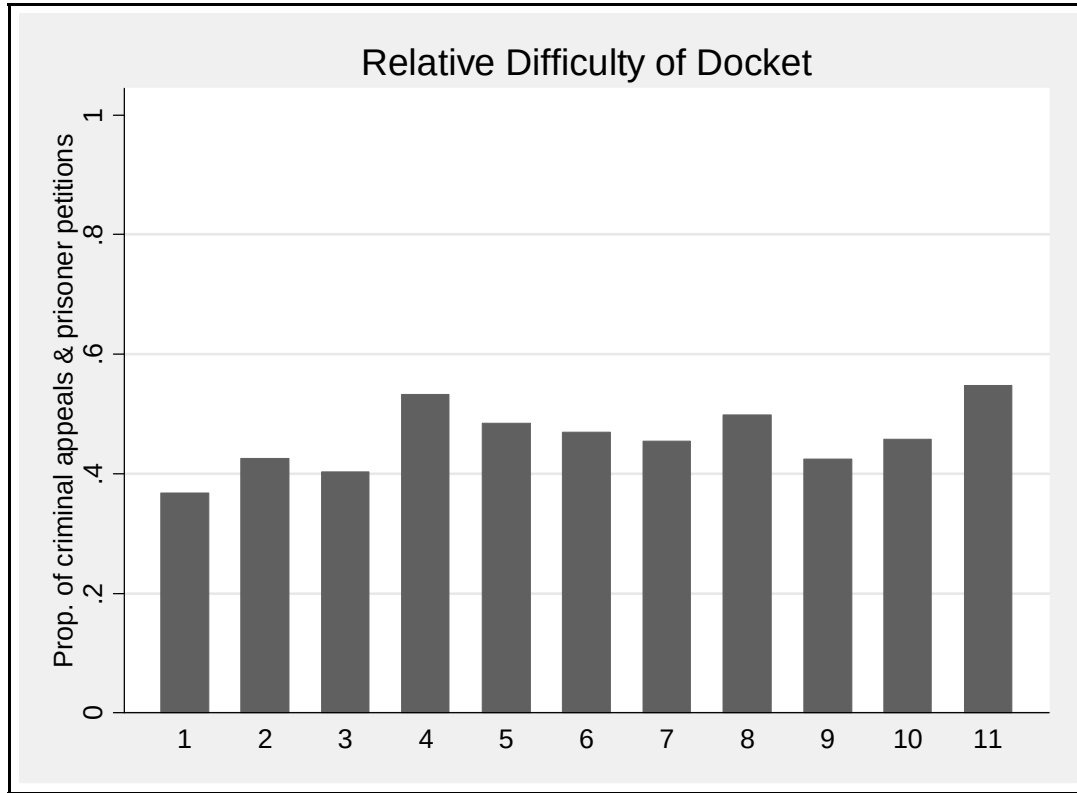


Figure 3.10: Distribution of Visiting Judge Participations, by Circuits

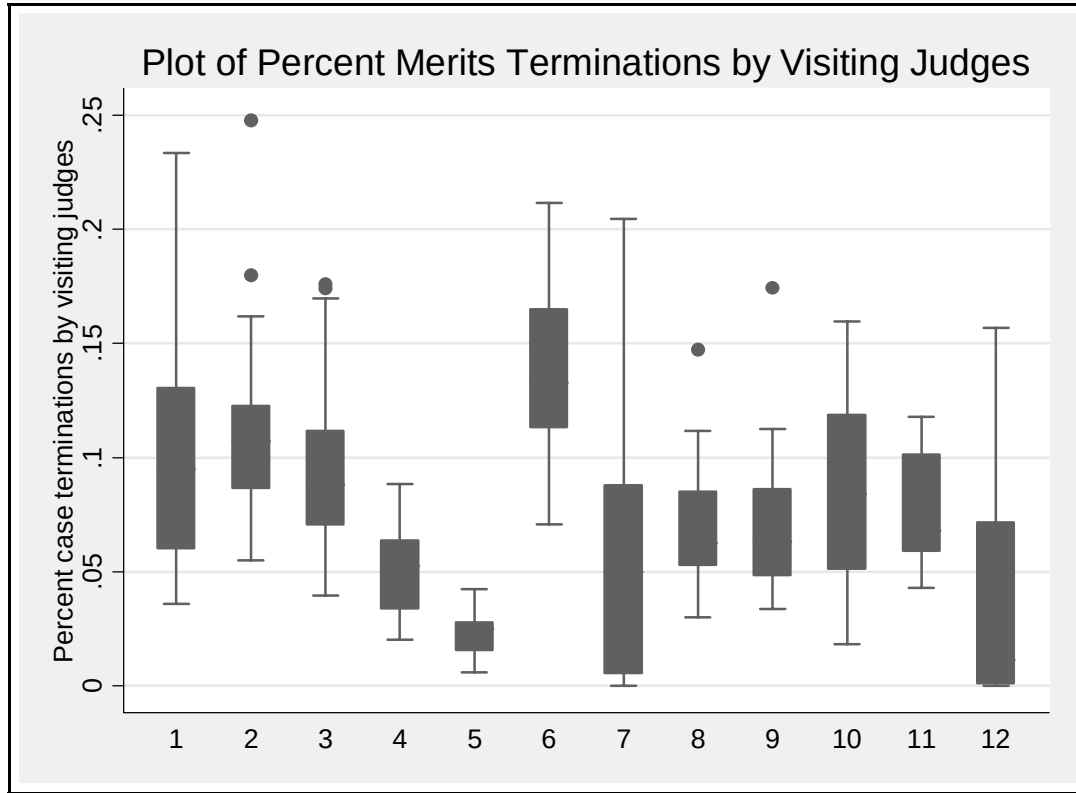


Table 3.2: Characteristics of Appeals Courts' Judges, 1983-2002

	Total judges (incl. senior)	Total women (incl. senior)	Total minority (incl. senior)	Median Ideology (incl. senior)
<i>Circuit</i>				
First				
Median	8	0	1	-.01
Std. dev	2.17	.5	.3	.14
Second				
Median	15	1	1	.06
Std. dev	3.89	.44	.44	.19
Third				
Median	14	3	1	-.01
Std. dev	3.49	1.28	.5	.02
Fourth				
Median	14	1	0	.27
Std. dev	2.79	.97	.3	.06
Fifth				
Median	19	2	1	.32
Std. dev	2.28	.5	1.4	.14
Sixth				
Median	19	2	2	.24
Std. dev	4.58	1.47	.91	.15
Seventh				
Median	13	1	0	.12
Std. dev	2.25	1.22	.40	.09
Eighth				
Median	15	0	1	.12
Std. dev	2.25	.51	0	.13
Ninth				
Median	33	5	6	-.08
Std. dev	6.42	1.88	.68	.08
Tenth				
Median	13	2	0	.24
Std. dev	3.41	.48	.5	.10
Eleventh				
Median	18	2	1	.21
Std. dev	2.71	1.34	.22	.19
All				
Median	14	2	1	.12
Std. dev.	6.95	1.67	1.59	.20

Note: Ideology ranges from -1 (most liberal) to 1 (most conservative).

**Table 3.3: GEE population-averaged models with interaction terms
First through Eleventh circuits (1983-2002)**

Circuit Characteristics	<u>CONSISTENCY</u>		<u>CONSISTENCY</u>		<u>CLARITY</u>	
	<i>Model 1: En banc rate</i>		<i>Model 2: Reversal rate</i>		<i>Model 3: Mixed outcomes</i>	
	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>
Proportion of women judges	-13.76 (7.60)	.07	-2.24 (1.60)	.163	-16.2* (5.52)	.003
Proportion of non-white judges	.834 (9.89)	.894	5.34* (1.67)	.001	3.01 (5.63)	.593
Circuit size	.499 (.310)	.107	-.146* (.043)	.001	-.131 (.101)	.196
Std. dev. of circuit ideology	20.6* (4.3)	.000	-2.60* (1.04)	.012	-2.94 (4.24)	.489
Visiting judge participations	-.912 (3.12)	.770	-1.14 (1.15)	.320	5.47* (2.77)	.049
Size*women	.791* (.379)	.037	.267 (.153)	.082	.992* (.369)	.007
Size*non-white	-.347 (.567)	.540	-.398* (.131)	.002	-.072 (.632)	.910
Size* ideology	-1.26* (.624)	.044	.480* (.136)	.000	.024 (.399)	.952
Controls						
Merits term. per judge	.010 (.008)	.187	-.001 (.001)	.193	.003 (.004)	.471
Proportion of criminal & prisoner petitions	-1.43 (2.19)	.514	.272 (.630)	.666	-1.42 (1.29)	.273
Task variability	6.09 (8.97)	.497	-3.03* (1.45)	.037	20.3 (11.4)	.074
Constant	-14.6* (3.45)	.000	-.467 (.429)	.276	-6.18* (1.74)	.000
<i>N</i>	220		220		220	
Chi ²	135.61		205.61		71.81	
Model sig.	p < .001		p < .001		p<.001	

Notes: *p< .05, two-tailed test. Standard errors adjusted for clustering on circuit.
Output for dummy variables for years omitted (1983 used as baseline).

**Table 3.4: GEE population-averaged models with interaction terms
First through Eleventh circuits (1983-2002)**

Circuit Characteristics	<u>CLARITY</u> <i>Model 4:</i> <i>Dissent rate</i>		<u>CLARITY</u> <i>Model 5:</i> <i>Dissent rate</i>	
	<i>Coef.</i> <i>(Robust SE)</i>	<i>p-</i> <i>value</i>	<i>Coef.</i> <i>(Robust SE)</i>	<i>p-</i> <i>value</i>
Proportion of women judges	-.829* (.422)	.05	-3.11* (.905)	.001
Proportion of non-white judges	.123 (.565)	.82	-1.52 (1.42)	.283
Circuit size	.016 (.017)	.34	.025 (.042)	.549
Std. dev. of circuit ideology	-.430 (.642)	.50	1.06 (1.26)	.401
Visiting judge participations	.499 (.464)	.28	.203 (.467)	.664
Size*women	--	--	.192* (.069)	.006
Size*non-white	--	--	.134 (.134)	.316
Size* ideology	--	--	-.148 (.120)	.218
<i>Controls</i>				
Merits term. per judge	-.004* (.001)	.00	-.004* (.001)	.000
Proportion of criminal & prisoner petitions	-.135 (.307)	.66	-.149 (.330)	.653
Task variability	-2.00 (2.19)	.36	-1.88 (2.14)	.379
Constant	-2.38* (.288)	.00	-2.43* (.373)	.000

N 220 220

Chi² 125.26 232.46

Model sig. p<.001 p<.001

Notes: *p< .05, two-tailed test. Standard errors adjusted for clustering on circuit. Output for dummy variables for years omitted (1983 used as baseline).

Figure 3.11

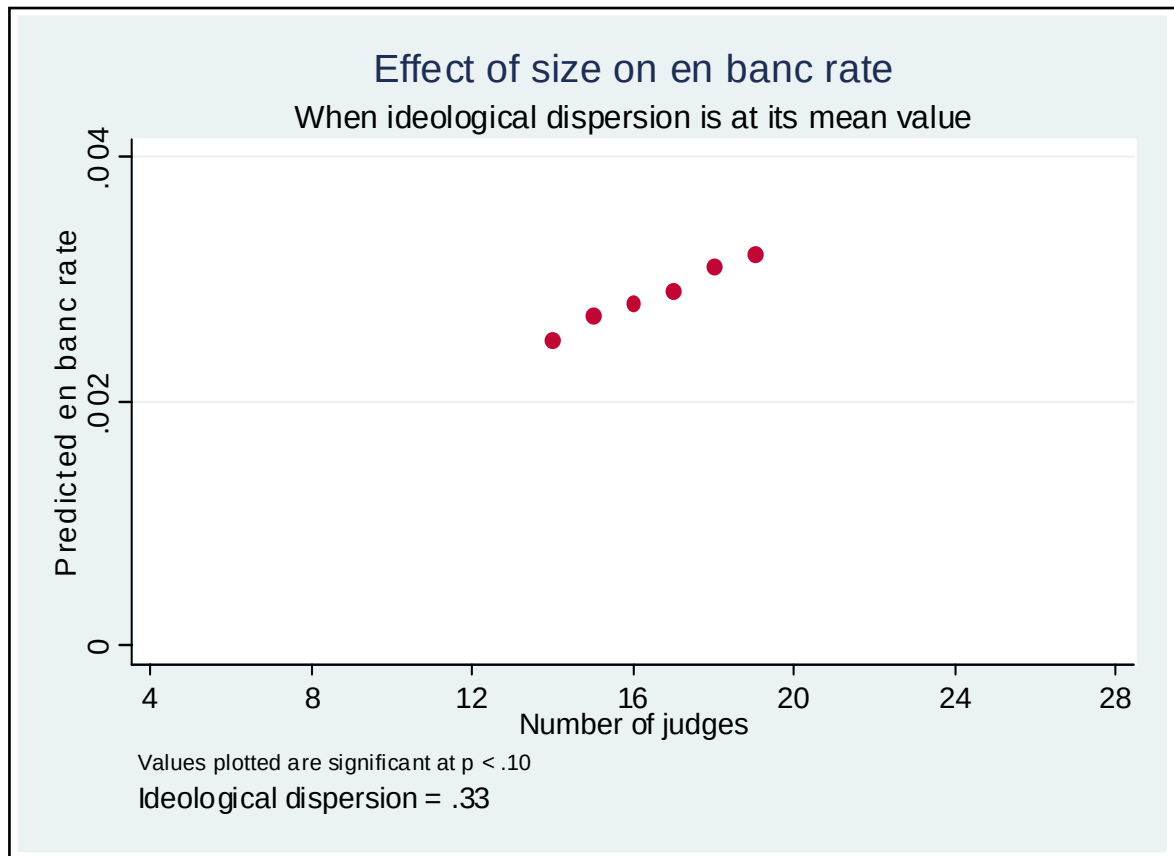


Figure 3.12

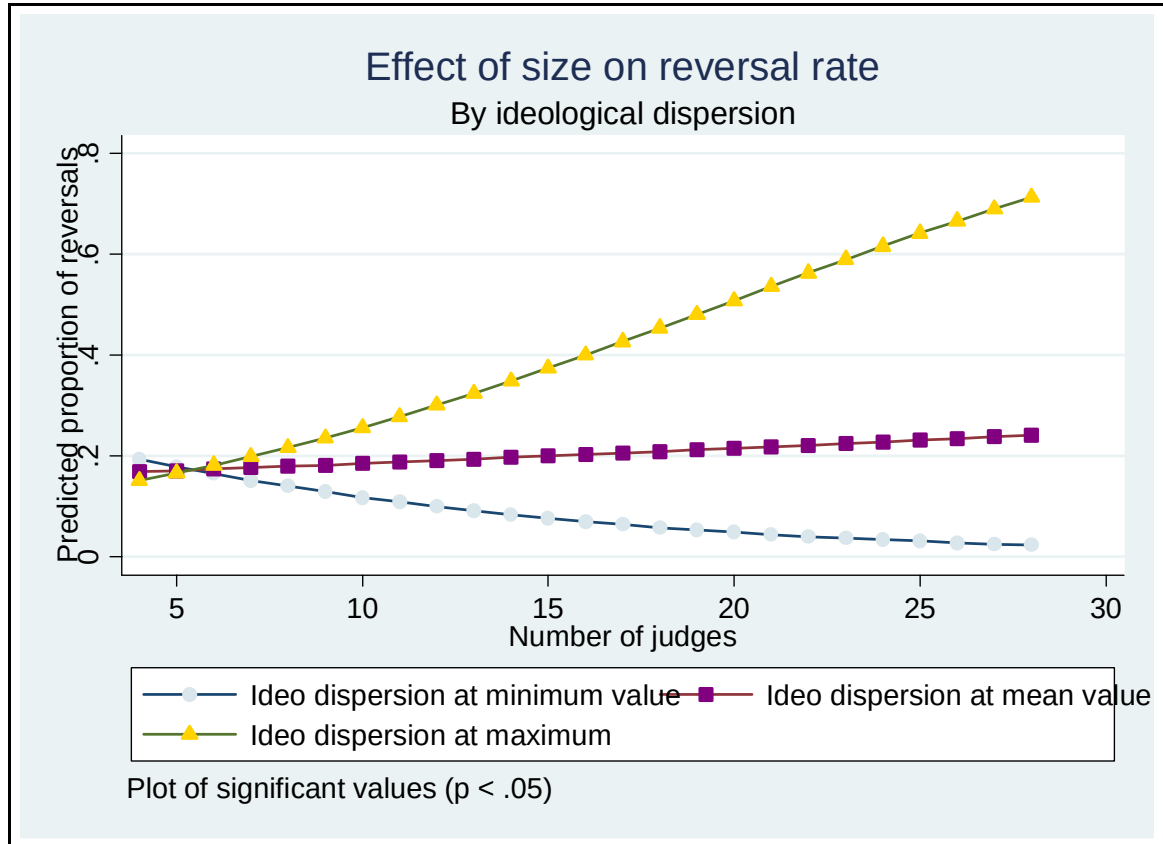


Figure 3.13

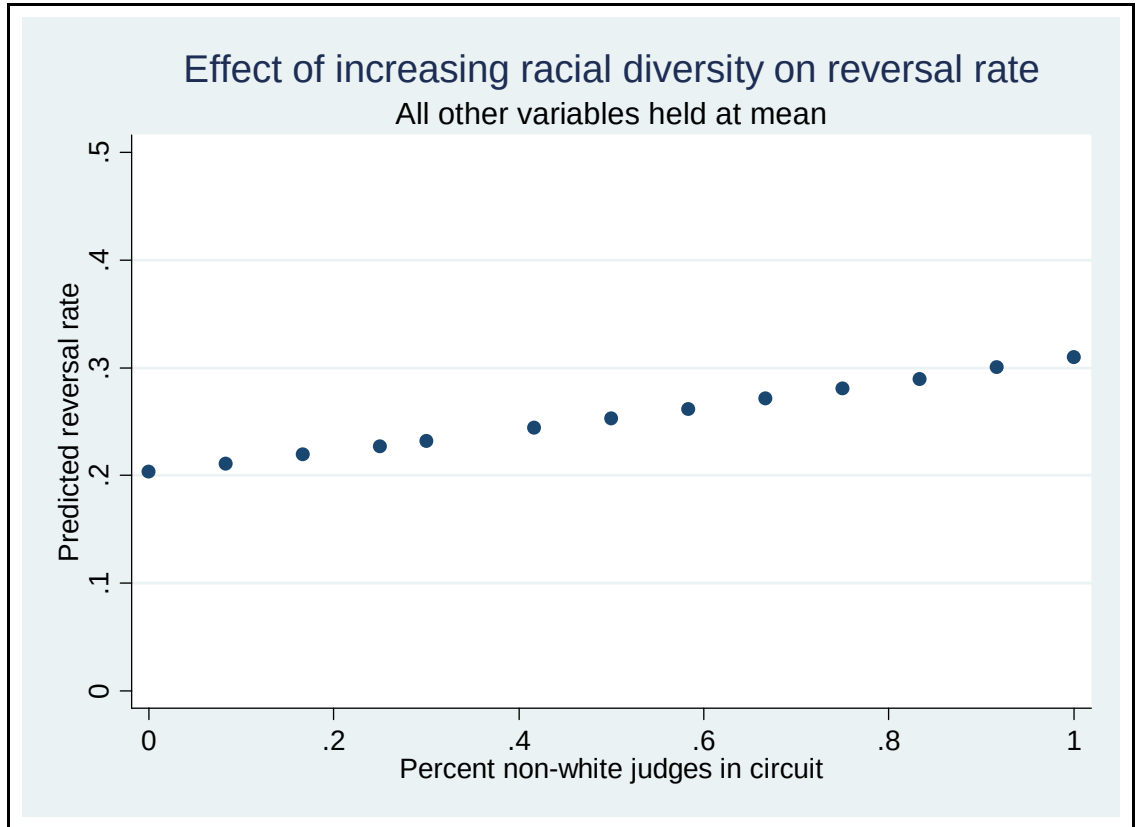


Figure 3.14

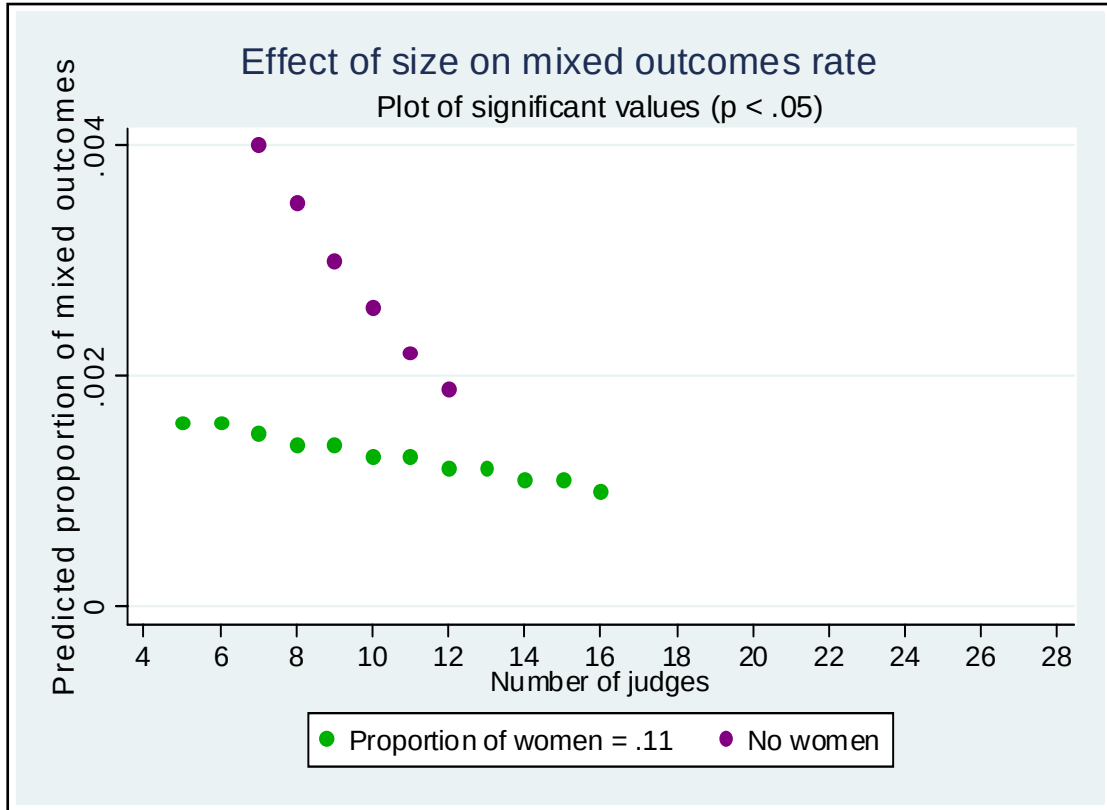
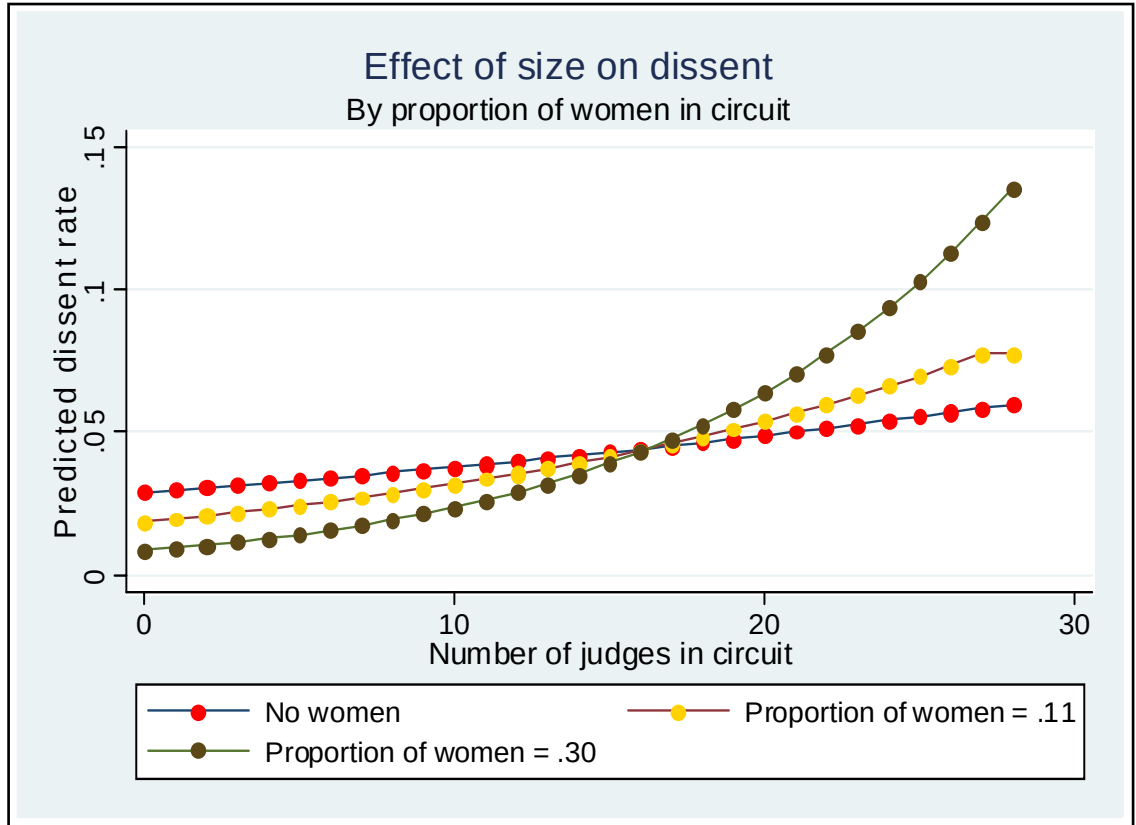


Figure 3.15



Chapter 4: Panels

The results of the circuit level analyses suggest that all circuit judges may not be similarly situated in terms of the environments in which they decide cases. However, on an aggregate level, we are limited to discussing circuit processes in broad terms and cannot extrapolate down to case level processes without committing the ecological fallacy. In order to understand the dynamics of how organizational factors influence legal outcomes, it is necessary to examine these processes at the case level to, first, unpack some of the meaning behind the aggregate results and, second, incorporate more refined measures and controls into the model. Furthermore, by looking at the environments in which panels decide cases, we can uncover if certain panel configurations mitigate environmental complexity in the circuit environment as a whole.

This chapter begins by presenting an overview of the panel's role in appellate decision making, tracing the progression of an appeal from the time of its filing to its ultimate resolution. I then move to a discussion of the factors that may influence panel behavior, presenting several hypotheses about the likely effects of case complexity on legal clarity. These hypotheses are tested first by considering case level factors alone and then by accounting for circuit context in conditioning outcomes. I conclude by discussing trends that emerge from circuit comparisons of panel decision making processes.

4.1 The Role of Panels in Decision Making

Though there are a number of variations in how courts of appeals handle their caseload, the process by which a case comes before a panel is relatively similar across circuits. The chief judge of the circuit, usually acting through the clerk, is responsible for random assignment¹ of three judges to panels, which may include senior status judges from within the circuit and visiting judges from the same or other circuits.² It should be emphasized that the panel selection and case assignment processes work independently of one another, in order to “maintain the real and apparent integrity of the process” (McKenna, Hooper, and Clark 2000, 18). For example, the Rules and Internal Operating Procedures manual for the Eleventh Circuit explains its process for judge assignment: “The circuit executive and the scheduling committee take into account a fixed number of weeks for each active judge and the available sittings from the court's senior judges, visiting circuit judges, and district judges. After this determination, names of the active judges for the sessions of the court are drawn by lot from a matrix for the entire court year” (2007, 131). Case assignment to panels is, by all accounts, an essentially randomized process, with exceptions made in some situations when cases are related to each other in terms of issues, litigants, or facts; adjustments may also be made to prevent imbalances across panels in terms of case difficulty (Cohen 2002).

¹ There is no legal requirement of truly random assignment (Hettinger, Lindquist, and Martinek 2003), though some circuits require it by rule (Brown 2000). Some empirical evidence (e.g. Atkins and Zavoina 1974) does support the accusation that panel assignments were manipulated by chief judges during a limited period of time in the 1960s, but there is no evidence that manipulation has occurred since this period. To the extent that assignment is non-random, it is likely due to considerations related to equitable distribution of cases among judges (Cohen 2002).

² See Peppers, Vigilante, and Zorn (2000) for a discussion of the possibility that chief judges act strategically in their appointment of visiting judges to panels.

For the litigants in a dispute, the appellate process begins with the losing party at the district court or administrative agency filing a notice of intent to appeal. As Songer, Sheehan, and Haire describe,

The trial court loser (now designated as the “appellant”) then proceeds to do three things: assemble the record appendix for the appeal, specify a list of errors alleged to have been made during the trial, and write a brief to argue the specifications of the error...Copies of the record, specifications of error, and the brief are sent to each judge assigned to sit on the three judge panel hearing the case and to opposing counsel. Opposing counsel (representing the trial court winner, now referred to as the appellee or respondent) is then permitted to file an opposing brief that details arguments for affirming the decision of the trial court or administrative agency. After appellant’s counsel receives the respondent’s brief, they may elect to write a second brief, known as a reply brief, in which they attempt to counter the legal arguments raised in the respondent’s brief (2000, 8-9).

After a case is filed and assigned a docket number, all of the courts of appeals have a number of screening mechanisms in place to determine the path an appeal will take. As documented in a recent FJC report (McKenna, Hooper, and Clark 2000), every regional circuit has a mediation track to encourage settlement in certain cases, which are identified for mediation by staff attorneys. Such programs work to reduce the caseload pressures in a circuit and to limit unnecessary judicial intervention.

Oral argument

According to Federal Rule of Appellate Procedure 34, a case may proceed without oral argument (i.e. being decided based solely on the briefs) only after a unanimous agreement by the panel judges. In practice, the decision about whether a case will be tracked as argument or non-argument is one made by staff attorneys and then reviewed by judges (McKenna, Hooper, and Clark 2000).³ Decisions about oral argument also may turn on whether the appellant is *pro se*, with several circuits not

³ One exception to this general rule occurs in the Tenth Circuit, in which judges sit on separate screening panels to make these determinations themselves.

permitting those representing themselves to argue their case orally; cases that deal with more technically difficult issues also are more likely to be given oral argument (McKenna, Hooper, and Clark 2000). Under the rules of federal appellate procedure, a case should generally be slated for oral argument unless the appeal is frivolous, the dispositive issues have been authoritatively decided, or the facts and legal arguments have been adequately presented in the written briefs and would not be aided by oral argument (McKenna, Hooper, and Clark 2000, 10).

If oral argument is granted in a case, circuits vary somewhat with respect to the number of cases argued per day and argument time per side. In general, it is typical to hear about 4-6 cases per day, though the Seventh Circuit may hear up to 9 cases on short argument days. Argument time ranges from 10 minutes per side to a half an hour, depending on the court and the perceived difficulty of the case.

When a case is tracked for oral argument, law clerks assist a panel's judges by producing what are known as bench memorandum. These documents, which summarize the facts, issues, and relevant law of each case, help judges "to understand and recall what is involved" without advocating for a particular party, like the briefs (Cohen 2002, 91). Typically, each judge's law clerks prepare a separate memo, though panels in the Ninth Circuit utilize a bench memo "pool" in which clerk resources are pooled to produce one memo (Cohen 2002, 94).⁴ Given the workload that each judge carries, bench memos provide an important function by helping to "jog" a judge's memory and highlighting issues or arguments that should be explored during oral argument.

⁴ Cohen notes that Ninth Circuit judges believe that this practice allows their law clerks to spend more time on more important tasks, such as writing drafts of opinions.

Opinion assignment and publication

Once a case has been argued, the judges “conference” to discuss the case and state their preliminary votes. The panel’s most senior judge, or the chief judge⁵ if he or she is on the panel and in the majority, assigns the majority opinion. The judges then go their separate ways to write the opinion (or opinions, if there is a concurrence or dissent). Like the bench memo stage, the opinion writing process is also heavily reliant on law clerk assistance. In fact, Cohen (2002) found that most judges in his study use law clerks to write first drafts of opinions, rather than using them as a sounding board.

During the writing stage, judges communicate about drafts and issues related to the case through several media. As Cohen (2002) and Wasby (1977, 1980, 1987, 1988, 1989-90) have observed, judges have become increasingly reliant on email (specifically, the CCI, or Closed Circuit Internet) as a means of communication, in addition to the telephone (also common), mailed memos (less common), and in-person discussions (the least common, especially in geographically dispersed circuits). Visiting judges are disadvantaged in that they are not included in the CCI email system (Cohen 2002, 193), making communication more cumbersome with all members of a panel in such cases.

The decision to publish

When an opinion is completed, a panel must then determine whether it will be published in the Federal Reporter and thus become part of the body of precedent. The norm of not requiring publication in all cases developed as a response to the rising

⁵ During the time period of this study, eligibility for the chief judge position was based on age and seniority (the most senior active judge who was younger than 65 years). Chief judges may serve no more than seven years, and any one becoming chief judge before age 65 was allowed to serve until he or she was 70, or for seven years, whichever came first (Hettinger, Lindquist, and Martinek 2003).

caseload faced by the Courts of Appeals and is not without controversy (see Richman and Reynolds 1988, Robel 1989). Jonathan Cohen (2002, 75) explains one rationale given in defense of the practice in the following way: “Unpublished dispositions serve to avoid cluttering the case law with numerous ordinary cases that merely repeat the rule and that may run the risk of confusing the rule with seemingly contrary statements that attorneys might mistake for a revocation of precedent. By limiting publication to instances where the published opinion adds some significant aspect to the case law, the rules also limit maverick judges’ and lawyers’ ability to create exceptions to a doctrinal rule that the panel had no intention of suggesting or allowing.” However, panels do not have unfettered discretion in terms of this important decision. Beginning in the 1970s, the Federal Judicial Conference encouraged the circuits to develop their own rules and guidelines for publishing precedential opinions (McKenna, Hooper, and Clark 2000).

Though there is variation across the courts, “triggers” for publication of a case may include oral argument, representation by legal counsel (as opposed to *pro se* cases), the presence of separate opinion (concurring or dissenting), the holding of the panel (i.e. reversals), and whether the lower court opinion was published (McKenna, Hooper, and Clark 2000).⁶ Given differences in both docket composition and circuit rules on publication, courts’ mean publication rates range widely; from 1983 to 2002, the First Circuit published an average of 55 percent of their cases, while the Fourth Circuit published an average of only 15 percent. (To compare, the median circuit published

⁶ In the data set used for the analyses in this chapter, there was no variable coded for whether the opinion mentioned if the case was orally argued or not. In general, most opinions do not mention whether a case was orally argued, though some will state that the case was submitted on the briefs. It is unclear whether the failure to make mention of the primary mode of argument in other opinions means the same thing across all circuits for all the years of this study. Consequently, I am unable to include a variable that controls for the panel having granted oral argument in a case.

approximately 32 percent of its merits terminations.) In addition to formal circuit rules on publication, a panel's decision to publish may also be informed by norms related to the characteristics of the circuit. Court size, workload per judge, and the proportion of merits terminations that involve criminal appeals and prisoner petitions are each negatively related to the publication rate of a circuit (with correlations of -.42, -.54, and -.65, respectively).

4.2 Theoretical perspectives on panel decision-making processes

Strategic perspectives

Scholars of the U.S. Courts of Appeals have focused much more of their attention on the decision making processes of panels than on the circuits themselves, and consequently, there are a number of well-developed theoretical perspectives that try to account for case outcomes at this level. One such approach emphasizes the strategic considerations of panels in either their role as an agent of the Supreme Court, or as the principal of the district courts in their jurisdiction.

Taking first the principal-agent relationship between the Supreme Court and the Courts of Appeals, it has been argued that panel decisions are motivated by judges' fear of Supreme Court reversal. As Baum explains, "[B]ecause of the threat of reversal by the reviewing court, [lower court judges] must balance their preferences against the preferences of that reviewing court: they sometimes take positions that diverge from their own preferences in order to avoid reversals that would move policy even farther from those preferences" (1997, 115). However, empirical studies have found scant evidence that the fear of reversal motivates judges to modify their behavior in any significant way

(see Klein and Hume 2003; Klein 2002; but see McNollgast 1995). Said differently, while appellate judges may wish to avoid reversal by the Supreme Court (e.g. Howard 1981), other considerations may weigh more heavily in their decision making calculus.

Another way that the hierarchical relationship between the Supreme Court and the Courts of Appeals has been operationalized looks at circuit court compliance with Supreme Court precedent.⁷ Here, the results have been much more favorable to the hypothesis that panels consider Supreme Court precedent when deciding cases, and that they are, most of the time, loyal agents of their principal, the Supreme Court (Songer 1987; Songer and Sheehan 1990; Songer, Segal, and Cameron 1994). The other aspect of vertical relations that may affect a panel's decisions is the circuit court's role as a principal, keeping district courts within its jurisdiction in line with circuit and Supreme Court precedent. Haire, Lindquist, and Songer (2003) find that increases in oversight of a particular circuit by the Supreme Court are positively related to the likelihood of a panel reversing a lower court decision, suggesting that the circuit courts try to make their agents "behave" when they perceive their court to be under increased scrutiny by their principal. It should be emphasized, however, that the oversight capabilities in the federal judicial hierarchy are limited by both the number of judges at each level, and by the sheer number of cases in the system.⁸

⁷ Though fear of reversal is hypothesized to be one reason for this compliance, there may be other reasons for compliance, such as respect for the authority of a higher court or a desire to achieve a legally "correct" answer (Klein and Hume 2003, 581). Furthermore, as Baum (1997, 115, footnote 28) points out, using reversals as a measure solely of doctrinal disagreement is problematic, since a reversal relates to the outcome for the litigants and not necessarily to the doctrinal content of an opinion.

⁸ Lindquist, Haire, and Songer (2007) quote Fiss (1983, 1452-3) on this point: "The span of control in the judge-judge relationship has increased in recent years to the point where only nine justices supervise roughly two hundred circuit judges, who in turn supervise more than six hundred district judges."

Norms of consensus

In addition to considerations related to Supreme Court compliance or district court oversight, explanations about panel behavior often emphasize the norms of consensus said to be prevalent in the Courts of Appeals, as evidenced by the very low dissent rate on these courts. (For example, between 1983 and 2002, the mean dissent rate was less than three percent of all merits terminations.)

There are a number of explanations for why norms of consensus are such a powerful influence on panel behavior. First, the fragmentation that occurs when a panel's decision has a dissenting or concurring opinion may reduce the legitimacy of the decision and, instead, emphasize the subjectivity of the law (see Hettinger, Lindquist, and Martinek 2006, 19). Thus, panels may seek to minimize disagreement to the extent possible in order to bolster the authority of their disposition. A second possibility relates to the nature of the cases. Given the right to one appeal for losing civil litigants and criminal defendants, it is quite likely that many of the appeals heard by circuit courts are relatively straightforward to dispose of, simply because the relevant law and precedent provides a clear resolution (Haire 2006, 273). If the law is unambiguous, then judges may find it easier to come to an agreement that suits all members of a panel.

Group dynamics within the panel arrangement may also discourage disagreement and separate opinion writing. While this may be explained based on the phenomenon of "group think," Cohen argues that this is really a function of the organizational culture in circuit courts: "Court culture teaches that a court that presents a unified face has fewer fragmented opinions, has a higher degree of civility among its judges, speaks with a higher degree of moral authority, and enjoys a higher degree of legitimacy. The court's

institutional commitment to collegiality results in a normative rule that decreases judges' propensity to write separate dissenting and concurring opinions and sets a higher expectation that judges will act civilly toward one another" (2002, 173).

Secondly, because the federal appellate courts utilize rotating panel assignments, the "shadow of the future" may prompt judges to be more accommodating to one another since they know they will have to work together again at some point (and sooner rather than later in smaller-sized courts). Of course, this group dynamic is different from collegial courts that do not utilize rotating panel assignments (e.g. the U.S. Supreme Court). The relative lack of familiarity among judges on an appellate panel may affect the quality of true deliberation and debate at conference, as is evidenced by the following quote from a federal appeals court judge:

When I first came on the court, I imagined that conferences would be reflective, refining, analytical, dynamic. Ordinarily they are none of these. We go around the table and each judge, from junior to senior, states his or her bottom line and maybe a brief explanation. Even if the panel is divided, the discussion is exceedingly crisp. The conference changes few minds (Wald 1999, 99).⁹

Norms of consensus on panels may also be due to the dual concerns of high workload and time pressure. As we saw at the circuit level, there is evidence that the workload of a circuit is negatively related to the frequency of dissent. From the perspective of an overworked judge, she or he has little incentive to spend the time working out a separate opinion, since doing so only serves to increase the workload.¹⁰

⁹ See also Rehnquist (1987), making a similar observation about the U.S. Supreme Court.

¹⁰ This sentiment is echoed by a state court judge in California: "I hate to say this, but just the workload alone may encourage one judge to agree with the others, because otherwise he or she would have to write a dissenting opinion" (quoted in Baum 2001, 281).

Hettinger, Lindquist, and Martinek (2006, 20)¹¹ point out that “[d]issenting opinions usually mean more work for the judges on the panel, not only for the dissenter herself...but also for those in the majority who may feel the need to counter the dissenter’s argument.” In addition, because dissents increase uncertainty in the law, frequent dissents might have the effect of attracting more litigation and thus increasing a circuit’s workload in the long run (Peterson 1981, 425).

Group decision making and complexity

In a very basic sense, modeling the work of appellate panels requires an understanding of how small groups make decisions, especially when they are given many tasks and are under considerable time pressure. Approaches that emphasize the cognitive limitations of human decision makers (and the coping mechanisms they employ) seem especially applicable here. As I have noted in earlier chapters, the bounded rationality model (Simon 1965) is one such theoretical approach. Under this conception, the cognitive limitations of individuals lead them to engage in group decision making, to search in the immediate environment for quick solutions, and to prefer “compromised” solutions that satisfy all members of the decision-making coalition. If bounded rationality accurately describes panel behavior, we should expect to see less individualistic behavior (such as authoring separate opinions) and more compromise.

A second, though related, framework for understanding group decision making tendencies is known as groupthink. Janis (1972) coined the phrase “groupthink” to describe group-based decisions that are faulty as a result of the group’s insulation, lack of critical or opposing perspectives, and resultant disconnection with moral judgment and

¹¹ The authors cite Flanders (1999, 402) on this point.

social reality. (The most well-known example of groupthink given by Janis is the Bay of Pigs invasion.) When group pressure is high and the group is especially cohesive, individual decision makers are less likely to express differing opinions or challenge the group consensus. Tiller and Cross (1999) arguably adopt this perspective in their manuscript advocating in favor of mandating ideologically mixed panels; their study finds that combinations of ideologically like-minded judges tend to produce ideologically extreme decisions. However, it should be emphasized that to describe a panel's behavior as "groupthink" is a normative criticism, because it assumes the decisions being reached are faulty. Because the data gathered for this project do not include any objective criteria on "good" or "bad" decisions, groupthink does not provide any leverage on explaining panel decision making.

Data

The data used for these analyses are primarily drawn from the multi-user databases on the U.S. Courts of Appeals, which are available online at the website of the Sidney Ulmer Project (<http://www.as.uky.edu/polisci/ulmerproject>). The stratified probability sample includes only published decisions (30 for each circuit year), of which I focus upon those opinions published from 1982 to 2002. Each case is weighted in order to approximate a random sample.¹² Information on circuit and district judge

¹² Using the documentation provided for the original version of the database and its update, I calculated weights for each circuit-year according to the proportion of the universe of cases for that particular circuit-year. This allows me to generalize only across published decisions; however, given that published decisions are more likely to be considered "complex" on a number of dimensions, this sampling decision does not pose any significant limitations on my analysis.

characteristics is taken from the Zuk, Barrow, and Gryski database, also housed at the Sidney Ulmer Project's electronic archive (<http://www.as.uky.edu/polisci/ulmerproject>).

Dependent variables

The analyses in this section focus on two central questions. First, I consider how various indicators of case complexity affect the clarity of published decisions made by panels. Then, I examine the relationship between complexity related to case characteristics and complexity at the output stage (opinion characteristics).¹³ The results of each of these analyses will subsequently be compared to analyses that account for both circuit-level factors and case-level factors.

To operationalize legal clarity, I rely on measures of fragmentation in either the consensus of the judges or in the panel's ultimate holding. The first proxy for clarity is a dichotomous measure coded as "1" if a case had either concurring and dissenting opinions, and "0" if no separate opinions were filed. In the sample, concurrences were filed in only 5 percent, or 378, of the opinions, while dissents appeared in 10 percent (793) of the cases. The second clarity measure is the presence of mixed outcome, defined as decision to affirm in part and reverse in part, or decisions to affirm in part, reverse in part, and remand. These dispositions made up 13 percent of cases in the sample. It should be emphasized here that these so-called mixed outcomes represent diminished legal clarity insofar as they fail to name a clear winner and loser in the case. Indeed, this is the position taken by Lindquist, Martinek, and Hettinger (2007), who argue that it is

¹³ As I note in the concluding section of this chapter, I do not consider case characteristics to be "inputs" in my model, since those variables are derived from published opinions ("outputs"). Chapter 5 explicitly accounts for the inputs in a case, which are the arguments and issues raised by appellants and respondents.

the very ambiguity of such outcomes that may lend legitimacy to a decision, since each party comes away as both a winner and a loser.¹⁴

To measure complexity in outputs, I also use two measures. The first is the length of an opinion, in pages. We might expect more complicated cases to require more explanation and, hence, lengthier opinions. In the sample, the average opinion is six pages, with a relatively large standard deviation of 5 pages. Looking across the courts, the Courts of Appeals for the Third and D.C. circuits have the highest median opinion lengths (eight and seven pages, respectively), while the Eighth Circuit tend to be more succinct (four pages).

The other measure employed here to account for opinion complexity is the Westlaw key notes total. (Westlaw is an online legal database which houses opinions and other legal documents for law school students and legal professionals.) Westlaw uses the key number system as a way of indexing legal concepts and points of law; consequently, the number of key notes assigned to case can be used as a rough measure of the legal salience of the case, as well as the relative complexity. Because this variable was not coded in the Courts of Appeals database prior to 1997, the analysis will be confined to decisions made from 1997 to 2002. During this time, opinions from the Second and Third circuits had the highest median number of key notes (11 and 10), compared to the overall mean of 10.5 (and a range of 0 to 86).

¹⁴ I do not take a position on whether a decision that is unanimous but a mixed outcome is more or less legally clear than a case with a separate opinion or opinions.

Influential variables in predicting case outcomes

Median panel ideology

Because case outcomes require at least two judges on a panel to agree, the decision of the majority may reflect compromise and consensus among the panel members. To account for this tendency, I calculated the median ideology score for the three judges, using the Giles, Hettinger, and Peppers measure which ranges from -1 most liberal to +1 most conservative. Where a district court judge participated on a panel as a visitor, I substituted the Poole and Rosenthal common space score of the appointing president as a rough measure of ideology.

Panel composition

Small group dynamics on a panel may be affected by the gender and racial composition of that panel. At the Courts of Appeals level, there is growing evidence that the presence of a female on a panel can affect the behavior of her male colleagues in certain kinds of cases (e.g. Peresie 2005; Songer, Davis, and Haire; Crowe 1999). To account for this possibility, I include a dummy variable coded “1” if at least one female judge is sitting on a panel and “0” if there are no women. I include a similar measure to account for the presence of a non-white judge on a panel. Because district court and visiting circuit judges sitting in designation may affect a panel’s dynamic differently than non-visitors, panels with visiting judges are controlled for with an additional dummy variable.

Case type complexity

The task of developing measures of case complexity has received surprisingly little attention in the Courts of Appeals literature, with only a few exceptions. Hettinger, Lindquist, and Martinek (2006, 59) identify two proxies for case complexity: the number of issues raised and the presence of cross-appeals. In other work (Lindquist, Martinek, and Hettinger 2007), these authors have relied upon factor analysis to derive a complexity score for each case, based again on the number of issues and opinion length.

Seventh Circuit judge and legal scholar Richard Posner has developed what he calls an effort index to identify “the subject-matter areas in which federal courts encounter disproportionately great or disproportionately little difficulty, as proxied by the way in which the case is disposed of” (1996, 230). Based on the ratio of percent signed opinions to percent appeals filed in 1993, this index identifies the following as most difficult case types in the appellate courts: environmental, forfeiture and penalty, admiralty, FELA, tax, securities, antitrust, securities (private), Jones Act, diversity, FTCA, civil rights, and criminal.¹⁵ Along similar lines, Klein (2002) identifies environmental and antitrust appeals as complex (as compared to search and seizure cases).

In contrast to the circuit court level, in which there is no uniform system for assigning weights to different types of cases,¹⁶ the Federal Judicial Center assigns case weights at the district court level. Civil case types that are considered to be complex

¹⁵ The case types listed have a ratio of greater than 1.0 (percent signed opinions divided by percent appeals filed).

¹⁶ Individual circuits can, however, use their own system of case weighting. For example, the Ninth Circuit use staff attorneys to read litigants’ briefs and assign a weight to each case based on their assessment of its relative difficulty. This information is then used to determine the amount of time parties will be allotted for oral argument, as well as for assigning cases to judges (interview, 12 December 2007).

include environmental, civil RICO, patent, all civil rights, antitrust, Freedom of Information Act, copyright, trademark, SEC, fraud, assault, libel, slander, insurance contracts, medical malpractice, federal tax suits, contracts, banking and finance, real or personal property actions, and labor.¹⁷ Criminal case types considered complex include drug offenses (continuing criminal enterprise, manufacturing, and distribution), firearms, murder/manslaughter/homicide, extortion, threats, RICO, and aggravated assault/kidnapping.

Heydebrand's (1977) study of the effect of environmental complexity on the district courts used a shortened version of the FJC list to determine complexity. The cases he considered to be complex (at the district court level) are copyright, patents, trademark, civil rights, and antitrust cases on the civil side; on the criminal side, he classifies forgery, counterfeiting, fraud, robbery, assault, and sex offenses as complex.

Taking this into consideration, I will test several measures in civil cases and in criminal cases, based upon the definitions provided by Klein, Posner, the FJC, and Heydebrand. Each of these variables are coded as a "1" if either of the coded case types for an appeal is included in the list of complex cases, and "0" if not. I do not use the measures suggested by Hettinger, Lindquist, and Martinek (2006), for two reasons. First, since I account for the number of issues elsewhere, there is no need to include them again here. Secondly, the presence of a cross-appeal does not help me determine which issue areas are more complex than others, though it arguably relates to a separate dimension of complexity associated with the number of issues raised. For this reason, the presence of a cross-appeal is coded as an indicator of the number of issues, as discussed below.

¹⁷ I consider case types that score 1.0 or above in the FJC index to be complex. The FJC case weight system attempts to account for the amount of a time it should take a judge to deal with a particular kind of case, based on national averages.

It should be noted here that in most circuits, rules about publication are set up so that complex cases are more likely to be published than “easy” cases (McKenna, Hooper, and Clark 2000). For this reason, relying on published opinions is likely to provide leverage on the question of complexity, since these cases exhibit a good bit of variation in degrees and kinds of case complexity.¹⁸

Number of issues

The number of issues raised in a case may also increase the difficulty of an appeal for a panel. Of course, there are several different ways to conceptualize (and count) issues. The first measure I use is the number of policy areas that a case involves.¹⁹ These include specific topics under the general issue areas of criminal law, civil rights, First Amendment, due process, privacy, labor relations, and economic activity and regulation. Information about the number of policy areas is limited by the coding scheme in the Courts of Appeals database, so I code this variable as “1” if there is more than one issue and “0” if there only one issue.

In addition to multiple policy areas, the number of issues may also be understood as it relates to the number of legal concepts involved in a case. This measure is a count of the number of legal concepts identified in an opinion, taken from the Courts of Appeals database. These are grouped by the type of dispute: criminal, disputes between private entities, disputes between private entities and government, and agency appeals.

¹⁸ The relative mix of “easy” and complex cases may also be driven by litigant behavior, specifically the proclivity to settle in certain kinds of cases. Given data limitations, I am unable to account for the relative complexity of cases that are settled between the district court ruling and an appeal.

¹⁹ My use of the term “policy areas” reflects a social science perspective of the number of issues in a case, while the variable for legal concepts is arguably conceptualized to be consistent with how a legal practitioner might understand multiple issues.

Examples of the legal concepts under the area of criminal appeals, for example, include jury instructions, sentencing, admissibility of evidence, adequacy of counsel, and search and seizure, among others. For this analysis, concepts mentioned in the opinion were coded as “1” and “0” if otherwise, then summed. The total number of legal concepts mentioned in an opinion was then concluded in the model.

Finally, I include a dummy variable to control for the presence of a cross-appeal, which by definition, raises multiple issues, since both parties are appealing separate issues from the district court’s decision.

Hypotheses

How might panels respond to case complexity in their decision making? The bounded rationality account suggests that case complexity will enhance the tendency for all members of a panel to agree, or “satisfice.” This prediction yields the three following hypotheses:

H₁: A separate opinion will be less likely in cases with multiple policy areas and legal issues represented.

H₂: A separate opinion will be less likely in cases in which there is a cross-appeal.

H₃: A separate opinion will be less likely in civil and criminal cases that are considered complex.

According Lindquist, Martinek, and Hettinger (2007), panels may be more likely to compromise in complex cases by issuing split decisions to affirm in part and reverse in part. This is in keeping with the bounded rationality account: individuals, when faced

with their cognitive limitations in problem solving, will prefer group solutions to individual ones.

H₄: A mixed outcome will be less likely in cases with multiple policy areas and legal issues represented.

H₅: A mixed outcome will be less likely in cases in which there is a cross-appeal.

H₆: A mixed outcome will be less likely in civil and criminal cases that are considered complex.

It also seems likely that panels might respond to case complexity by writing more complex opinions, as measured by opinion length and the number of key notes identified. Some research on humans' information processing capabilities has found evidence of a linear relationship between the complexity of inputs and complexity of outputs, at least to a certain point (e.g. Miller 1960). However, these findings are not directly on point to my inquiry in this chapter, since case characteristics (as defined by an opinion) do not truly represent inputs in a case. Still, the underlying premise seems reasonable: in more complicated cases, opinions will tend to reflect that complexity.

H₆: Longer, more legally salient opinions will be more likely in cases with multiple policy areas and legal issues represented.

H₇: Longer, more legally salient opinions will be more likely in cases in which there is a cross-appeal.

H₈: Longer, more legally salient opinions will be more likely in civil and criminal cases that are considered complex.

Methods

To model a panel's decision, I use two different statistical approaches. First, when the dependent variable is dichotomous (as in the separate opinion and mixed

outcome models), I use logistic regression and cluster on the case. For the opinion length model, I utilize OLS regression with robust standard errors. Because all of my analyses rely on a probability sample of published opinions, I also weight the cases to approximate a random sample of published opinions.

Combined model

In this set of analyses, I examine how panels respond to different kinds of case complexity—specifically, whether complexity induces all members of a panel to agree, as suggested by the bounded rationality model, or whether it breeds divisiveness and reduces legal clarity by increasing the likelihood of separate opinions.

As noted above, there are a number of possible measures for case complexity in federal appellate cases. A correlation analysis of these variables with the measures for number of policy areas and legal concepts revealed no correlation among the variables that might cause problematic levels of collinearity in any of the models (see Table 4.1). Indeed, the highest r -value was a weak 0.295 (between legal complexity and the FJC measure of civil case complexity). Similarly, the presence of a cross-appeal was uncorrelated with the number of case types ($r=.02$) and the number of legal provisions ($r=.06$).

The results of the combined analyses are presented in Tables 4.2 through 4.7 and arrayed so that different measures of case complexity (from the FJC, Judge Posner, and Heydebrand's work on district courts) can be compared against each other. Beginning first with the models of separate opinion writing, we can see that the presence of a cross appeal is positively and significantly related to the likelihood of both dissenting and

concurring opinions in a case—which suggests, as Lindquist and her coauthors have argued, that such cases may present multiple (and often conflicting) presentations of issues that make it hard for judges to reach consensus. The effect is relatively small; a case with a cross-appeal has a .11 predicted probability of a dissent, compared to a .09 probability in a case without a cross-appeal present.

We also see, in six of the nine models presented in Tables 4.2 through 4.4, that the presence of a female judge on a panel increases the probability of a dissenting opinion, but not of a concurring opinion. Holding all other variables at their means, the predicted probability of dissent on a panel with at least one woman is .11, compared to .08 on a panel that is all-male in its composition. It should be emphasized that this finding should not be interpreted as an increased tendency for female judges to dissent (as noted elsewhere, other research has failed to find gender differences in dissenting behavior), but is more appropriately viewed as an effect on panel dynamics. We will return to this finding later in this chapter to see how it may be affected by circuit context.

None of the three case complexity variables achieve significance in any model of separate opinion writing. However, the number of legal concepts is negatively related to the likelihood of a concurring opinion, providing some support for the bounded rationality account of decision making. That is, when faced with an appeal that contains multiple legal issues, it appears that judges are able to coalesce around a single disposition, rather than splintering unanimity with separate opinion writing, and particularly, concurrences. It may be that when there are fewer legal issues at stake, it is easier for one or more judges to focus on a difference of interpretation, for example, in a concurring opinion.

Table 4.5 displays the results of logit models of mixed outcomes, or decisions to affirm in part and reverse in part. Here we see that multiple policy areas, legal concepts, and cross-appealing parties are all positively associated with split decisions. Consistent with Lindquist, Martinek, and Hettinger (2007), these findings may reflect a panel's inclination to take a nuanced approach when an appeal has multiple dimensions or when it presents multiple issues to resolve. In addition, two of the three measures of civil case complexity reach statistical significance in these models and are also positively associated with decisions to affirm in part and reverse in part. The Posner measure was the only case complexity measure to fall short of statistical significance.

Finally, the last two tables in this section examine the effect of case and panel-level factors on complexity in output, as measured by opinion length (Table 4.6) and the Westlaw key notes measure (Table 4.7). Taking opinion length first, all three models show that increasing the number of policy areas from one to more than one will increase the page length by about a page, on average. The effect for increasing the number of legal concepts is also of the same magnitude when other factors are held constant. We see smaller, but still positive, effects when there is a cross-appeal, or when the appeal involves a civil case classified as complex under the FJC case weighting measure or the Heydebrand measure. However, if the case involves criminal issues that are rated 1.0 or higher by the FJC,²⁰ the opinion will be, on average, roughly half of a page shorter than a case without that distinction. The negative coefficient for these kinds of criminal cases suggest that while such cases may be deemed more complex and time-consuming at the district court level, the opposite may be true when they are reviewed on appeal.

²⁰ These kinds of cases involve narcotics, firearms, murder/manslaughter/homicide, extortion, threats, RICO, aggravated assault/kidnapping.

Finally, Table 4.7 reports the results of three OLS regression analyses of the Westlaw key notes measure. The number of key notes assigned to a case represents the legal salience and complexity of the opinion, where higher numbers of key notes will be indicative of a more legally “rich” analysis by a panel. All three models show that cases with multiple policy areas and multiple legal concepts are significantly related to higher complexity of output, as measured by the key notes. This, by itself, is not surprising, since a case that contains a number of legal dimensions will likely require a panel to address most or all of those dimensions in their opinion. Furthermore, this highlights the fact that the number of legal concepts variable I use taps into the same underlying concept as the key notes do—legal complexity. A correlation test supports this interpretation, as the two variables are correlated at .41. (In comparison, the number of policy areas is correlated with key notes only at .15.)

None of the FJC or Heydebrand variables are significantly related to the number of key notes, but Posner’s measure of case complexity (which includes antitrust, intellectual property, admiralty, and taxation cases) is actually negatively related to the number of key notes. This would tend to contradict the hypothesis that complex types of cases necessarily lead to complexity in output.

Discussion

Overall, we find some support for the bounded rationality account of panel behavior when faced with case complexity, though this characterization is strongest in terms of predicting split decisions. We see that multiple policy areas, legal concepts, and cross-appealing parties are all positively associated with mixed outcomes. Since each of

these variables taps into the number of issues in a case, this finding suggests cases with multiple issues (broadly conceived) may promote give-and-take more than cases with fewer issues. In terms of predicting separate opinions, when a case involves a cross appeal, dissensus is actually more likely on a panel, contrary to expectations. Competing claims of a cross-appeal may do more to impede unified group decision making than simply the number of legal issues (which was negatively related to concurring opinions).

However, a panel's handling of case complexity may be related to factors beyond those connected to the panel's composition or to case characteristics. I turn my attention next to the question of how the circuit context in which a panel operates may affect its decisions.

4.3 Incorporating the Circuit Context

Though there are commonalities to the appellate process that extend to all circuits, given the substantial variation in court environments discussed in chapter 3, appellate judges likely carry out their task of reviewing cases in very different contexts. Differences in court size, the amount of work shouldered by each judge, the heterogeneity of a circuit with respect to the race and gender of its judges, the ideological composition of the court, the relative difficulty of the docket, and the use of visiting judges all may structure the environment in which panels decide cases.

Exploratory Data Analysis

To capture these contextual effects, the work of a panel should be modeled in a way that reflects its position as a subgroup situated within the larger group of the circuit

(i.e. in a hierarchical fashion). Hierarchical data structures such as this one, which are quite commonly found in political science research, present a number of challenges for statistical modeling if they are ignored. One problem is the violation of the assumption of observational independence, since the level-one unit (e.g., a panel) belongs in a non-random way to a level-two unit (e.g., a circuit). Luke (2004, 6-7) cites Duncan, Jones, and Moon (1998) on this point, noting that “all of the un-modeled contextual information ends up pooled into the single error term of the model.” When this occurs, all of the panels belonging to the same circuit will have correlated errors, which can make predictors appear to be statistically significant when they are not (i.e. inflate Type-I error).

Hierarchical linear modeling (HLM) is one methodological approach to accounting for nested, or multilevel, data structures. Steenbergen and Jones (2002, 219) describe the central goal of multilevel modeling as accounting for “variance in a dependent variable that is measured at the lowest level of analysis by considering information from all levels of analysis.” However, this method is not appropriate when there is a small N in either the level-one or the level-two units:

A relevant general remark is that the sample size at the highest level is usually the most restrictive element in the design. For example, a two-level design with 10 groups, i.e. a macro-level sample size of 10, is at least as uncomfortable as a single-level design with a sample size of 10. Requirements on the sample size at the highest level, for a hierarchical linear model with q explanatory variables at this level, are at least as stringent as requirements on the sample size in a single level design with q explanatory variables (Snijders and Bosker 1999, 140, as cited by Bowers and Drake 2005, 301-2).

Because the universe of circuits (the level two unit of analysis) could, at most, equal only 13 courts,²¹ HLM will not provide reliable estimates or hypothesis tests

²¹ This number includes the eleven numbered circuits, the DC circuit, and the federal circuit.

because of an insufficient N.²² In cases such as this, Bowers and Drake (2005) recommend exploratory data analysis as an alternative to using HLM inappropriately in the common case of a small number of level-two units. In other words, by graphing the relationships between the level-one and level-two variables, it is possible to leverage the hierarchical nature of the data without reporting unreliable estimates.

The first set of figures (4.1 to 4.4) display the distribution of several level-one independent variables, as grouped by circuit. Looking at median values, there is no clear overall trend in terms of docket difficulty or workload and output complexity (as measured by opinion length and the number of Westlaw key notes). We can see, however, in circuits that have relatively high reversal rates, there is a slight tendency for panels to write longer opinions. Though there is less overall variation in the key notes variable (i.e. the range is tighter than for opinion length), we see the pattern mirrored here as well. This is also true in circuits that rely more on participation by visiting judges as well as in circuits with higher dissent rates.

The second set of figures (4.5 to 4.10) display scatter plots of the relationship between legal complexity and output complexity (both opinion length and the number of key notes), as conditioned by several circuit characteristics. The graphs display the upper (75th percentile and above) and lower (25th percentile and below) quartiles for court size, workload, docket difficulty, visiting judge participation, circuit heterogeneity, and ideological spread. The upper and lower quartiles were selected for comparison because if differences are likely to exist anywhere, they should exist between the two extremes.

²² See Maas and Hox (2002, 2004) for discussion of appropriate sample sizes; they suggest a minimum of 50 level-two groups in order to report reliable confidence intervals at all levels of the model.

In general, each graph shows a moderately positive relationship between legal complexity and output complexity that does not vary substantially given variation in circuit characteristics. To the extent that we see any circuit-related differences in this relationship, they tend to appear in the graphs with key notes as the dependent variable. For example, the relationship between legal complexity and the number of key notes appears to be conditioned somewhat by the effect of a circuit's relative judicial heterogeneity, as measured by the Herfindahl index. In more heterogeneous circuits (those with the lowest Herfindahl scores), we see a slightly steeper slope in the relationship between the number of legal provisions and opinion length, though there is more dispersion in these observations than in those from more homogeneous circuits. This provides tentative evidence that the effect of the number of legal provisions on output complexity may be stronger in courts that are more diverse with respect to gender and race.

Of course, one disadvantage of pictorial representations like scatter plots is that they fail to control for other factors that may be influencing the results. To gain more leverage on the question of circuit effects on panels' decisions, it appears that additional analyses may be useful. The next section returns to the models from the earlier OLS and logit analyses, disaggregating them by circuit in order to separate out circuit-specific effects.

Comparing Individual Circuits

Going back to the models of split decisions, opinion length and Westlaw key notes presented in section 4.2, I reran them individually for each circuit²³ using the measures from the Federal Judicial Center as the measure of case complexity.

Table 4.8 displays the results for the mixed outcome model in each of the numbered circuits. The variables that perform most consistently across the board are the measures for the number of policy areas, legal concepts, and the cross-appeal variable. Legal complexity achieves statistical significance in eight circuits (all but the Third, Seventh, and Eighth), while the number of different policy areas and the presence of a cross-appeal are each significant in five circuits (the First, Third, Sixth, Ninth and Tenth; and the First, Second, Fifth, Seventh, and Eleventh, respectively).²⁴ The circuits for which the presence of multiple policy areas affected the likelihood of a mixed outcome tended to fall in the mid to low range of workload per judge, suggesting that in circuits with greater work demands, panels are less willing to “split the difference.” Conversely, in circuits where judges have relatively less work pressure, panels may have the luxury of handing down more nuanced rulings.

Other variables that were positive and significantly related to mixed outcomes included the presence of a complex civil case type (in the Third and Fourth circuits), the presence of a complex criminal case type (in the Third Circuit), and panel median ideology (in the Tenth Circuit). While no factors other than court size link the Third and

²³ Ideally, I would also rerun the three models for separate opinions (i.e. the likelihood of, respectively, a separate opinion, dissent, and concurrence). However, when the data are disaggregated by circuit, Stata 9.0 reports that the F-test fails to reach significance at $p < .05$ for the majority of the circuits, likely because of the infrequency of separate opinions. In order to maintain a high level of confidence in my results, I have opted to report only the results for the models that clear this methodological hurdle.

²⁴ Because the F-test for the Eighth Circuit indicates that model as a whole is not significant at $p < .05$, it is excluded from the discussion here.

Fourth circuits in an apparent way (both fall around the median court size of 12), the Third Circuit ranked second to last in average proportion of criminal appeals and prisoner petitions. Relatively less exposure to criminal appeals may contribute to Third Circuit panels' propensity to issue decisions to affirm in part and reverse in part when faced with more difficult kinds of criminal cases. Finally, in the Tenth Circuit, the panel median ideology was negatively related to a split decision, meaning that more conservative panels would be, on average, less likely to issue decisions to affirm in part and reverse in part. Given the relative conservatism of the Tenth Circuit as a whole during this time period (the median court ideology was .239), it seems reasonable that panels that are also conservative in their makeup would have less need to compromise via decisions to affirm in part and reverse in part.

Tables 4.9 and 4.10 display the results of the models of output complexity, as measured by opinion length and Westlaw key notes, respectively. Some general trends emerge here as well. The number of legal issues continues to be by far the most consistent predictor of output complexity, achieving conventional levels of significance in all but one circuit for both models. Even the Seventh Circuit, which failed to reach significance at the .05 level for the key notes model, was statistically significant at $p < .10$. The effects are quite large, as the estimates for page length ranged from one additional page to almost two pages and from one to five key notes. This strong result indicates that cases with greater legal complexity are also those that exhibit greater output complexity, based on multiple measures. Evidently when cases present multiple legal concepts, panels tend to write longer, richer opinions, no matter the circuit in which they are situated.

Another fairly consistent predictor of opinion length was the presence of multiple policy areas. This measure was positive and significant in six circuits, ranging from small in size (the First) to large (the Ninth). However, in terms of key notes, it reached statistical significance in only two circuits (the Third and Eleventh). When a case involved an area of civil law that the FJC classifies as complex, panels in the Second, Fifth, and Ninth circuits tended to write from three-fourths of a page to just over an additional page more than for other case types. However, when an appeal involved one of the complex criminal case types identified by the FJC, the First and the Fourth circuits wrote shorter opinions--a page and half and two pages, respectively.

The variables related to panel composition only appear to affect output complexity in a handful of courts. The Second, Seventh, and Eighth Circuits all score among the top four circuits in terms of homogeneity, as measured by the Herfindahl index (which ranges from zero to one, with higher values indicating greater homogeneity), and it was in these circuits that the presence of a woman or a non-white judge on a panel was related to the length or substance of an opinion. The presence of a non-white judge was negatively related to both opinion length and the number of key notes in the Seventh Circuit, a court which had only one non-white judge during this time period: Ann Claire Williams, an African-American woman, who was originally appointed as federal district court judge by President Reagan but was elevated to the Court of Appeals by President Clinton. It may also be relevant that the Seventh Circuit had the largest median ideological spread of any of the courts during this time period (1.1 out of a possible 2.0).

In contrast, the presence of a woman on a panel was positively related to opinion length in the Second Circuit. Between 1982 and 2002, there were three women on the Second Circuit Court of Appeals: Amalya Kearse, an African-American woman appointed by President Carter; Rosemary Pooler, a white woman appointed by President Clinton; and Sonia Sotomayor, a Hispanic woman appointed by President Clinton.²⁵ While it would be erroneous to conclude that in the Second Circuit female judges write longer opinions, it does appear that diversification with respect to both gender and race may have had an effect on legal outputs of panels in that circuit. Specifically, this may signify more robust deliberation among members of heterogeneous panels, resulting in longer opinions.

Finally, the presence of a visiting judge on a panel increased the length of opinions in the First and Tenth circuits, two courts in the top five in terms of reliance on visiting judges to assist with caseload. However, in the Eighth Circuit, the participation by a visiting judge on a panel was negatively related to opinion complexity, as measured by Westlaw key notes. This effect was stronger than any of the other variables in the model for that circuit; a panel with a visiting judge had, on average, two and half fewer key notes than a panel without a visiting judge. The Eighth Circuit finding is consistent with many of the normative criticisms leveled at the visiting judge practice (e.g. Benesh 2006), but given the totality of the individual circuit results, there appears to be no widespread basis for concern.

²⁵ In addition, Reena Raggi was appointed by George W. Bush to serve on the Second Circuit in 2002, but due to her confirmation late in the year, she is neither included in the judge database nor in these analyses.

Overall, the results from the individual circuit models reveal differences that may be attributed to court characteristics such as workload or judicial heterogeneity as well as to circuit norms about opinion writing and collegial judging. In addition, we can see that while certain case characteristics show the same relationship with legal outcomes in all or almost all courts, other factors, like panel heterogeneity (with respect to race, gender, and the presence of visiting judges), do not uniformly affect how panels cope with various dimensions of complexity in the cases they review.

4.4 Conclusions

The analyses presented in this chapter highlight the usefulness of triangulation as a strategy for exploring causal relationships. Operationalizing multiple dimensions of complexity helps us to gain a fuller understanding of the environment in which decision making by panels occurs, and it allows us to search for patterns in the ways in which panels in different organizational contexts respond to various kinds of complexity in the cases they hear. In doing so, we see that, while certain factors matter for most or all circuits (e.g. legal complexity and the number of policy areas), individual differences do exist both in terms of the presence and direction of other relationships.

Evaluating the evidence that panels, as small groups, behave consistent with a bounded rationality account of decision making, there appears to be fairly strong support for this proposition. First of all, the relatively low rate of dissenting opinions in the Courts of Appeals highlights the norm of issuing opinions with “one voice”; that is, on average, panels tend to arrive at solutions amenable to all three members, rather than

allowing individual differences to manifest themselves as separate opinions. This, by itself, provides evidence of compromise and of satisficing behavior.

Secondly, the models largely support the contention that aspects of case complexity tend to produce satisficing behavior. None of the case complexity variables, except for the presence of a cross appeal, are significantly associated with the likelihood of a dissent in the combined models. Even concurring opinions, which are also rarely utilized, do not seem to be related to most aspects of case complexity, save the number of legal provisions. Third, if we equate decisions to affirm in part and reverse in part with satisficing behavior by panels, there is a clear relationship between case complexity and group consensus. The number of policy areas, the number of legal issues, the presence of a cross appeal, and two of the three measures of civil case complexity are all positively and significantly related to the likelihood of a mixed outcome. Thus, it appears that one way that panels cope with complexity in their environment is to make decisions *as a group*, just as the bounded rationality account predicts.

Another theoretical perspective explored in this chapter is the relationship between case complexity and output complexity. We see a positive, linear relationship between several measures of complexity related to characteristics of a case (the number of policy areas, legal issues, presence of a cross-appeal, and complex civil case types) and output complexity, as measured by the length of opinions. With respect to the number of case types and legal provisions, this relationship is mirrored when output complexity is operationalized as the number of Westlaw key notes.

It is important to emphasize that operationalizing aspects of case characteristics that relate to complexity is not the same as measuring “inputs” in a case. This is largely

due to data constraints, as the measures of case characteristics and measures of case outcomes are both taken from a panel's opinion. Thus, the case characteristics coded reflect the panel's conception of the case and not necessarily the litigants' views (the true "inputs" of a case). Preliminary tests from one circuit show that the number of issues raised by litigants in their briefs appears to be weakly to moderately related to the number of key notes,²⁶ which tells us that litigant "inputs" may be related to case outputs on a broader scale.

The picture of the federal appellate courts that emerges from this chapter is one in which circuit context not only shapes but also interacts with the work of the panel to affect legal outcomes. Because legal outcomes are also dependent upon the arguments and issues raised on appeal by the litigants, this is the subject I turn to in the next chapter.

²⁶ The correlation between key notes and the number of issues raised by appellants was .33. The correlation between key notes and respondent issues was .61.

Table 4.1: Correlations among Complexity Variables

	Case type	Legal prov.	Cross appeal	Heydebrand civil	Klein civil	Posner civil	FJC civil	FJC crim.
Policy areas	1.0							
Legal issues	.124	1.0						
Cross appeal	.021	.061	1.0					
Heydebrand complex civil	.098	.030	.024	1.0				
Klein complex civil	.061	.041	.021	.123	1.0			
Posner complex civil	.009	-.040	.004	.067	.256	1.0		
FJC complex civil	.129	.023	.102	.518	.230	.218	1.0	
FJC complex criminal	.011	.071	-.055	-.141	-.066	-.086	-.283	1.0

Table 4.2: Logit Analysis of the Likelihood of a Separate Opinion
All numbered circuits and DC circuit (1982-2002)

	<i>Model 1: FJC</i>		<i>Model 2: Posner</i>		<i>Model 3: Heydebrand</i>	
	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>
No. policy areas	.005 (.124)	.967	-.001 (.122)	.995	-.001 (.124)	.994
No. legal issues	.015 (.034)	.652	.015 (.034)	.665	.015 (.034)	.662
Cross appeal	.217 (.073)	.003	.215 (.072)	.003	.213 (.072)	.003
Case complex.						
FJC complex	-.038 (.099)	.701	--		--	
civil						
FJC complex	-.035 (.137)	.797	--	.847	--	
criminal						
Posner-complex	--		-.043 (.223)		--	.901
civil						
Heydebrand-	--		--		.017 (.138)	.435
complex civil						
Heydebrand-	--		--		-.130 (.166)	
complex criminal						
Woman on panel	.284 (.105)	.007	.284 (.105)	.007	.282 (.105)	.007
Minority on panel	.019 (.107)	.862	.018 (.107)	.869	.017 (.107)	.870
Panel median ideology	.182 (.163)	.264	.182 (.163)	.264	.178 (.163)	.277
Visiting judge	-.149 (.109)	.171	-.150 (.109)	.169	-.150 (.109)	.168
Constant	-2.24 (.265)	.000	-2.25 (.265)	.000	-2.25 (.265)	.000
<i>N</i>	7370		7370		7370	
Pseudo r^2	.0276		.0276		.0278	
Model sig.	p < .001		p < .001		p < .001	

Notes: Boldface type denotes $p < .05$, two-tailed test. Standard errors adjusted for clustering on circuit. Output for dummy variables for years and circuits omitted (1982 and First Circuit used as baseline). Cases exclude en banc panels.

Table 4.3: Logit Analysis of the Likelihood of Dissent
All numbered circuits and DC circuit (1982-2002)

	<i>Model 1: FJC</i>		<i>Model 2: Posner</i>		<i>Model 3: Heydebrand</i>	
	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>
No. policy areas	-.009 (.123)	.939	-.016 (.121)	.894	-.022 (.122)	.856
No. legal issues	.016 (.034)	.631	.015 (.034)	.664	.015 (.034)	.660
Cross appeal	.225 (.071)	.002	.224 (.071)	.002	.223 (.070)	.002
Case complex.						
FJC complex	-.044 (.096)	.650	--		--	
civil						
FJC complex	-.107 (.135)	.428	--		--	
criminal				.774		
Posner-complex			-.062 (.215)		--	
civil						.599
Heydebrand-			--		.070 (.133)	
complex civil						.697
Heydebrand-			--		-.063 (.162)	
complex criminal						
Woman on panel	.282 (.101)	.005	.282 (.101)	.005	.282 (.102)	.005
Minority on panel	-.039 (.105)	.708	-.040 (.105)	.699	-.041 (.105)	.699
Panel median ideology	.200 (.160)	.213	.200 (.160)	.211	.198 (.161)	.217
Visiting judge	-.074 (.104)	.476	-.075 (.104)	.471	-.075 (.104)	.471
Constant	-2.31 (.264)	.000	-2.32 (.264)	.000	-2.32 (.263)	.000
<i>N</i>	7370		7370		7370	
Pseudo r^2	.0276		.0275		.0276	
Model sig.	p < .001		p < .001		p < .001	

Notes: Boldface type denotes $p < .05$, two-tailed test. Standard errors adjusted for clustering on circuit. Output for dummy variables for years and circuits omitted (1982 and First Circuit used as baseline). Cases exclude en banc panels.

Table 4.4: Logit Analysis of the Likelihood of a Concurrence
All numbered circuits and DC circuit (1982-2002)

	<i>Model 1: FJC</i>		<i>Model 2: Posner</i>		<i>Model 3: Heydebrand</i>	
	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>
No. policy ares	-.113 (.163)	.489	-.110 (.163)	.500	-.133 (.164)	.417
No. legal issues	-.097 (.047)	.040	-.095 (.047)	.043	-.094 (.047)	.045
Cross appeal	-.111 (.138)	.420	-.138 (.148)	.352	-.126 (.144)	.381
Case complex.						
FJC complex	-.026 (.137)	.851	--		--	
civil						
FJC complex	.322 (.170)	.058	--		--	
criminal				.265		
Posner-complex	--		-.369 (.331)		--	
civil						.393
Heydebrand-	--		--		.150 (.176)	
complex civil						.169
Heydebrand-	--		--		.276 (.201)	
complex criminal						
Woman on panel	.206 (.138)	.134	.203 (.137)	.138	.207 (.137)	.133
Minority on panel	-.070 (.147)	.635	-.075 (.147)	.611	-.071 (.147)	.631
Panel median ideology	.173 (.221)	.433	.173 (.221)	.434	.181 (.222)	.415
Visiting judge	-.174 (.145)	.229	-.175 (.145)	.226	-.174 (.145)	.230
Constant	-2.71 (.373)	.000	-2.69 (.371)	.000	-2.70 (.371)	.000
<i>N</i>	7370		7370		7370	
Pseudo r^2	.0342		.0331		.0335	
Model sig.	p < .001		p < .001		p < .001	

Notes: Boldface type denotes $p < .05$, two-tailed test. Standard errors adjusted for clustering on circuit. Output for dummy variables for years and circuits omitted (1982 and First Circuit used as baseline). Cases exclude en banc panels.

Table 4.5: Logit Analysis of the Likelihood of a Split Decision
All numbered circuits and DC circuit (1982-2002)

	<i>Model 1: FJC</i>		<i>Model 2: Posner</i>		<i>Model 3: Heydebrand</i>	
	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>
No. policy areas	.511 (.097)	.000	.545 (.096)	.000	.515 (.096)	.000
No. legal issues	.267 (.028)	.000	.266 (.028)	.000	.266 (.028)	.000
Cross appeal	.401 (.141)	.004	.428 (.157)	.006	.428 (.156)	.006
Case complex.						
FJC complex	.236 (.084)	.005	--		--	
civil						
FJC complex	.004 (.115)	.970	--		--	
criminal						
Posner-complex	--		.069 (.190)	.716	--	
civil						
Heydebrand-	--		--		.405 (.105)	.000
complex civil						
Heydebrand-	--		--		-.014 (.141)	.921
complex criminal						
Woman on panel	-.084 (.089)	.340	-.081 (.088)	.358	-.079 (.089)	.372
Minority on panel	-.031 (.094)	.740	-.026 (.094)	.779	-.028 (.094)	.768
Panel median ideology	-.124 (.134)	.355	-.122 (.134)	.361	-.114 (.134)	.396
Visiting judge	.012 (.091)	.897	.016 (.091)	.864	.016 (.091)	.860
Constant	-3.46 (.260)	.000	-3.409573 .2584653	.000	-3.41 (.259)	.000
<i>N</i>	7370		7370		7370	
Pseudo r ²	.0519		.0502		.0529	
Model sig.	p < .001		p < .001		p<.001	

Notes: Boldface type denotes p < .05, two-tailed test. Standard errors adjusted for clustering on circuit. Output for dummy variables for years and circuits omitted (1982 and First Circuit used as baseline). Cases exclude en banc panels.

Table 4.6: OLS Regression of Opinion Length
All numbered circuits and DC circuit (1982-2002)

	<i>Model 1: FJC</i>		<i>Model 2: Posner</i>		<i>Model 3: Heydebrand</i>	
	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>
No. policy areas	1.04 (.192)	.000	1.09 (.191)	.000	1.04 (.192)	.000
No. legal issues	1.40 (.086)	.000	1.39 (.086)	.000	1.39 (.086)	.000
Cross appeal	.364 (.182)	.045	.432 (.191)	.024	.426 (.189)	.024
Case complex.						
FJC complex	.359 (.133)	.007	--		--	
civil						
FJC complex	-.582 (.160)	.000	--		--	
criminal						
Posner-complex	--		.200 (.261)	.442	--	
civil						
Heydebrand-	--		--		.652 (.190)	.001
complex civil			--			
Heydebrand-	--				-.006 (.195)	.975
complex criminal						
Woman on panel	.221 (.144)	.126	.233 (.145)	.108	.234 (.145)	.106
Minority on panel	-.054 (.152)	.722	-.045 (.152)	.768	-.047 (.152)	.756
Panel median ideology	-.201 (.201)	.381	-.191 (.201)	.344	-.183 (.201)	.364
Visiting judge	.185 (.136)	.173	.194 (.136)	.153	.193 (.136)	.155
Constant	2.43 (.367)	.000	2.46 (.370)	.000	2.46 (.370)	.000
<i>N</i>	7369		7369		7369	
<i>R</i> ²	.2259		.2227		.2242	
Model sig.	p < .001		p < .001		p<.001	

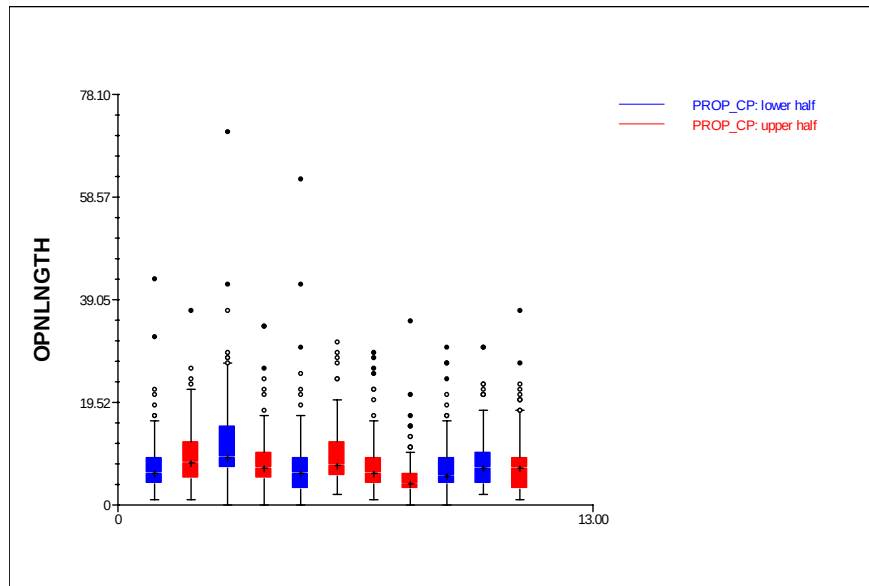
Notes: Boldface type denotes $p < .05$, two-tailed test. Standard errors adjusted for clustering on circuit. Output for dummy variables for years and circuits omitted (1982 and First Circuit used as baseline). Cases exclude en banc panels.

Table 4.7: OLS Regression of Westlaw Key Notes
All numbered circuits and DC circuit (1997-2002)

	<i>Model 1: FJC</i>		<i>Model 2: Posner</i>		<i>Model 3: Heydebrand</i>	
	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>
No. policy areas	2.41 (.485)	.000	2.41 (.480)	.000	2.33 (.487)	.000
No. legal issues	2.37 (.203)	.000	2.36 (.202)	.000	2.36 (.203)	.000
Cross appeal	.086 (.209)	.681	.065 (.211)	.759	.067 (.214)	.759
Case complex.						
FJC complex	-.203 (.422)	.630	--		--	
civil						
FJC complex	.658 (.512)	.199	--		--	
criminal						
Posner-complex	--		-2.53 (.697)		--	
civil						
Heydebrand-	--		--		.605 (.514)	.240
complex civil			--			
Heydebrand-	--				.554 (.567)	.329
complex criminal						
Woman on panel	.087 .396	.827	.082 (.394)	.836	.071 (.396)	.858
Minority on panel	-.197 .418	.636	-.205 (.417)	.624	-.201 (.418)	.631
Panel median ideology	-.071 .617	.909	-.094 (.610)	.877	-.097 (.610)	.873
Visiting judge	-.157 (.467)	.736	-.184 (.466)	.694	-.176 (.466)	.706
Constant	(-1.28) (.914)	.160	-1.22 (.909)	.181	-1.25 (.910)	.168
<i>N</i>	2112		2112		2112	
<i>R</i> ²	.2286		.2303		.2284	
Model sig.	p < .001		p < .001		p<.001	

Notes: Boldface type denotes $p < .05$, two-tailed test. Standard errors adjusted for clustering on circuit. Output for dummy variables for years and circuits omitted (1997 and First Circuit used as baseline). Cases exclude en banc panels.

Figure 4.1a: Opinion Length Distribution by Circuit & Docket Difficulty *



*Note: For all box plots, blue boxes represent circuits in the lower 50 percentile of some variable, and red boxes represent the upper 50 percentile

Figure 4.1b: Westlaw Key Notes Distribution by Circuit & Docket Difficulty

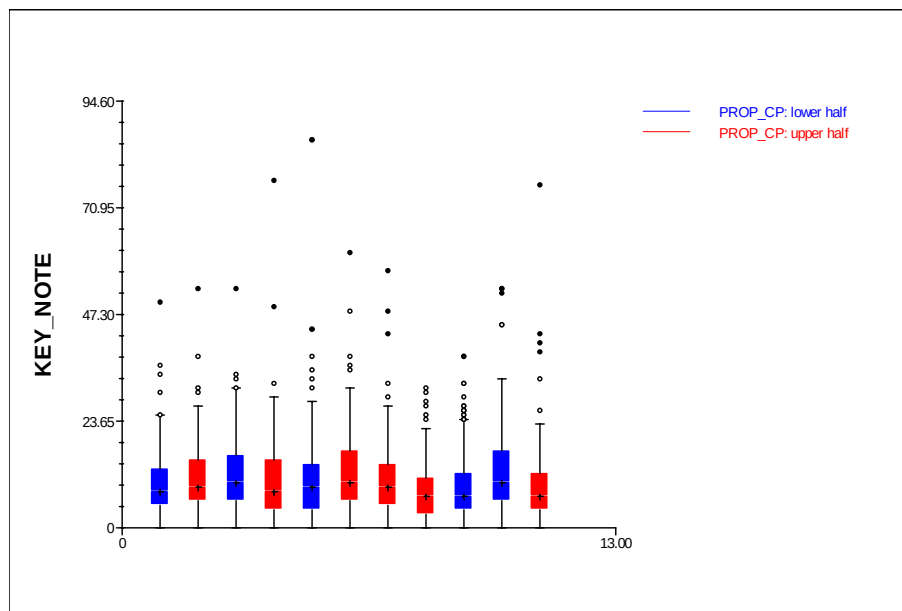


Figure 4.2a: Opinion Length Distribution by Circuit & Workload per Judge

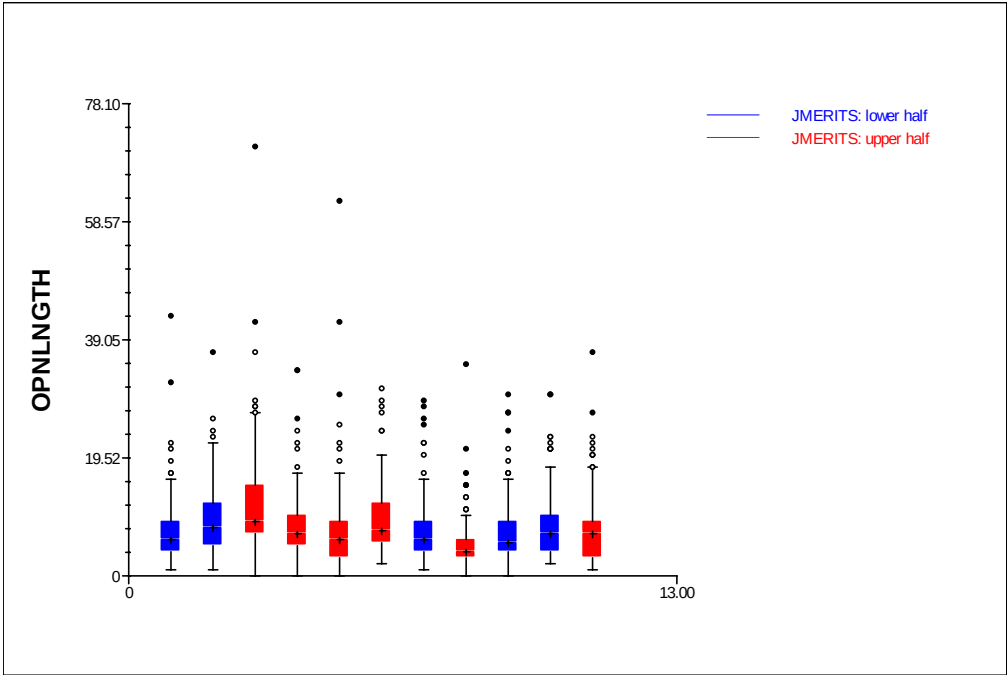


Figure 4.2b: Westlaw Key Notes Distribution by Circuit & Workload per Judge

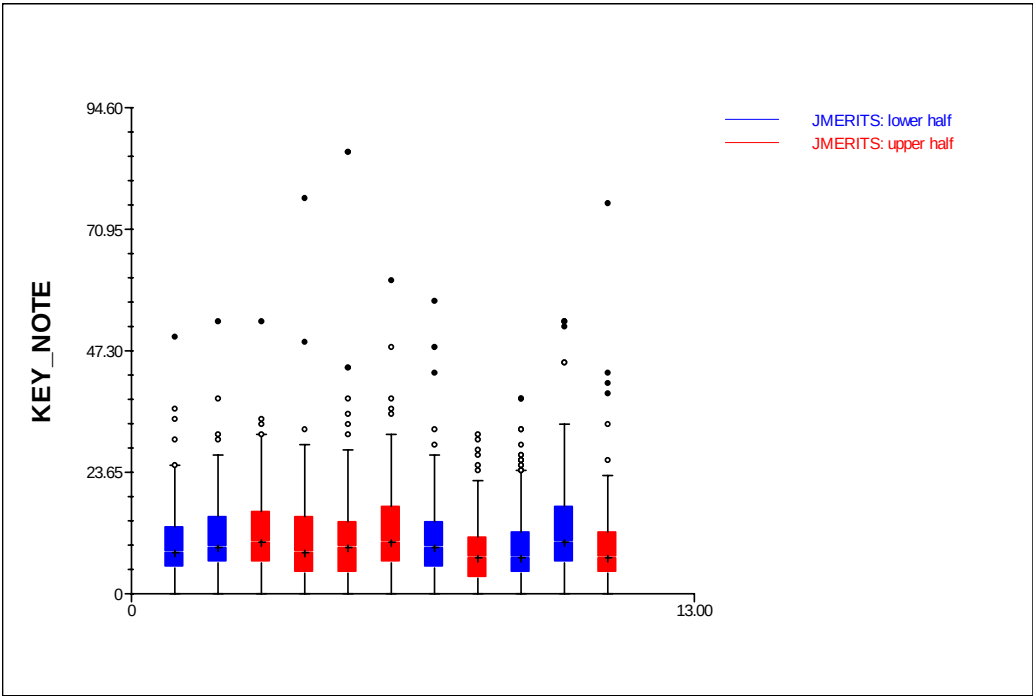


Figure 4.3a: Opinion Length Distribution by Circuit & District Court Reversal Rate

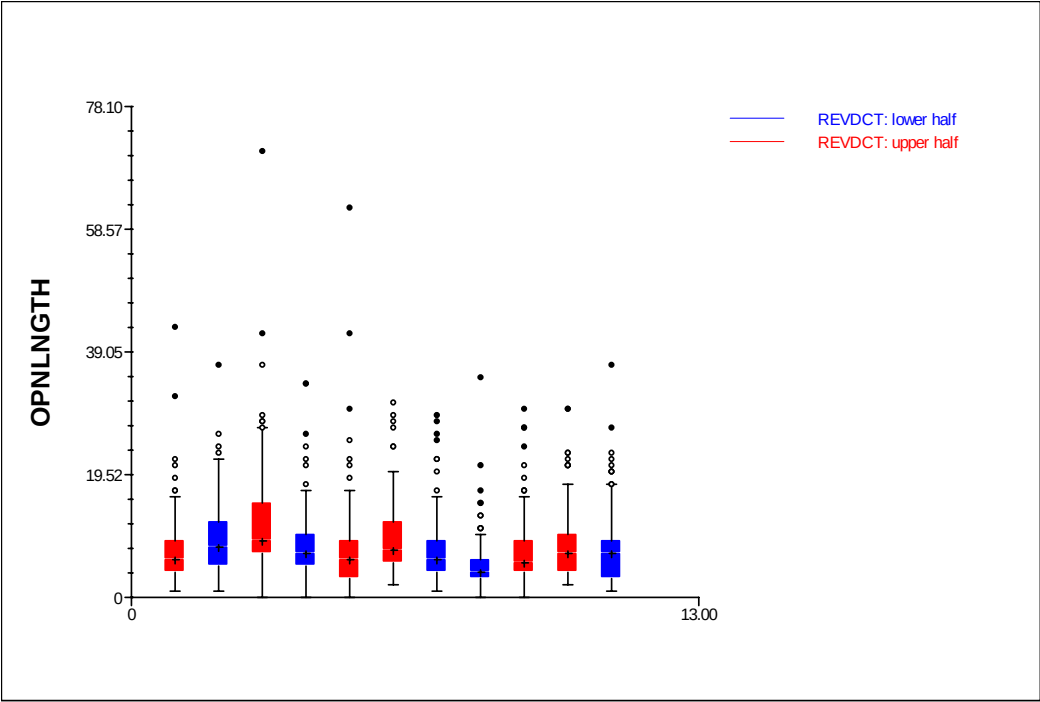


Figure 4.3b: Westlaw Key Notes Distribution by Circuit & District Court Reversal Rate

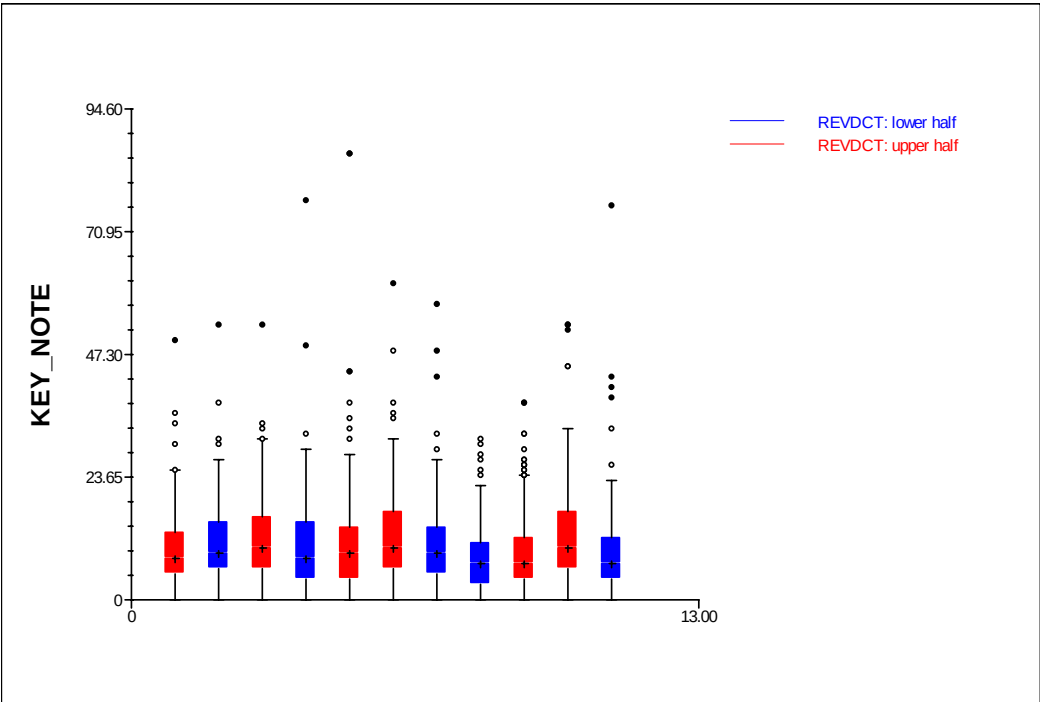


Figure 4.4a: Opinion Length Distribution by Circuit & Visiting Judge Participations

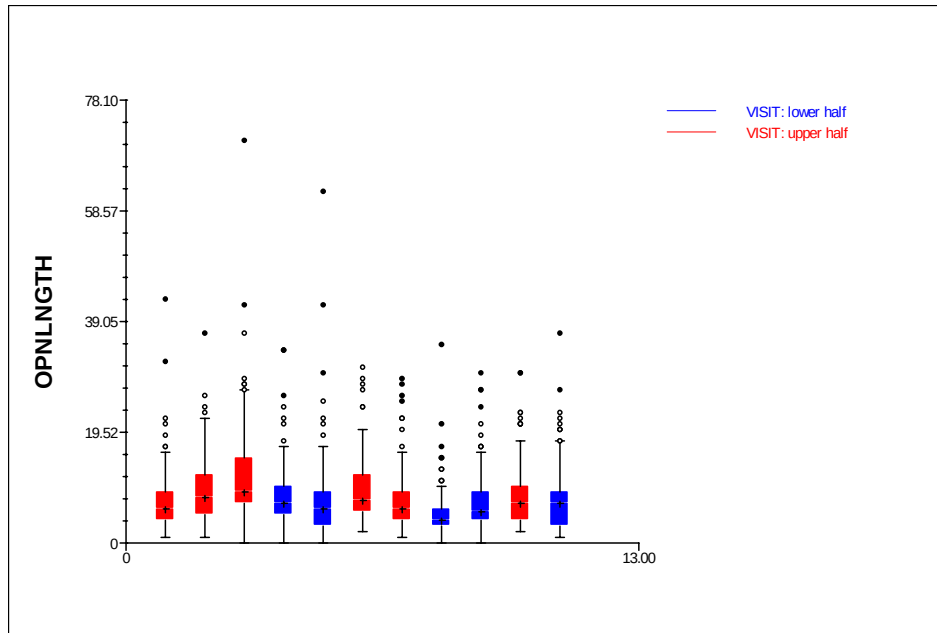


Figure 4.4b: Westlaw Key Notes Distribution by Circuit & Visiting Judge Participations

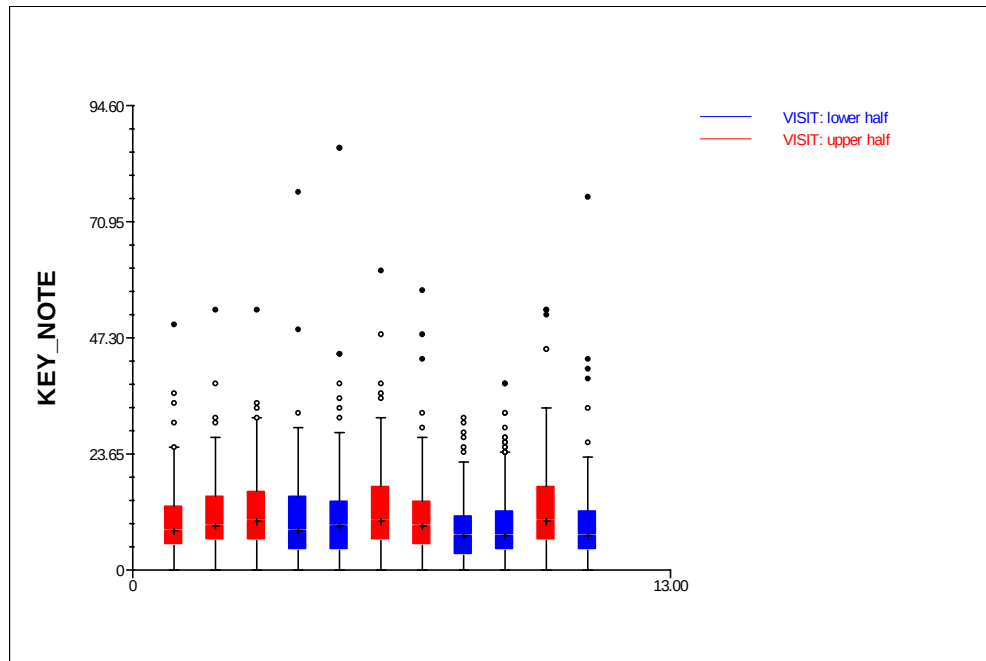


Figure 4.5

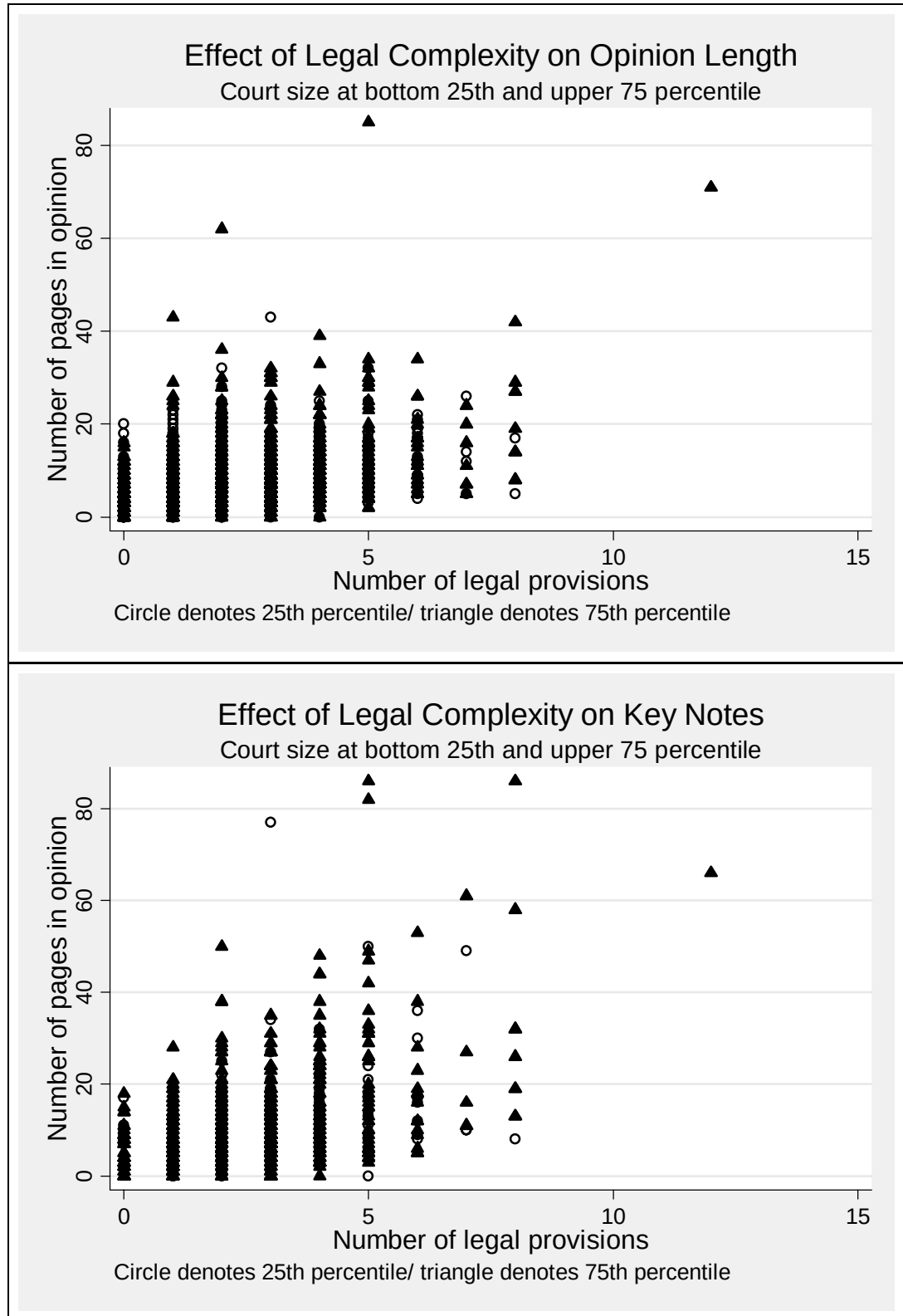


Figure 4.6

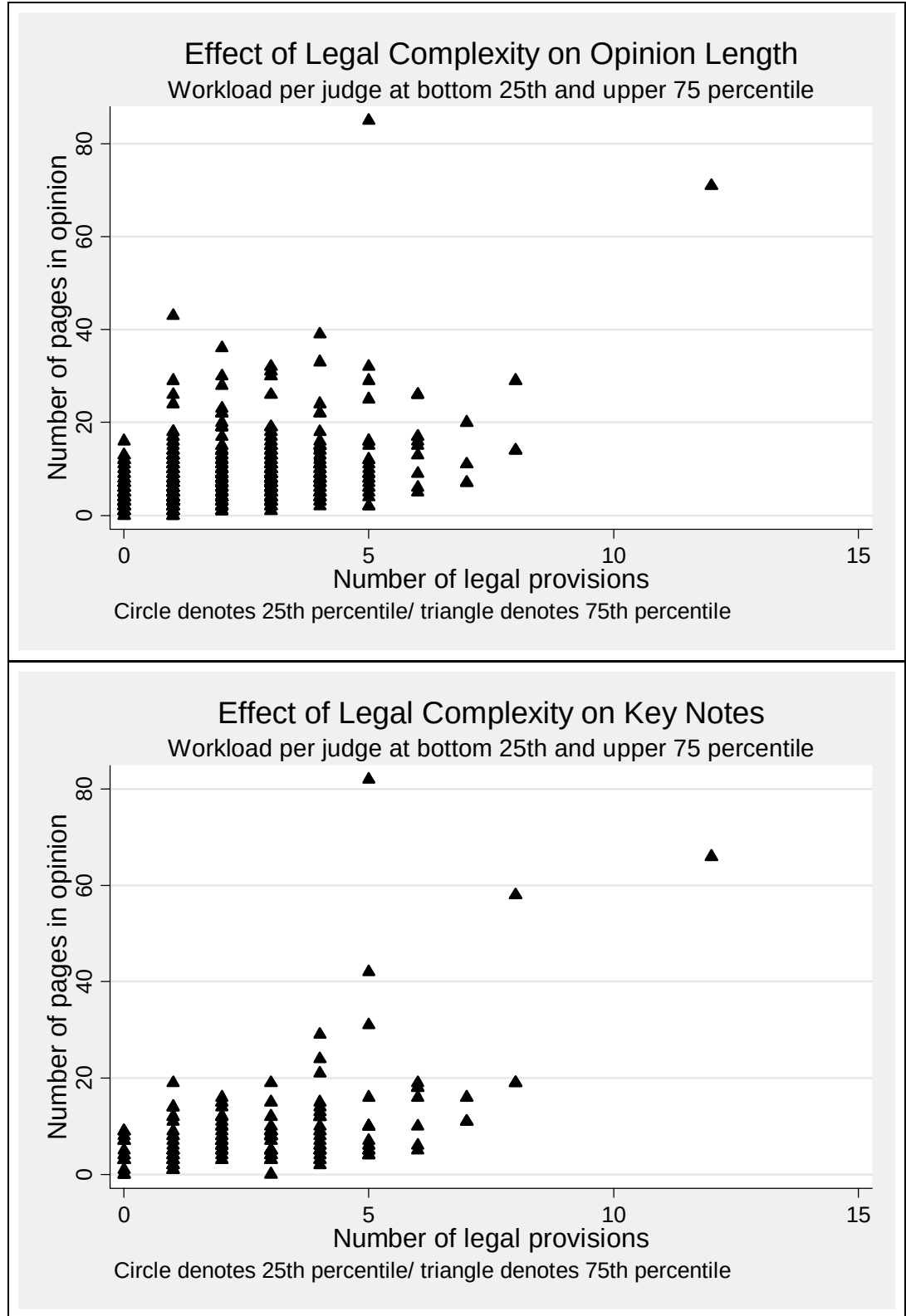


Figure 4.7

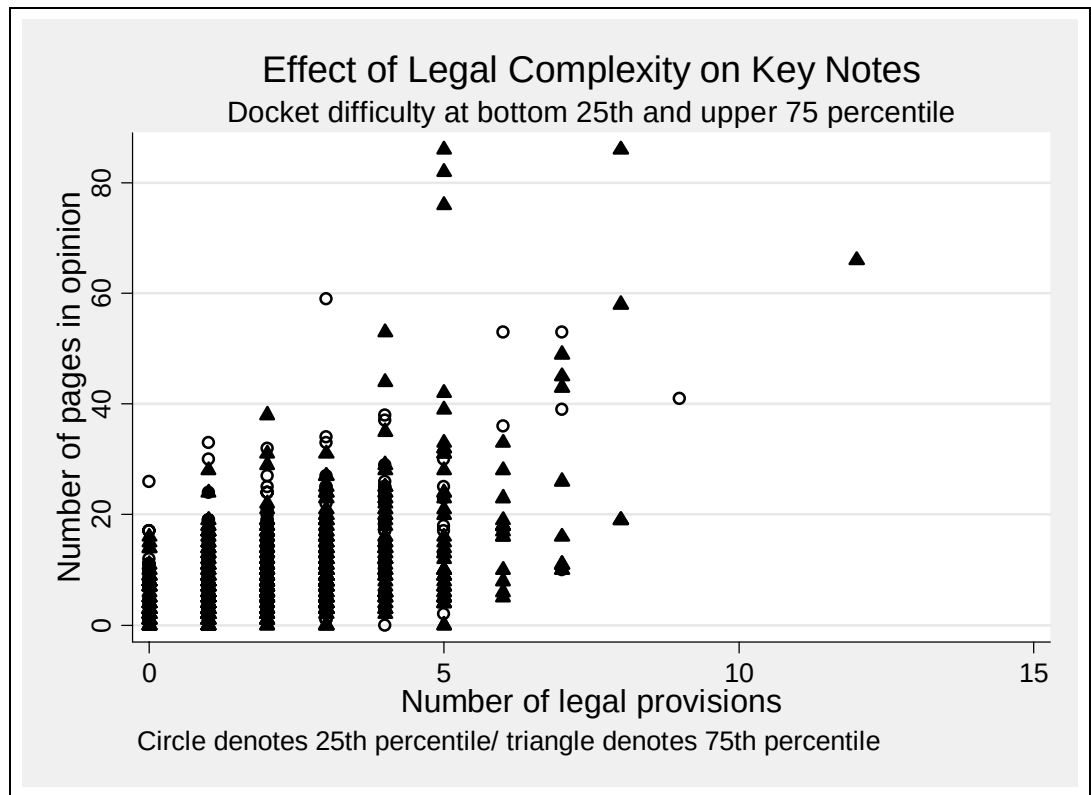
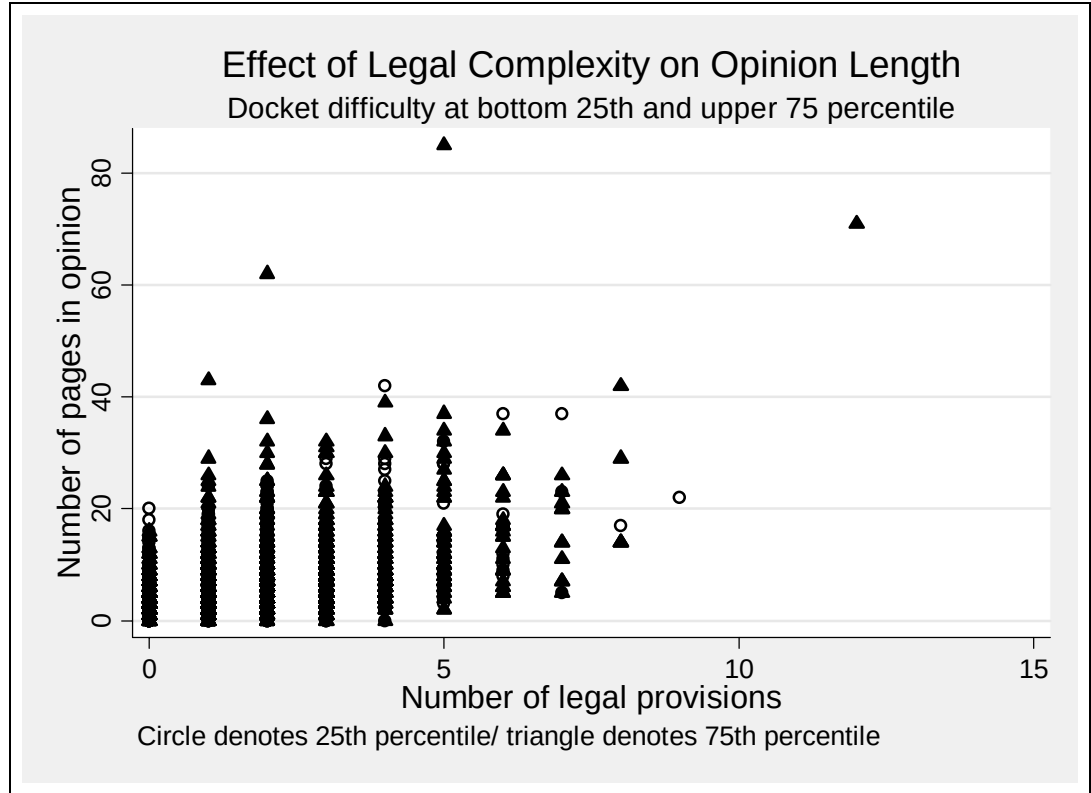


Figure 4.8

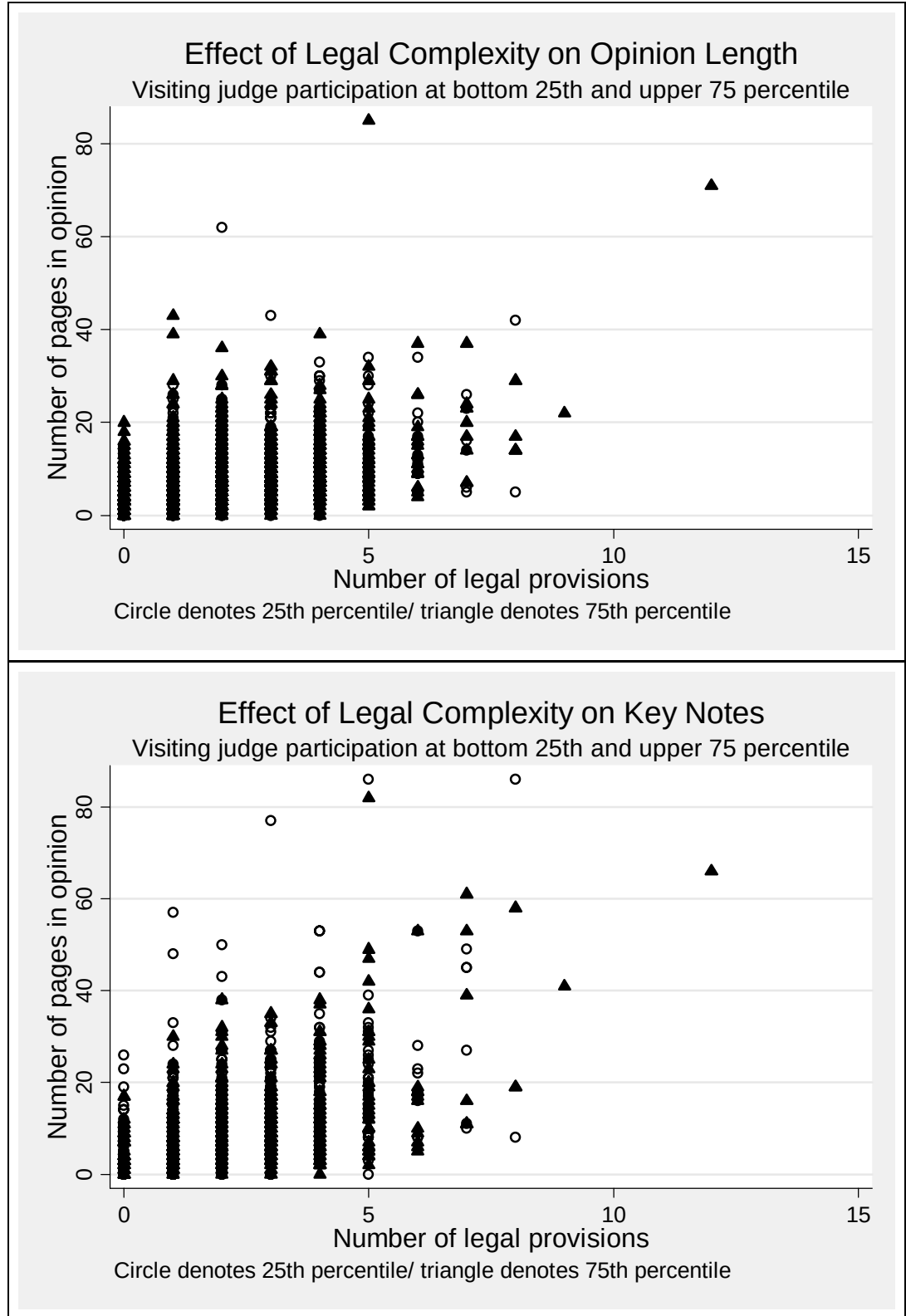


Figure 4.9

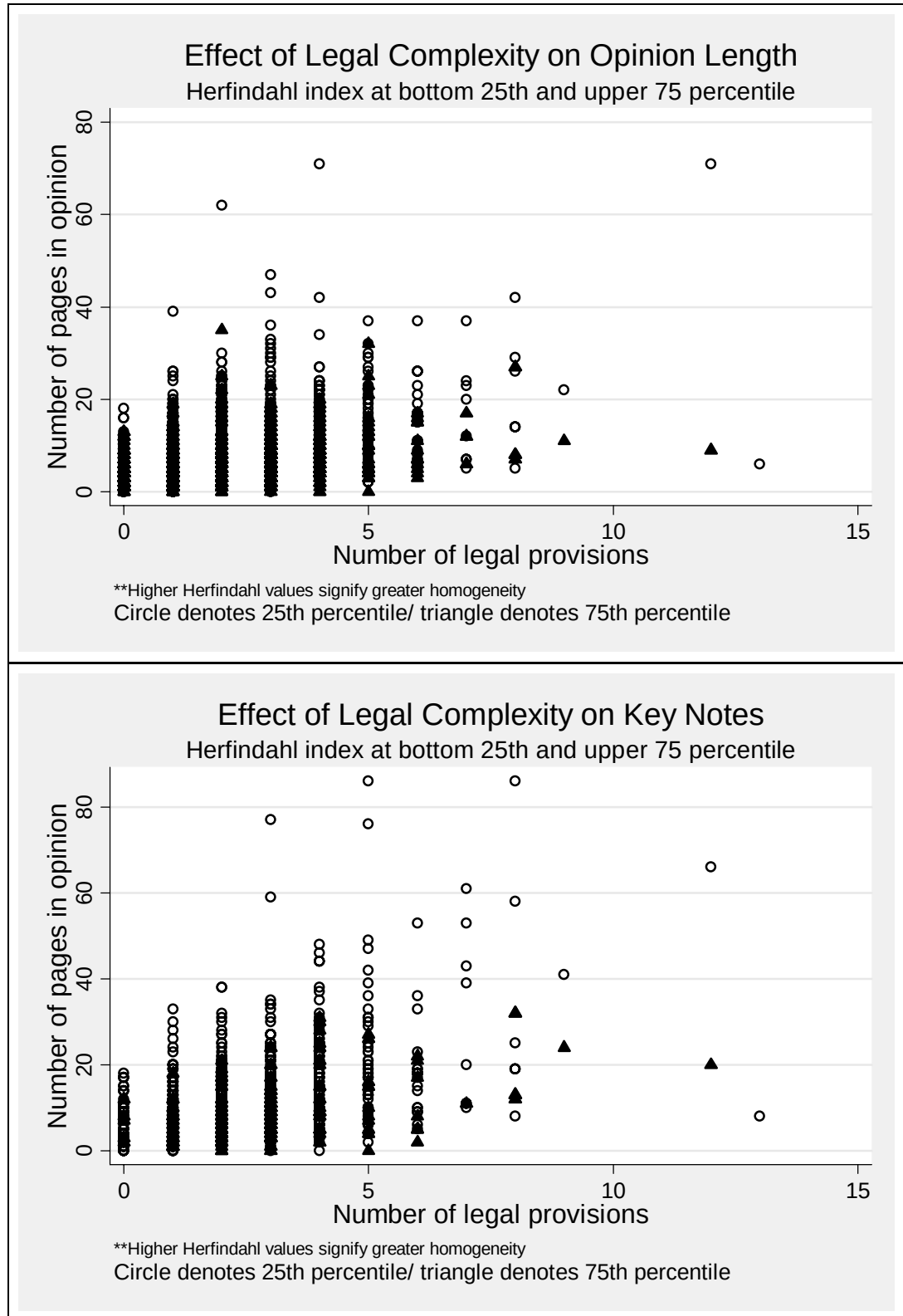


Figure 4.10

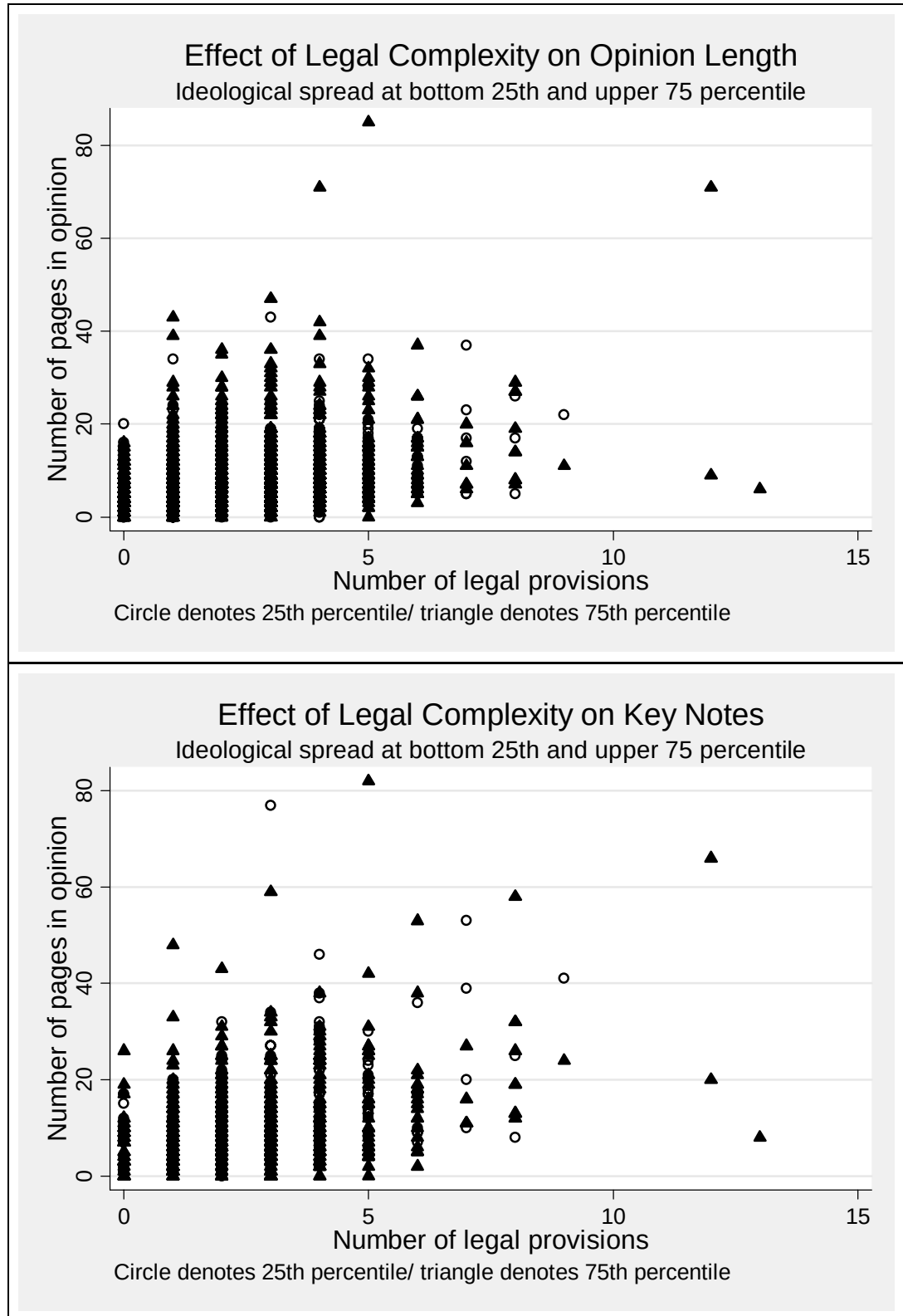


**Table 4.8: Logit Analysis of the Likelihood of a Split Decision,
By Individual Circuits (1982-2002)**

	<u><i>First Circuit</i></u>	<u><i>Second Circuit</i></u>	<u><i>Third Circuit</i></u>	<u><i>Fourth Circuit</i></u>	<u><i>Fifth Circuit</i></u>	<u><i>Sixth Circuit</i></u>
	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>
No. policy areas	.838* (.322)	.025 (.333)	1.23* (.324)	-.024 (.392)	.339 (.431)	.967* (.325)
No. legal issues	.192* (.094)	.423* (.082)	.182 (.097)	.279* (.097)	.541* (.110)	.283* (.096)
Cross appeal	.381* (.173)	1.13* (.293)	.102 (.144)	.287 (.287)	1.95* (.372)	.764 (1.17)
FJC complex civil	-.092 (.290)	.368 (.248)	.749* (.248)	.772* (.275)	.433 (.332)	-.060 (.294)
FJC complex criminal	-.730 (.443)	.292 (.360)	.819* (.417)	-.134 (.441)	.662 (.379)	-.184 (.377)
Woman on panel	-1.15 (.690)	.065 (.438)	-.038 (.263)	.183 (.355)	.034 (.387)	-.114 (.290)
Minority on panel	.247 (.286)	-.319 (.392)	-.326 (.287)	.597 (.875)	.132 (.319)	.285 (.321)
Panel median ideology	-.725 (.481)	.049 (.674)	-.660 (.564)	.306 (.560)	.546 (.665)	.268 (.452)
Visiting judge	-.036 (.302)	-.345 (.329)	-.031 (.268)	-.038 (.293)	-1.04 (.762)	.308 (.256)
Constant	-3.77* (.834)	-2.58* (.751)	-4.92* (.930)	-3.38* (.857)	-3.62* (.786)	-4.98* (1.16)
<i>N</i>	587	616	608	578	589	619
Pseudo r^2	.104	.136	.106	.090	.169	.120
Model sig.	p<.05	p < .05	p< .05	p < .05	p<.05	p<.05

Notes: * denotes $p < .05$, two-tailed test. Output for dummy variables for years omitted (1982 used as baseline). Cases exclude en banc panels.

(Con't) **Table 4.8: Logit Analysis of the Likelihood of a Split Decision, By Individual Circuits (1982-2002)**

	<u>Seventh Circuit</u>	<u>Eighth Circuit</u>	<u>Ninth Circuit</u>	<u>Tenth Circuit</u>	<u>Eleventh Circuit</u>
	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>
No. policy areas	.217 (.448)	.278 (.456)	.706* (.314)	.799* (.351)	.544 (.348)
No. legal issues	.224 (.127)	-.111 (.130)	.370* (.102)	.413* (.102)	.354* (.092)
Cross appeal	1.22* (.451)	.364 (.354)	.684 (.889)	.345 (.328)	1.25* (.363)
FJC complex civil	-.145 (.346)	.740* (.360)	.002 (.305)	-.203 (.307)	-.025 (.274)
FJC complex criminal	.594 (.418)	-.225 (.489)	.118 (.325)	-.421 (.372)	-.084 (.373)
Woman on panel	.747 (.570)	1.22* (.628)	.086 (.262)	.256 (.266)	-.106 (.268)
Minority on panel	-.841 (.858)	.202 (.358)	.199 (.249)	.298 (.466)	.091 (.328)
Panel median ideology	.077 (.705)	.381894 .777	-.433 (.446)	-1.21* (.464)	1.05 (.643)
Visiting judge	-.206 (.465)	-.038 (.352)	.039 (.302)	.362 (.288)	.042 (.296)
Constant	-2.67* (.987)	-2.84* (.876)	-3.84* (.750)	-5.14* (1.11)	-3.41* (.752)
<i>N</i>	529	623	615	588	607
Pseudo r^2	.091	.081	.093	.139	.126
Model sig.	p< .05	†	p< .05	p< .05	p< .05

Notes: * denotes p< .05, two-tailed test. † denotes model as a whole fails to reach standard levels of significance. Output for dummy variables for years omitted (1982 used as baseline). Cases exclude en banc panels.

**Table 4.9: OLS Regression of Opinion Length,
By Individual Circuits (1982-2002)**

	<u>First Circuit</u>	<u>Second Circuit</u>	<u>Third Circuit</u>	<u>Fourth Circuit</u>	<u>Fifth Circuit</u>	<u>Sixth Circuit</u>
	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>
No. policy areas	1.41* (.540)	.431 (.496)	2.37* (.903)	1.29* (.667)	1.04 (.753)	1.03 (.558)
No. legal issues	1.02* (.143)	1.45* (.168)	1.33* (.320)	1.55* (.227)	1.70* (.240)	1.25* (.153)
Cross appeal	.064 (.279)	1.26* (.584)	.662 (.735)	-.191 (.217)	1.20 (.691)	.398 (.545)
FJC complex civil	-.076 (.384)	.714* (.342)	.781 (.498)	.071 (.395)	1.05* (.437)	.608 (.384)
FJC complex criminal	-1.45* (.450)	.145 (.410)	-.851 (.859)	-2.06* (.441)	.461 (.990)	.628 (.512)
Woman on panel	-.300 (.726)	1.24* (.561)	.085 (.621)	.690 (.596)	-.753 (.492)	.305 (.367)
Minority on panel	-.128 .367	-1.25* (.553)	.522 (.657)	-.792 1.19	-.919 (.594)	-.026 (.376)
Panel median ideology	-.083 (.838)	-.530 (.853)	-.791 (1.39)	.585 (.686)	-1.70 (1.15)	.698 (.554)
Visiting judge	.817* (.405)	.170 (.410)	.348 (.569)	.131 (.395)	-.358 (.740)	-.485 (.362)
Constant	2.06* (.966)	3.22* (.821)	-.199* (1.44)	.177 (.946)	1.22 (1.08)	1.33 (.907)
<i>N</i>	617	615	608	606	617	619
<i>R</i> ²	.177	.347	.212	.323	.239	.281
Model sig.	p<.05	p < .05	p<.05	p < .05	p<.05	p<.05

Notes: * denotes p< .05, two-tailed test. Output for dummy variables for years omitted (1982 used as baseline). Cases exclude en banc panels.

(Con't) **Table 4.9: OLS Regression of Opinion Length
By Individual Circuits (1982-2002)**

	<u>Seventh Circuit</u>	<u>Eighth Circuit</u>	<u>Ninth Circuit</u>	<u>Tenth Circuit</u>	<u>Eleventh Circuit</u>
	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>
No. policy areas	.469 (.454)	.127 (.552)	.867* (.443)	1.04* (.540)	1.65* (.523)
No. legal issues	1.02* (.146)	.984* (.152)	1.34* (.168)	1.26* (.149)	1.63* (.181)
Cross appeal	1.25 (.685)	.948 (.676)	.863 (.574)	.209 (.383)	2.48* (.714)
FJC complex civil	.243 (.353)	.015 (.353)	1.15* (.363)	-.103 (.371)	.551 (.392)
FJC complex criminal	-.793 (.418)	-.156 (.496)	.497 (.382)	-.375 (.413)	-.062 (.500)
Woman on panel	.156 (.639)	1.12 (.869)	.112 (.313)	.172 (.330)	-.312 (.390)
Minority on panel	-2.26* (.742)	-.085 (.425)	-.060 (.289)	.823 (.825)	.080 (.437)
Panel median ideology	1.11 (.593)	.024 (.654)	-.681 (.472)	.779 (.549)	-1.21 (.842)
Visiting judge	-.073 (.369)	.762* (.342)	.125 (.335)	.751* (.335)	.330 (.381)
Constant	5.42* (.852)	2.14* (.848)	.422 (.704)	2.17* (.933)	1.89 (1.15)
<i>N</i>	619	623	615	613	607
<i>R</i> ²	.177	.210	.306	.264	.325
Model sig.	p<.05	p < .05	p<.05	p < .05	p<.05

Notes: * denotes p< .05, two-tailed test. Output for dummy variables for years omitted (1982 used as baseline). Cases exclude en banc panels.

**Table 4.10: OLS Regression of Westlaw Key Notes
By Individual Circuits (1982-2002)**

	<u>First Circuit</u>	<u>Second Circuit</u>	<u>Third Circuit</u>	<u>Fourth Circuit</u>	<u>Fifth Circuit</u>	<u>Sixth Circuit</u>
	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>
No. policy areas	1.40 (1.68)	1.44 (1.37)	3.28* (1.55)	3.88 (2.13)	3.02 (2.54)	2.99 (1.58)
No. legal issues	1.60* (.450)	2.89* (.413)	1.43* (.646)	2.87* (.713)	5.27* (1.20)	3.77* (.749)
Cross appeal	.268 (.496)	-.847 (1.31)	-.175 (.502)	.105 (.431)	2.46 (2.81)	.052 (.683)
FJC complex civil	.300 (1.14)	1.35 (1.37)	-1.32 (1.45)	.134 (1.40)	-1.72 (1.81)	.734 (1.56)
FJC complex criminal	1.38 (1.82)	2.63 (1.58)	-2.76 (1.62)	-.754 (1.44)	.715 (2.48)	3.61* (1.69)
Woman on panel	-.191 (1.71)	2.15 (1.35)	1.57 (1.49)	.964 (1.27)	-.771 (1.71)	-1.24 (1.42)
Minority on panel	-.382 (1.14)	-.306 (1.20)	1.53 (1.77)	-.491 (2.11)	1.71 (1.37)	.345 (1.73)
Panel median ideology	-4.20 (2.73)	3.97 (3.33)	2.06 (2.58)	.630 (2.36)	1.65 (2.69)	.026 (2.04)
Visiting judge	-.989 (1.56)	2.24 (1.50)	.196 (1.36)	-.134 (1.28)	1.70 (2.47)	-1.94 (1.31)
Constant	3.91 (2.38)	-1.55 (2.75)	.835 (2.91)	-4.38 (3.24)	-.097 (2.81)	1.58 (2.75)
<i>N</i>	178	178	173	171	175	179
<i>R</i> ²	.148	.402	.141	.299	.419	.365
Model sig.	p<.05	p < .05	p<.05	p < .05	p<.05	p<.05

Notes: * denotes p< .05, two-tailed test. Output for dummy variables for years omitted (1982 used as baseline). Cases exclude en banc panels.

(Con't) **Table 4.10: OLS Regression of Westlaw Key Notes
By Individual Circuits (1982-2002)**

	<u>Seventh Circuit</u>	<u>Eighth Circuit</u>	<u>Ninth Circuit</u>	<u>Tenth Circuit</u>	<u>Eleventh Circuit</u>
	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>	<i>Coef. (Robust SE)</i>
No. policy areas	2.88 (2.65)	1.45 (.903)	.501 (1.06)	1.44 (1.28)	4.18* (1.29)
No. legal issues	.936 (.561)	2.24* (.327)	2.46* (.387)	2.36* (.552)	2.54* (.489)
Cross appeal	-3.85 (2.44)	.387 (.586)	.819* (.379)	-.188 (.791)	3.16 (2.17)
FJC complex civil	.854 (1.81)	2.14* (1.06)	-1.94 (1.12)	-2.86 (1.70)	.711 (1.07)
FJC complex criminal	.308 (1.37)	1.76 (.988)	.819 (1.65)	-.214 (1.73)	-.481 (1.10)
Woman on panel	-.082 (1.52)	.683 (1.14)	-.926 (1.08)	-.398 (1.63)	-.244 (1.00)
Minority on panel	-4.24* (1.85)	-2.39* (1.19)	1.14 (1.05)	.253 (1.80)	-1.60 (1.23)
Panel median ideology	-.164 (2.28)	1.03 (1.72)	-.505 (1.84)	1.39 (2.49)	-3.84 (2.11)
Visiting judge	--	-2.57* (1.01)	-1.03 (1.22)	3.03 (2.08)	.898 (1.00)
Constant	6.26* (3.06)	-1.74 (2.17)	.209 (2.46)	2.83 (2.80)	-.610 (2.61)
<i>N</i>	279	175	176	180	175
<i>R</i> ²	.102	.355	.309	.198	.404
Model sig.	p<.05	p < .05	p<.05	p < .05	p<.05

Notes: * denotes p< .05, two-tailed test. Output for dummy variables for years omitted (1982 used as baseline). Cases exclude en banc panels.

Chapter 5: Appellate Advocacy

In the last chapter, I considered the relationship between case complexity and legal outcomes, focusing on characteristics of cases, appellate panels, and circuits. However, there are arguably two important players missing from this account so far: the litigant and her legal counsel. Appellants and respondents provide the arguments that serve as “inputs” in the appellate decision making process, along with the record from the district court or administrative agency. Judges rely on the arguments provided by appellate advocates in their briefs, because of both institutional requirements and the need for information.

The chapter will examine the relationship between issue framing and complexity by analyzing panels’ adoption and treatment of various issue frames put forward by litigants. I begin by discussing the structure and role of appellate briefs in panel decision making operation. The next section moves to a discussion of theoretical perspectives that may help us explain how briefs function with respect to the cognitive aspects of decision making. I also consider the role of litigation experience and legal resources in light of other research that has shown advantages for certain kinds of litigants. I conclude by proposing several ways to expand this preliminary examination.

5.1 Issue Framing and Appellate Briefs

Advocacy through appellate briefs

In considering the relationship between complexity and outputs, thus far I have focused upon case characteristics (e.g., the number of policy areas, legal issues, etc.). However, these issues first come to light in the appellate briefs sent to the judges who are assigned to a panel in a given case. The interaction between the appellate advocates and the judges is structured by uniform federal rules of appellate procedure, as well as circuit-specific operating procedures and norms.

When an appeal is filed in one of the circuit courts, counsel for each side present their arguments in written appellate briefs, which are submitted to the court either electronically or by mail. Under rule 28(a) of the Federal Rules of Appellate Procedure, an appellate brief must contain the following elements, in this order:¹

- Corporate disclosure statement
- Table of contents
- Table of authorities (statutes, cases, and other legal authorities)
- Jurisdictional statement
- Statement of the issues presented for review
- Statement of the case that describes the nature of the case, the procedural history, and the disposition below
- Statement of facts relevant to the issues submitted for review
- Summary of the argument

¹ F.R.A.P. 28(b) permits respondents to stipulate to the appellant's version of the jurisdictional statement, statement of issues, statement of the case, and statement of facts, or to provide their own version.

- Argument, which must include, among other elements, the contentions raised and supporting rationale, the standard of review, and what relief is sought

The party appealing the lower court or agency decision files the first brief, which is followed by the appellee's responding brief and if the appellant chooses, a "reply" brief filed by the appellant. As noted by the Seventh Circuit's "Practitioner's Handbook for Appeals" (2003, 71-75), the briefs are "by far the most important step" in persuasion because they are reviewed by the judges both before and after oral argument and must contain "all the judges want to know." Attorneys may not raise issues in oral argument that do not appear in their submitted briefs,² so the quality and substance of the briefs are closely linked to the final outcome of the court. This being the case, the Practitioner's Handbook cautions attorneys to refine their arguments and limit their focus: because "judges are reading the briefs in six cases in preparation for each day of oral argument[,] the writer must select what is important and deal only with that...Except for unusually complicated cases, a brief that treats more than three or four matters runs a serious risk of becoming too diffused and giving the overall impression that no one claimed error can be very serious." One federal appeals court judge agreed with the three-to-four issue rule of thumb, noting, "When I read a brief, I want to be able to put it down and say, 'What is he asking for?' If there's one long monologue and the issues aren't clear, you're not clear what they're asking for."³

² In contrast, judges may in limited circumstances raise issues not brought before the district court. Examples of *sua sponte* issues include procedural matters, such as jurisdiction, mootness, and attorney sanctions.

³ Confidential interview, December 27, 2007.

There are several reasons why federal appellate judges must rely heavily on the litigants' briefs.⁴ First, the requirement that the circuits accept all appeals for which they have jurisdiction means that the judges must become legal generalists, in a sense, to tackle the wide range of legal questions brought on appeal. In any given case, then, it is likely that the attorneys may have more detailed knowledge and depth of experience in a particular area of law. A second factor that contributes to the dependence of judges on appellate briefs is the sheer workload that each judge carries; there is simply not enough time for every judge and her staff to devote large amounts of time to each assigned case without incurring intolerable levels of delay. Because of these limitations, as well as the institutional norms related to addressing arguments made in briefs, judges have considerable incentives to adopt attorneys' framing of the central issues in a case. However, the question becomes, what are the factors that control *which* litigant's arguments are eventually adopted by a panel in its ruling?

Framing issues and providing cues

Research on issue framing provides some theoretical leverage into the question of issue adoption by judges. Framing is defined as "*to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described*" (Entman 1993, 52, emphasis in original). There are two causal mechanisms by which framing might work. Accessibility models posit that framing effects passively alter the accessibility of different considerations (e.g.

⁴ For examples of circuit judges' statements to this effect (i.e. that they are dependent on the briefs), see e.g. Howard (1981) and Posner (1999).

Chong 1993), while a second perspective (Nelson, Clawson, and Oxley 1997; Nelson and Kinder 1991; Nelson, Willey, and Oxley 1998) argues that framing effects produce conscious deliberation about the relative importance of different considerations (as summarized in Druckman 2001, 1043-4)

Communication scholars argue that an important distinction exists between persuasion and framing. Nelson and Oxley (1999, 1044) explain that persuasion involves a communicator effectively changing the content of an individual's beliefs, while framing affects the "importance individuals attach to particular beliefs." Furthermore, while persuasion may be unlikely to affect sophisticated audiences, elites (such as judges) may not be immune to the effects of issue framing:

If it is true... that framing operates by making particular considerations more salient, then more sophisticated recipients should be just as susceptible to framing effects as less sophisticated recipients, if not more so. This is precisely because more sophisticated individuals are by definition more likely to have such information already stockpiled in long-term memory. Indeed, one could argue that holding such beliefs in memory is necessary for framing to have any impact at all. Furthermore, unlike standard persuasion models, framing effects do not depend upon the recipient's acceptance of the messages assertions...Such an effect again stands in contrast to traditional persuasion theory, which holds that one is unlikely to be persuaded by arguments with which one disagrees. (Nelson, Clawson, Oxley 1997, 227-8).

But should we expect issue frames presented by all types of litigants to have the same effect? If this were the case, then there would be no basis for predicting whose issue frames would be opted in an opinion. Along these lines, Druckman (2001) argues that successful framing requires source credibility. He finds that only credible sources can use a frame to alter the perceived importance of different considerations that then affect overall opinion (2001, 1054). In the context of an appellate panel, then, the source of a brief may provide an important cue about the reliability of the information (and the frames) contained within.

Party capability theory

In addition to the cognitive processes at work via issue framing, litigant success may also be explained by the nature of the parties who come before the court. Following Galanter (1974) and his argument that repeat-player litigants possess a number of distinct advantages over “one-shot” litigants,⁵ several studies have tested this proposition in the U.S. Courts of Appeals. In a study of four circuits in one year, Songer and Sheehan (1992) find that in published opinions, individuals fared significantly worse than all other types of litigants (23 percent success rate), while the United States government enjoyed almost a 90 percent success rate, on average. Businesses, local governments and state governments fell within those two extremes, but, all factors being equal, won more often than they lost.

This disparity also holds up when success rates are studied over time. Songer, Sheehan, and Haire (1999, 811) examined decisions in the Courts of Appeals from 1925 to 1988 and uncovered a consistent advantage for “repeat player litigants with substantial organizational strength.” One mechanism by which this advantage may operate is through legal experience and expertise; more so than individual, one-shot litigants, repeat players have the financial resources to retain counsel with both substantive expertise as well as institutional experience in litigating in federal court (Haire, Lindquist, and Hartley 1999, 671-2).

⁵ Some of these repeat-player advantages include economies of scale, access to superior legal resources, the ability to shape “the rules of the game,” and the capacity to play for maximum long-term gain, even if it means losing in the short-term. It should be noted that Galanter explicitly rejects the notion that “repeat players” are one and the same as “haves,” but he does allow that this is the case most of the time.

Issue Adoption Hypotheses

I now extend the framework of party capability theory beyond outcomes (i.e. who wins or loses the case) to issue adoption (i.e. which issue frames are adopted by the court in its majority opinion). In an environment characterized by time and workload pressures, I expect the importance of source credibility in the framing process, as well as the advantages of repeat player litigants, specifically legal resources, to affect issue adoption by the court.⁶

Source credibility hypothesis: Because the court will be more likely to defer to parties with expertise in litigation, the issue frames presented by businesses and government parties will be adopted more often than those presented by individual litigants.

Litigation resources hypothesis: Litigants with greater numbers of attorneys or firms will be more successful in issue adoption and favorable treatment than those parties with one attorney and one firm.

Data and Analysis

To test whether these hypotheses bear out in issue adoption, I utilize a probability sample drawn from the Seventh Circuit for the years 2001-2003 and from the Eleventh Circuit for 1994-1997. These two courts were selected primarily due to the availability of appellate briefs; the Seventh Circuit is the only circuit that posts briefs free of charge on its public website, and I was able to access previously gathered data on briefs from the

⁶ I recognize that these hypotheses are not necessarily mutually exclusive. For example, Songer and Sheehan (1992) define litigation resources to include both financial resources and litigation experience.

Eleventh Circuit.⁷ Time and resource constraints prevented me from collecting additional briefs from other circuits for the present analysis.⁸

Because the Seventh Circuit does not make its briefs in criminal cases electronically available, for the sake of comparability, I exclude criminal appeals from the Eleventh Circuit sample as well. Additionally, I control for the influence of amicus participation on litigant success (see e.g., Songer, Kuersten, and Kaheny 2000) by excluding such cases from the sample. Cases were coded as to whether the court addressed or suppressed the appellant or respondent's issues in the majority opinion (footnote mentions were counted as issue suppression).⁹ If an issue raised by an appellant or respondent was addressed by the court, then the treatment (favorable or unfavorable) of that issue was also recorded. These constraints yielded 34 cases (205 issues) for the Seventh Circuit and 72 cases (271) from the Eleventh Circuit.

Appellants in the Eleventh Circuit were more likely to be individuals (42 percent) or corporations (16 percent) than any level of government (combined, 16 percent) or other organization (2 percent). This general pattern for appellants was repeated in the Seventh Circuit as well.¹⁰ On the respondent side, in the Seventh Circuit, businesses, federal government, and state government each comprised about one-third of all appellees, with individuals taking up less than six percent. In contrast, for the Eleventh Circuit, businesses were the most common respondent (31 percent), followed by

⁷ I am grateful to Susan Haire for sharing these data.

⁸ The Eighth and Tenth circuits (along with the Eleventh) make appellate briefs available electronically via the fee-based database known as PACER (Public Access to Electronic Court Records). To access briefs from other circuits, a researcher must code the documents on site at the clerk's office.

⁹ I use the terms "issue addressed" and "issue adopted" interchangeably, in both cases meaning that the panel used the issue frame provided in the brief. As I explain above, the court may "adopt" an issue frame but still rule against the party that provided that frame; this is captured in the "judicial treatment" variables.

¹⁰ Individuals comprised almost 59 percent of appellants, with businesses representing 32 percent and all forms of government collectively comprising 6 percent.

individuals (17 percent), the federal government (12 percent), state and local governments, and other organizations (17 percent).

Table 5.1 displays the breakdown of cases in which the court addressed all of the issues raised in a brief's Statement of Issues. Overall, issue adoption is more likely for both appellants and respondents when fewer issues are raised; consistent with the admonitions given in the Seventh Circuit's Practitioner's Handbook, litigants who raise a multitude of issues rarely have all of those issues considered by the court. From an issue framing perspective, presenting too many possible issue frames may be distracting and raise too many different considerations for decision makers under both time and work pressure.

To put Table 5.2 into context, it is illuminating to consider the broader context of litigant success in the federal appellate courts. Excluding criminal cases, in all circuits, between 1982 and 2002, appellants who were individuals lost 73 percent of their appeals, doing slightly worse than businesses (70 percent), and much worse than state and local governments (62 and 63 percent, respectively) and the federal government (44 percent). In the Court of Appeals for the Seventh Circuit, local government appellants did far worse, losing 86 percent of the time, as did individuals (80 percent). The federal government and state governments fared the best as appellants, but still lost more often than they won (56 percent of the time). However, in the Eleventh Circuit, local governments were much more successful than the state or federal government

appellants,¹¹ while individuals and corporations prevailed less than 20 percent of the time.

Now looking at success in issue adoption, we can see that in the Seventh Circuit, individuals, corporations, and local government appellants are relatively successful in having the court adopt their framing of an issue—though not nearly as well as the federal government, which has almost a perfect record. But when it comes to the court’s treatment of those issues, the success rate of all groups plummets. It should be noted, however, that when the federal government was a respondent (not shown here), the court’s resolution of those issues favored the federal government in 15 out of 15 issues. In the Eleventh Circuit, appellant corporations experienced issue suppression the most often, followed by individual appellants. Less variation exists among classes of respondents, though the federal government surpassed all other groups in issue adoption. In terms of issue treatment, when an appellant was an individual person, the court responded favorably about 30 percent of the time; in contrast, despite the federal government’s infrequent participation as an appellant, it still dominated all other classes of litigants on this measure with a 75 percent favorable response rate.

Turning next to legal resources, as measured by the number of attorneys and the number of law firms representing a litigant (Tables 5.3 and 5.4), a few patterns do emerge. First, in both circuits, appellees with multiple attorneys fare better in issue adoption than do those with a single advocate. A similar trend appears for appellants, but diminishes once the number of attorneys increases beyond three (in the Seventh Circuit) and two (in the Eleventh Circuit). Appellants with two to three lawyers also fare better in

¹¹ In the Eleventh Circuit, local governments won 47 percent of the time, state government appellants 32 percent of the time, and federal government 28 percent.

the treatment of their issue frames than appellants with only one attorney. In contrast to the relatively consistent results for the size of the litigation team, no clear pattern connects the number of law firms and issue adoption or issue treatment.

Though we should be cautious in interpretation,¹² there does appear to be moderate support for the source credibility hypothesis, especially with respect to government litigants, as well as mixed support for the litigation resources hypothesis. Given that previous research has focused on case outcomes, not issue adoption or issue treatment specifically, the fact that these results are largely consistent with broader trends in case outcomes may suggest a somewhat different causal mechanism for “repeat player” success. That is, cognitive processes related to framing may increase judges’ propensity to adopt (and to treat favorably) issues as couched by certain classes of litigants. Source credibility of repeat players may serve as a kind of “cue” for judges to latch onto,¹³ consistent with a bounded rationality account of judicial behavior in an environment characterized by many different kinds of complexity.

This is not to downplay the role of legal resources. Clearly, more money can buy more (and arguably better) legal counsel, and we do see evidence that multiple attorneys may be better than a single lawyer in crafting issue frames that resonate with judges. Furthermore, given the moderate positive correlation ($r = 0.4$) between the number of attorneys and the federal government as a litigant on either side, legal resources and

¹² While these results are suggestive, cross-tabulations cannot control for the effect of other important factors that may be influencing issue adoption and treatment. Future research should examine this relationship using multivariate analysis and extend the sample to include more circuits in order to increase generalizability.

¹³ For an examination of the role of the Solicitor General as a repeat player who can provide cues to Supreme Court justices, see Bailey, Kamoie, and Maltzman (2005).

source credibility may have a mutually reinforcing effect on the acceptance of issue frames by appellate panels.

5.2 Conclusions

Building on the previous chapter, we can see another facet of how judges grapple with complexity, shown here as competing issue frames raised by litigants in their briefs. For example, panels appear less likely to address all the issues raised in appellate briefs as the total number of issues increases, displaying a negative relationship between complexity of input and output. Judges may engage in this pruning process for conscious reasons, such as producing a clear and coherent opinion or reducing the total number of items upon which the panel must agree.¹⁴ However, this response may also be driven in part by other, unconscious processes. Because of the cognitive limitations of individuals, relying on cues, such as source credibility, may help to ease the information-gathering pressures associated with decision making. And given institutional rules and norms that require judges to rely on issue frames presented by appellate advocates, source credibility of repeat player litigants may increase the propensity of panels to adopt the issue frames of some parties but not others.

Of course, there are limitations to the analyses contained in this chapter. I consider only two circuits, and in the Seventh Circuit I am only able to examine civil cases due to restrictions on public access to briefs in criminal appeals. Nonetheless, the findings do contribute to a fuller picture of the kinds of complexity that appeals court

¹⁴ They may also address fewer issues than were raised in the briefs because the resolution of one issue may foreclose other issues. For example, if there is some procedural bar (e.g. standing or jurisdiction), then there may be no need to proceed to other issues relating to the merits of the case.

judges face in their work. Future research that expands data collection to other circuits could both validate the claims made here and uncover court-related differences in judicial treatment of certain kinds of issues and certain kinds of litigants. In order to isolate further the effects of case complexity and environmental complexity, the next chapter considers how these factors may affect individual judges, drawing on both statistical analyses and interviews with circuit judges.

Table 5.1: Percent of Cases in Which the Majority Adopted All Issues

Raised by Litigant, by Number of Issues

<i>Number of issues raised in brief</i>						
	<u>1</u> <u>issue</u>	<u>2</u> <u>issues</u>	<u>3</u> <u>issues</u>	<u>4</u> <u>issues</u>	<u>5</u> <u>issues</u>	<u>6+</u> <u>issues</u>
<i>Appellant</i>						
7 th circuit	71.4% (5)	77.8% (7)	71.4% (5)	25% (1)	50% (1)	66.7% (2)
11 th circuit	100% (13)	50% (10)	18.8% (3)	14.3% (2)	25% (1)	0% (0)
<i>Respondent</i>						
7 th circuit	100% (5)	83.3% (10)	60% (6)	100% (2)	0% (0)	50% (1)
11 th circuit	76.9% (10)	47.4% (9)	23.8% (5)	0% (0)	25% (2)	0% (0)
Seventh Circuit (N=34) Eleventh Circuit (N=72)						

Table 5.2: Judicial Treatment of Issues by Litigant Type

	<u>Individual</u>	<u>Corporation</u>	<u>Local government</u>	<u>State government</u>	<u>US government</u>
U.S. Court of Appeals for the Seventh Circuit (N=205)					
<i>Issue suppression</i>					
Appellant	25.8% (18)	16.1% (5)	0% (0)	0% (0)	100% (1)
Respondent	25% (1)	19.4% (7)	20% (5)	0% (0)	5.3% (1)
<i>Issue addressed</i>					
Appellant	74.3% (52)	83.9% (26)	100% (2)	0% (0)	0% (0)
Respondent	75% (3)	80.6% (29)	80% (20)	0% (0)	94.7% (18)
<i>Issue Resolution</i>					
Favors appellant	4.1% (2)	25% (5)	0% (0)	0% (0)	0% (0)
U.S. Court of Appeals for the Eleventh Circuit (N=271)					
<i>Issue suppression</i>					
Appellant	27.1% (19)	40.5% (15)	7.7% (1)	0% (0)	0% (0)
Respondent	23.1% (9)	26.3% (15)	32.3% (4)	33.3% (1)	18.8% (3)
<i>Issue addressed</i>					
Appellant	72.9% (51)	59.5% (22)	92.3% (12)	100% (9)	100% (4)
Respondent	76.9% (30)	73.7% (42)	66.7% (8)	66.7% (2)	81.3% (13)
<i>Issue Resolution</i>					
Favors appellant	30% (18)	16% (4)	33.3% (4)	28.6% (2)	75% (3)

Table 5.3: Judicial Treatment of Issues by Size of Litigation Team

	<u>One Attorney</u>	<u>Two Attorneys</u>	<u>Three Attorneys</u>	<u>Four + Attorneys</u>
U.S. Court of Appeals for the Seventh Circuit (N=205)				
<i>Issue suppression</i>				
Appellant	26.3% (20)	9.1% (1)	0% (0)	27.3% (3)
Respondent	28% (7)	18.5% (5)	22.2% (6)	5.3% (1)
<i>Issue addressed</i>				
Appellant	73.7% (56)	90.9% (10)	100% (9)	72.7% (8)
Respondent	72% (18)	81.5% (22)	77.8% (21)	94.7% (18)
<i>Issue Resolution</i>				
Favors appellant	4.1% (2)	37.5% (3)	22.2% (2)	0% (0)
U.S. Court of Appeals for the Eleventh Circuit (N=271)				
<i>Issue suppression</i>				
Appellant	38.8% (14)	19.5% (10)	40% (6)	36.4% (4)
Respondent	33.3% (6)	21.7% (13)	21.4% (6)	19.2% (5)
<i>Issue addressed</i>				
Appellant	61.1% (22)	80.4% (41)	60% (9)	63.6% (23)
Respondent	66.7% (12)	78.3% (47)	78.6% (22)	80.8% (21)
<i>Issue resolution</i>				
Favors appellant	15.4% (4)	38.6% (17)	33.3% (4)	22.7% (5)

Table 5.4: Judicial Treatment of Issues by Number of Firms

	<u>One Firm</u>	<u>Two Firms</u>	<u>Three Firms</u>	<u>Four+ Firms</u>
U.S. Court of Appeals for the Seventh Circuit (N=205)				
<i>Issue suppression</i>				
Appellant	24.1% (20)	14.3% (1)	0% (0)	33.3% (2)
Respondent	18.6% (13)	21.4% (3)	11.1% (1)	0% (0)
<i>Issue addressed</i>				
Appellant	75.9% (63)	85.7% (6)	0% (0)	66.7% (4)
Respondent	81.4% (57)	78.6% (11)	88.9% (8)	0% (0)
<i>Issue resolution</i>				
Favored appellant	9.3% (5)	33.3% (2)	0% (0)	0% (0)
U.S. Court of Appeals for the Eleventh Circuit (N=271)				
<i>Issue suppression</i>				
Appellant	28.2% (26)	14.8% (4)	37.5% (1)	50% (1)
Respondent	25.8% (16)	22.4% (13)	33.3% (2)	25% (1)
<i>Issue addressed</i>				
Appellant	71.7% (66)	85.2% (23)	62.5% (5)	50% (1)
Respondent	74.2% (46)	77.6% (45)	66.7% (4)	75% (3)
<i>Issue resolution</i>				
Favored appellant	27.8% (20)	31.8% (7)	12.5% (1)	100% (2)

Chapter 6: Judges

Thus far, we have considered the effects of environmental complexity on aggregate outcomes of the various circuits, with particular attention to the consequences for legal clarity and consistency. For example, we found evidence that suggests the composition of a court's judges may affect organizational culture and consequently produce circuit-specific norms and tendencies related to separate opinion writing and district court reversal. Expanding on the concept of environmental complexity, chapter 4 identified a number of indicators of case complexity likely to influence the end product of a panel's work on a case. We saw that while some factors, like the number of legal provisions in a case, exhibited a fairly constant effect on outcomes regardless of the circuit, other factors such as the presence of a female or non-white judge on a panel affected outcomes only in a few, fairly homogeneous circuits.

This chapter builds on the preceding one, shifting its focus from the work of a panel to the individual judge and his or her vote. The central questions posed in the following pages are how do individual judges respond to case complexity, and how are these reactions shaped by the context in which judges decide cases? I will attempt to address these questions using several different approaches. In the first section of this chapter, I discuss factors that may influence individual decision making and, based on the extant research in this area, formulate several hypotheses to test. In these analyses, I consider explicitly the circuit and panel context in which individual behavior takes place

and address the implications of these aspects of a judge's environment. Then, in the second section of this chapter, I adopt a different methodology for examining judicial behavior: interviews with appeals court judges themselves. This section asks judges to describe, in their own words, their understanding of case complexity and strategies for handling it, important norms and practices in their circuits, the impact of experience on their performance, and the role of appellate advocates in aiding the court.

6.1 The Role of Individual Factors in Judicial Decision Making

A central argument of this project has been that appeals court judges decide cases under conditions of complexity that exist in their circuit as well as in the cases they review. From the vantage point of a single judge, there are several reasons why we may characterize the appellate judge's job of deciding cases as a relatively complex task. First, while many appeals court judges have been "specialists" in some substantive area or areas of law prior to their appointment, given the wide range of legal issues represented in the cases appealed to the federal circuit courts, appeals court judges are forced to become "generalists" in their work. Adjusting to a relatively greater degree of task variability may make for a steep learning curve, particularly for those who lack experience in appellate proceedings or in judging altogether. Secondly, as discussed in Chapter 5, appeals court judges must constantly evaluate competing issue frames presented by litigants, which may differ substantially on the number and content of legal issues raised, as well as on the application of precedent and other legal authorities to the dispute. A third complicating consideration to the task of deciding cases is the use of the panel, rather than the individual, as the primary decision-making unit. It is not enough

for a judge to come to a conclusion on his own; he must also convince one of his colleagues to agree with him. Thus, the requirement of negotiation and compromise adds an additional layer of complexity, since a judge must be willing to prioritize her commitment to the arguments she has made, in order to decide which she is willing to compromise and which she is unwilling to alter.

Finally, the task of deciding cases is made more complicated by a judge's overall workload and the time pressure related to that workload.¹ An appeals court judge handles multiple cases at a time and must keep straight the information included in the appellate briefs, the record, and bench memos prepared by law clerks. At the same time, institutional rules and norms pressure judges to turn out opinions in a timely fashion as well as to respond to circulated opinions by other judges on the panel. A judge must also keep up-to-date on circuit precedent, both to inform his work on cases still pending and to determine when to call for en banc rehearings. Perhaps more importantly, a judge must stay abreast of Supreme Court's recent holdings and monitor her own work as well as the work of district court judges in abiding by the high court's precedent.

Given the cognitive limitations of individuals, even highly educated individuals like judges, and the complex nature of the task described above,² why would a judge decide to author a separate opinion? First, the decision may be shaped by the institutional context in which the judge is situated. Norms about separate opinion-writing appear to differ across judicial institutions (e.g. Hall 1985; Brace and Hall 1990), as a result of the nature and volume of the workload that judges face. Thus, while a particular judge may be reticent to author many dissenting or concurring opinions while she serves on the

¹ Though some of this pressure is eased by the contributions of law clerks, in the end, the judge is responsible for the final work product and so must manage and oversee work performed by clerks.

² Baum (1997, 140-1) makes a similar point about Supreme Court justices.

Courts of Appeals, if she is elevated to the Supreme Court, it is likely that she will adapt her opinion writing behavior to be consistent with the norms of that institution (Gerber and Park 1997).

Secondly, a judge's decision to write separately may be driven by more individualized considerations. Research in the judicial literature on nonconsensual decisions has tended to assume that separate opinion writing is evidence that judges are acting to further their ideological or policy preferences (i.e. consistent with the attitudinal model), or, alternatively, that they are behaving strategically. At the court of appeals level, there is little evidence that, across all issue areas, judges author dissenting opinions with strategic considerations about en banc review or the Supreme Court in mind (Hettinger, Lindquist, and Martinek 2006, 84-86; Hettinger, Lindquist, and Martinek 2004).³ This is in contrast with findings about strategic dissents on both state supreme courts (e.g. Brace and Hall 1993) and the United States Supreme Court (Wahlbeck, Spriggs, and Maltzman 1999).⁴ The support for attitudinal based explanations of dissent by courts of appeals judges is somewhat stronger (e.g. Hettinger, Lindquist, and Martinek 2004, 2006). Specifically, ideological distance between a judge and the majority opinion writer is significantly and positively related to likelihood of that judge authoring a dissent.

In general, these models of behavior assume that judges are goal-oriented actors, who act in order to further their legal and/or policy goals. However, research on the precise causal mechanism by which judges' attitudes affect their decisions is still largely

³ Van Winkle (1997) finds evidence of strategic behavior among appeals court judges, but only in one area of criminal law and in a limited period of time.

⁴ Hettinger, Lindquist, and Martinek (2004, 2006) suggest that one explanation for this differential behavior may be that judges on courts with a mandatory docket are not faced with the same kind of opportunities for strategic action as judges on courts with discretionary dockets are.

underdeveloped in the political science realm. As summarized in Braman and Nelson (2007, 942), one camp of attitudinalist researchers argue that judges first arrive at their decisions based on their policy preferences and then “back-track” to bolster those decisions with legal justifications; in contrast, a second group (Baum 1999; Rowland and Carp 1996) sees policy preferences or ideology as a kind of filter through which individuals select information that they find to be persuasive. One example of an approach that goes beyond the typical “black box” account of decision making is the work of Eileen Braman, who has examined questions about the role of the law in judicial decision making using theories from cognitive psychology. In a 2007 paper, Braman and her co-author, Thomas Nelson use evidence from experimental studies on law students and “lay” undergraduates to argue that “policy attitudes interact with case characteristics and the norms of decision making to produce directed outcomes” (2007, 940).⁵ Their research suggests, in part, that when two sets of case facts are not clearly similar or dissimilar, individuals may respond to the ambiguity by relying on their ideological preferences to “break the tie.” While this finding does not directly speak to the question of separate opinion writing, it does imply that complexity in case characteristics may affect the relative importance of a judge’s ideology in helping him arrive at a decision—a proposition that I will test in the pages that follow.

In sum, while I recognize that multiple reasons exist for a circuit court judge to write separately, I am especially interested in how factors related to case complexity may interact with other variables to affect the likelihood of a separate opinion, and thus, fragment the consensus of a panel. Furthermore, I am interested in comparing these

⁵ Braman and Nelson argue that judicial decision makers decide cases by analogy (i.e. compare the case facts under consideration with fact patterns in earlier cases).

relationships across circuits, in order to understand better the effects of circuit context on individual judge behavior.⁶ In the next subsection, I move to a discussion of the variables which I include in my model of individual judge behavior.

Dependent variables

As has been discussed in previous chapters, fragmentation of the court's opinion, in terms of separate opinion writing, may reduce the clarity of the holding for those trying to discern the "rule" laid out by a panel's disposition in a case. In this chapter, the focus is on the behavior of individual judges, and as such, the primary dependent variable that will be investigated is the likelihood of a judge authoring a dissenting opinion.

In addition, I examine the role of case complexity in conditioning the effects of a judge's policy attitudes by modeling the likelihood of a liberal vote. This has, I believe, implications for understanding consistency of legal outcomes. Because the federal judicial selection process is structured in such a way that it tends to maximize the importance of a judge's policy preferences, it is not surprising that we observe judges to be especially likely to break along ideological lines when there is ambiguity in the law or room for discretion. Thus, we should expect liberal judges to cast liberal votes more often than conservative judges—or, in other words, we should expect ideology to produce voting behavior that is consistent over the long term. However, if the effect of ideology

⁶ Hettinger, Lindquist, and Martinek (2006) incorporate three circuit level characteristics in their individual judge model of separate opinion writing (circuit size, a circuit's separate opinion rate, and merits terminations per judge) because they believe that circuit characteristics may condition individual behavior. While I agree with this contention, I do not follow their approach here because specifying the individual model in this way does not capture the theorized conditional relationship between group-level and individual-level variables. Instead, it models the relationship as if the effect of circuit characteristics was constant across all individuals. Interaction terms, which would capture the conditional aspect of the relationship, present significant statistical problems, which are summarized in Steenbergen and Jones (2002). Thus, while my approach may not be ideal, I believe it represents the most theoretically and methodologically sound way to account for both individual and circuit-specific effects.

is dampened by certain indicators of case complexity, or conversely, if it is magnified, then this obviously has implications for consistency in terms of a judge's voting record.

Measures of case complexity

As in chapter 4, I choose to operationalize multiple dimensions of the concept of case complexity, in order to identify more precisely which characteristics of a case are affecting judicial votes. To account for the number of issues, which Hettinger, Lindquist, and Martinek (2006) find to be positively related to the likelihood of a concurrence, I include three separate measures. First, I include a dummy variable equal to 1 if a case is identified as having multiple case types, and 0 if not. Secondly, I include a measure of the number of legal provisions identified in the case as a rough measure of legal complexity. Finally, I account for the presence or absence of a cross appeal, though it should be noted that Hettinger, Lindquist, and Martinek (2006) do not find this factor to affect either concurring or dissenting behavior.

Next, I include the FJC measures of civil and criminal case complexity to capture case complexity in subject matter. To reiterate, the civil cases considered "complex" under these criteria include environmental, civil RICO, patent, all civil rights, antitrust, Freedom of Information Act, copyright, trademark, SEC, fraud, assault, libel, slander, insurance contracts, medical malpractice, federal tax suits, contracts, banking and finance, real or personal property actions, and labor. Complex criminal cases include drug offenses, firearms, murder, extortion, threats, RICO, aggravated assault, and kidnapping. Because I believe case complexity may work to condition the effect of individual judges' policy preferences, as well as the effect of "newcomer" judges on the

court, I will model these relationships as a series of interactions, which will be explained further below.

Experience and outsider status on the court

Relative newcomers to a circuit may be unwilling to call attention to themselves by writing separate opinions, as they acclimate to the procedures and rhythms of life on a particular circuit. There is some evidence that newly appointed federal judges tend to behave more cautiously at first, tending to defer to their more seasoned colleagues. The so-called freshman effect has been documented, at least with respect to some judges on the U.S. Supreme Court (see Hagle 1993; Hurwitz and Stefko 2004), as well as for newcomer judges on the Courts of Appeals (Hettinger, Lindquist, and Martinek 2003). Regardless of whether more time on the bench gives a judge more expertise in a given subject area, time may bolster a judge's confidence in her ability to tackle a difficult issue or area of law. I define a freshman judge as one who has served three or fewer years as a federal appeals court judge. Because a freshman judge may be especially disinclined to write separately in a complex case, I include an interaction term between freshman status and case complexity (specifically, the presence of a cross appeal; whether the case is classified as a complex civil case; and the number of legal provisions) to test for this proposition.

In addition, visiting judges who are district court judges sitting in designation may be especially reluctant to assert a separate opinion, for several reasons. If they are visiting from another circuit, they may be less familiar with the body of precedent in the circuit in which they have been temporarily designated. Regardless of their home circuit,

district court judges may be uncomfortable writing separately because they are, like freshman judges, still unfamiliar with appellate procedures. Finally, they may feel that it is inappropriate for an “outsider,” non-appellate judge to break consensus in a panel.⁷

Like the freshman judge variable, I also interact this measure with three case complexity variables to account for the differential behavior in complex versus non-complex cases. Hettinger, Lindquist, and Martinek (2006) find that both visiting judges and newcomer judges are significantly less likely than other judges to dissent than to join the majority opinion.

Personal characteristics

The question of differential behavior by non-traditional judges has tended to focus largely upon the ideological direction of judges’ decisions, rather than separate opinion writing. One notable exception is a 2003 paper by Hettinger, Lindquist, and Martinek, in which the authors find that non-white judges are significantly more likely to dissent but no differences in concurring or dissenting behavior related to gender. However, to control for the potential effects of these personal characteristics, two dummy variables will be included in the model for race and gender, respectively.

Ideology

The last set of individual-level variables included in the model relate to the ideological predisposition of judges and how these attitudes may interact with aspects of

⁷ I recognize that visiting judges who are appeals court judges from other circuits may also opt not to write separately for this reason.

case complexity to affect decision making.⁸ The work of Braman and Nelson (2007) suggests that a judge's policy attitudes may play an important simplifying role in decision making when fact patterns are ambiguous in terms of their relationship to available precedent. Extrapolating from this finding, ideology may serve a similar, simplifying function when a case involves multiple case types, high levels of legal complexity, a cross-appeal, or a complex case type.

As a proxy for a judge's ideology, I substitute the Giles, Hettinger, and Peppers (2002) scores discussed in chapters 3 and 4, which range from -1 most liberal to +1 most conservative, and reflect the preferences of the appointing president or the home state senator(s) when senatorial courtesy is present. I then create several multiplicative terms that include a judge's ideology interacted with each of the case complexity variables.

There are no clear expectations with respect to the direction of the relationship, though some earlier work on the U.S. Supreme Court finds ideologically distinct differences in the integrative complexity of written opinions (Tetlock, Bernzweig, and Gallant 1985, but see Gruenfeld 1995). Based on Braman and Nelson's work, it is more likely that such an interactive effect, if it exists, would be observable in the ideological direction of a judge's vote, which is modeled in the latter half of the analysis.

Panel composition

Finally, I include two measures related to the composition of the panel. The first measure accounts for the effect of ideological distance on a panel, under which

⁸ Other work in psychology has examined the relationship between judge ideology and the integrative complexity of Supreme Court opinions (e.g. Tetlock, Bernzweig, and Gallant 1985; Gruenfeld 1995). However, the nature of my data does not allow me to construct a satisfactory measure of integrative complexity here to test these propositions at the U.S. Courts of Appeals level.

conditions it seems reasonable to expect greater difficulty in achieving consensus (as compared to panels composed of judges who are relatively similar in terms of ideology). I use the Giles, Hettinger, and Peppers scores to calculate the ideological spread on the panel, which may range from 2 at its maximum to 0 at its minimum. The second measure controls for the presence of woman on the panel, which according to the analyses in chapter 4, increases the likelihood of a dissent being filed in a case.

Data

The data used for these analyses are derived from the Multi-User Database on the U.S. Courts of Appeals,⁹ transformed so that a judge-vote was the unit of analysis. They include a probability sample of 30 published opinions per year from the eleven numbered circuits for the years 1982 to 2002.¹⁰ This yielded a total of 20,514 judge-votes for analysis, all of which came from three-judge panels (i.e., decisions made by en banc panels were excluded from the analysis).

Methods

It could well be argued that a three-level hierarchical approach is warranted in studying the behavior of individual judges; after all, a judge is “nested” within a panel, which is then “nested” within a circuit. Indeed, I have made the argument that each level of group membership plausibly conditions the behavior of the individual. However, there are a couple of methodological stumbling blocks involved in taking this approach. First,

⁹ These data were collected with the support of grants from the National Science Foundation (SES-0318349). Any findings and conclusions of this paper do not necessarily reflect the views of the Foundation.

¹⁰ Cases were weighted to approximate a random sample.

as has been discussed in chapter 4, multilevel modeling with a small number of higher level units (i.e. the total number of circuits) is at least as problematic as estimating an OLS regression with a very small number of cases. The more levels of analysis there are, the more acute the small N problem becomes (Bowers and Drake 2005). Moreover, even if the N of circuit was sufficient, a second problem with estimating a three-level model in this scenario has to do with the use of rotation in assignment to panels. That is, judges have overlapping memberships to the level-2 group (i.e., the panel), rather than membership in only one level-2 group, because different combinations of judges are assigned to sit together in different cases. While an appropriate model for such complicated data structures does exist—an additive crossed random effects model—interpretation of results would be muddled by then estimating a third level of analysis for circuit-specific effects.

Consequently, in the interest of transparency, I have chosen an alternative approach to address the nested structure of the data. In addition to estimating a pooled model for all circuits, I will present logit analyses of eleven separate models, one for each circuit, to paint a picture of the context in which a judge operates, and then will display several overlay graphs showing the predicted probability of a judge authoring a separate opinion, under specified conditions, across all circuits.

Discussion

Table 6.1 shows the frequencies of dissenting and concurring opinions in the sample of published opinions used. In general, we can see that, to the extent a judge authored a separate opinion in any circuit, the opinion was more likely to be a dissent than a concurrence. Moreover, writing any kind of separate opinion, even a dissent, is

the exception rather than the rule; the vast majority of judges did not break off from the majority opinion. In terms of comparison by court, judges in the Fourth Circuit exhibited the highest dissent rate, at just under five percent, followed by judges in the Third, Sixth, Eighth, and Ninth Circuits (all at over three percent). Sixth Circuit judges also had the highest rate of concurrence of all the courts at one percent. What these particular circuits share in common is that they all place in the top third of ideological spread, when the circuits are ranked from the widest to smallest range. This suggests the development of norms related to separate opinion writing may be an outgrowth of the ideological composition of a court, rather than related to workload or court size, for example.

In Tables 6.2 through 6.4, we can see the frequency of dissents and concurrences when a case exhibited certain aspects of complexity. There is no substantive difference in the frequency of dissent or concurrence related to a case being classified as a complex civil case under the FJC system. When there is a cross-appeal, there is a slightly higher percentage of dissents (approximately one percentage point greater) compared to cases without a cross-appeal; no differences can be seen with respect to concurrences. Finally, looking the number of legal provisions in a case, we can see a relationship between higher numbers of legal issues and dissent, at least until the number of provisions reaches eight. The relationship between legal complexity and concurrences is somewhat weaker.

However, cross-tabulations cannot control for the impact of multiple variables in affecting outcomes, so next I estimate a combined logit model that pools together all eleven of the circuits. Here, I focus only on dissent since there is more variation in this dependent variable. Circuit-specific effects are captured with dummy variables, which may help us identify court norms and tendencies related to dissent. In the basic form of

the model, run without any interaction terms, we can see that the presence of a cross-appeal significantly increases the likelihood that a judge will dissent; increasing the ideological spread on a panel also boosts the chances of a judge writing a dissent. The number of legal provisions reaches significance at the .10 level and is positively related to the likelihood of dissent. There is no support for either of the newcomer hypotheses, as neither the freshman variable nor the visiting judge variable achieves statistical significance.

Model 2 builds on the baseline model by incorporating interaction terms between the judge status variables and indicators of case complexity, as well as between judge ideology and case complexity. As in the first version, the model as a whole is statistically significant at the .01 level. Here, we see some marked differences from the baseline model that shed light on the relationship between judge characteristics and case complexity. The interaction between visiting judge status and legal complexity is negative and significant at the .05 level, suggesting that as the number of legal provisions in a case increases, judges visiting from district courts will be less likely to write a dissent. We can compare visiting and non-visiting judges by calculating predicted probabilities for each group when legal complexity is at its minimum and at its maximum. On average, the probability of a visiting judge dissenting drops from .04 to .001 when a case increases in legal complexity from its minimum to its maximum. In comparison, for “home court” judges, the likelihood of dissent decreases in a smaller range, from .02 to .00, when all other factors are held at their means. The substantive effects then, of this interaction term, suggest that case complexity affects visiting judges and non-visiting judges’ propensity to dissent in a very similar way. Furthermore, the

smaller range for home court judges may evidence norms of collegiality and consensus among colleagues who must regularly work with one another. In terms of the other newcomer variable, we see weak support indicating that freshman are less likely to author dissents in complex civil cases, but the predicted probabilities here show only a very small effect (.01 reduction in likelihood). To the extent that there is a freshman effect, it appears to be a very slight one.

Turning to the circuit dummy variables (not shown), the results comport with the frequencies from Table 6.1. Using the First Circuit as the baseline, about three-fourths of the other circuits were significantly more likely to be associated with dissent. (This is not surprising, given that judges in the First Circuit had the lowest frequency of dissent in the sample.) The exceptions were the Fifth Circuit ($p = .083$), the Seventh Circuit ($p = .822$), the Tenth Circuit ($p = .087$), and the Eleventh Circuit ($p = .120$). Referring back to Table 6.1, we can see that these four circuits were very close to the First Circuit in terms of the infrequency of dissent.

Before estimating models for individual circuits, I calculated predicted probabilities for the pooled model. Figure 6.1 shows the effect of ideological spread on the likelihood of dissent, by judge ideology. We can see that as the ideological distance on a panel increases, liberal and conservative judges alike are more likely to dissent, though liberal judges have a slightly greater propensity to do so than moderate or conservative judges. In order to untangle the effects of both ideology and case complexity, Table 6.6 displays predicted probabilities for several ideal types.¹¹ The baseline probability for a dissent is quite low (.02), but the combination of case complexity (the presence of a cross appeal and high numbers of legal provisions) and a

¹¹ These predicted probabilities were calculated from the baseline model, with no interaction terms.

wide range of ideology on the panel boosts the probability of dissent up to .12. This effect is greater than the effect of case complexity or ideological spread alone and suggests that both case characteristics and group dynamics on panels may contribute to an individual judge's decision to "go it alone." In such cases, there may simply be too many opportunities for disagreement.

Table 6.7 displays the results for individual circuits, using the model form that includes only the three interaction terms between judge ideology and case complexity.¹² There are some notable differences compared to the combined model. First, several variables related to judge status or personal characteristics achieve statistical significance at the 90 percent confidence level. Female judges are more likely to author dissents in the Sixth, Seventh, and Eleventh circuits, but less likely to do so in the Fourth. In the Third Circuit, contrary to predictions, visiting judges were more likely to author a dissent. Also in the Third Circuit, Caucasian judges were more likely to dissent than judges who are African-American or Hispanic. However, overall, the hypotheses regarding freshman and visiting judges found little to no support.¹³

With respect to case characteristics, no single variable performed consistently across the board. Multiple case types were negatively associated with dissent in the Sixth and Ninth circuits; in terms of commonalities, both of these courts rank in the top quartile in terms of court size and are also close together in terms of ideological spread. Judges from the Second and Sixth circuits were more likely to dissent in cases with higher numbers of legal provisions, but only when the judge was ideologically moderate (i.e.,

¹² Because of problematic levels of multicollinearity, the minority judge variable in Fourth and Seventh circuits and the visiting judge variable in the Eleventh Circuit had to be excluded in those models.

¹³ One explanation for the freshman judge non-finding may be the over-inclusiveness of the category, which was operationalized as a judge with 3 or less years on the courts of appeals. A narrower definition might yield differential behavior.

their ideology score was equal to zero). Unlike in the combined model, the cross appeal variable performed poorly as an interaction term in all of these models, but when the individual circuit models were run without interaction terms (not shown), the coefficient for cross-appeals was positive and statistically significant in the Sixth and Eighth circuits, and came close to standard levels of significance in several other courts.

Nonetheless, several findings do shed some light on the relationship between judge ideology and case complexity, and those variables' effect upon the propensity to dissent. In the Fifth Circuit, when an appeal was classified as a complex civil case under the FJC definition and all other values were held at their means, a judge with the median ideology score (.271) was slightly less likely to dissent than in a non-complex case. This tendency was mirrored on the liberal end of the spectrum but, interestingly, not on the conservative end. For the most liberal judge in the Fifth Circuit, the probability of a dissent drops from .02 in a non-complex case down to zero in a complex case. In contrast, for the most conservative judge on that court, the probability of a dissent actually increases from a non-complex case to a complex one (a change from .02 to .05). Combining this insight with the finding that the ideological spread of a panel was significantly related to the likelihood of a dissent, the results become even more interesting.

All other factors being equal, when case was not classified as a complex civil suit and the ideological spread on the panel was held at zero, the probability of the most conservative judge dissenting was effectively zero (.0064). In that same type of case, increasing the spread of the panel to its maximum value (1.09) causes the probability of dissent to jump to .07. Next, in a complex civil case, the most conservative judge has a

.02 probability of dissenting if ideological spread is equal to zero, but increasing the spread to its maximum value, that judge is *eight times* more likely to dissent (.16). For the most liberal judge, we see identical effects for non-complex cases, but in complex cases, increasing the ideological spread of a panel from its minimum to maximum values does not increase the liberal judge's probability of dissent above zero.

In the Eighth Circuit, when a case had the minimum number of legal provisions (zero), the probability of the most liberal judge dissenting was .01. But when a case exhibited the maximum number of legal provisions (12), the most liberal judge had a .80 likelihood of dissenting. In contrast, the most conservative judge went from a .04 probability of dissent down to zero when the legal complexity value was increased from its minimum to its maximum. These findings suggest that the differences between liberal and conservative judges in the Fifth and Eighth circuit courts may extend beyond the ideological direction of their votes to how they respond to complexity in the cases they review.

Building on these results, the final analysis presented in this section models the effect of case complexity in conditioning the impact of judge ideology on the ideological direction of the vote. In this analysis, I pool together the judges from all the circuits in order to produce more robust results; in addition, I add two more variables that may affect the propensity of a judge to vote in a liberal direction. One variable controls for the ideological direction of the lower court's decision, since the majority of decisions by the courts of appeals affirm the decision below. A second variable controls for the participation of the United States government as an appellant; given its very high success

rate, when the U.S. advocates a conservative position, a judge may be less likely to cast a liberal vote.

The results appear to support the contention that the relationship between case complexity and ideology can affect outcomes, at least in terms of one conceptualization of case complexity. The interaction between ideology and legal complexity is negative and significant at the .001 level. To untangle the nature of this effect, I calculated predicted probabilities of dissent for a judge with the median ideological score (.012). When a case had the minimum value for legal complexity, the probability of a liberal vote was relatively high at .35. However, as the number of legal provisions in a case increased, that probability steadily went down, to .20 with the median number of legal provisions (6), and then finally down to .09 when legal complexity was at its highest value (13). This suggests a dampening effect upon ideology when a case becomes more legally complex and is visually demonstrated in Figure 6.2 for the most liberal and most conservative judge.

In attempting to square these findings with cognitive psychology accounts about the role of ideology in judicial decision making, a few possible explanations come to mind. First, it may be relevant that we see a conditional effect only between ideology and the legal complexity variable, and not with civil case complexity or the presence of a cross appeal. Not all kinds of complexity may cause ideology to function as an unconscious or conscious “tie-breaker,” and complexity related to the relative difficulty of a case (e.g. competing claims in a cross-appeal, technical difficulty of an area of law) may draw on a different reasoning process by judges. Another possibility is that, as more legal “constraints” appear in a case, there is simply less room for a judge’s ideology to

influence her vote. This does not necessarily preclude Braman and Nelson's claim that ideology assists with analogic decision making; since these data only look at the final vote, they cannot tell us about the cognitive reasoning process that led a judge to take that final position. To delve more deeply into the "process" side of these questions, the next section takes a different methodological approach to disentangling the relationship between environmental complexity, case complexity, and judicial decision making.

6.2 The Interviews

Of course, quantitative kinds of data cannot tell us the whole story. Interpretive methods can offer insights about process, in ways that models focused on predicting outcomes cannot. Indeed, Shivley (2002, 19) writes that "less quantitative research provides greater breadth, greater openness to totally new theories, and a greater awareness of the complexity of social phenomena."

For this section, I conducted confidential interviews with six judges from two circuits (the Eleventh and the Ninth), and who were diverse with respect to their status (senior status or active), the party affiliations of their appointing presidents, and their gender. (The interview protocol may be found in Appendix B.) Due to the time limited structure of the interviews (no more than 60 minutes), I was not able to cover all questions with all judges, since some judges elaborated more in their answers than others. Nonetheless, I found the judges, without exception, to be quite forthcoming and willing to consider carefully the questions posed to them. In the pages that follow, I have organized their responses into broad categories in order to provide a kind of structure to their insights. Finally, it should be noted that I have included all responses relevant to the question posed, regardless of whether they support any hypothesis I have proffered.

Defining complexity and difficulty

Taking the question of difficulty first, some of the judges were quite upfront about particular areas of law, or subject matter, that they considered to be difficult. Science, immigration, sentencing cases, and capital cases were all mentioned by multiple judges.

14

“There are cases involving, say, molecular physics, neutrons, and cell structures and DNA and things like that, where good lawyers have to mobilize the resources of expert witnesses who’ve written books on the subject and can explain what the facts really are. Scientific facts are sometimes difficult to fully understand and until you do understand them, you run the risk of misapplication of legal principles. I think those cases are difficult in a different sense. They would be difficult to anyone who’s not an expert in that field. I’m not. I’m not an expert in medicine and molecular physics.”

“Immigration [cases]...are difficult because of the importance of the case for the petitioner because it involves the petitioner’s life or liberty. [It also] involves our interaction with an administrative agency and an agency that’s very poorly funded and financed and they don’t do a good job. Difficulty comes in substantial part because we’re having to do so much of the work because the Board of Immigration Appeals, which is the intermediary appellate court, typically rubber stamps and says, We approve the immigration judge’s decision.

The other area where we have an awful lot of work is sentencing. That’s because of the Supreme Court adopting different positions. Now it’s opened up the whole system again. The Supreme Court [came down with] two conflicting decisions a few years ago and we’ve been struggling with it ever since.”

“I would say, in no particular order, some of the cases that are more difficult involve scientific evidence. I [had] a liberal arts background and graduated from college [in the 1960s] and law school [in the 1970s], so the world of science and the world of the law is changing completely...Those cases are difficult and they take more time and concentration.

“I guess the next one I would put on the list is civil securities fraud litigation....[T]hey’re greatly detailed as compared with other civil cases...It’s at least double-layered. [In the first layer], you go through very complex complaints—hundreds of pages, hundreds of paragraphs. And then the second layer is that very often what they’re saying...is that a publically traded corporation did things that affected the market during a particular period of time. That requires you at the second layer, to analyze what they’re saying, to look at the information on the market impact and then parse through the elements of the claim.”

One judge noted that difficulty is often related to trying sincerely to “follow the law”:

“There are certain areas in which the rule of law is difficult to fit a broad variety of facts [cites the question of hardship in immigration as an example]...If you try to stretch the

¹⁴ For a fascinating discussion of how courts of appeals judges evaluate trial courts’ decisions about science, see Caudill and LaRue (2006).

rule of law over an infinite variety of facts, it's like trying to put a broken bale of hay back into a bale. So those areas are difficult for judges because judges, if they're conscientious, try to follow the law if they can find it and they know what it is, and apply it to the facts. You get these fuzzy or opaque fact patterns and there's where you have real difficulty.

"There's quite a bit of confusion in law when Congress doesn't know what it's doing, and it creates unintended consequences. It's not always ambiguous, it's more lack of clarity...[T]here is a lot of legislation, state and federal, which occasionally contains two meanings, but, most often, is unclear. It's just written by people who are confused about the facts, or not in agreement about the facts, or trying to cover them up."

There was no consensus about whether greater exposure to difficult cases made them easier to decide over time. One judge noted that immigration and sentencing cases were both the most difficult *and* the most commonly seen—suggesting that familiarity was unrelated to perceived difficulty. Several other judges disagreed with that assessment, with one commenting:

"The first time you encounter a case that's different from your pre-judicial experience, they always take more time. You always find them a little bit more difficult. I did one Social Security case in my entire 25 years of practice, so the first time one of those rolls down, it takes more time. And I'd never done any immigration, asylum, conventions, or torture, or any of those kinds of things."

A third judge noted that one danger with repetition of difficult case types is burn-out:

"You could ask the same question about a domestic relations court. After a judge has heard three or four hundred custody fights, they become kind of inoculated to the human tragedies that they're seeing and they just want to get it over with. Enough already and call for the next case. So there is a hazard, I guess, with repetition, [that] you might get to the point of seeing this just as a categorical disaster...A little bit of this happens in the other human tragedy cases like immigration, refugee cases, political asylum from countries that are impossible to live in with any kind of security or decency. You hear these stories over and over and over again, and we don't know whether we believe them or not. Some of those cases are not technically difficult, they're emotionally difficult. There's no happy result."

Other judges disputed that even on average, one area of law might be more or less difficult than another area. This group of judges tended to assert that difficulty was

primarily a function of the quality of information contained in the record¹⁵ and in the appellate briefs.

“I don’t know that I could define them. I’d rather say that it depends more on how well they’re presented by counsel. What usually is a simple issue can be confused very much if it’s badly lawyered.”

“Sometimes a case is difficult because it’s hard to understand the facts, it’s hard to know what happened. That may be the lawyers’ fault for not writing clear briefs. Sometimes a case is difficult because it isn’t clear what the law is. There may not be any opinions on the question before. There may appear to be some tension or conflicts in the law. Sometimes it’s an area of law that you’ve had no previous contact with.”

“You get the skills in law school to deal with any kind of problem and if you have the proper research in hand, it doesn’t matter whether it’s corporate securities, whether it’s environmental regulation...You know, in environmental cases when the record is so huge, if you call that complex, it takes more time to go through the records and all the environmental impact statements and environmental assessments and those kinds of things. Similarly, in capital cases, the record is huge and, coming from some states,...the briefs are bad, the record’s bad...So the subject matter is not [difficult], it’s the record and the briefs.”

In general, all of the judges struggled to draw a bright line distinction between “difficulty” and “complexity” in cases, though some general themes did emerge. One such theme was that difficulty involves larger policy implications,¹⁶ while complexity refers to the number of dimensions in a case: the size of the record, the number of issues, the number of litigants and jurisdictions, etc.

“Difficulty [is] being sure you’re right in immigration and sentencing cases. And I think that the environmental cases, I think it’s fair to say, are more complex. They’re technical and there are more issues and there are issues in the background which you can’t very well see.”

“Well, there’s a difference between complexity and difficulty...A case can have 35 issues and in that sense be complex, but you can run through them fairly quickly...But difficult is where you have a choice. Either there’s no law in circuit or it’s a case of first impression across the whole country. The Supreme Court hasn’t spoken to it. And you have a choice. You know that choice A is going to make it difficult for some folks, and

¹⁵ The judges’ comments suggest that the trial court record can increase complexity under two scenarios: when the record is incomplete, or when the record is too complete (i.e. long).

¹⁶ One judge described the difficulty of immigration cases, as compared to other agency cases, in this way: “[T]here’s always a real human story behind the petition. It might be somebody claiming genital mutilation from Africa, it might be somebody claiming forced abortion or sterilization from China, it might be somebody claiming torture or whatever from country X, so there’s always a significant human story behind it. And you’re aware of the consequences of your decision both ways.”

choice B is going to make it difficult for some other folks. You have to decide between the value you attach to different things. Do you attach value to access to the courts, do you attach value to the notion that you have a bright line rule and, in the future, you know exactly where that line is, and I know where to avoid stepping over it? And this varies from judge to judge.”

“If you have good lawyers, immigration cases are hard. If you have bad lawyers, they are very hard, because you’re trying to figure out what the lawyers should have figured out. Immigration cases can be very difficult and they can be very complex. What makes a case difficult and complex are huge records, bad briefs. It’s very hard for me to distinguish between difficult and easy cases, because I know one kind of case, say a [Fifth Amendment] takings case, can prove to be very difficult and very complex. Class actions, where you have thousands of people involved, you have fifty jurisdictions involved in a Wal-Mart case—something like that can be both difficult and complex. On the other hand, you could have a huge class action that wasn’t very difficult, it was just complex because it had so many parties and so many jurisdictions were involved.”

In contrast, other judges seemed to equate the number of issues with difficulty and the interconnectedness among issues with complexity. One judge likened the process of deciding a complex case to working one’s way through a very long decision tree with “lots of branches.”

“[T]he thing that makes a case complex has more to do with the ability of lawyers to present it than anything else. Now there are some cases where the factual background is just a jungle to work your way through what happened. You find that you are dealing with state law and federal law and regulatory rules, and a lot of different things will be affected by the decision, so each decision that you make is just as easy as any other, but you have to make a lot of them...One case could have a question, What is the statute of limitations on a certain type of action. That’s it: did it run or not? One issue and you decide that issue. Some cases have half a dozen or ten or twenty issues and you have to decide each and every one of them, and that amounts to difficulty, it may not add to complexity, unless the decision of one of them opens up a bucket of worms about some of the other issues.”

“There are different kinds of complexities. There are complexities by subject matter that may be unfamiliar to laypeople or untrained people. An example would be...scientific subjects. Because the language of the particular discipline is unfamiliar to laymen, the complexity of subject matter makes the thing look more difficult than it really is...Then there’s the multiple issue aspect of complexity where a particular legal problem may have several legal questions that all bear upon the outcome; some are questions of fact, some are questions of law, and just knowing the difference is important. A person needs to know when are we looking for the facts, when are we looking for the right law to apply to the facts. First, you’ve got to find out what the facts are, and that’s when a complex case becomes more complex, and I guess that makes it difficult. To me, a case could be

evaluated as to its difficulty by looking at how many different questions are involved in this case. How many different questions can we answer with ‘yes’ and ‘no,’ how many have to be answered with qualified answers or nuanced answers and so forth.”

Judges also differed in their characterizations of the relative degree of complexity associated with constitutional, statutory, and regulatory law.

“I think that constitutional cases are, for the most part, not as complex as regulatory agency cases because constitutional principles are pretty well defined now over the last couple hundred years so they are fairly clear in most cases. There are a fairly clear set of rules [but] they vary and they change from time to time.”

“Constitutional law, I wouldn’t describe it as easy, but for me, I’m a student of history, I think I understand the ebb and flow of the Constitution over the years. We read the Supreme Court carefully, you know we’re an intermediate court, if the Supreme Court has spoken on an issue, whether we like what they have said or not, we are bound to apply it...But there are some areas [in constitutional law] that are difficult, and those are areas where the Supreme Court has bobbed and weaved around an issue.

Statutory interpretation is a creature that is very different. When I went to law school, it wasn’t even taught...[B]y its nature, the process of coming to a final bill is compromise, obtaining a vote here or there, avoiding a filibuster in the Senate, and it does not come out with perfect clarity...So you have statutory product that may be the result of hundreds of compromises and legislative history that consists of one side saying how wonderful the statute is and the other side saying all of the horrible things the statute is going to do if you implement the statute. And you have to be careful of how you treat all that legislative history...I think the whole area is difficult.”

“Depends on the briefing and it depends on the record. Constitutional cases can be easier than regulatory cases in many instances...except in capital cases because so much is at stake. They may be complex because of the record or because of the inadequacy of the briefing, which may involve constitutional questions, but constitutional questions that are not that difficult. It’s once you identify them and see what the facts of the case are, the facts are what makes it very complex.”

This judge also elaborated on the challenges related to overseeing agency appeals over the course of several presidential administrations:

“I think one of our problems with administrative law is that the administrative judges are subject to the pleasure of the executive department. In [all my] years on the bench, I would see new presidents come in, and more people would be denied asylum. Another president comes in, more people are granted asylum...We need independent administrative judges who are not subject to the direction of the executive.”

Strategies for handling complexity and difficulty

A number of judges mentioned the research assistance of their law clerks as an important means of responding to difficult cases outside their field of expertise or comfort range. To the extent that law reviews were considered to be helpful, it was as part of a clerk's overall research inquiry. A typical comment was, "I always ask the clerks to survey the law review material. Now, a lot of this stuff is, by its nature, esoteric, but every once in awhile, something will pop out."

Judges were somewhat more reluctant to say that they relied upon the expertise of other judges on their panel or in their circuit in such situations. Responses ranged from fairly negative in tone to more open-minded to the possibility:

"[The expertise of other judges on the panel is] not a decisive factor."

"Rarely. Very rarely. We don't do much of phone calling like that, and there's a sense in the culture of my court that you would get into issues of whether you were doing the right thing [on a case]. You have a duty as a judge to make your own decision. We have a tradition of communication with everybody at once. We don't form caucuses or cabals behind anyone's back. I'm sure that happens sometimes anyway, but you try to avoid it."

"I don't think that you would find on this court, and I doubt on hardly any court, that you would have a sort of expert judge on a certain field that you are going to look to, to be helpful in this case. That would be a little bit dangerous. You would lose the effect of a multiple judge court if you just decided, Well, Judge Jones knows this field, we'll just let him decide it. So we don't do that, [although] I can think of one field where one judge who knows because of his practice, so if you ran into a case in that field, you'd feel comfortable to know that he thought you had it right."

"Sometimes you have colleagues [you can ask]. I have a colleague on the Ninth Circuit who is the principal author of one of the leading casebooks on federal courts...and if I've got a really knotty civil procedure question, I wouldn't hesitate to call him and say, What's your read on this?"

"Does it help to have a particular expert? Of course...We have a number of academics on the court, and it's like reading a really good book or a really good article. But it doesn't necessarily affect the way in which you decide a case. It's being with very bright, intelligent people on any given subject, and they may refer you or remind you of something that you should know about. But it's the lawyer's job to present their case."

In cases involving very technical issues, such as scientific evidence, one Ninth Circuit judge described measures taken to assist judges in evaluating claims that may be beyond their expertise:

“There’s a whole lot of subjects neither judges nor lawyers know a lot about. Sometimes [the two briefs] are poles apart, and you have to get a third expert in and say which one of these experts is best, has got the best science. We have kind of a junk science screening process. We have to get help sometimes, to screen out.”

Finally, a few judges brought up amicus curiae briefs as a possible avenue for clarifying issues in difficult or complex appeals.

“Sometimes they can be very helpful, particularly if the case has started without the very best counsel, but suddenly everybody realizes this thing is going to affect a lot of people or industries or rules of law, so some really fine, fine lawyers that come in with an amicus are very helpful. Now there’s another area...which troubles me some. And that is where on a case [that is] well-presented and it is obvious that the parties would like the court to know that a lot of people are very concerned about this case. So they may go out and solicit amici to come and file too, to show the judges that, Hey, we’ve got a lot of people that are counting on us here. And when they do that, sometimes it’s totally worthless repetition—and they can send their client a pretty big bill for sitting down and writing twenty pages that reiterate the first twenty pages of what the appellant or appellee’s brief said.”

“There are two types of amicus briefs. There’s the great majority of it, which I find to be useless. There’s the minority of them that I find useful... The kind I find really useful are, for example, from industries when I have had no contact at all with the industry or the government, when I have no contact with that government agency.”

The effect of caseload pressures on individual judge performance

Several judges were asked about their opinion on workload pressures in their circuits and what they believed the effect of those were. Judges, like this one, who had served for several decades on the court, bemoaned the surge in caseload.

“It’s huge. It’s absolutely huge. And it does affect the way you work. Because when I was working on 10-12 cases a month, it was far different than working on 30-40 cases. You have to give priority to certain cases; you’re always behind.”

One judge spoke at length about what he believed to be the negative consequences of increasing workload—primarily, increased delegation to law clerks and

growing bureaucratization of the circuit. He went on to note how he felt it affected individual performance:

“My feeling as a district judge and to some extent as a circuit judge, is that excess workload reduces the quality of the output, and it reduces it in a couple of ways. One is, it leads to over-delegation. In my opinion, American courts are more and more over-delegating. I do not think law clerks should be writing the Supreme Court or Court of Appeals opinions. The judges ought to be writing them, and the law clerks should be editing them...[U]ntil you’ve done the writing yourself, I don’t think you can really be confident that you’re correct about the facts and the law.

Another thing that happens is...when judges work too hard, they are too tempted and I include myself in this, to apply whatever procedural bar there is to avoid getting to a just result on the merits. Anything that will close a case looks damn tempting if you’re working too late at night.”

A common theme in the responses by Ninth Circuit judges was the sheer number of immigration cases, particularly after some procedural changes in the INS administrative review process in 2001. One judge described the jump in cases from ten percent of the total docket to fifty percent as “a tsunami.”

The judges were divided as to whether their workload colored decisions to write separately in a case. One respondent noted that a judge could always just dissent without providing reasons if workload concerns were a problem. He went on to explain that given the usual amount of preparation for a case, a judge who felt strongly enough to dissent should be able to pull together his reasons for a dissent relatively easily. Another judge disagreed and gave the example of how workload affected decisions about en banc rehearings.

“It’s bound to affect you and how strongly you feel about something. There are lots of cases that are filed that I disagree with, but I don’t feel strongly enough to call for en banc...and other cases I won’t let go, and I’ll ask for an en banc.”

Some of the responses suggested that circuit norms of collegiality and consensus were more important than workload *per se* in dictating whether and how a judge responded to a disagreement with an opinion. When asked why most opinions were

unanimous, one senior judge responded, “Well, because they agree. They don’t disagree, certainly not strong enough to express an opinion.” Another judge commented that the high degree of consensus in the Courts of Appeals was largely due to the determinative nature of the law in resolving the cases before them:

I guess I’m generally regarded as a conservative of the libertarian streak, when people try to characterize me. And I am struck when I sit with a panel, sometimes a couple of farthest left judges on my court, and we still agree almost all the time. I think the explanation is for why we agree is not that we’re straining to agree for institutional purposes, it’s that the law is the law. There really is a lot of law that produces determinative results. It doesn’t always, but it does, most of the time. I will be on a panel where there is tremendous philosophical, political variation among the judges, but also 80 or 90 percent agreement on the cases.

A senior judge, who had visited on the Eleventh Circuit, recounted a story in which he came to the conclusion that the precedent that controlled in a certain case was wrongly decided. But rather than dissenting, or trying to convince another judge on the panel to overrule the precedential case, he wrote a concurrence stating that while he agreed with the majority that an earlier case controlled the present dispute, he believed the precedent to be wrongly decided. When I asked him why he did not dissent, he replied that “A collegial court should do that sort of thing, and they should do it in conference, before they go public with it. Usually in conference, when you bring up something like that, the other judges will go back and get their law clerks to take a look at it, and they’ll iron it out and work out an opinion everybody can agree on.”

The role of the appellate advocate

Most of the judges reflected on the importance of the appellate advocate in their work, emphasizing the traits and tactics of good counsel and bemoaning the habits of lesser quality counsel. Appellate experience as well as subject matter experience was seen as being generally helpful, as evidenced by these comments:

“Yes, I do think the experienced litigators have something of an advantage. I can’t give you any general rule; we face the cases as they come.”

“I think [the regulatory cases] probably involve litigants who are able to retain very good counsel, who are very experienced and know their business and can get to the point and present it well. I don’t say that’s always so. Some will come to court saying, Now, judge, this is a 428.3 subsection (b) case, and we’re ready to argue it to you. And I don’t know what a 428.3 subsection (b) case is, because he’s so experienced in the field that they talk in vocabulary that’s not known outside the community. So that can sometimes be trouble. But usually in those cases, the lawyers have been to court before, they know the issues, and they know what’s going to be the point upon which the case turns, and they’re going straight to it and help the court a great deal.”

Criticism about the quality of counsel tended to focus on poor writing skills as the source of the problems.

“A good appellate writer picks out the three or four most important issues and focuses on those. Those who do the shotgun approach [make] you begin to lose faith. They want to win anything they can get, and they show a real lack of clarity in knowing what the real issues are... If you get a good lawyer, he or she will know exactly in this case you want to focus on the inadequacy of the counsel, you don’t want to raise a lot of little dinky issues that show you don’t like the district court judge, etc., etc., that have no real bearing on the case.”

“Some of the difficulty [with badly written briefs] is that we’re getting a generation of lawyers coming out of law school now who can’t write a simple declarative sentence. They never learned to do that in high school, and they didn’t learn it in law school...About all we can do is hope for the best. I have law clerks who come from good law schools, good high schools, good colleges. I try to pick them carefully...They work on research and help me draft opinions and so on, and even with them, I constantly find things that need to be improved. And so realizing the lawyers working in a lot of law firms are not the ‘A’ students, but the ‘C’ students, you can see why a lot of those briefs are badly organized.”

The role of experience as a federal appeals court judge

Judges tended to agree that there was a period of acclimation, or a “freshman effect” when they first arrived to the Courts of Appeals.

“I have found with everything I have done, starting with even private practice, it took me maybe five years to get the hang of it. And being a judge is the same way. It took me about five years to get the hang of being a trial judge, and then I got elevated and I needed another five years to adjust to being a circuit court judge.”

“When you first come in, you don’t know what you’re doing, and it’s not about the law...But I think I felt fully comfortable procedurally as a judge, probably it took two or three years to figure out the best way to use my time, the best way to use my law clerks, the best way to relate to my fellow judges, and my initial desire was not to make a name for myself in writing flashy dissents...And I was going to write every opinion myself. Now I wouldn’t do it if I had time...But I did this [very complex environmental case]

myself, and one of my wonderful colleagues, an older judge whom I admired very much, pulled me aside and said, Boy, this was a wonderful opinion, [and] I'm going to take it home this afternoon and cut it in half. And I said, Oh, Judge X, please let me do it myself. What I'd done is, I'd written like an academic. I'd referred to all my friends who were doing important things, written important law review articles, and cited them in my opinion. And I finally came to the conclusion, I'm writing for the litigants. I'm writing for the litigants, to give reasoned grounds for my decision...So, it took me, I would say, before I felt in the groove, so to speak, about three years."

"I think there probably is a learning curve and I think it differs from person to person...I actually think that somebody who comes from an active private practice firm has a bit of an advantage at the appellate level. Because in private practice, what happens is, a client brings you a case, you assess it and...then you gather the research...and you walk in and try to convince a judge of the correctness of your client's position. At the court of appeals, the cases roll in, and you dive into them and eventually you end up saying, I think this is the correct way to decide a case, and then it's a matter of convincing a judge who happens to be a colleague, so the exchange is cordial and collegial and all of that. And the skill is convincing a judge, and all you have to do is convince one of your colleagues, and you hold the day. So in a strange and counterintuitive way, I found that people who come straight from private practice, an active litigation practice, have a shorter learning curve than those who come from the district courts or trial courts."

One judge recounted the guidance he received from the chief judge at the time he joined the court as being helpful in making that transition:

"Well, when I came on, the chief judge advised sitting in, listening to arguments, reading briefs, I think for a couple months. They were good preparation when you didn't have to make any decisions. You just had to think of what you might have done."

This approach was specific to a particular chief judge, however, and was not mentioned by any of the other judges in their recollections of their early days on the bench.

Opinion writing: are judges writing to any particular audience?

Arguably, writing for a specific audience may help promote clarity in appellate opinions. When asked if they had a particular audience in mind (such as the litigants, other circuit or district court judges, the Supreme Court, or the general public) as they wrote an opinion, to the extent that they accepted the word "audience," judges either tended to cite either the litigants or their colleagues. They tended to reject the notion that they themselves thought of the Supreme Court as an audience when writing an opinion,

instead asserting that “other judges” took that approach. However, when pushed a bit on the question, several scenarios emerged in which judges felt it appropriate to tailor some of their arguments for the justices of the Supreme Court.

“I would want whoever reads it to have some understanding of the law and legal procedure and to know what he’s reading. Now you can’t write for the newspaper, they’re going to reinterpret it as they see fit anyway. I think, I write it to go into the books and to contribute a grain of sand to the body of the law. I don’t know that I care what audience there is. I really had not even thought that I would write for any audience.”

“The litigants. I learned that the hard way...What I attempt to do is to answer the question so that the litigant knows the answer and knows why. Now if it’s a question of first impression, you might want to throw in law review articles...but that would be a rare case, because the litigant doesn’t care. It’s to answer the question, and if there is a split in the circuits, it would be to explain to the Supreme Court why we have not gone with the Third Circuit, but like the Seventh, and be very clear about why we have chosen sides. And in that case, we are writing for the Supreme Court.”

“It depends on what you are writing. There are two broad categories. The first category is unpublished opinions [memoranda of disposition]...What you want to do in the memorandum of disposition is tell the losing party why they lost. What facts you’re relying upon, what law you’re relying upon, which enables them, if there’s a basis for doing it, to file a petition for rehearing. Not an en banc, but just one to the panel to say that, Hey, you guys got that wrong. The next big category is [published] opinions. You’re telling the parties how it came out, you’re telling the scholarly world what the standard for these kinds of cases is, and if it deals with allegations of prosecutorial misconduct, you want to state it clearly enough what you’re doing to let prosecutors know what they can and cannot do.”

“First of all for my colleagues. To persuade them. They have to be the primary audience. And if I manage to persuade them, then everything follows.”

“Let me tell you what the most important skill in the procedure of writing an opinion is. It’s being able to count to three, actually you only have to be able to count to two if it’s an ordinary panel. You have to be able to count all the way up to 6 if it’s an en banc. You’re not writing an opinion unless you get a majority.”

“I keep in mind that the Supreme Court is capable of grading my papers. I try not to intentionally defy the Supreme Court. I think most judges at my level don’t care about any other audience. They realize that the press will probably get it wrong because they’ll jump to a conclusion about the outcome of a case, and in the story that goes out to the public...But these [public] reactions, if you start thinking about that, well, you can’t get your work done. The professional audience is the audience. I mean, you write with the idea that you hope you’re not offending them, or they’ll think you’re stupid.

“But on the question of whether or not we’re going to be [overturned] by the Supreme Court, there’s no way to know...[W]e all learn that at the inferior federal court level, we don’t try to predict what the Supreme Court is going to do. Don’t try to handicap them as you would a horse race...it’s a fool’s errand. The best thing for courts of appeals judges to do is follow the law of their own circuit, to the extent they understand what the Supreme Court has already said in the past. Their client is the case before them. If the

Supreme Court wants to change the emphasis of a certain point in a certain time in history, they'll do it. They'll do it for good reasons, for bad reasons, or no reasons at all."

The audience for dissents was different for some judges.

"You're writing in a sense for the litigants, as well, because there'll be some litigants who will be very unhappy with the opinion. I don't dissent that much, but we do have some judges that are writing for the Supreme Court all the time. But my dissent would be to point out the incorrectness of the decision based upon established law. If it's a question of, and there are very few of these, first impression, then some of that might be for the Supreme Court, but that's very rare."

"[I]f you're dissenting, you might well be...writing a letter to your colleagues because...in the Ninth Circuit, it's really rare for a case to go en banc that does not have a published opinion. But more often than not, so there the audience might be the other members of the court because you know they are going to read the slip opinions when they come out, and they'll read the dissent and if the dissent captures their imagination, then they might vote for en banc."

"When I write a dissent, I really don't care if anyone joins because it's not the law. When I write an opinion... If I write something particularly good, I'm likely to lose somebody who'd otherwise join. So my opinions are blander than my dissents."

"I would guess, if there's any time when the dissent, you might say, seeks an audience, it would be if the judge who writes the dissent has expressed that party's view pretty strongly [and] it may be helpful in getting the other judges to vote to hear the case en banc. That may be written to an audience of other judges on the court, or ultimately to the Supreme Court. "

Clarity of the law and separate opinion writing

Judges were then asked their thoughts about whether separate opinion writing on the Supreme Court diminished the clarity, or the strength of, the precedent the lower federal courts were to follow. Two judges generally agreed with this assessment, focusing primarily on plurality opinions:

"I regard a plurality opinion, whether by one of our en banc courts or the Supreme Court or any other large court. . .as a failure. A judge or a lawyer who has to apply the law can't figure out what it is... I think what it undermines is usability. You know, lawyers have clients who come in and they say, Can I do this? Or what should I do? District judges have cases and they're asking how should I rule on this objection, how should I instruct the jury. It's useful to everybody to have answers."

"It's very hard on us when the Supreme Court has eight concurring opinions or something of that nature to try to make sense of the law. You just have to sit down and sometimes I'll write out opinions one through nine and make sort of an outline, and my clerks help me with this. On a religious freedom case, that's one good example. Then you plot it out, and you figure out to the best of your ability, where you think it ought to come down. It's like working on a puzzle, and you have your own inclinations and

things like equal protection and due process give you some leeway with the Supreme Court. So you have to sit down and study the opinions, and I outline them and put them in a certain order and decide what I think is most consistent with the Supreme Court decision and what is the most just thing to do.”

Other judges took a different perspective on the question, focusing on the implications of lack of clarity on the Supreme Court. These answers ranged from acknowledging room for discretion when precedent was unclear or ambiguous, to rejecting the contention out of hand.

“I’ve got a case on my desk right now, about three or four pages, and it contains some things that the Supreme Court might disagree with, and I’m looking at it and wondering, well, should that mean our panel should change its mind, if we’re convinced we’re applying the law correctly as we have received it from the Supreme Court...Even though we know that when we line it up with some judges on the Supreme Court, there may be some pressure to go the other way. And they may change it, and say we’re wrong. But we don’t, we’re not going to decide our case on a hunch about what the Supreme Court is going to do, we’re going to decide the case based on what we think we are required to do by the precedent that’s now in existence.”

“Well, that’s a little bit of a dicey area. My own view is that if the majority of the justices on the Supreme Court have spoken to an issue, you apply it whether you like it or not. You don’t try to find wiggle room, you just apply the rule. The other side of that coin is, if it’s not clear or the Supreme Court has not ruled on it, then we’re not in the business of predicting. If you have extant law, you apply it. Even if once that rule gets to the Supreme Court, they might toss it out, they might rule the other way. You apply the rule. You don’t try to say, I know we have this rule but I’m real confident the Supreme Court will [overrule] it. You don’t do that.”

“No, I don’t think so. I think if it’s the judgment of the Supreme Court ...we’re stuck with it, no matter what we think. They might change.”

Several judges declined to answer the question with respect to the Supreme Court, but were willing to offer opinions on separate opinion writing in their own court.

“I don’t think [that separate opinions reduce clarity of circuit precedent]. Normally, if it’s a straight out dissent, and it’s a three judge panel, it’s one judge saying, Hey, the majority is wrong, and here’s why I think they’re wrong. And that will either achieve some traction or not.”

“I think that a dissenting opinion is usually very strengthening to the opinion of the court because it makes clear that what the dissenter said was not overlooked. If nobody had dissented, it’s possible that the panel might have overlooked this point. If the dissenter says that a certain thing shouldn’t have controlled the case, then you know the other judges were aware of that contention and haven’t overlooked it.”

The last judge quoted above also advocated, for circuit judges, the practice of writing narrow opinions, or “putting a fence around it,” as a way to be clear what precedent actually is and is not. His reason for advocating this approach was that he felt that broadly written opinions caused attorneys and other legal observers to “start drawing, from what has been written, very wild conclusions about where we’re going.”

Circuit norms

Most of the judges emphasized the norm of collegiality on their court as essential to their operations. The pervasiveness of collegiality seemed to take some by surprise. One judge told a story of how a judge newly appointed by Reagan approached a Carter appointee after a court dinner to say, “You know, I was prepared not to like you, but I’m amazed at how much we have in common.” Another judge, who had been elevated from a federal district court appointment, had this to say:

“When I first got on the court of appeals, I heard about another circuit where the dissension among the members of the court was so great that a judge would go to lunch in the city and go into a restaurant and if he saw another one of the judges he didn’t like, he’d go eat somewhere else. And I decided that if that were the situation, I’d pick up and find another line of work.”

Even law clerks can be taken aback by the prevailing norm of consensus:

“What amazes my law clerks is that we agree in 85 to 90 percent of the cases and the ones that get the attention are where we disagree...It’s not how the LA Times, the New York Times portray it. You’d think that we were standing there with guns pointed at each other.”

Cultivating collegiality within a court, however, seems to take a great deal of intention and constant maintenance. All but one of the Ninth Circuit judges also seemed

to believe that the size of that circuit, coupled with the rotation practice, was useful in maintaining collegial relations.¹⁷

“You know, sometimes we have some sharp dissents which are sharper than I would like, in terms of attacking personalities, and I think we’ve improved a lot on that... We have a lot of talk about collegiality, you don’t attack the person, you attack the idea, and then that [leads to] collegiality. You know, sometimes people change their minds that you never would have thought would change their minds, if you work for consensus on the key elements of the opinion you want to have.”

“There are two old saws which are absolutely correct. Familiarity breeds contempt and absence makes the heart grow fonder. I have friends that sit on state supreme courts that have maybe 7 judges and all the time they can give their speeches, write their opinions. And they get to a point where they basically don’t like each other. And our court is large enough that if I sit tomorrow with Judge [X], I may not see her for eighteen months. And not that she’s someone I don’t get along with; I get along with all my colleagues. But the rotation is such that there’s not a lot of time for personalities. And I believe that’s better, and you know if you don’t see a colleague in terms of sitting on a panel for maybe a year, or a year and a half, it’s nice to see them again.”

“[Compared to a state court of appeals,] our whole setup is much more dynamic and encourages learning. You’re forced to learn and happily so.”

Several judges mentioned that remaining in frequent communication with the other judges in their court helped promote a collegial environment.

“With the advent of email, we are constantly in touch, back and forth. It could be about educational seminars, it could be about our cases, it could be about our families... We talk on the phone all the time. Actually, the advent of email was bad for awhile because you could just sit down and boom out something, and if you [had been] talking on the phone instead, you would have explained it better. You know, a response to: ‘You want to change my opinion? Don’t you realize what it will do if you want me to take out the next ten paragraphs?’ Instead, you would call up and say, ‘Oh yeah, I see what you mean. I’ll put a couple paragraphs up front and take out the last two. How would that do?’ ‘Oh, that would be great.’ We’re getting more familiar [with] how to talk to each other by email. It used to be when you had to dictate, then read it, you’d say, Oh, I’m not going to send that. But now in email, you turn around and go, boom.”

“I would say that 80 percent of the court I know quite well...Emails are the ordinary form of communication.”

“We call, we can pick up the phone and talk to anybody...There’s a great deal of collegiality in this business, and if there weren’t, it’d be a horrible job. The judges, of necessity, as much as you would not like to have it so...do sort of have to get...cloistered, away from all the good old buddies and lawyers we’ve all enjoyed so much. So we have to work with each other, and we can disagree without being

¹⁷ In contrast, a judge who had served on the Fifth Circuit before being transferred to the Eleventh Circuit spoke less favorably about the effects of a large court. In particular, he bemoaned the length of administrative meetings, recalling an instance in which every one of the 24 judges was given five minutes to speak, and after they had all finished, the final vote resulted in a tie. “So then the judges who had opposed division [of the Fifth Circuit] got more amenable to the idea,” he noted.

disagreeable about it. Usually, we can do it heatedly if necessary, because we're serious about it, but then get together for lunch. It's a family."

Circuit practices

In 1979, Stephen Wasby published an article on intracircuit consistency, in which he interviewed Ninth Circuit judges and district court judges about their perceptions of the "problem." (It should be noted that not all of those interviewed agreed with the characterization of intracircuit inconsistency as a problem.) Among the mechanisms suggested for reducing inconsistency were pre-publication opinion circulation, reliance on attorneys to highlight conflicts, identifying cases with similar issues before oral argument, and more research and vigilance by individual judges. Comparing these interviews from thirty years ago with the interviews from this project, a number of those early "suggestions" have become circuit practice; yet, circuit judges (particularly in the Ninth Circuit) remain sensitive to criticisms linking their size to intracircuit inconsistency.

One judge from the Ninth Circuit spoke at length about the ways in which he felt his court promoted consistency in its decisions.

"Well, we're large enough and our volume is such that we can't do what other circuits can comfortably do, which is to circulate opinions in advance to every member of the court for them to look at, so that they can say, Wait a minute, this doesn't change the result, but this footnote is wrong or cites a case that's been overruled or something like that. But we do have a pre-publication report, once a three-judge panel sends a case in for filing, the office that's responsible for filing holds that from putting it out for publication for about five working days. And during those five working days, our central staff...summarize the case, tell you what it's about, who was on the panel, and they tell you cases that may be impacted by what this decision does.

"And that helps in a couple of ways. You look at it and say, I've got that same issue in a case I'm hearing next week, I'm going to wait until that slip opinion comes out or the opinion's in publication, to make sure the parties know about it and to make sure I fold it into my case. Or, you might say, Hey, this is going to be published in three or four days here, and it's dead bang on to a case I'm going to hear next week, so maybe I don't need to hear argument in that case next week. Or I can push argument until it's clear what that rule is because it's clear it's going to control in this."

The judge also went on to highlight the role of “en banc hawks” or “en banc police” who may have expertise in a particular area of law and stay on the look-out for cases involving this area. He did allow, however, that en banc review might be triggered by ideological considerations, given that the Ninth Circuit “represents the full philosophical perspective, both judicial and political, with a small ‘p.’”

In contrast, a judge from the Eleventh Circuit described a much less formal set of procedures for promoting consistency and flatly rejected the more strategic approach offered by the judge above:

“The same litigation may have produced several cases and in that instance, the clerk will note that on the paper transmitting the record to the judges that there is also a pending matter between so-and-so and so-and-so... Quite often [the lawyers] will point out that there is a case like this pending in this court or in another court of appeal, and they’ll tell you how the district court ruled on it, and where it is, and whether it’s been argued. I would hesitate to say that we would ever say, Hey, let’s put this one on the shelf and wait and see what they do with it over in the Fourth Circuit...If one [in our own circuit] is pending, I don’t know if there is anything you can do about it. Unless you find that it’s been [argued] two months ago or three months ago, it may be that you’re not going to get your opinion out before the other panel gets its opinion out, and so you might probably [buy] a little time. [But] if you leave the job of deciding it to the other panel, you’re being lazy and that wouldn’t do.”

One judge characterized the necessity of case management practices related to screening cases as “triage,” noting that “we spend more time on the patients you can save, and the ones that are going to die anyway, you try to make them more comfortable [without deploying] all your resources trying to bring them back from the grave.” He elaborated,

“There are a number of cases that are really cookie cutter cases. They’re so similar in fact patterns and in the legal consequences of those facts, that you don’t need to be a genius or a law review editor or anything to figure them out. Now they’re very easy disposed of—as soon as you read the brief, you can tell this case isn’t going to take much time. So those are shuttled off to what we call a screening panel, and the Fifth and the Eleventh have something like that too (each circuit does it a little differently), but all of the circuits, when they are screening cases, they are selecting cases that are not going to get the full court press, to use a basketball term. They’re going to be given enough judge time that they’re not going to be given a full opinion with a lot of footnotes and all that stuff. And they don’t deserve it.”

Descriptions of the purpose of oral argument and when it was merited in a case

also reflected the sentiment from above:

“[T]he truth of the matter is, the oral argument of cases in our court, and I think in any court of appeals, is a learning experience for the judges. That’s why we set them down for oral argument. You know, we don’t hear oral argument in all cases.”

“Those that we submit on the briefs are generally issues where the law is clear, or where we don’t think we’ll be helped by oral argument because the briefs are so bad. There can be many reasons that we don’t [hear oral argument], but generally we submit it on the briefs with an easy one- or two-issue cases we felt the law is settled and an opinion will not be required. If we think an opinion’s going to be required, I think we always ask for oral argument.”

“The ones that don’t have oral arguments have such cut-and-dried analyses [which is] the reason they’re not being orally argued. Everyone has agreed this is very obvious and can be disposed of quite summarily.”

“[I]n every criminal appeal, the lawyer feels compelled to appeal the decision, unless it’s been by a plea, and even with those, they sometimes appeal the sentence that’s been given on the plea...[or] else someone is going to charge [the lawyer] with being inadequate counsel. And therefore I’m quite sure in a lot of criminal cases, a good lawyer will have seen his client tried and convicted, and he will automatically file his notice of appeal and then he will sit in his office, pondering, What on earth can I argue as error in this case? And when we see that case, we recognize it. It won’t be set down for oral argument, and the lawyer is probably quite relieved that he’s not going to have to be questioned about it.”

“The central staffing in San Francisco, when the briefing is completed, ...give the case a weight anywhere from one to ten. And three’s and above are presumed to require argument, two’s and below are presumed not to require argument. They go through a separate screening process....to be sure that estimation is accurate. The other thing that [case weighting] impacts is the amount of time the parties are given for argument. So a 3-weight would get ten minutes a side, a 7-weight might get 15 minutes per side, and then 8, 9, or 10 might get 30 minutes per side. And then we deliberately weight death penalty cases at 24 weights, so that they’re the only case that’s heard that day, and the panel can concentrate on them. Death penalty cases, I think, get 40 minutes per side. Now, when the panel gets briefs and starts to work on the case, the three judges that are going to work on the case can agree among themselves to modify that time allocation.”

Several judges commented on the distinctive norms and practices of their circuit, especially as compared with other courts they had served on as visiting judges. One senior judge from the Ninth Circuit who listed visiting experience on the First, Second, Third, Eighth, and Eleventh Circuits observed, “[It was] very educational for me to see how different the law was depending on the circuit.” The judge mentioned two specific

practices that he felt distinguished the Ninth from the other courts. First was the bench memo pool, in which the responsibility for drafting a bench memo is shared among the law clerks of all the judges assigned to a panel.¹⁸ (This was in contrast to other circuits in which each judge on a panel assigned his or her law clerks to prepare separate bench memorandum.) The second distinctive practice noted by the judge had to do with opinion assignment:

“If your clerk writes the [bench] memo, and the panel comes out the same way as the bench memo, then you are the judge that writes the opinion. So that confines a great deal of discretion in the presiding judge. We don’t have any rule that says that, but it’s absolutely standard practice. People would be shocked if you departed from it. To give you a contrast, in the Eighth Circuit, the presiding judge completely controlled the assignments, and he didn’t make them at the time. He took them home and thought about them for a week and then made the assignments. And that kind of discretion gives quite a lot of power to the presiding judge on the panel and our practice makes the panel members much more equal.”

The interviews: conclusions

Overall, the judges spoke favorably of their colleagues and the work environment on their court. It was clear that some judges had more interest or experience thinking about matters related to court administration, and this background was reflected in the answers they were able to give on questions related to evaluating case difficulty and circuit practices, for example. A striking theme that emerged in all of the interviews, regardless of which president appointed the judge, was the importance of the norm of collegiality—both in terms of what was perceived as making “good law” and in terms of creating a pleasant working environment within the rotating panel assignment structure.

¹⁸ See Cohen (2002, 91-92) for a more in-depth discussion of the bench memo pool, which he compares to the cert pool practice in the United States Supreme Court.

6.3 Conclusions

This chapter considered how individual judges respond to complexity in the cases they review, and how those responses might be shaped by the context of the panel and the circuit in which they are situated. The findings from the dissent models suggest that both case characteristics and group dynamics on a panel play a part in a judge's propensity to break from the consensus position and author a dissent. Ideological homogeneity on panels, in contrast, appears to make it easier, even in complex cases, for a judge to come to agreement with her colleagues. It may be that sharing a similar ideological perspective with other judges on a panel provides a common framework from which judges can sift through multiple concerns raised by complex cases. However, the effect of ideology is not uniform across all judges. The findings from the Fifth and Eighth Circuits suggest that the interaction of ideology and case complexity may differ for liberal and conservative judges, at least in some circuit environments. Since no obvious factor connects these two circuits, further exploration is warranted to uncover the reasons why we see differential effects here but nowhere else.

When we consider the relationship between ideology and case complexity from a different angle, another piece of the puzzle emerges. As the legal complexity of a case increases, we see a dampening effect on ideology that affects both liberal and conservative judges in a similar way. This may be because such cases have less room for ambiguity; legal considerations may crowd out any role that ideology can play. No such relationship emerged for aspects of case complexity related to the presence of a cross appeal, multiple case types, or substantive difficulty of the area of law. One explanation for this may be that the latter factors draw on a different reasoning process than the

former, but without experimental evidence to support this contention, it is difficult to say for sure.

Defining complexity is a thorny undertaking because of the concept's many dimensions, as is evidenced by the judges' comments and by the results from the logit analyses. Even judges themselves struggled to characterize what they meant by "complex" and "difficult" cases. However, the results from this chapter represent an important first step and give us some clues about where to take future research efforts.

**Table 6.1: Frequency of Separate Opinions in Sample of Published Dispositions
By Three Judge Panels, 1983-2002**

<i>Circuit</i>	Dissent	Concur
First	1.4% (26)	0.32% (6)
N = 1881		
Second	2.3% (44)	0.27% (5)
N = 1881		
Third	3.8% (70)	0.43% (8)
N = 1854		
Fourth	4.6% (85)	0.71% (13)
N = 1833		
Fifth	1.9% (35)	0.48% (9)
N = 1866		
Sixth	3.8% (71)	1.0 (19)
N = 1875		
Seventh	1.6% (30)	0.21% (4)
N = 1872		
Eighth	3.3% (62)	0.32% (6)
N = 1875		
Ninth	3.3% (62)	0.64% (12)
N = 1869		
Tenth	2.1% (39)	0.05% (1)
N = 1857		
Eleventh	1.9% (36)	0.76% (14)
N = 1851		
All circuits	2.7% (560)	0.47% (97)
N = 20,514		

Note: Unit of analysis is a judge-vote. The number of judge-votes per circuit varies slightly due to missing data.

Table 6.2: Frequency of Separate Opinions in Complex Civil Cases

	Case Classification	
	Non-complex cases	Complex civil cases
Frequency of dissent	2.76% (379)	2.66% (181)
Frequency of concurrence	.48% (66)	.46% (31)
N	13,713	6801

Note: Unit of analysis is a judge-vote.

Table 6.3: Frequency of Separate Opinions in Cases with a Cross Appeal

	Nature of appeal	
	No cross appeal	Cross appeal
Frequency of dissent	2.64% (491)	3.62% (62)
Frequency of concurrence	.49% (91)	.35% (6)
N	18,627	1,713

Note: Unit of analysis is a judge-vote.

**Table 6.4: Frequency of Separate Opinions,
By Legal Complexity in a Case**

	Number of legal provisions									
	0	1	2	3	4	5	6	7	8	9+
Frequency of dissent	2.0% (38)	2.8% (193)	2.8% (175)	2.7% (89)	2.5% (35)	3.5% (18)	2.8% (5)	8.8% (5)	6.1% (2)	0% (0)
Frequency of concurrence	.38% (7)	.43% (30)	.50% (31)	.55% (18)	.36% (5)	.77% (4)	0% (0)	0% (0)	6.1% (2)	0% (0)
N	1863	6990	6189	3267	1404	519	177	57	33	12

Note: Unit of analysis is a judge-vote.

Table 6.5: Logit results for combined dissent models, 1982-2002

	<i>Model 1</i>		<i>Model 2</i>	
	<i>Coef. (Robust SE)</i>	<i>p- value</i>	<i>Coef. (Robust SE)</i>	<i>p- value</i>
Freshman	-.041 (.132)	.758	.234 (.249)	.347
Visiting judge	.025 (.228)	.913	.557 (.363)	.125
Ideology	-.075 (.146)	.608	.002 (.263)	.993
Gender (1=woman)	.184 (.169)	.277	.180 (.170)	.291
Race (1=nonwhite)	.110 (.167)	.510	.112 (.168)	.503
No. policy areas	-.085 (.135)	.526	-.085 (.135)	.526
Cross appeal	.173 (.048)	.000	.135 (.070)	.053
Legal issues	.066 (.035)	.062	.104 (.038)	.006
Complex civil case	-.066 (.097)	.479	-.036 (.110)	.743
Ideo*legal complexity	--	--	-.094 (.092)	.310
Ideo*complex civil	--	--	.227 (.265)	.391
Ideo*cross appeal	--	--	.147 (.204)	.472
Freshman*legal complexity	--	--	-.074 (.107)	.493
Freshman*complex civil	--	--	-.516 (.302)	.088
Freshman*cross appeal	--	--	.141 (.160)	.378
Visiting judge*legal complexity	--	--	-.389 (.142)	.006
Visiting judge*complex civil	--	--	.344 (.342)	.315
Visiting judge*cross appeal	--	--	.086 (.142)	.544
Woman on panel	.078 (.124)	.530	.082 (.124)	.509
Ideological spread on panel	.580 (.158)	.000	.572 (.158)	.000
Constant	-4.99 (.366)	.000	-5.09 (.371)	.000
<i>N</i>	17545		17545	
Pseudo R ²	.0266		.0300	
Model sig.	p<.01		p<.01	

Notes: Output for dummy variables for years omitted. Cases exclude en banc panels and are weighted to approximate a random sample.

Figure 6.1

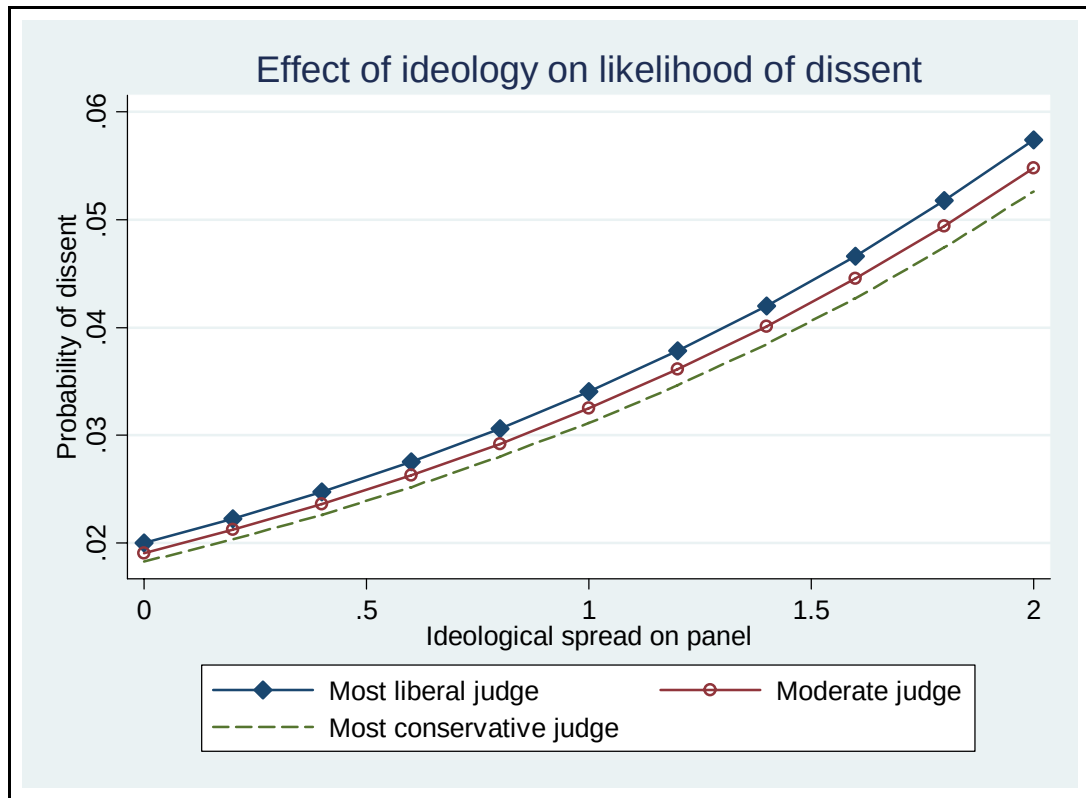


Table 6.6

Ideal type	Probability of dissent
Cross appeal, high legal complexity, and high ideological spread on the panel	.12
Cross appeal, high legal complexity, and low ideological spread on the panel	.04
No cross appeal, with low legal complexity, and high ideological spread on the panel	.05
No cross appeal, with low legal complexity, and low ideological spread on the panel	.02
Case with all variables held at mean or modal values	.02

**Table 6.7: Logit Analysis of the Likelihood of a Dissent,
By Individual Circuits (1982-2002)**

	<u><i>First Circuit</i></u>	<u><i>Second Circuit</i></u>	<u><i>Third Circuit</i></u>	<u><i>Fourth Circuit</i></u>	<u><i>Fifth Circuit</i></u>	<u><i>Sixth Circuit</i></u>
<i>Judge characteristics</i>						
Freshman judge	.479 (.612)	-.410 (.502)	.012 (.491)	.005 (.341)	-.779 (.594)	.174 (.339)
Visiting judge	.437 (1.15)	-.742 (.753)	1.59** (.861)	-.173 (.433)	-.601 (1.28)	-.220 (.606)
Judge ideology	1.22 (1.42)	-1.44 (1.40)	-.410 (.725)	-.091 (.798)	-.002 (.814)	-.147 (.594)
Judge gender (1=female)	-.608 (1.46)	.561 (.704)	-.731 (.488)	-1.24** (.707)	1.15 (1.27)	.834** (.482)
Judge race (1=nonwhite)	1.27 (.885)	.802 (.502)	-1.51* (.743)	--	.204 (.568)	.340 (.498)
<i>Case characteristics</i>						
No. policy areas	.200 (.581)	.088 (.405)	.305 (.360)	.020 (.361)	-.958 (.797)	-.828* (.439)
No. legal issues	-.131 (.205)	.211* (.108)	.024 (.103)	-.009 (.103)	.040 (.114)	.170* (.088)
Cross appeal	.144 (.286)	-.335 (.564)	-.361 (.633)	.195 (.164)	.646 (.703)	-.424 (.556)
FJC complex civil	-.955 (.645)	.309 (.366)	.152 (.294)	.158 (.263)	-15.5* (2.69)	-.153 (.294)
<i>Multiplicative terms</i>						
Ideo*legal complexity	-.577 (.427)	.536 (.394)	.135 (.258)	-.138 (.315)	.059 (.258)	.178 (.182)
Ideo*complex civil	-2.04 (1.48)	.663 (1.28)	-.728 (.775)	.923 (.796)	28.5* (5.30)	.192 (.675)
Ideo*cross-appeal	-.414 (.955)	.106 (2.02)	1.24 (1.15)	.132 (.294)	.313 (1.19)	1.70** (.971)
<i>Panel characteristics</i>						
Woman on panel	-.079 (.821)	-.545 (.607)	.149 (.317)	.435 (.295)	-1.33 (1.03)	-.022 (.341)
Panel ideol. spread	1.35 (.878)	.955 (.656)	.391 (.414)	1.08* (.445)	2.19* (.796)	.307 (.379)
Constant	-5.58* (1.02)	-4.39* (.661)	-4.20* (.540)	-3.86* (.495)	-3.94* (.917)	-2.87* (.559)
<i>N</i>	1463	1556	1470	1630	1605	1620
Pseudo <i>r</i> ²	.114	.046	.049	.030	.117	.041
Model sig.	p<.05	†	p<.05	p<.10	p<.05	p<.05

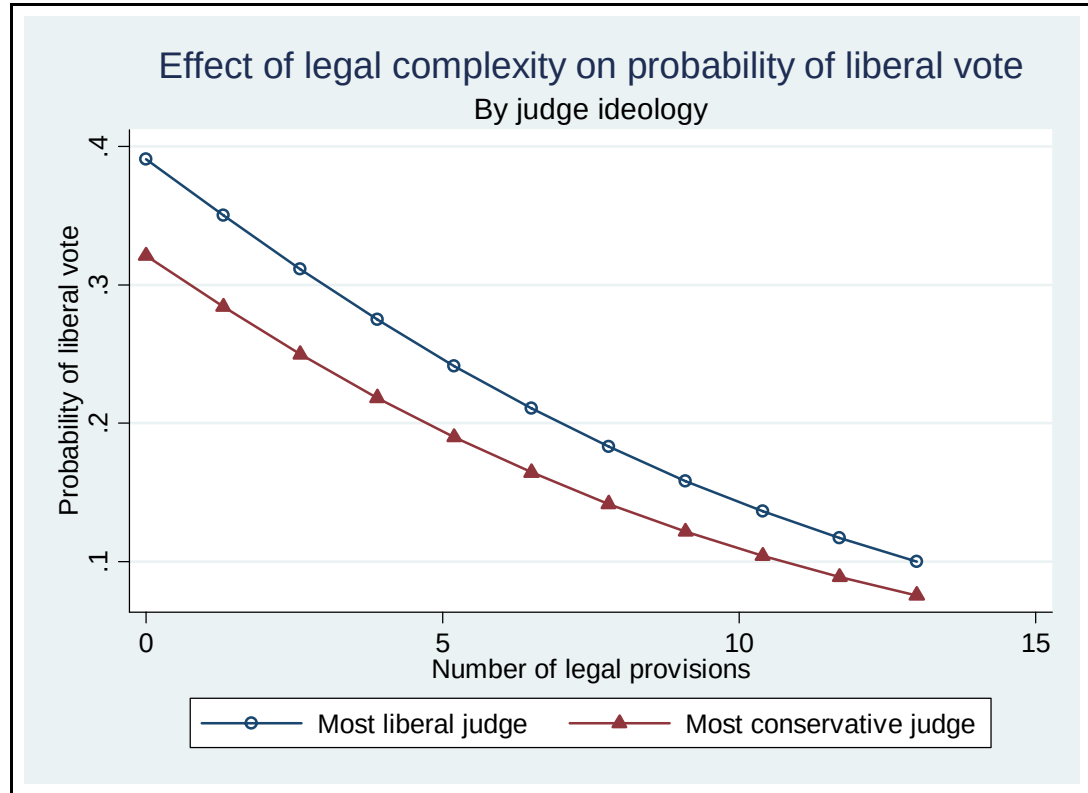
Notes: Robust std. errors reported. * denotes $p < .05$, two-tailed test. **denotes $p < .10$, two-tailed test. † denotes model as a whole fails to reach standard levels of significance. Output for dummy variables for years omitted. Cases exclude en banc panels and are weighted to approximate a random sample.

(Con't) **Table 6.7: Logit Analysis of the Likelihood of a Dissent,
By Individual Circuits (1982-2002)**

	<u><i>Seventh Circuit</i></u>	<u><i>Eighth Circuit</i></u>	<u><i>Ninth Circuit</i></u>	<u><i>Tenth Circuit</i></u>	<u><i>Eleventh Circuit</i></u>
<i>Judge characteristics</i>					
Freshman judge	-1.40 (1.05)	-.544 (.585)	.052 (.381)	.296 (.484)	-.110 (.459)
Visiting judge	.787 (.769)	.419 (.635)	-.179 (.724)	.367 (1.26)	--
Judge ideology	.549 (1.39)	1.26 (.910)	-.162 (.890)	.232 (.760)	-1.16 (1.45)
Judge gender (1=female)	1.52** (.934)	.358 (.679)	-.131 (.425)	.041 (.482)	1.02** (.617)
Judge race (1=nonwhite)	--	-.747 (.832)	.356 (.384)	-.290 (1.12)	.330 (.627)
<i>Case characteristics</i>					
No. policy areas	.167 (.616)	.103 (.439)	-.780** (.432)	.328 (.425)	.183 (.508)
No. legal issues	.111 (.164)	-.050 (.160)	-.010 (.128)	-.056 (.124)	.146 (.195)
Cross appeal	.126 (.718)	.234 (.207)	.304 (.216)	-.053 (.274)	.153 (.584)
FJC complex civil	.282 (.441)	-.050 (.160)	.256 (.308)	-.618 (.402)	.236 (.393)
<i>Multiplicative terms</i>					
Ideo*legal complexity	-.078 (.465)	-.831* (.365)	-.421 (.394)	-.132 (.319)	-.177 (.534)
Ideo*complex civil	-.198 (1.23)	-.257 (1.12)	1.21 (.944)	.216 (.913)	-2.82 (1.79)
Ideo*cross-appeal	.278 (2.28)	-.299 (.258)	1.54 (1.29)	-.055 (.559)	2.34 (1.90)
<i>Panel characteristics</i>					
Woman on panel	-.425 (.789)	1.10 (.964)	.158 (.321)	.672** (.418)	-.343 (.533)
Panel ideo. spread	.055 (.872)	.494 (.748)	.061 (.463)	.780 (.579)	-1.23 (.868)
Constant	-4.69* (1.09)	-3.32* (.780)	-3.10* (.493)	-5.30* (.837)	-4.01* (.777)
<i>N</i>	1684	1677	1640	1565	1564
Pseudo r^2	.035	.077	.036	.043	.076
Model sig.	p<.05	p<.05	†	p<.10	p<.05

Notes: Robust std. errors reported. * denotes $p < .05$, two-tailed test. **denotes $p < .10$, two-tailed test. † denotes model as a whole fails to reach standard levels of significance. Output for dummy variables for years omitted. Cases exclude en banc panels and are weighted to approximate a random sample.

Figure 6.2



Chapter 7: Conclusions and Directions for Further Study

This project began with a simple observation: the circuits that make up the United States Courts of Appeals differ substantially from one another, despite the institutional characteristics they share in common. Circuits vary in terms of their size; the relative heterogeneity of their judges with respect to race, gender, and ideology; the nature and size of their caseload; and their reliance on certain practices, such as utilizing senior and visiting judges to decide cases. The decentralized nature of the Courts of Appeals has led to the development of very individualized norms and practices across the circuits, both formal and informal, that affect the nature of the working environment for federal appeals court judges. I have argued that the characteristics of a circuit can mitigate or enhance the effects of complexity in the cases that panels review, and in making this argument, I have specifically relied on theoretical perspectives that account for the cognitive limitations of individual decision makers. Consequently, the perspective I take is one that acknowledges the role of both institutions and individual judges in shaping legal outcomes.

This study offers some insight into the nature of these relationships, though by no means does it provide all the answers. However, I believe it does represent an important first step in taking the research on the Courts of Appeals in a somewhat different direction. In the pages that follow, I highlight the major findings of my study and offer

some thoughts on their implications for our understanding of appellate judging in the lower federal courts. I conclude with some observations about where future research might build on this project, as well as its applicability for a wider range of questions.

6.1 Summary of Findings

Clarity and consistency

Appeals court judges do not review cases in a vacuum. Indeed, their work has implications that go beyond resolving disputes between litigants. Published opinions become part of their circuit's precedent and must be followed by subsequent panels, as well as by district court judges in their circuit. The development of precedent within a circuit is, of course, subject to Supreme Court oversight, though the effectiveness of the Supreme Court as an overseeing body is somewhat limited by the miniscule proportion of appeals that are granted certiorari each year. Beyond the litigants, circuit judges, district judges, and the Supreme Court, interest groups as well as the general public can be affected by the policy implications of decisions. Furthermore, decisions by appeals court panels can serve to bolster or undermine the perceived legitimacy of the federal judicial system.

For all of these reasons, then, it behooves appeals court panels to strive for clarity and consistency in their decisions. Though I recognize these concepts could be understood a number of different ways, I have focused on clarity and consistency with respect to their relationship to predictability and uniformity of the law. Said another way, I am interested in clarity and consistency from the perspective of those trying to follow

the court's law. A decision is clear insofar as the court speaks with one voice in answering a legal question; fragmentation in either the unanimity of a panel (i.e., a separate opinion) or in the court's holding (i.e., decisions to affirm in part and reverse in part) diminishes clarity. Consistency refers to the relationship between a panel's decision and circuit precedent, as well as to the relationship between circuit precedent and district court decisions. (I gauge the former by the frequency of en banc review and the latter by district court reversal.) It is fair to say that clarity and consistency are conceptually related; in fact, it is arguably easier to achieve consistency in decisions within a circuit if the decisions of individual panels are clear.

Chapter 3 provides evidence that defining legal clarity in this way causes some conceptual overlap with another feature of the Courts of Appeals: strong norms of consensus (especially as compared with the U.S. Supreme Court). These norms likely arose as a result of institutional features, such as panel decision making and a non-discretionary docket, coupled with very high workloads. Consensus and collegiality help to "grease the wheels" of justice in an environment in which judges sit with their colleagues on a rotating basis to review appeals. Indeed, all of the judges who were interviewed were in agreement on this point: collegiality among judges was essential for optimal functioning of their circuit. Consequently, what I call "clarity" may simply be the end product of many interactions that are structured to promote consensus.

At an aggregate level, there is evidence that circuit norms about consensus develop at least partly in response to workload pressures on judges: higher rates of workload are related to lower rates of dissent in a court. This would tend to suggest that circuits who speak more often with a single voice may do so as a result of norms that

favor overlooking disagreement in order to dispose of more cases. Using the rate of mixed outcomes (decisions to affirm in part and reverse in part) as a measure of clarity also has implications in terms of consensus. These so-called split decisions may also, as Lindquist, Martinek, and Hettinger (2007) have argued, indicate accommodation among judges on a panel. This account seems a plausible interpretation of the finding that increased court size is negatively related to the rate of mixed outcomes. At the margins, larger courts may engage in less accommodation, perhaps because of the infrequency with which judges sit together on panels.

Chapters 4 and 6 focused upon clarity with respect to panel outcomes and judges' votes, emphasizing those factors that might produce a split decision or cause a judge to break away from the majority position. The results suggest that both case characteristics and the group dynamics of the panel are influential in affecting clarity at the micro levels. I will return to these findings later, in my discussion of case complexity.

Because of the nature of the concept, legal consistency is best examined in an aggregate sense, by looking at circuit outcomes. The measure for en banc review performed rather poorly overall, which is not altogether unsurprising, for several reasons. First, the relative infrequency of en banc panels across all circuits severely reduces the variation available to explain. Secondly, there is evidence that some circuits deliberately try to avoid en banc review, by pre-circulating any opinions that would depart from circuit precedent or create intercircuit conflict (Kanne 2008).¹ Such practices have the practical effect of reducing the effectiveness of en banc review as a measure of

¹ Judge Kanne of the Seventh Circuit details his court's rule 40(e), as well as similar, informal procedures in the Second and D.C. Circuits.

consistency. Moreover, appeals court judges have expressed differences of opinion on what the grounds for en banc review ought to be,² aside from the guidelines set down in the Federal Rules of Appellate procedure.

The second measure of legal consistency is the frequency with which an appeals court reversed the district courts in its circuit. If the circuit has had difficulty articulating the legal rule on an issue, then district court judges may struggle to discern what governing precedent actually is, and experience more reversals as a result. For example, in the Ninth Circuit case *Odom v. Microsoft* (486 F.3d 541), the court noted that the “confusion in our precedents [on an issue related to RICO] has caused difficulties for the district courts in this circuit” (as cited in Hellman 2008). One plausible cause of inconsistent circuit law might be the ideological composition of the circuit; if a circuit is comprised of judges who are very ideologically distant from one another, it may be especially difficult to develop a coherent body of law. (This tendency would likely be exacerbated by the practice of rotating assignments to panels.) Consistent with these expectations, we find that in larger circuits where judges are more ideologically dispersed, reversal rates are higher.

Of course, using an aggregate measure like district court reversals has the disadvantage of not accounting for other factors related to the district courts that might account for reversals. For example, the relative degree of ideological congruence between district court judges and their circuit might explain variation in reversal rates;

² See Hellman (2008) for a discussion of competing philosophies on this question. Summarized briefly, Judge Ginsburg of the DC Circuit argues that the decisions of panels should reflect the preferences of the court as a whole, so if a majority of a circuit believes a panel has erred, they should vote for en banc review. Judge Browning of the Ninth Circuit contends that circuit majorities should only intervene to review a panel when there is a conflict between panels or if there is a case of “truly exceptional importance.”

other possible factors could include district court workload or vacancies. Unfortunately, because these data on district courts were not gathered for this study, further refinements to the reversal models must be left for future research.

The interviews with judges were quite mixed on the questions of clarity and consistency. While there was agreement that clarity and consistency were important goals when writing an opinion, there was no consensus about whether fragmented opinions (from the Supreme Court or a circuit court) tended to reduce the clarity of the law. To the extent that separate opinion writing was seen to reduce clarity, circuit judges seemed to view it as a problem that primarily affected the Supreme Court and not the work of appeals court panels. A judge who observed, “It’s very hard on us when the Supreme Court has eight concurring opinions or something of that nature, to make sense of the law,” described how she and her law clerks often have to sit down and “plot out” very fractured Supreme Court opinions. The exception was one sitting judge, who stated unequivocally that he regarded “a plurality opinion, whether by one of our en banc courts or the Supreme Court or any other large court, or [on] a three judge panel [with] three opinions...as a failure” because “a judge or a lawyer who has to apply the law can’t figure out what it is.”

Other judges hedged their answers a bit, noting, for example, that although appeals court judges were bound to follow the Supreme Court when there was a clear majority, when “it’s not clear, or the Supreme Court has not ruled on it, we’re not in the business of predicting.” Finally, one judge argued that a separate opinion in a case actually *increased* clarity because “it makes clear that what the dissenter said was not overlooked” by the majority.

In terms of consistency, the judges appeared to have great faith in the en banc process and its ability to ferret out conflicts between panels and circuit precedent. The Ninth Circuit judges were quite defensive of the mini-en banc procedure, noting that a recent experiment to increase the size of the mini-en banc from 11 judges to 15 had proved “unworkable” without any noticeable benefits. The judges also mentioned both formal and informal mechanisms for alerting a panel or a circuit to intracircuit conflict, including relying upon litigants’ counsel to identify potential or actual conflicts, the work of circuit legal staff in identifying potential conflicts, and the vigilance of “en banc hawks” (judges who monitor new cases for decisions that might trigger full court review).

In sum, it appears that more work ought to be done in refining both the definitions and operationalizations of the concepts, legal clarity and consistency. Particularly with respect to clarity, it would be worthwhile to explore definitions that comport with judges’ own definition of clarity in their work. This shortcoming—overlooking the perspectives of judges themselves in studying judicial behavior—is certainly a common one for much of political science scholarship that attempts to explain judicial decision making. While there may be good reason to do so in other areas of inquiry (e.g., when the casual process being studied involves behaviors that are the result of unconscious tendencies by judges, or when professional norms prevent judges from being entirely candid), there is nothing inherently problematic in proceeding based upon judges’ proffered definitions of legal clarity and consistency. Moreover, it seems likely that the legal resources at judges’ disposal may also play a role in promoting or hampering both legal clarity and consistency. Further research could interview law clerks and staff attorneys to learn how they see their roles in contributing to a predictable and uniform body of law.

Environmental complexity within circuits

A central assumption of this project is that the circuit context in which decision making occurs structures legal outcomes. The concept of environmental complexity, from the organizational theory literature, encapsulates this notion. Defined as the number and kinds of tasks performed by an organization, environmental complexity, in the circuit context, relates most directly to a court's docket. We have already discussed how the pressures of workload in "busier" circuits may produce norms that favor unanimity over dissensus, as a way of coping with time and work demands.

Aside from workload, the only other factor related to a circuit's docket that significantly affected aggregate legal outcomes was the degree of task variability. Circuits with more diverse caseloads (i.e., representing more unique types of cases) reversed district courts less frequently than those courts with more uniform dockets. This finding is in opposition to the hypothesis that greater variability in a court's docket will lead to more instability in the law, as evidenced by the circuit's tendency to reverse district court judges more frequently. Given the small amount of variation in this measure, and the absence of controls for factors related to the district courts, we should be cautious in making too much of this finding by itself. One possibility for further refinement would be to merge this measure with that of docket difficulty in order to more accurately portray this aspect of environmental complexity; in other words, a better way to model the decision making environment would be consider variability in light of the overall difficulty of the court's docket.

The failure of my measure of docket difficulty to perform in any of the models is surprising, to say the least. The roughness of the measure (the proportion of criminal

appeals and prisoner petitions) may contribute to this outcome, though I suspect two other factors may be driving this. First, this variable taps into criminal and prisoner cases that are decided on the merits, not those that are disposed of summarily. By virtue of the fact that a case was decided on its merits, there is good reason to believe that the case was not “easy” in any meaningful way. This interpretation is supported by the comments of the judges interviewed, several of whom noted that criminal cases were some of the most difficult kinds of cases, particularly given the Supreme Court’s inability to provide useful guidance on evaluating sentencing decisions made by trial judges.

Secondly, even to the extent that my current measure accurately reflected the relative difficulty of criminal and prisoner cases, it is almost certainly underinclusive. More refined measures of docket difficulty at the circuit level could reflect, for instance, judges’ statements about the difficulty of immigration and asylum petitions. A cleaner measure could also be employed at a lower level of analysis, such as the odds of a panel being assigned a “difficult” case.

Adding another dimension to environment complexity, I have also argued that *who* is doing the judging may be a significant factor in the legal outcomes that are produced. The hypothesized link between an organization’s demography and its performance has been the focus of a growing body of work in public administration (e.g. Pitts 2005), management (e.g. Kanter 1977), and political science (e.g. Saint-Germain 1989). These studies flow out of an argument concisely summarized by Pfeffer (1983, 303-4), namely that the “relative proportions of groups condition the form and nature of social interaction and group processes” and can, in turn, affect workers “psychological well-being, attitudes, and even job performance.” From this proposition, however,

several plausible accounts emerge. One possibility is that employee heterogeneity can improve organizational performance by bringing more diverse perspectives to bear on decision making (e.g. Adler 1997). On the other hand, we might expect homogeneous groups to be much more cohesive and thus able to perform more effectively. A third perspective, usually termed the “critical mass hypothesis” after Kanter’s work in *The Men and Women of the Corporation* (1977), argues that when members of a minority group reach certain proportions in an organization, they can affect and change the organization’s culture. Much of the work in political science testing Kanter’s proposition has tended to focus on legislative institutions, examining questions related to the numerical levels of women required before female legislators can be effective members of the institution, or before they can represent women’s interests.

My work, like the totality of the literature on the “critical mass question” broadly defined, provides no definitive answers about the effects of diversifying the judges of the Courts of Appeals. While it is beyond the scope of this study to measure, say, the effects of symbolic representation on public perceptions of the judiciary, I do believe that several of my findings about judicial heterogeneity and legal outcomes contribute to the ongoing conversation in the literature about the impact of women and minority judges on legal outcomes. However, because this project does not explicitly focus on the concept of active representation (also called substantive representation), I think it adds an important new perspective: rather than simply looking at whether women judges or non-white judges act to benefit those groups of which they are a part, this project examines judicial diversity more broadly, in light of its effects on organizational culture and performance.

Looking at the effects of racial and gender diversification on circuit outcomes, the findings suggest that heterogeneity with respect to gender may affect circuit culture more than racial heterogeneity. The only effects for racial diversity were seen in the reversal model, which for the reasons discussed above, gives us cause for downplaying this finding. Indeed, it may be more significant that racial diversity had no effect on dissenting behavior, the rate of mixed outcomes, and the frequency of en banc review. There are several plausible interpretations for these results. One possibility is that racial diversification of the federal appeals courts simply has no effect (because of shared socialization experiences, or other reasons) on the clarity and consistency of the law they create. However, my sense is that this statement is too strong for the data, given the relatively homogeneous nature of all the circuits. While presidents from Carter on have actively worked to diversify the bench, a significant majority of every circuit is still white (and male). Moreover, the category that I have fashioned is in itself so heterogeneous, including African-Americans, Hispanics, and Asian-Americans, that it is somewhat unsurprising that we find no evidence of a “shared” perspective.

As for the effects of gender diversification, it appears that the appointment of more women to the Courts of Appeals may have affected the culture in the circuit courts. Even accounting for overall heterogeneity (i.e., using a measure that allows for the intersection of race and gender) does not explain away the results in Chapter 3. In larger courts, circuits with a greater proportion of women dissent more often than circuits with fewer or no women; but among smaller-sized courts, homogeneous circuits dissent more frequently than those courts with the average or maximum percentage of women. One interpretation I have put forth is that these differences have much to do with the

frequency with which judges interact on panels. The development of norms about dissensus may well differ in circuits with fewer judges compared to circuits with many judges, because of the number of possible combinations of three-judge panels. While, overall, small courts dissent less often than large ones, it is interesting that the largest change in the predicted probability of dissent happens as court size increases in a court with the maximum proportion of women. It is perhaps less surprising that a completely homogeneous court with respect to gender shows the smallest amount of change. This finding may speak to how well women judges are integrated into the work of their court, as well as about how their male colleagues respond to their presence. Research in employment discrimination and sexual harassment cases provides some preliminary support for the hypothesis that the chief effect of more women on the bench is their effect on their peers—namely, making male judges more likely to support the position of plaintiffs claiming discrimination. While the causal mechanism behind these results is uncertain, my findings suggest that a similar effect may be seen at an aggregate level as well. Chapters 4 and 6 show that while female judges are no more likely than their male colleagues to author a dissent, the presence of a female judge on a panel increases the likelihood of a dissent, but not a concurrence, in a case.

Furthermore, comparing the circuits to one another, it appears that court and panel dynamics may affect legal outcomes in other ways. In two of the most homogeneous circuits (with respect to both race and gender), having a woman judge on a panel was associated with longer and more legally salient opinions. While the numbers are small enough in such courts to attribute differences only to individuals (rather than to

a judge's gender per se), it is possible that an "injection" of diversity into a court may produce more robust debate and deliberation—at least, at first.

Finally, the heterogeneity of judges within a circuit also can refer to whether a judge is "visiting" from a district court in that circuit or another (or whether they are a senior circuit judge from outside the circuit). At the aggregate level, circuits that relied more upon the participations of visiting judges were no more likely to exhibit different dissent, reversal, or en banc rates, and were only slightly more likely to issue more split decisions. Though much normative criticism has been leveled at the increasing reliance upon "visitors," I found that the presence of a visiting judge on a panel made very little difference in terms of the clarity or complexity of a panel's opinion. While it may be important for the legitimacy of a court to have opinions issued only by circuit judges of that court (and perhaps particularly so in high-profile cases), overall, my results are consistent with the sentiment of one judge, who noted that using visiting judges "doesn't really contribute one way or another."

In sum, no uniform findings emerge with respect to the heterogeneity of appeals court judges and legal outcomes. This by itself is, I think, an important conclusion, as it suggests that diversification may affect courts in different ways, depending on the organizational culture already established, the nature of the court's work, and existing norms about collegiality and professional interactions. It also highlights the "balkanization" of the Courts of Appeals, as twelve very individual courts. One intriguing possibility for further inquiry, related to the courts' heterogeneity, would be to consider whether a conditional relationship might exist between complexity in a court's docket and the heterogeneity of its judges. Such a study would capitalize on both the

differences in personnel and tasks faced across the Courts of Appeals and would contribute to the literature on the effects of diversity on organizational performance.

Models of decision making in conditions of complexity

One aim of this project was to incorporate theoretical approaches that explicitly account for the cognitive limitations of human decision makers in dealing with complexity in their decision making environment. This marks a departure from the theoretical perspectives most commonly used to explain judicial behavior on the U.S. Courts of Appeals, many of which originally debuted in work focused on the Supreme Court: namely, the attitudinal and strategic models. Over time, Courts of Appeals scholars have been persuasive in arguing that there are many good reasons to broaden our explanations to account for the role of the law, as well as the hierarchical dynamic that shapes the work of an intermediate appellate court. To these, I would add the importance of considering environmental complexity, as well as small group dynamics.

In this project, I considered several theoretical perspectives that plausibly might capture the experience of judging in the Courts of Appeals: a court with high workload and broad range of tasks, low discretion, and group decision making by rotating combinations of judges. In Chapter 3, I explicitly focused upon testing the so-called garbage can model against the bounded rationality or satisficing model in explaining aggregate circuit outcomes. The picture that emerges from those analyses fails to give clear, broad-based support for either of those accounts, however. I believe this may be explained by several factors. First, macro-level models inevitably contain a lot of “noise” due to the nature of the rough, aggregate measures that must be used, making it more

difficult for any comprehensive theory to be supported. In terms of the models themselves, there are additional reasons why the garbage can account fared so poorly. An apt critique that has been leveled at the garbage can model is that it fails to generate falsifiable hypotheses for us to test. While it does have the advantage of being a theory of organizational behavior, rather than one of individual behavior, there are no bright line distinctions made between garbage-can organizations and non-garbage-can ones. Even to the extent it does describe decision making accurately in some contexts, it fails to specify fully which contexts those are.

Furthermore, the aspects of the theory that arguably are most plausibly applied to the Courts of Appeals context—that judges may be decision makers with ready solutions (in the form of legal doctrine, philosophy, or policy prescription) waiting for the right “problem” to come along—are not easily tested by the kinds of data gathered for this project. Even in interviews with judges, there is good reason to believe that were judges aware of behavior consistent with this account, professional norms would discourage them from divulging them, for reasons of maintaining the legitimacy of the law and their legal institution. Consequently, it appears that the garbage can model has very little utility for our understanding of circuit courts, at least as long as we lack “insider” information about judges’ decision making processes from sources like former law clerks.

As for the bounded rationality approach, there does appear to be some support for its usefulness in explaining the behavior of judges on panels, as opposed to the behavior of circuits as organizations. (This is fairly unsurprising, given that the theory was originally developed as a way to explain individual behavior.) In general, appeals court

judges may be more likely to compromise on a single outcome because, as one judge observed, “[t]here really is a lot of law that produces determinative results.” Because many litigants take advantage of their right to one appeal, a large proportion of the questions appealed to federal circuit courts involve relatively straightforward applications of the law, thus providing no reason for a judge to dissent or concur. As a consequence, the frequency of separate opinion writing in these courts is quite low. Secondly, because the Courts of Appeals utilize panels as decision-making bodies rather than individual judges, norms about consensus and collegiality have arisen that discourage frequent separate opinion writing, as evidenced by many of the judges with whom I spoke.

More specifically, I argued in Chapter 4 that applying the bounded rationality approach would mean that case complexity should induce judges on a panel to “satisfice” (i.e., generate one opinion), rather than to cause judges to opt to write separately. The underlying rationale for this argument is that if individuals gravitate toward group decision making, or satisficing, because of their own cognitive limitations, then they should be especially likely to do so in situations in which the “problem” is more complex. My findings tend to support this interpretation, as none of the measures of case complexity, except for the presence of a cross appeal, was significantly related to the likelihood of a dissent in the models of all circuits. I also suggested in Chapter 4 that a panel’s decision to affirm in part and reverse in part may be interpreted as satisficing behavior, and as such, it appears that panels tend to handle complexity in their cases by making decisions as a group, like the bounded rationality account predicts.

In addition to testing the garbage can and bounded rationality accounts as models of decision making, I have also incorporated some perspectives related to human

cognition. In terms of the effects of complexity on information processing, I find a positive, linear relationship between these opinion length and complexity related to case characteristics; more complex cases produce longer, more legally rich opinions. When I model the decision making process by operationalizing the “inputs” in a case as the issues raised in appellate briefs, a fuller picture of judicial decision making emerges. First, a “winnowing” process occurs; judges tend to restrict the number of issues raised on appeal, particularly as the number of issues raised in a brief increases. There may be conscious reasons for this winnowing. For example, a judge may find that focusing on one issue makes it easier for her colleagues to agree, or that one issue is dispositive of the claim. A judge may also, unconsciously, opt to focus on a smaller number of issues because of workload pressures; it is simply easier to keep several cases in one’s head if they are reduced to their basic elements.

In addition to winnowing, we see differential patterns of success in terms of the types of litigants who come before the court. Combining earlier research on the success of “repeat player” litigants with political psychologists’ work on issue framing, these preliminary findings suggest that reliance on cues, such as source credibility, may help to ease the information-gathering pressures associated with judges’ decision making. These cognitive processes are then reinforced by institutional rules that require judges to rely on appellate advocates’ framing of issues in their briefs.

Overall, it appears that the theoretical perspective offered by the bounded rationality account is useful in aiding our understanding of judicial behavior in the Courts of Appeals, especially when considered alongside other models of cognition and decision making. While these types of models represent somewhat of a departure from more

abstract approaches (by assuming away less of the decision making environment), I would argue that the trade-off between elegance and, in my mind, accuracy in modeling is well-worth it.

Defining and understanding case complexity

Rather than assuming away case complexity or treating it as merely a control variable, in this project I have sought to account explicitly for the presence and nature of case complexity in affecting legal outcomes. In trying to articulate a workable definition of case complexity that could be empirically tested, I took a broad view, operationalizing multiple dimensions of complexity related to the number and kinds of issues a case presented on appeal. I supplemented the measures I developed based on existing literature with comments from judges themselves about how they defined concepts like “complexity” and “difficulty.”

Several measures of case complexity stood out from the others. In particular, the presence of a cross-appeal in a case was positively related to the likelihood of dissenting and concurring opinions, as well as to split decisions by a panel. When both parties appeal some aspect of the decision below, judges may find it harder to sift through the facts and relevant law to find common ground for a unanimous opinion—unless, that opinion represents some compromise among all the positions, as a decision to affirm in part and reverse in part might. Another measure of case complexity that performed well was the measure of legal complexity, or the number of legal issues coded in the opinion. Legal complexity was negatively related to the likelihood of a concurring opinion in a case and positively associated with mixed outcomes. It is worth noting that multiple

dimensions of case complexity appear to be related to mixed outcomes, while only the presence of a cross-appeal consistently mattered in predicting dissent.

What I discovered from the judge interviews was that “complexity” is a relative term, highly contingent on a judge’s past experience; in other words, whether a case may be considered “complex” or not may be in the eye of the beholder. Past judicial and legal experience seemed to matter in shaping a judge’s perception of complexity and sense of efficacy in handling complex cases.³ Beyond the variety in responses regarding a definition of “complexity,” I was struck by how the judges struggled to distinguish between complexity and difficulty. No consensus emerged about where, if at all, to draw the line; some judges used the words interchangeably, while others made clear distinctions between the terms.

A final piece in the puzzle about how case complexity figures into the judicial decision making process relates to the role of ideology, broadly defined. Ideology can be viewed as an organizing framework, encompassing political preferences (i.e., liberal or conservative) as well as interpretive philosophies that may work to reinforce those political preferences (e.g. strict constructionists are more often conservatives than liberals). I have also incorporated research from political psychology that argues that ideology may also function as a tie-breaker when legal decision makers attempt to fit the facts of a case to earlier precedents.

My findings suggest that ideology operates in tandem with case characteristics and group dynamics on a panel to affect legal outcomes. While liberal and conservative

³ Though the scope of my interviews was limited to only two circuits, it seems likely that measures of case complexity may differ across circuits, depending on the past professional experiences of judges, fluctuations in docket composition, and the legal resources available to assist judges in managing caseload.

judges alike are more likely to dissent when the ideological distance on a panel increases, a scenario in which there is both high case complexity *and* an ideological divide is far more likely to result in a dissent than when there is merely case complexity or distance alone. Similarly, ideological homogeneity on a panel seems to make it easier for a judge to join the majority opinion even when a case is quite complex. I believe that these findings represent an important new way to think about judicial ideology, and that they demonstrate the importance of incorporating measures of complexity into our decision making models.

6.2 Implications and Directions for Further Study

The future of research on the United States Courts of Appeals offers a number of promising areas of inquiry for scholars, although this is not to say that much important work has not already taken place. The contributions of Donald Songer, Susan Haire, and Ashlyn Kuersten in creating and updating a comprehensive database on Courts of Appeals decisions from 1925 to 2002, as well as the work of Gary Zuk, Deborah Barrow, and Gerard Gryski in assembling data on circuit judge attributes, has paved the way for a number of important studies on judicial decision making in these courts. When these data troves are viewed in light of the rich insights from studies based on interviews with judges and their staff (work by J. Woodford Howard, Stephen Wasby, Jonathan Matthew Cohen, and David Klein, to name a few), it becomes clear that Courts of Appeals scholars have the advantage of a wide range of sources from which to draw interesting research questions.

While there are certainly many directions for new research suggested by this dissertation, I have identified three areas in particular that represent promising avenues for further explanation and inquiry. The first area relates to refining and developing new measures of legal clarity, insofar as the work of the Courts of Appeals is concerned. This may require finer distinctions to be made among types of separate opinions, and perhaps specifically focusing on plurality opinions coming out of both the Supreme Court and the Courts of Appeals (particularly in en banc cases). To the extent that such opinions negatively affect “usability” by lower courts, as argued by one judge, it may improve our understanding of the dynamics within a hierarchical judicial system; similarly, it may give us a better window into understanding how judges make decisions when the law is vague, ambiguous, or inconsistent. Future research might also incorporate a circuit’s publication rate into the analysis, because of its implications regarding clarity: namely, that publishing more opinions may actually serve to clutter up a circuit’s body of law and make it less clear. As one judge from the Ninth Circuit noted, “[t]here’s so much published law out there that you can find anything that you want.” There are similar implications for clarity and uniformity in the recent developments on citation of unpublished orders—specifically, the 2007 change in Federal Rules of Appellate Procedure, which allows for a circuit-by-circuit determination of whether unpublished orders may be considered precedential.

The second major area for further research is in the area of organizational demography, as it relates to the Courts of Appeals. Perspectives that draw from social psychology, small group theory, and even management science may be useful in gaining insights on the effects of judicial heterogeneity upon organizational culture. In addition,

research that looks at increasing or decreasing diversification over time may yield interesting findings regarding whether a circuit “resets” to some previous level after an influx of women or minority judges, or whether the court simply adjusts and assumes different norms of operation. Similar time-series analyses could be used to look at diversification on a range of other characteristics, such as ideology, age, and previous professional experience. Indeed, the existing literature on diversity and organizational performance suggests that diversity’s effects are not constant over time and may be conditioned by organizational culture as well as other contextual factors (Milliken and Martin 1996, Jackson, Joshi, and Erhardt 2003).

In addition to exploring legal clarity and judicial diversity more thoroughly, a third area for new research that I believe to be especially promising has to do with cognition and decision making. Looking more to cognitive psychology to explain human decision making processes may provide fascinating insights into questions related to, for example, how issue framing functions in a judicial context. While my study only examines a small portion of appellate briefs in two circuits, other research could explain the analysis to include other circuits and compare issue adoption across courts, noting how judicial treatment may be related to issue complexity or the frequency with which certain kinds of appeals are heard. Furthermore, cognitive psychology has the potential to help us understand the causal mechanisms of decision making and thus continue to refine our conception of how an individual’s ideology functions in the process of judicial decision making. Judicial scholars often make the argument that ideology may serve to affect outcomes only in “salient” cases (e.g. civil liberties), but if the effect of ideology is

dampened, or heightened, by the relative complexity of the case, then this has important implications for our understanding of the causal process at work.

In his book *Making Law on the United States Courts of Appeals*, David Klein concludes his final chapter by noting, “Understanding how judges make law probably requires going beyond judges themselves” (2002, 145). I have attempted to do just that in this project by considering the work environment of the circuits, as well as the nature of the cases that appeals court judges must review. While I certainly have not provided definitive answers to all the questions I have posed, I believe this project has carved out some new inroads in our understanding of the federal appellate courts and, in this sense, broadened our knowledge in important ways.

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Appendix A: Table of Concepts, Variables, Indicators, and Hypotheses

Concept	Variable(s)	Indicator(s)	Hypotheses
CIRCUIT LEVEL VARIABLES			
<i>Legal clarity at the circuit level (DV)</i>	<i>Mixed outcomes</i>	Proportion of published decisions to affirm in part and reverse in part for one circuit in one year. (Denominator is all merits terminations.)	
Unit of analysis: Circuit-year			
	<i>Dissent rates</i>	Proportion of dissenting opinions issued in published decisions in one circuit for each year. (Denominator is all merits terminations.)	
<i>Legal consistency at the circuit level (DV)</i>	<i>Rate of reversing district court</i>	Proportion of reversals of district court decisions in each circuit per year (published opinions only). (Denominator is all merits terminations.)	
Unit of analysis: Circuit-year			
	<i>Frequency of en banc review</i>	Proportion of en bancs in each circuit per year (Denominator is all merits terminations.)	

Ind. variables
***Environmental
complexity at the
circuit level***

*Racial composition of circuit's
judges*

Proportion of judges who are
African-American, Hispanic, or
Asian in a circuit in a given
year

Garbage can hypotheses:
Circuits that are more
heterogeneous with respect
to the gender and racial
diversity of judges will have
a greater rate of en banc
decisions, district court
reversals, and mixed
outcomes. This effect
should be stronger in larger-
sized circuits than in
smaller courts.

*Racial composition conditioned by
court size*

Multiplicative term interacting
racial composition with size

*Gender composition of circuit's
judges*

Proportion of judges who are
female in a circuit in a given
year

*Gender composition conditioned by
court size*

Multiplicative term interacting
gender composition with size

Satisficing hypothesis:
Circuits that are more
heterogeneous with respect
to the gender and racial
composition of their judges
will issue fewer dissenting
opinions, and this effect
will be conditioned on court
size.

*Overall racial and gender
heterogeneity score in Herfindahl
index*

$\sum p_1^2 + p_2^2 + p_3^2 \dots + p_k^2$
where p is equal to the
proportion of active and senior
judges in a circuit who are,
respectively, white men, white
women, African-American
men, African-American
women, Hispanic men,
Hispanic women, Asian men
and Asian women.

Ideological diversity of judges

Standard deviation in Giles
Hettinger Peppers ideology
score for each circuit

Garbage can hypotheses:
The ideological dispersion
of judges in a circuit will be
positively related to en banc
decisions, district court
reversals, and mixed
outcomes, and the effect
should be stronger in larger
courts than in smaller
courts.

Satisficing hypothesis:
Circuits with greater
ideological distance
between judges will issue
fewer dissenting opinions,
and this effect will be
conditioned on court size.

*Task variability in types of cases
heard*

Number of different types of
cases published as a percentage
of all possible kinds of cases
under the USCA database

Garbage can hypothesis:
As the task variability
increases, we should see an
increase in en banc
decisions, district court
reversals, and mixed
outcomes.

Satisficing hypothesis:
As the task variability of a
circuit increases, we should
see a decrease in dissenting
opinions.

Size of circuit

Number of judges in a circuit, including senior and visiting judges. Used as a component of interaction term.

Circuit caseload

Merits terminations per judge

Garbage can hypothesis:
As caseload increases, we should see an increase in en banc decisions, district court reversals, and mixed outcomes.

Satisficing hypothesis:
As caseload increases, we should see a decrease in dissenting opinions.

Difficulty of caseload

Proportion of merits terminations that are criminal appeals and prisoner appeals

Garbage can hypothesis:
As the relative difficulty of cases in a circuit's docket increases, we should see an increase in en banc decisions, district court reversals, and mixed outcomes

Satisficing hypothesis:
As the relative difficulty of cases in a circuit's docket increases, we should see a decrease in dissenting opinions.

Visiting judges

Percent of case participations
(in cases decided on the merits)
by visiting judges. Source:
*AO, Judicial Business of the
United States Courts*. Table S-
2, S-4.

Garbage can hypothesis:
As reliance on visiting
judges increases, we should
see an increase in en banc
decisions, district court
reversals, and mixed
outcomes.

Satisficing hypothesis:
As reliance on visiting
judges in a circuit increases,
we should see a decrease in
dissenting opinions.

PANEL LEVEL VARIABLES			
<i>Legal clarity at the panel level (DV)</i>	<i>Mixed outcomes</i>	Decision to affirm in part and reverse in part (0,1)	
Unit of analysis: Case-year	<i>Separate opinion</i>	Concurring opinion filed (0,1) Dissenting opinion filed (0,1)	
<i>Output complexity (DV)</i>	<i>Opinion length</i>	Page length of majority opinion	
	<i>Richness of opinion</i>	Number of Westlaw key notes (1997-2002)	
<u>Ind. Variables</u>			
<i>Number of issues</i>	<i>Number of policy areas</i>	Number of case types coded in Multi-User database (1=more than one, 0=one)	A separate opinion will be less likely in cases with cross appeals, cases with multiple policy areas and cases with multiple legal issues represented.
	<i>Legal complexity</i>	Raw number of legal concepts coded in database (criminal issues, civil law-private issues, civil-government issues)	A mixed outcome will be less likely in cases with cross appeals, cases with multiple policy areas and cases with multiple legal issues represented.
	<i>Cross appeal</i>	Presence of a cross-appeal (0,1)	

***Case complexity
at the panel level***

Case type complexity: civil cases

Complex civil case types following Heydebrand (1977): copyright, patents, trademark, civil rights, and antitrust cases (1 = complex case, 0 if otherwise)

Longer, more legally salient opinions will be more likely in cases with cross appeals, cases with multiple policy areas and cases with multiple legal issues represented.

A separate opinion will be less likely in civil cases that are considered complex.

A mixed outcome will be less likely in civil cases that are considered complex.

Longer, more legally salient opinions will be more likely in civil cases that are considered complex.

Complex civil case types following FJC district court case weight system: environmental, civil RICO, patent, all civil rights, antitrust, FOIA, copyright, trademark, SEC, fraud, assault, libel, slander, insurance contracts, medical malpractice, federal tax suits, contracts, banking and finance, real or personal property actions, labor

Complex (USCA) civil case types following Posner (1996, 75): antitrust, intellectual property, admiralty, and taxation

Complex (USCA) civil case types following Klein (2002): antitrust, environmental law

Case type complexity: criminal cases

Complex criminal case types following Heydebrand (1977): forgery, counterfeiting, fraud, robbery, assault, and sex offenses (1= complex case, 0 if otherwise)

A separate opinion will be less likely in criminal cases that are considered complex.

A mixed outcome will be less likely in criminal cases that are considered complex.

		Complex criminal case types based on FJC case weight system [1.00 and above]: drug offense—continuing criminal enterprise, manufacturing, distribution, firearms, murder/manslaughter/homicide, extortion, threats, RICO, aggravated assault/kidnapping,	Longer, more legally salient opinions will be more likely in criminal cases that are considered complex.
<i>Issue framing</i>	<i>Issue(s) adoption</i> (DV)	Panel majority addresses issue raised by litigant in the main text of opinion (0,1)	
	<i>Issue resolution</i> (DV)	Panel majority’s treatment of issue raised by litigant (in main text of decision) was favorable	
<u>Ind. Variables</u>			
<i>Issue frame offered by litigant</i>	<i>Issues in appellant’s brief</i>	Issue identified in appellant brief’s “Statement of Issues”	
	<i>Issues in appellee’s brief</i>	Issue identified in respondent brief’s “Statement of Issues”	
<i>Legal resources</i>	<i>Number of attorneys</i>	Number of attorneys and firms listed for appellants	
	<i>Number of legal firms</i>	(respondents) in brief	

Deference to parties with expertise in litigation

Advantage of U.S government

Deference to repeat players

U.S. government is a party (0,1)

Adopt government's issue frame in disputes between individuals and government (0,1)

Adopts businesses' issue frame in disputes between individuals and businesses (0,1)

Source credibility hypothesis:

Because the court will be more likely to defer to parties with expertise in litigation, the issue frames presented by businesses and government parties will be adopted more often than those presented by individual litigants.

Litigation resources hypothesis:

Litigants with greater numbers of attorneys or firms will be more successful in issue adoption and favorable treatment than those parties with one attorney and one firm.

**INDIVIDUAL
JUDGE VARIABLES**

<i>Separate opinion (DV)</i>	<i>Separate opinion</i>	Concurring opinion filed (0,1) Dissenting opinion filed (0,1)
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Unit of analysis:
Judge-vote

<i>Case outcome (DV)</i>	<i>Ideological direction of judge's vote</i>	1 = liberal outcome 0 = conservative outcome
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Unit of analysis:
Judge-vote

Ind. Variables

<i>Case complexity at the individual judge level</i>	<i>Number of issues</i>	Number of issues coded in database (headnotes)
	<i>Legal complexity</i>	Raw number of legal provisions coded in database (criminal issues, civil law- private issues, civil- government)

Case type complexity: civil cases

Complex civil case types following Heydebrand (1977): copyright, patents, trademark, civil rights, and antitrust cases (1 = complex case, 0 if not)

Complex civil case types following FJC district court case weight system: environmental, civil RICO, patent, all civil rights, antitrust, FOIA, copyright, trademark, SEC, fraud, assault, libel, slander, insurance contracts, medical malpractice, federal tax suits, contracts, banking and finance, real or personal property actions, labor

Case type complexity: criminal cases

Complex criminal case types following Heydebrand (1977): forgery, counterfeiting, fraud, robbery, assault, and sex offenses (1= complex case, 0 if otherwise)

		Complex criminal case types based on FJC case weight system [1.00 and above]: drug offense—continuing criminal enterprise, manufacturing, distribution, firearms, murder/manslaughter/homicide, extortion, threats, RICO, aggravated assault/kidnapping	
<i>Ideological predisposition of judge</i>	<i>Judge ideology</i>	-1 conservative to 1 liberal (using Giles, Hettinger, Peppers scores). Giles, Hettinger, and Peppers score account for the influence of senatorial courtesy as well as a president's preferences in nominating judges.	<i>Ideology hypothesis:</i> Case complexity will condition the effect of judge ideology on the likelihood of a liberal vote. Case complexity will condition the effect of judge ideology on the likelihood of dissent.
	<i>Judge ideology conditioned by number of issues in case</i>	Interaction: Giles, Hettinger, Peppers scores* number of issues in case	
	<i>Judge ideology conditioned by legal complexity of case</i>	Interaction: Giles, Hettinger, Peppers scores * legal complexity of case	
	<i>Judge ideology conditioned by case type complexity</i>	Interaction: Giles, Hettinger, Peppers scores*case type complexity	

<i>Freshman judge</i>	<i>Judge recently appointed to Courts of Appeals</i>	Judge appointed to circuit courts 3 years or less from year of case (0,1)	Freshman judges will be less likely than other judges to write a separate opinion in a complex case.
<i>Visiting judge</i>	<i>Judge visiting from another circuit or court</i>	Visiting district court judge (0,1)	Visiting judges will be less likely than other judges to write a separate opinion in a complex case.
<i>Panel composition</i>	<i>Ideological composition of the panel</i>	Ideological spread on the panel, using Giles, Hettinger, and Peppers scores.	
	<i>Gender composition of the panel</i>	Presence of woman on a panel (1, 0)	

CONTROL
VARIABLES

<i>Panel norms of consensus</i>	<i>Panel median ideology</i>	-1 conservative to 1 liberal (panel member who represents the median, using Giles, Hettinger, Peppers scores)
<i>Circuit norms and practices</i>	<i>Circuit</i>	Dummy variables for each circuit court
<i>Time</i>	<i>Year</i>	Dummy variables for each year
<i>Judge personal traits</i>	<i>Judge race/ethnicity</i>	Judge is African-American, Hispanic, or Asian-American (0,1)
	<i>Judge gender</i>	Judge is a woman (0,1)
<i>Tendency of circuit courts to affirm lower court decision</i>	<i>Lower court decision</i>	Lower court decision was in a liberal direction (0,1)
<i>Advantage of U.S. government</i>	<i>Presence of U.S. government</i>	U.S. government is a party in case (1=yes)

Appendix B: Interview Protocol

Date of interview: _____ **Circuit:** _____

Judge: _____ [to be blacked out after interview]

I'm interested in how judges cope with complexity in the circuit environment and in the cases they decide. I'd like to begin by talking about complexity in cases first.

Are there any areas of law that you would say are generally more difficult than other areas? [Prompt: for example, antitrust law compared to criminal law.]

Can you estimate the proportion of cases in your circuit that you would classify as technically "difficult"? By technically difficult, I mean that a case requires a judge to do more research and perhaps go outside the bounds of his or her legal expertise to evaluate a claim.

What substantive areas of law appear most frequently in your circuit? [Prompt: criminal appeals, environmental regulation cases, immigration appeals, etc.]

Does the difficulty of certain areas of law in any way depend on the frequency with which you see cases in these areas? In other words, are some areas of law always difficult, no matter how frequently you are exposed to them? If so, which areas?

What criteria does your circuit use to distinguish between “easy” and “difficult” cases?

People likely differ on how they characterize what makes a case “complex.” In your mind, what makes a case “complex”? [Prompts: The number of issues presented? The number of legal provisions at stake? The substantive area of law? The presence of cross appeals? The scope of the issue (the number of people affected)?]

Would it be possible to rank from most to least complex, the following kinds of cases are, on average: constitutional cases, federal statutory cases, appeals from agency decisions?

Do you feel that the FJC’s case weights system provides a useful way to distinguish among different types of cases?

In which areas of law do you feel the most comfortable? In which areas do you feel the least comfortable?

Could you tell me how important each of the following factors is when you are presented with a case that deals with an area of law with which you are unfamiliar:

- a) *Expertise of other judges on the panel*
- b) *Expertise of other judges in your circuit*
- c) *Expertise of judges outside your circuit*
- d) *Arguments presented by the parties in their briefs*
- e) *Arguments presented by any amici in their briefs*
- f) *Information provided by your staff*
- g) *Law review articles*

Are there other relevant factors that I did not include?

In your recollection, does it seem that it is easier or more difficult for the judges on a panel to reach consensus in cases that involve (a) multiple issues as compared to a single issue, (b) multiple legal provisions compared to a single legal provision, (c) substantively complex areas of law compared to substantively simple areas of law?

On the Supreme Court, justices often mention a “freshman” period before they become a fully effective member of the court. Is this true on the Court of Appeals? If so, about how long does the period last?

Now I’d like to ask you some questions about the overall approach of your circuit in deciding cases.

I would imagine that when you decide a case, you might have certain general objectives in mind. Let me mention some possible objectives. Could you tell me how important, if at all, each one is to you when you're deciding a case?

- a) Making sure that the body of law in an area is consistent.*
- b) Making sure that the opinion is legally clear (easy to interpret, unambiguous)*
- c) Deciding cases promptly; keeping up with caseload*
- d) Making sure the decision is legally correct, regardless of whether you are happy with the specific outcome*
- e) Insuring that the outcome of the specific case is good (just, beneficial to society)*

What kinds of steps does your circuit take to ensure that the body of law it creates is consistent? [Prompt: en banc review, panel reconsideration option, prefiling circulation of opinions, pending issue flag, reversing district courts]

In your opinion, does your circuit's use of visiting judges help the circuit to be more consistent, or does this practice negatively affect consistency?

What kinds of steps does your circuit take to ensure that the body of law it creates is clear (easy to interpret, unambiguous)?

We hear much these days about overloaded dockets. Would you characterize the workload in your circuit as low, just about right, a little too much, or far too much? How has your circuit responded to workload pressures?

In your opinion, how does the way that your circuit handles its caseload affect the consistency of law coming out of the circuit?

In your opinion, how does the way that your circuit handles its caseload affect the clarity of law coming out of the circuit? [Prompt: by clarity, I mean how clear your decision is to those reading it.]

Are there any communications technologies or circuit practices that you find particularly helpful in staying informed about what other panels in your circuit are deciding?

When you are writing an opinion, which audience are you most eager to reach? Litigants? Judges affirmed or reversed below? Supreme Court justices? Other government officials? Members of the bar? Law schools? Interest groups? The general public? Other judges in your circuit? Other appeals court judges?

In their briefs, attorneys may raise numerous issues in the hopes that this will increase the odds that their framing of the dispute is accepted by the judges. When you are reading the parties' briefs, how do you decide which issues you will focus upon and which you will not address?

Similarly, when you are deciding a case that is very complex or technical, the litigants may have more technical expertise on the issue than the average judge (for example, a case involving an environmental regulation). In these situations, do you trust the litigant to be the "expert" on the issue? What factors would make you more likely to perceive a litigant as "expert" on the issue? (Prompt: for example, in a regulatory case, would you consider the federal regulatory agency to be an "expert" or do you think the group challenging the regulation is more likely to be an expert on the issue?)

That is the end of the questions. I would be grateful to know what you think of them. Have we missed anything of importance that scholars should study to understand the Courts of Appeals?