JUDICIAL SELECTION AND DECISIONMAKING IN THE NINTH CIRCUIT

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The confirmation rate for those nominated to fill positions on the U.S. Courts of Appeals has been steadily declining. At the start of the Carter Administration, one hundred percent of those nominated to the circuit courts were confirmed. From 1995 to 2000, less than half of those nominated by President Clinton were confirmed,[1] with some nominees waiting more than three years for a confirmation vote. After Republicans gained control of the U.S. Senate, President G.W. Bush should have enjoyed a high success rate with appointments to the lower federal appellate courts, yet several of his nominations have failed amid debates surrounding the nominee's policy views.[2] Ideological divisions between Democrats and Republicans increasingly shape federal judicial selection processes,[3] with more attention to those nominated to sit on high visibility courts

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1. *See* DENIS STEVEN RUTKUS & MITCHEL A. SOLLENBERGER, JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977–2003, CRS REPORT FOR CONGRESS (Library of Cong. 2004).

2. For a comprehensive analysis of lower federal court judicial selection, see SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997) [hereinafter GOLDMAN, PICKING FEDERAL JUDGES]; Michael. J. Gerhardt, *Judicial Selection as War*, 36 U.C. DAVIS L. REV. 667 (2003) (describing increased tension between Administrations and the Senate over judicial appointments); Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871 (2005) [hereinafter Goldman, *Judicial Confirmation Wars*] (finding increased use of ideology as a criterion for judicial appointment and relationship to confirmation delay); Elliot E. Slotnick, *Federal Judicial Selection in the New Millennium*, 36 U.C. DAVIS L. REV. 587 (2003) (analyzing contemporary federal judicial selection and offering predictions for future confirmation battles).

3. The 2004 Democratic Party platform stated, "We support the appointment of judges who will uphold our laws and constitutional rights, not their own narrow agendas[,]" whereas Republicans offered more detail over the concerns of those in their party. As the 2004 Republican platform noted, "In the federal courts, scores of judges with activist backgrounds in the hard-left now have lifetime tenure. Recent events have made it clear that

such as the Ninth Circuit. The focus of this Article is to evaluate a central question in the debate over judicial selection, including nominations to the Ninth Circuit: Do judges make decisions that are consistent with the policy views of the appointing administration? Part I reviews the existing scholarship on lower federal court appointments and judicial behavior, and establishes the framework for analysis. Part II describes the data used to test for appointment effects on decisionmaking. Part III presents the results, and Part IV follows with discussions and conclusions.

I. FEDERAL JUDICIAL SELECTION AND DECISIONMAKING IN THE U.S. COURTS OF APPEALS

A. Judicial Selection and Presidential Administrations

Over the last several decades, officials of both Democratic and Republican administrations have recognized the policy significance of appointing federal judges who enjoy life tenure. According to one Nixon Administration official, "Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office. . . . [If the President] establishes *his* criteria and . . . machinery for insuring that the criteria are met, the appointments that he makes will be *his* . . . ."[4]

In his leading research on lower federal court appointments, Sheldon Goldman offers a framework for conceptualizing and classifying judicial selection strategies utilized by Presidents.[5] Specifically, he identifies three types of agendas: policy, partisan, or personal agendas. If a President utilized judicial selection to appoint individuals who support his policy goals, the appointment process advanced a policy agenda. If a President utilized judicial appointments as vehicles for shoring up political support for himself or his party, the process advanced a partisan agenda. If a President gave judicial appointments to personal friends or associates, personal agendas dominated judicial selection.

B. Lower Federal Court Judicial Selection: Franklin Roosevelt Through Nixon

According to Goldman's analysis of presidential papers, FDR used several appointments to advance his New Deal policies; however, his successor, Harry Truman, did not view the courts as being central to his policy goals.[6] Instead, Truman Administration officials viewed court appointments as patronage—"rewards" for political loyalty to the President and the Democratic Party. Later, President Eisenhower adopted judicial selection procedures aimed at identifying well-qualified Republicans to staff the lower federal courts.[7] In the 1960s, Democratic administrations tended to advance (with varying degrees of

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these judges threaten America's dearest institutions and our very way of life . . . ." *See* Goldman, *Judicial Confirmation Wars*, *supra* note 2, at 872.

4. The quotation is from a memo written by Nixon aide Tom Huston. For a full discussion of Huston's memo, see GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 2, at 206.

5. *See id.* at 3.

6. *See id.* at 68.

7. *See id.* at 130.

success) a partisan agenda when making judicial appointments. President Johnson frequently gained the support of Southern Democratic senators and party leaders for his nominees whereas officials in the Kennedy Administration more often deferred to senators when making appointments.[8] In the 1968 presidential campaign, candidate Richard Nixon was a vocal supporter of restoring "law and order" to the criminal justice system. Nonetheless, research by Goldman indicates that both Nixon and Ford emphasized the value of judicial appointments in advancing the stature of the president and the Republican Party.[9]

C. Lower Federal Court Judicial Selection: Carter through G.W. Bush

The election of 1976 brought Jimmy Carter to the White House. He pledged to initiate new "merit selection" procedures for the appointment of federal judges. Committed to a policy of affirmative action, Carter established commissions within each circuit to identify potential nominees for vacancies on the U.S. Courts of Appeals.[10] His subsequent appointments resulted in a cohort that included a substantial number of minorities and women. However, policy views and partisan backgrounds of nominees were not ignored. The makeup of the commissions included Democratic Party activists, and the final choice for an appointment was made by the White House.[11] Moreover, Carter also directed the nominating commissions to identify candidates who possessed a commitment to "equal justice under the law."

The 1980 Republican platform, endorsed by Ronald Reagan, called for the appointment of judges who held "the highest regard for protecting the rights of law-abiding citizens[,] . . . belief[s] in the decentralization of the federal government[,] . . . and . . . respect [for] traditional family values and the sanctity of innocent human life."[12] Reagan Administration officials developed procedures that formalized White House involvement in the identification of candidates and screening of their judicial philosophies. Following his reelection in 1984, President Reagan appointed Edwin Meese to be Attorney General. Meese vigorously argued for judges to exercise greater restraint and return to an approach that emphasized "original intent."[13] Judicial selection continued in a very similar manner during the G.H.W. Bush Administration with joint efforts by the White House and the Department of Justice. Although Bush shifted a number of the responsibilities back to the Department of Justice, White House counsel continued to screen candidates' policy views.[14]

After twelve years of Republican administrations, the election of Bill Clinton was viewed by Democrats as an opportunity to restore balance to a federal bench that overwhelmingly consisted of Reagan–Bush appointees. Like President

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8. *See id.* at 172.
9. *See id.* at 208.
10. W. Gary Fowler, *Judicial Selection Under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures*, 67 JUDICATURE 265, 267 (1984).
11. *See* GOLDMAN, PICKING FEDERAL JUDGES, *supra* note 2, at 258.
12. *See* Fowler, *supra* note 10, at 266.
13. *See id.* at 267.
14. Sheldon Goldman, *The Bush Imprint on the Judiciary*, 74 JUDICATURE 294, 297 (1991).

Carter, Clinton focused on identifying well-qualified women and minorities to fill vacancies on the lower federal courts. In contrast to Carter, Clinton did not employ circuit-level commissions but relied instead on officials in the Department of Justice to play a central role in coordinating the evaluative process for nominees to the U.S. Courts of Appeals.[15] Nonetheless, the names of potential nominees for the U.S. Courts of Appeals were generated by White House officials who continued to play an active role in the final choice of a nominee. The emphasis on ideology, however, appeared to diminish somewhat. According to the Department of Justice official responsible for judicial selection, "[T]he process has been wildly disserved by this idea that this is a huge ideological battle for the courts and . . . [that] there is no middle ground."[16] The identification of "confirmable" nominees also required that Clinton Administration officials negotiate with Republicans in the U.S. Senate, including not only party leaders but also those representing states located in circuits with vacant seats.[17]

In the 2000 campaign, candidate G.W. Bush stressed his desire to appoint conservatives to the federal courts.[18] Upon his election, President Bush established processes designed to ensure the selection of candidates who would share his views. Similar to earlier administrations, Bush established a committee made up of White House and Department of Justice officials (the "Judicial Selection Committee") to identify and screen nominees.[19] Unlike his predecessors, Bush ended the formal consultative role played by the American Bar Association Standing Committee on Federal Judiciary in the screening of potential nominees.[20] The Administration also had to contend with Democratic senators who were furious over the treatment accorded to Clinton's judicial nominees in earlier congressional sessions.[21]

The current state of controversy over judicial appointments reflects a more general trend over the last three decades, where administrations increasingly focused on the selection of those who will sit on the lower federal courts, rather than focusing solely on the Supreme Court. Although President Nixon identified the policymaking potential associated with appointments to the U.S. Courts of Appeals, his Administration tended to adopt partisan agendas when identifying prospective nominees to these courts. It was not until the Reagan Administration that officials shifted the focus to the policy views of the candidates. Attention to policy concerns ultimately attracted the involvement of organized interests and party leaders in the Senate. As outlined below, the advice and consent role—once characterized by cooperation—is now dominated by conflict.

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15. Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 229–30, 243 (2001).

16. Sheldon Goldman, *Judicial Selection Under Clinton: A Midterm Examination*, 78 JUDICATURE 276 (1995) (attributing quotation to former Assistant Attorney General Eleanor Dean Acheson).

17. *See* Goldman et al., *supra* note 15, at 228.

18. Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282 (2003).

19. *See id.* at 283.

20. *See id.* at 285.

21. *See id.* at 292, 293.

D. Federal Judicial Selection and the Role of the U.S. Senate

In judicial appointments to the lower courts, the President makes the nomination with the "advice and consent of the Senate."[22] Although Hamilton suggested in *The Federalist Papers* that the advice and consent role would be a passive check on the President's appointment power, as a matter of practice, senators have played an important part in the selection of federal judges since the very beginning of Congress.[23] This role is not confined to a formal vote on confirmation. Game-theoretic models of the nomination process indicate the process is much more complex with Presidents, in anticipation of senatorial reaction, working to select a nominee who will be "confirmable."[24] According to one account, administrations have "carefully organized the selection process to allow regular probing of the anticipated congressional reactions to planned presidential nominations before announcing the names of their nominees."[25]

Although the views of party leaders in the Senate, including those of the Chairman of the Judiciary Committee, are important, it is the influence of home state senators that frequently constrain Presidents in appointments to the U.S. Courts of Appeals. As a result of the custom of senatorial courtesy, home state senators of either party may decline to return his or her "blue slip" to the Senate Judiciary Committee Chairman and thus delay, if not kill, the nomination.[26] In recent years, senators from the opposition party have flexed their political muscle. During the Clinton Administration, negotiation over the nomination of William Fletcher to the Ninth Circuit ultimately led to the nominee's mother, Judge Betty Fletcher, a member of the same court, taking senior status and the simultaneous nomination of a candidate to the Ninth Circuit who was promoted by Republican Senator Slade Gorton of Washington. After these negotiations, William Fletcher was confirmed by a close vote—more than three years after being nominated. Although Judge Fletcher's experience represents an unusual case, it also reflects on a trend of increasing confirmation processing times for nominees to the U.S. Courts of Appeals over the last ten years. In the 103rd Congress (1993–94), the average number of days from the nomination to the hearing date was 77.4. This figure rose to 235.3 days during the last two years of the Clinton Administration. Although confirmation processing times fell during the 108th Congress (2003–04) to an average of 144.8 days, the current Administration continues to face obstacles

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22. U.S. CONST. art. II, § 2.

23. For a discussion of historical perspectives on federal judicial selection, see HAROLD W. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS (1972); G. CALVIN MACKENZIE, THE POLITICS OF PRESIDENTIAL APPOINTMENTS (1981).

24. For a more general discussion of game-theoretic accounts associated with nomination and confirmation, see Thomas Hammond & Jeffrey Hill, *Deference or Preference—Explaining Senate Confirmation of Presidential Nominees to Administrative Agencies*, 5 J. THEORETICAL POL. 23 (1993).

25. MACKENZIE, *supra* note 23, at 225.

26. For a description of contemporary blue-slip procedures and the norm of senatorial courtesy, see Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218 (2002).

with only fifty-three percent of President Bush's first term federal appeals courts nominees confirmed.[27]

E. Appointment Effects on Judicial Decisionmaking in the Ninth Circuit.

Public law scholars have long noted the connection between appointments and federal judicial policy. As suggested by Goldman, "Judges chosen by a democratically elected president can be expected in a general sense to reflect the values and policy outlook of the appointing administration."[28] Empirical support for this premise is well documented in studies of the decisionmaking of the U.S. Courts of Appeals as a whole.[29] For this analysis of decisionmaking in a single circuit, one also would expect that judges appointed by Republican administrations are more likely to support a conservative position when compared to those appointed by Democrats.

Prior research suggests small but significant cleavages in the decisionmaking of judges appointed by Presidents of the same party.[30] Scholars examining voting by judicial appointees of Democratic Presidents have found the Carter cohort to be more liberal.[31] This also may hold in an analysis limited to the Ninth Circuit for several reasons. To begin, President Carter appointed fifteen judges to the Ninth Circuit with ten of those appointments to newly created seats, and he also employed commissions that effectively minimized the influence of home state senators. In contrast, President Clinton faced constraints from Republican leaders in the Senate throughout most of his two terms. Although Clinton ultimately named fourteen judges to the Ninth Circuit, these constraints meant that he did not enjoy the same flexibility experienced by President Carter when selecting nominees for this court. With respect to the Ninth Circuit, judicial voting by the Carter cohort is therefore expected to be more liberal than voting by Clinton appointees.

The policy impact of appointment cohorts also will be affected by the ideological makeup of the bench at the start of an appointing administration. If a

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27. Goldman, *Judicial Confirmation Wars*, *supra* note 2, at 905 (calculating figures).

28. Sheldon Goldman, *Federal Judicial Selection*, *in* JOHN GATES & CHARLES JOHNSON, THE AMERICAN COURTS: A CRITICAL ASSESSMENT 190 (1991).

29. For a comprehensive review of these studies, see DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS (2000); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219 (1999); Donald R. Songer & Sue Davis, *The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955–1986*, 43 W. POL. Q. 317 (1990).

30. *See* Sue Davis, *President Carter's Selection Reforms and Judicial Policymaking: A Voting Analysis of the United States Courts of Appeals*, 14 AM. POL. Q. 328 (1986); Donald Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 965 (1992).

31. Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 173 (1983); Susan Haire et al., *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274, 278 (2001).

judge is appointed by a Republican to a bench that is predominantly staffed by others who also were appointed by a Republican, the judge will be more likely to vote in a manner that is consistent with those policy preferences as the makeup of panels will reflect on the ideological majority. This scenario fairly describes the situation encountered by those appointed by President G.H.W. Bush to the Ninth Circuit from 1989 to 1991. His appointees joined a majority appointed by a Republican President. On the other hand, a judge appointed by a Republican to a bench in which the majority was appointed by Democrats will be more likely to have a voting record that is moderate for the same reason. In 1981, sixteen of the twenty-three judgeships in the Ninth Circuit were occupied by those appointed during Democratic presidential administrations.[32] As a result, a Reagan appointee likely sat on panels whose two other members were judges appointed by Democratic Presidents. Deference to the ideological majority is also reinforced by the potential for rehearing en banc. Given these differences in the existing ideological makeup of the Ninth Circuit over time, one would expect that judicial decisions by Reagan appointees will be more moderate than those appointed by G.H.W. Bush, who took seats on a bench more evenly split between Democrats and Republicans.

It is less clear, however, whether judicial selection strategies affect the ideological cohesion of an appointment cohort.[33] Accounts of federal judicial selection would suggest that Presidents who utilized judicial appointments to advance policy goals, such as Reagan and G.H.W. Bush, would be more likely to appoint ideologically cohesive cohorts that shared their views. In contrast, one would expect that Presidents Carter and Clinton, who utilized appointments for nonpolicy (partisan) reasons, would appoint a cohort with ideologically diverse views. Therefore, it is expected that voting by appointees of Democratic Presidents (Carter and Clinton) will be less ideologically cohesive than voting by those appointed under Republican Presidents (Reagan and G.H.W. Bush). Within these cohorts, it is also expected that efforts to diversify the judiciary may have contributed to officials nominating those who were not particularly strong proponents of the policy views of the appointing administration. Relative to other courts of appeals, Ninth Circuit "nontraditional" judges have been quite diverse and include women, African-Americans, Asian-Americans, and Hispanics. If the appointment of a nontraditional candidate to a Ninth Circuit position was motivated by the desire to bring diversity rather than advance a policy agenda, then one may expect that women and minority judges will demonstrate decisionmaking that is less ideologically cohesive when compared to their male, Caucasian colleagues.

Effects associated with the politics of judicial selection are expected to be modest as most cases raise issues for which precedent offers a clear resolution. According to one circuit judge, the right answer is evident in about seventy-five

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32. *See* Federal Judicial Center, History of the Federal Judiciary, http://www.fjc.gov/history/home.nsf (last visited Mar. 22, 2006).

33. *See* Ashlyn Kuersten & Donald Songer, *Presidential Success Through Appointments to the United States Courts of Appeals*, 31 AM. POL. RES. 107 (2003) (finding no relationship between agendas utilized by Presidents in judicial selection and judicial decisionmaking).

percent of the cases.[34] Appointment effects also may vary by issue area. In an analysis of cases before the Ninth and D.C. Circuits, scholars concluded that Reagan–Bush appointees did not influence policy resulting from environmental decisions as much as they had in civil rights and liberties.[35]

To adequately test for appointment effects, the present analysis includes a control for case type. It is expected that stronger differences in decisionmaking between appointment cohorts will emerge in civil rights and liberties cases.

II. DATA AND METHODS

Confirmation and appointment information were obtained from the Federal Judicial Center, the Multi-User Database on the Attributes of U.S. Appeals Court Judges,[36] and the Lower Federal Court Confirmation Database. Data on decisionmaking were drawn from the Multi-User Database on the U.S. Courts of Appeals.[37] As described in the documentation for the database, votes are coded in terms of the policy content along a liberal–conservative dimension. For example, a vote supporting the position of a litigant claiming a civil rights violation is coded as "liberal" whereas a vote against that position is coded as "conservative." In criminal cases, a vote supporting the position of the defendant (or prisoner) is coded as "liberal" whereas a vote against is "conservative." In labor-economics cases, liberal votes include those in which judges supported the positions taken by unions, the federal government in regulatory and tax cases, and individual plaintiffs in tort cases. Conservative votes include those in which judges supported the positions taken by management (against unions), opposed those taken by the federal government in regulatory and tax cases, and supported corporate defendants in tort and insurance cases filed by individuals. After narrowing the cases to those decided by judges sitting on the Ninth Circuit, this observation set consists of 2317 votes (thirty cases per year from 1977 to 2002). Because the dataset samples only decisions accompanied by a published opinion, the results of

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34. JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 41 (2002).

35. Lettie M. Wenner & Cynthia Ostberg, *Restraint in Environmental Cases by Reagan–Bush Judicial Appointees*, 77 JUDICATURE 217 (1994).

36. The dataset was compiled by Professors Gerard S. Gryski, Deborah J. Barrow, and Gary Zuk (NSF No. SBR 93-11999). *See* THE S. SIDNEY ULMER PROJECT: MULTI-USER DATABASE ON THE ATTRIBUTES OF UNITED STATES APPEALS COURT JUDGES, 1801–1994, http://www.as.uky.edu/polisci/ulmerproject/appctdata.htm (last visited Mar. 22, 2006) [hereinafter MULTI-USER DATABASE].

37. The multi-user database of decisions of the appeals courts from 1925 to 1996 is available at the Web site for The S. Sidney Ulmer Project. *See id.* For this analysis, observations were restricted to cases decided after 1977 in the Ninth Circuit. The database was supplemented with a sample of cases decided from 1997 to 2002. Funded by a grant from the National Science Foundation (NSF No. SES-0318349), this update to the multi-user database will extend observations for all circuits during these years. The collection of the database is near completion; data for all circuits will be available in the spring of 2006. Any opinions, findings, and conclusions or recommendations expressed in this material are those of the Author and do not necessarily reflect the views of the National Science Foundation.

this analysis should be interpreted with caution as the observations are limited to decisions with greater policy content.[38]

III. RESULTS

TABLE 1
Seats on the Ninth Circuit, 1977–2004, by Party of Appointing President (D=Democratic, R=Republican, V=Vacant)

	'77	'78	'79	'80	'81	'82	'83	'84	'85
Seat no.									
1	D	D	D	D	D	D	D	D	D
2	D	D	D	D*	D	D	D	D	D
3	R	R	R	R	R	R	R	R	R
4	R	R	R	R	R	R	R	R	R*
5	R	R	R	R	R	R	R	R	R
6	R	R	R	R	R	R	R	R	R
7	D*	D	D	D	D	D	D	D	D
8	D*	D	D	D	D	D	D	D	D
9	R	R	R	R	R	R	R	R	R
10	D	D	D	D*	D	D	D	D	D
11	R	R	R	R	R	R	R	R	R
12	R	R	R	D*	D	D	D	D	D
13	R	R	R	R	R	R	R	R*	R
14			D	D	D	D	D	D	D
15			D	D	D	D	D	D	D
16			D	D	D	D	D	D	D
17			D	D	D	D	D	D	D
18			D	D	D	D	D	D	D
19			D	D	D	D	D	D	D
20			D	D	D	D	D	D	D
21			D	D	D	D	D	D	D
22			D	D	D	D	D	D	D
23				D	D	D	D	D	D
24								R	R
25								R	R
26									R
27									R
28									R
	5D 8R	5D 8R	14D 8R	16D 7R	16D 7R	16D 7R	16D 7R	16D 9R	16D 12R

38. For a discussion of the decision to publish and the limitations associated with relying on published decisions, see Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325 (2001). For an illustration of the consequences of relying on published decisions in analyses of judicial decisionmaking, see David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (finding that judicial ideology interacts with publication decisions in Ninth Circuit asylum cases).

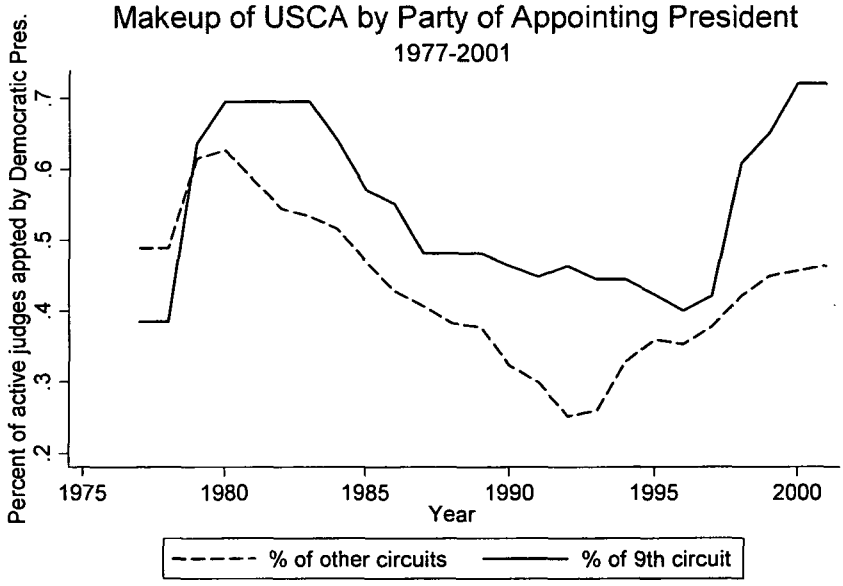
	'86	'87	'88	'89	'90	'91	'92	'93	'94
Seat no.									
1	D	D	D	D	D	D	D	D	D
2	D	D	D	D	D	D	D	D	D
3	R	R	R	R	R*	R	R	R	R
4	R	R	R	R	R	R	R	R	R
5	R	R	R*	R	R	R	R	R	R
6	R	R	R	R*	R	R	R	R	R
7	D	D	D	D	D	D	D	D	D
8	D	D	D	D	D	D	D	D	D*
9	R	R	R	R	R	R	R	R	R
10	R*	R	R	R	R	R	R	R	R
11	R	R	R	R	R	R*	R	R	R
12	D	D	D	D	D	D	D	D	D
13	R	R	R	R	R	R	R	R	R
14	D	D	D	D	D	D	D	V	V
15	D	D	D	D	D	D	D	D	D
16	D	V	V	R*	R	R	R	R	R
17	D	D	D	D	D	D	D	D	D
18	D	D	D	D	D	D	D	D	D
19	D	D	D	D	D	D	D	D	D
20	D	D	D	D	D	D	D	D	D
21	D	D	D	D	D	D	D	D	D
22	D	R*	R	R	R	R	R	R	R
23	D	D	D	D	D	D	D	D	D
24	R	R	R	R	R	R	R	R	R
25	R	R	R	R	R	R	R	R	R
26	R	R	R	R	R	R	R	R	R
27	R	R	R	R	R	R	R	R	R
28	R	R	R	R	R	R	R	R	R
	15D 13R	13D 14R	13D 14R	13D 15R	13D 15R	13D 15R	13D 15R	12D 15R	12D 15R

	'95	'96	'97	'98	'99	'00	'01	'02	'03	'04
Seat no.										
1	D	D	D	D	D	D	V	V	V	V
2	V	V	V	D*	D	D	D	D	D	D
3	R	R	R	R	R	R	R	R	R	V
4	R	R	R	R	R	D*	D	D	D	D
5	R	R	R	R	R	R	R	R	R	R
6	R	R	R	R	R	R	R	R	R	R
7	D	D	D	D	D	D	D	D	R*	R
8	D	D	D	D	D	D	D	D	D	D
9	R	R	V	D*	D	D	D	D	D	D
10	R	R	R	R	R	R	R	R	R	R
11	R	R	R	R	R	R	R	R	R	R
12	D	D	V	D*	D	D	D	D	D	D
13	R	R	V	V	D*	D	D	D	D	D
14	V	D*	D	D	D	D	D	D	D	V
15	D	V	V	D*	D	D	D	D	D	D
16	R	R	R	R	R	R	R	R	R*	R

17	D	D	D	D	V	D*	D	D	D	D
18	D	V	V	D*	D	D	D	D	D	D
19	D	D	V	V	V	V	D*	D	D	D
20	D	D	D	D	D	D	D	D	D	D
21	D	D	D	D	D	D	D	D	D	D
22	R	R	R	D*	D	D	D	D	D	D
23	D	D	D	D	D	D	D	D	D	D
24	R	R	R	V	V	V	V	R*	R	R
25	R	R	V	V	V	V	V	V	R*	R
26	R	R	R	R	R	R	R	R	R	R
27	R	R	V	V	V	D*	D	D	D	D
28	R	R	R	R	D*	D	D	D	D	D
	11D 15R	10D 15R	8D 11R	14D 9R	15D 8R	18D 7R	18D 7R	18D 8R	17D 10R	16D 9R

*Indicated turnover occurred during that year for the seat. Source: Federal Judicial Center (http://www.fjc.gov/history/home.nsf), and Multi-User Database on the Attributes of United States Appeals Court Judges, 1801–1994 (compiled by Professors Gryski, Barrow, and Zuk; http://www.as.uky.edu/polisci/ulmerproject/appctdata.htm).

FIGURE 1



Source: Federal Judicial Center (http://www.fjc.gov/history/home.nsf) and Multi-User Database on the Attributes of United States Appeals Court Judges (compiled by Professors Gryski, Barrow, and Zuk; http://www.as.uky.edu/polisci/ulmerproject/appctdata.htm).

Table 1 traces the makeup of the Ninth Circuit bench by identifying each occupant of a seat on the appeals court in terms of the party of the appointing president, beginning with 1977, the first year of the Carter Administration. As indicated in Table 1, dramatic shifts in the composition of the Ninth Circuit bench

occurred following the creation of new seats in 1979 and 1985. In 1978, five of the thirteen seats were held by judges appointed by Democratic Presidents. By the end of 1980, sixteen of the twenty-eight seats would be held by Democrats with fifteen of those occupants appointed by President Carter. The passage of a judges' bill in the early 1980s would add five more seats to the Ninth Circuit.[39] By the end of the Reagan and G.H.W. Bush Administrations, judges appointed by Republican Presidents would hold fifteen seats, a slim majority. With the election of Clinton, the makeup of the Ninth Circuit would shift back again. By 2000, eighteen judges appointed by Democratic Presidents would sit on the court with less than half that number—seven—appointed by Republican Presidents. Although half of the current seats on the Ninth Circuit were created by bills expanding the judiciary, these figures also suggest that vacancies were created by sitting judges who tended to time retirement decisions in a manner to create opportunities for administrations who shared the party of the earlier appointing president.[40] Figure 1 compares trends in the makeup of this court with the composition of other circuits over the same time period. Relative to other courts of appeals during this time period, Democratic Presidents have had more success in selecting those who will constitute a majority of active judges on the Ninth Circuit.[41]

TABLE 2
Ninth Circuit Judges' Votes by Party of Appointing President 1977–2002

Policy Direction	Democratic	Republican	Total
Conservative	44.9% (n=564)	56.9% (n=603)	50.4% (n=1,167)
Liberal	43.4% (n=546)	33.5% (n=355)	38.9% (n=901)
Mixed/no policy content	11.7% (n=147)	9.6% (n=102)	10.8% (n=249)
Total	(n=1257)	(n=1060)	(n=2317)

In the next stage of the analysis, we evaluate whether individual level judicial decisionmaking on the Ninth Circuit varies with the party of the

39. New seats created during the Carter Administration point to the important role of Congress (beyond confirmation) in shaping the policy legacy of an administration with respect to the courts. For more discussion on the politics surrounding changes in the federal court structure, see DEBORAH J. BARROW ET AL., THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE (1996); Jon R. Bond, *The Politics of Court Structure: The Addition of New Federal Judges*, 2 LAW & POL. Q. 181 (1980).

40. Research suggests that judges on the U.S. Courts of Appeals strategically time decisions to retire. *See* David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. RES. 458 (2000); James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991*, 48 POL. RES. Q. 573 (1995).

41. Research suggests that Republican Presidents historically have fared better in selecting judges for other circuits. *See* Susan Haire et al., *An Intercircuit Profile of Judges on the U.S. Courts of Appeals*, 78 JUDICATURE 101 (1994) (finding that approximately fifty-eight percent of all judges on the Ninth Circuit from 1891 to 1992 were appointed by a Republican President, "tied for seventh" when compared to other circuits).

appointing President. Previous studies of the combined U.S. Courts of Appeals have found modest differences associated with appointment cohorts. The present analysis supports the findings of that prior research. Although U.S. Courts of Appeals judges generally agree with one another more than they disagree, the results in Table 2 indicate statistically significant differences in decisionmaking associated with the party of the appointing President. Approximately 45% of votes by judges appointed by Democratic Presidents supported the conservative position compared to 57% of votes by judges appointed by Republican Presidents, a difference of 12%.

To further assess these differences, the unit of analysis was shifted from individual votes to judges. For each judge, a voting record was calculated to provide a rough indicator of liberalism in decisionmaking for that appointee. Records with at least eight votes were included for the analysis. A box plot was utilized (see Figure 2 below) to examine the distribution for each cohort. As hypothesized above, one would expect that Presidents Reagan and Bush would be more successful in appointing an ideologically cohesive cohort when compared to those appointed by Democratic Presidents Carter and Clinton, who did not focus as heavily on policy goals when making appointments to the U.S. Courts of Appeals.

The dimensions of the box itself provide a visual representation of the overall liberalism for each cohort as well as the ideological spread for that cohort. In Figure 2, the length of the "Democratic box" suggests the ideological spread for those appointed by Carter and Clinton is greater than that for the Republican cohort. The lines drawn from the box to the inner fences indicate the presence of several judges appointed by Democratic presidents who had voting records that departed substantially from others in the cohort. In contrast, the decisionmaking of the Republican cohort is more cohesive.

The boxplots also support the portrait of party-related differences in voting outlined in Table 2. The boundaries of the boxes outline the upper and lower ends for the middle of the distribution. The top of each box represents the judicial record that falls at the twenty-fifth percentile for that cohort with the bottom of the box representing the liberalism score that fell at the seventy-fifth percentile. For the Democratic cohort, these boundaries indicate that the group of appointees who fell in the middle half of the distribution had voting records that ranged from 41% (liberal) to 57%. In contrast, the middle half of the observations in the Republican distribution fell between 32% and 42%.

FIGURE 2
Boxplots of Judicial Voting Records, Ninth Circuit by Party of Appointing President

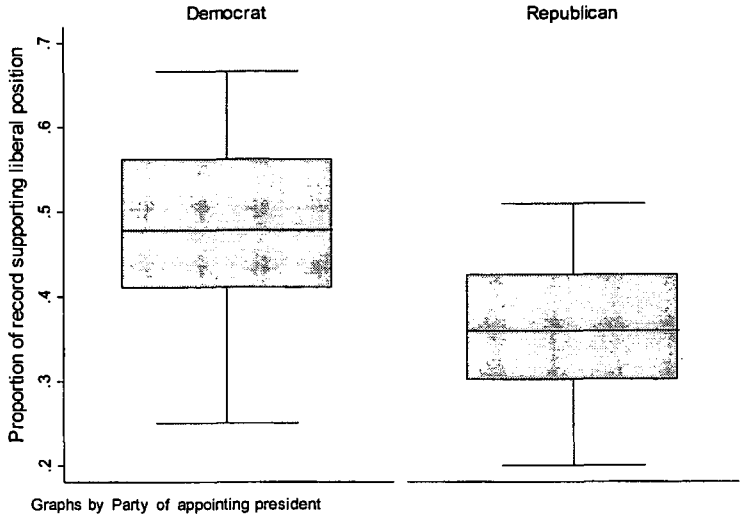
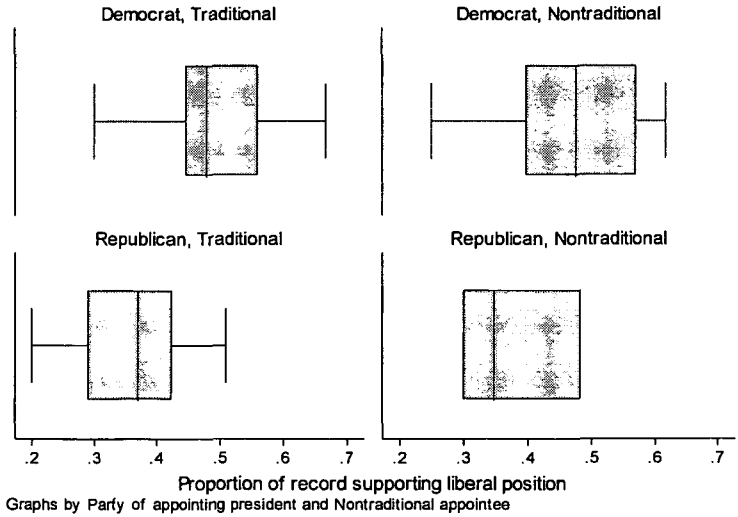


FIGURE 3
Boxplots of Judicial Voting Records, Ninth Circuit 1977–2002 (appointment year) by Party of Appointing President and Whether Nontraditional Appointee (Women and Racial Minorities)



To evaluate whether efforts to diversify the bench affect the ideological cohesion of an appointment cohort, boxplots by the party of the appointing President and the appointee's gender and race are included in Figure 3 above. Although the number of observations associated with nontraditional judges is small and should be interpreted with caution, these figures are suggestive. Nontraditional judges' voting records were more varied when compared to others in their respective appointment cohorts.

TABLE 3
Ninth Circuit Judges' Votes by Party of Appointing President and Policy Area 1977–2002

Policy Direction	Democratic	Republican	Total
Criminal law and procedure			
Conservative	59.2% (n=251)	73.4% (n=282)	66% (n=533)
Liberal	31.8% (n=135)	21.1% (n=81)	26.7% (n=216)
Mixed/no policy content	9.0% (n=38)	5.5% (n=21)	7.3% (n=59)
Total	(n=424)	(n=384)	(n=808)
Economic and labor policy			
Conservative	37.5% (n=198)	44.6% (n=192)	40.7% (n=390)
Liberal	50.9% (n=269)	42.3% (n=182)	47.1% (n=451)
Mixed/no policy content	11.6% (n=61)	13.0% (n=56)	12.2% (n=107)
Total	(n=528)	(n=430)	(n=958)
Civil rights and liberties			
Conservative	37.5% (n=100)	55.3% (n=114)	45.2% (n=214)
Liberal	46.1% (n=123)	34.9% (n=72)	41.2% (n=195)
Mixed/no policy content	16.5% (n=44)	9.7% (n=20)	13.6% (n=64)
Total	(n=267)	(n=206)	(n=473)

Previous research suggested the importance of controlling for case content.[42] The present analysis examines appointment effects across three case types: criminal law and procedure, economic and labor policy, and civil rights and liberties. After introducing these controls, statistically significant differences between appointment cohorts remained, but varied in magnitude by issue area. Differences were more pronounced in civil rights and liberties cases;

42. *See* SONGER ET AL., *supra* note 29, at 115 (finding sharp party-based differences in voting on civil rights cases before the U.S. Courts of Appeals from 1961 to 1988, but only minor party-based differences in voting on labor and economic regulatory issues).

approximately 38% of the votes by judges appointed by Democratic Presidents supported the conservative position, while those selected under Republican administrations supported the conservative position in 55.3% of their decisions. In economic cases, differences between those appointed by Democrats and Republicans were less dramatic—only 7.1%. Criminal defendants did not fare well generally, but were more likely to fail in an appeal before a judge appointed by a Republican President (approximately 21% of the decisions were prodefendant) when compared to those appointed by Democrats (31% of the decisions were pro-defendant).

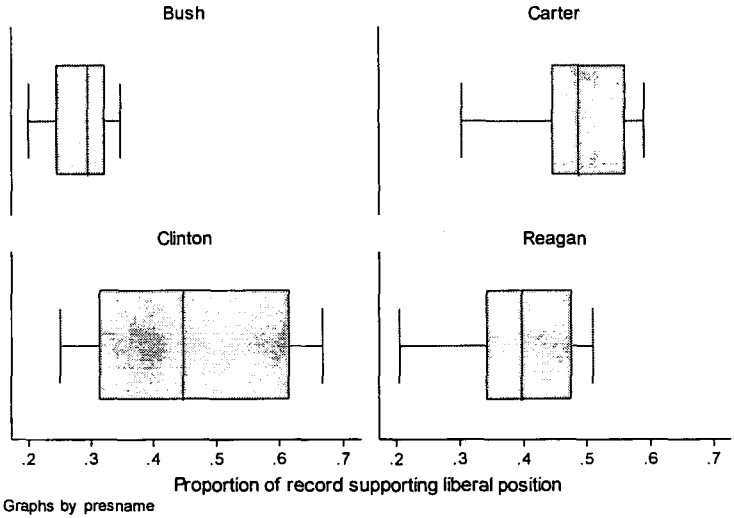
TABLE 4
Ninth Circuit Judges' Votes
by Appointing President
1977–2002

Policy Direction	Nixon-Ford	Carter	Reagan	Bush	Clinton	Total
Conservative	56.3% (n=241)	44.2% (n=405)	54.5% (n=247)	64.5% (n=89)	47.4% (n=101)	50.4% (n=1167)
Liberal	36% (n=154)	43.6% (n=400)	34.2% (n=155)	24.6% (n=34)	39.4% (n=84)	38.9% (n=901)
Mixed/no policy content	7.7% (n=33)	12.3% (n=112)	11.3% (n=51)	10.9% (n=15)	13.2% (n=28)	10.8% (n=249)
Total	(n=428)	(n=917)	(n=453)	(n=138)	(n=213)	(n=2317)

Previous studies suggest differences in decisionmaking among appeals court judges appointed by different Presidents of the same party.[43] These results, displayed in Table 4, offer only limited support for that contention. Of the cohorts analyzed for this Article, U.S. Courts of Appeals judges appointed by G.H.W. Bush cast votes that were more conservative than any other cohort. As noted above, it is possible that the difference in voting between Reagan and G.H.W. Bush appointees may be accounted for by differences in the partisan makeup of the bench at the time of appointment.

43. Research suggests differences in voting between appointment cohorts of the same political party, particularly in civil rights cases. *See* Gottschall, *supra* note 31, at 165; Haire et al., *supra* note 31, at 278.

FIGURE 4
Boxplots of Judicial Voting Records, Ninth Circuit 1977–2002 (appointment year) by Appointing President



Boxplots were again utilized to assess whether each President appointed a cohort that uniformly shared his views. In Figure 4, the length of the "Clinton box" suggests the ideological spread for this cohort is greater than any of the other appointment cohorts. The lines drawn from the box to the inner fences indicate the presence of a few Carter and Reagan judges whose voting records departed substantially from others in their respective cohorts. In contrast, the decisionmaking of the four appointees in the G.H.W. Bush cohort is uniformly conservative.

The results reported in the tables above suggest that differences in judicial decisionmaking in the Ninth Circuit are associated with the politics of selection. Those appointed by Democrats are more likely to support the liberal position than those appointed by Republicans, particularly in civil rights and liberties cases. The only remaining question is whether these party-based differences in the Ninth Circuit are similar to patterns in decisionmaking by judges in other circuits on the U.S. Courts of Appeals. To evaluate this question, civil rights and liberties cases decided from 1977 to 1999 are utilized. Data from the Multi-User Database were supplemented by stratified samples to yield twenty cases per circuit per year in this issue area. Votes of district court judges sitting by designation were excluded from the analysis.

TABLE 5
U.S. Court of Appeals Judges' Votes in Civil Rights Cases on the Ninth Circuit and Other Circuits by Party of Appointing President 1977–1999

Policy Direction	Democratic		Republican		Total	
	9th Cir.	Other Circuits	9th Cir.	Other Circuits	9th Cir.	Other Circuits
Conservative	45.4% (n=241)	50.7% (n=2063)	56.3% (n=285)	58.0% (n=3463)	50.7% (n=526)	55.0% (n=5526)
Liberal	43.5% (n=231)	38.3% (n=1560)	31.8% (n=161)	31.0% (n=1852)	37.8% (n=392)	34.0% (n=3412)
Mixed/no policy content	11.1% (n=59)	11.0% (n=447)	11.9% (n=60)	11.0% (n=657)	11.5% (n=119)	11.0% (n=1104)
Total	(n=531)	(n=4070)	(n=506)	(n=5972)	(n=1037)	(n=10,042)

Voting by Ninth Circuit Republican appointees was very similar to decisions of colleagues in other circuits who also were appointed by Republican Presidents. Interestingly, votes of judges appointed by Democratic Presidents in the Ninth Circuit were more liberal when compared to those appointed by Democrats in other U.S. Courts of Appeals. Further examination of this difference revealed that the difference is accounted for by judges appointed by President Carter.

IV. DISCUSSION

In a recent article, Erwin Chemerinsky noted that the image of the Ninth Circuit is one of a "far left court that is reversed more often than any other circuit."[44] As he dismissed this characterization as being inaccurate, Chemerinsky made several important observations. First, closer examination of reversal rates suggests that the Ninth Circuit is not singled out by the U.S. Supreme Court for sanctioning.[45] Second, one cannot label such a large circuit—with twenty-eight active judgeships (and numerous judges on senior status)—as being ideologically homogenous.[46] The findings reported here support Chemerinsky's impression of an ideologically diverse circuit. In addition, these results suggest that ideologically based patterns underlying this diversity are related to judicial selection. Yet the analysis also suggests the policy consequences of judicial appointments are more complex. For administrations that successfully appoint a majority on the circuit, the policy legacy of the President will extend beyond his appointees as individual judges often defer to the majority on the panel with additional consideration given to the makeup of the circuit given the potential for rehearing en banc.

Generally, throughout the time period considered (1977–2000), Republican appointees were in the minority on the Ninth Circuit. President Reagan

44. Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1 (2003).
45. *See id.* at 20.
46. *See id.* at 21.

clearly was more successful in appointing supermajorities on other U.S. Courts of Appeals, such as the Seventh Circuit. Nonetheless, the Reagan Administration benefited from the creation of five new seats on the Ninth Circuit. By the end of the G.H.W. Bush Administration, judges appointed by Republican Presidents held a slim majority on the Ninth Circuit. Given the emphasis on policy agendas in judicial selection during the Reagan–G.H.W. Bush era, it was not surprising that those appointed by Republicans compiled voting records that were more ideologically cohesive when compared to those appointed by Democrats.

With a record number of appointments to seats on the Ninth Circuit, President Carter was able to appoint a large cohort who established the parameters of judicial policy in this circuit for decades after his Administration. Although President Clinton appointed fourteen judges to the Ninth Circuit, the voting records of his appointees are less ideologically cohesive and decidedly more moderate than those appointed by his Democratic predecessor. Like Carter, Clinton judges will likely hold a majority of the active judgeships on the Ninth Circuit for many years into the future. President G.W. Bush has named only four judges to the circuit—substantially fewer than earlier administrations. With continued debate over presidential nominations to the U.S. Courts of Appeals, it is likely that the differences characterizing appointment cohorts in the past will not increase, but instead perhaps diminish over time as Presidents seek to find middle ground with "confirmable" nominees.

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