

Studying Judges with Numbers

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In the last two decades, the United States has witnessed some exceedingly heated debates about the composition of the federal judiciary. Are judges “activists”? Should they stop “legislating from the bench”? Are they abusing their authority? Or are they protecting fundamental rights in a way that is indispensable in a free society? What, exactly, are they doing, and what should they do differently?

Several American presidents have sought to populate the federal courts with judges who, it was hoped, were likely to rule in their preferred directions. In issues including abortion, separation of church and state, environmental protection, and criminals’ rights, presidents have wanted judges of a particular kind. On occasion, the United States Senate has checked the president by blocking nominees who were expected to rule in ways that senators disapproved. Under President Bill Clinton, for example, the Republican-controlled Senate Committee on the Judiciary

refused to schedule hearings on a number of nominees, effectively preventing their confirmation. To some Republicans, President Clinton's nominees were simply too "liberal." Under President George W. Bush, a Democratic minority in the Senate succeeded in filibustering several controversial nominees. To some Democrats, President Bush's nominees were simply too "conservative." In 2005 Republican and Democratic senators reached an agreement by which most of President Bush's controversial nominees would be confirmed—but the filibuster has yet to be taken off the table.

The objection to presidential nominees to the federal bench has, of course, been most fierce during debates over the Supreme Court. In 1987 President Ronald Reagan's nomination of an extremely distinguished appellate judge, Robert Bork, was rejected by the Senate by a vote of 58 to 42. The rejection was largely based on ideological grounds; no one argued that Judge Bork was incompetent, and the real concern, to his critics, was his likely pattern of votes. President Clinton's choice of Supreme Court nominees was constrained by the anticipated reactions of Republican senators. His ultimate choices, Ruth Bader Ginsburg and Stephen Breyer, were "precleared," in the sense that prominent Republicans signaled that they would be acceptable.

In his own decisions about Supreme Court nominees, President George W. Bush has been entirely aware of the possible negative votes of Democratic senators. His first nominee, John Roberts, was widely regarded as superb in quality and also as acceptable, on ideological grounds, to many moderates and liberals. President Bush's second nominee, White House Counsel Harriet Miers, withdrew after a series of complaints about her lack of experience and about what some conservatives considered to be her insufficiently conservative record. Samuel Alito, President Bush's third nominee, attracted considerable controversy. While

no one doubted his credentials, a number of Democrats objected that he was simply too conservative—unduly respectful of executive power and unlikely to safeguard individual rights. Nonetheless, Justice Alito was confirmed by a vote of 58 to 42.

But the focus on the Supreme Court should not obscure the immense importance of lower court nominees. The decisions of lower courts are rarely reviewed by the Supreme Court; their decisions are effectively final. As a result, the courts of appeals play an exceedingly large role both in settling disputes and determining the likely direction of the law. It is for this reason that the likely votes of lower court nominees have played a significant role in national debates.

Underneath these political contests is a degree of uncertainty about how judges actually behave. What is the relationship between judicial votes and political convictions? Is it sensible to divide judges into “liberals” and “conservatives”? Or is it better to say that judges generally follow the law, in a way that makes political views irrelevant? Might the answer to both of the last two questions be a firm no?

Judges and Presidents

The major goal of this book is to shed new light on these questions, simply by looking at what judges actually do.¹ Our focus is insistently empirical. We have compiled a large and distinctive data set, consisting of many thousands of judicial votes in numerous domains. We aim to analyze the data to answer some unresolved questions about the federal judiciary. Almost all of our focus is on the courts of appeals, which are uniquely easy, and uniquely informative, to study. For our purposes, a particular virtue of the federal courts is their intermediate character. The Supreme Court resolves the most difficult and contested cases,

and hence it is not exactly a surprise if Republican appointees vote differently from Democratic appointees. The federal district courts conduct trials, and many of their cases are routine, at least as a matter of law; it should not be surprising if, in such cases, Republican and Democratic appointees are essentially indistinguishable. (We are not claiming that this is in fact the case in all domains.) The courts of appeals decide cases that are often difficult and contested, but usually not so much so as those that reach the Supreme Court. The decisions of these courts therefore provide an exceedingly illuminating test of the role of politics in judicial judgments.

With respect to federal courts of appeals, the United States has, in fact, been conducting an extraordinary and longstanding natural experiment. The experiment involves the relationship between presidential choices and judicial decisions. The vast majority of appellate decisions are rendered by three-judge panels, and the membership of these panels is the result of a random draw from the group of judges sitting on the circuit in which the case is appealed. Because of the random assignment of judges, it is possible to study how Republican and Democratic appointees differ from one another in a remarkably wide range of cases. If presidents care about a judge's likely rulings—and what president does not?—then an investigation of the effect of presidential appointments will tell us something important. Most simply, it will show whether Republican and Democratic presidents select judges with different views, and it will show the extent to which they differ as well. Such an investigation will also provide some information on the relationship between what might be called “political ideology” and judicial judgments.

To be sure, many people believe that, as a general rule, political ideology should not and does not affect legal judgments. We agree, and we shall attempt to show that this belief contains some

important truth.² Frequently the law is clear, and judges should and will simply implement it, no matter who has appointed them. Both President George W. Bush and Senator John Kerry, for example, have emphasized that judges ought to follow the law, and we shall provide considerable evidence to suggest that they do exactly that. But what happens when the law is unclear? In that event, it is hopelessly inadequate to ask judges to “follow the law.” By hypothesis, the law does not provide anything to “follow.” In such cases, does the political affiliation of the appointing president matter? What role does ideology play then?

It is easy to imagine two quite different positions. It might be predicted that even when the law is unclear, in the sense that binding precedents cannot be found, ideology does not matter; the legal culture itself imposes a sharp discipline on judges, so that judges vote as judges rather than as ideologues. Perhaps judges protect freedom of speech, or equality under the law, regardless of their personal beliefs, even in difficult cases not controlled by existing law. Alternatively, it might be predicted that, in hard cases, the judges’ “attitudes” end up predicting their votes, so that liberal judges, or judges appointed by Democratic presidents, show systematically different votes from those of conservative judges, or those appointed by Republican presidents. The “attitudinal model,” influential and well known in law and politics, attempts to explain judicial votes in just these terms.³

It is important to make a distinction here. We might want to test the effects of the political affiliation of the appointing president; alternatively, we might want to test the effects of judicial ideology itself. It would be exceedingly valuable to know whether and where Republican appointees differ from Democratic appointees. It would also be valuable to know the differences across presidents. For example, do the appointees of President Bill Clinton differ from those of President Jimmy Carter? What

are the differences, if any, among the appointees of Presidents Richard Nixon, Ronald Reagan, George H. W. Bush, and George W. Bush?

We are able to make considerable progress on these questions, and hence we shall focus throughout the book on the political affiliation of the appointing president. But that affiliation is only a proxy for judicial ideology. Democratic presidents have been known to appoint relatively conservative judges, and Republican presidents have been known to appoint relatively liberal ones.⁴ In American history, many presidents have followed the practice of “senatorial courtesy,” by which senators from the president’s party have a substantial role in picking judges to fill seats in their own states.⁵ As a result, there can be a significant difference between a president’s political commitments and the general approach of the judges appointed by that president.

This point should not be overstated. In the modern era, at least, presidents are usually interested in ensuring that judicial appointees are of a certain stripe. A Democratic president is unlikely to want to appoint judges who will seek to overrule *Roe v. Wade*⁶ and strike down affirmative action programs. A Republican president is unlikely to want to appoint judges who will interpret the Constitution to require states to recognize same-sex marriages or to eliminate religion from the public sphere. It is reasonable to hypothesize that as a statistical regularity, judges appointed by Republican presidents (hereinafter described, for ease of exposition, as Republican appointees) will be more conservative than judges appointed by Democratic presidents (Democratic appointees, as we shall henceforth call them).

But is this hypothesis true? If so, when is it true, and to what degree is it true? What exactly is meant, in this context, by “more conservative”? We shall try to answer these questions. In a way,

the political affiliation of the appointing president actually provides a more interesting benchmark than ideology itself, assuming that we could obtain direct access to it (as some studies have done, in efforts to explore the role of judicial ideology as such).⁷ Does it matter whether judges are appointed by a Democratic or a Republican president? If so, when does it matter, and how much does it matter? What difference do particular presidents make? Were President Reagan's appointees, for example, different from President Nixon's appointees?

There is a more subtle and more intriguing possibility. Human beings are often influenced by other human beings, particularly those with whom they frequently interact. When like-minded people get together, they often go to extremes.⁸ And sometimes people suppress their private views and conform to the apparent views of others. Drawing on these findings, we might speculate that federal appellate judges are subject to "panel effects"—that the votes of individual judges are affected by the votes of other judges on the panel. On a three-judge panel, a judge's likely vote might well be affected by the other two judges assigned to the same panel. In particular, we might ask: *Does a judge vote differently depending on whether she is sitting with no judge, one judge, or two judges appointed by a president of the same political party?*

It might be hypothesized that a Republican appointee, sitting with two Democratic appointees, would be more likely to vote as Democratic appointees typically do—whereas a Democratic appointee, sitting with two Republican appointees, would be more likely to vote as Republican appointees typically do. But is this, in fact, the usual pattern? Is it an invariable one? Recall that judges in a given circuit are assigned to panels (and, therefore, to cases) randomly. A fortunate consequence is that the existence of a large data set allows these issues to be investigated empirically.⁹

Controversial Cases and Three Hypotheses

In this book, we examine many different areas of the law, focusing on a number of controversial issues that seem especially likely to reveal divisions between Republican and Democratic appointees. Our list of areas is long. We explore cases involving abortion, affirmative action, campaign finance, capital punishment, Commerce Clause challenges to congressional enactments, commercial speech, congressional abrogation of state sovereign immunity, the Contracts Clause, criminal appeals, disability discrimination, the Federal Communications Commission (FCC), gay and lesbian rights, environmental regulation, the National Labor Relations Board (NLRB), the National Environmental Policy Act¹⁰ (NEPA), obscenity, standing, school and racial segregation, piercing the corporate veil, punitive damages, race discrimination, sex discrimination, sexual harassment, and takings of private property without just compensation. We will offer a more detailed description of our subjects and methods below.

Our initial goal is to examine three hypotheses:

1. *Ideological voting.* In ideologically contested cases, involving the most controversial issues of the day, a judge's ideological tendency can be predicted by the party of the appointing president: Republican appointees vote very differently from Democratic appointees.

2. *Ideological dampening.* A judge's ideological tendency is likely to be dampened if she is sitting with two judges of a different political party. For example, a Democratic appointee should be less likely to vote in a stereotypically liberal fashion if accompanied by two Republican appointees, and a Republican appointee should be less likely to vote in a stereotypically conservative fashion if accompanied by two Democratic appointees. If ideological dampening occurs, it follows that in disability dis-

crimination cases, Democratic appointees will be more likely to side with employers when sitting with two Republican appointees—and that when sitting with two Democratic appointees, Republican appointees will be more likely to side with disabled people.

3. *Ideological amplification.* A judge's ideological tendency, in ideologically contested cases, is likely to be amplified if she is sitting with two judges from the same political party. A Democratic appointee should show an increased tendency to vote in a stereotypically liberal fashion if accompanied by two Democratic appointees, and a Republican appointee should be more likely to vote in a stereotypically conservative fashion if accompanied by two Republican appointees. If this hypothesis turns out to be true, it would have large implications, because it would suggest that like-minded judges might well go to extremes.

Note that for purposes of measuring ideological dampening and ideological amplification, we take, as the baseline for analysis, cases in which a judge sits with one Republican appointee and one Democratic appointee. Unfortunately, we do not have any record of how federal judges vote in isolation. But it seems natural, and at least illuminating, to start with cases in which judges sit with an appointee of both parties, and to see how their patterns shift when they sit with two appointees of a single party.

We find that in numerous areas of the law, all three hypotheses are strongly confirmed.¹¹ Each hypothesis finds support in federal cases involving affirmative action, NEPA challenges, congressional abrogation of state sovereign immunity, sex discrimination, disability discrimination, sexual harassment, review of environmental regulations, campaign finance, piercing the corporate veil, racial discrimination, segregation, obscenity, Contracts Clause violations, restrictions on commercial advertising, and the NLRB. In such cases, our aggregate data support all three hypotheses.

Indeed, we find many extreme cases of ideological dampening, which we might call “leveling effects,” in which party differences are wiped out by the influence of panel composition. When leveling effects are present, Democratic appointees, when sitting with two Republican appointees, are at least as likely to vote in the stereotypically conservative fashion as are Republican appointees when sitting with two Democratic appointees. In fact, we find many areas in which Democratic appointees sitting with two Republicans show *more* conservative voting patterns than do Republicans sitting with two Democratic appointees. The same shift can be shown for Republican appointees as well.

Perhaps most important, we also find strong amplification effects, in which judges show far more ideological voting patterns when they are sitting with two judges appointed by a president of the same political party. Amplification effects are so strong that if the data set in the relevant cases is taken as a whole, Democratic appointees sitting with two Democratic appointees are about *twice* as likely to vote in the stereotypically liberal fashion as are Republican appointees sitting with two Republican appointees. This is a far larger disparity than the disparity between Democratic and Republican votes when either is sitting with one Democratic appointee and one Republican appointee.

In most of the areas investigated here, the political party of the appointing president is a fairly good predictor of how individual judges will vote. Hence the affiliation of the appointing president matters a great deal to the content of the law. But in those same areas, the political party of the presidents who appointed the other two judges on the panel is at least as good a predictor of how individual judges will vote! If you would like to know how a particular judge is likely to vote in a controversial area of the law, you will often do well to ask: What is the political affiliation of the president who appointed the two other judges on the

panel? All in all, Democratic appointees show somewhat greater susceptibility to panel effects than do Republican appointees. What this means is that Democratic appointees are more vulnerable to the views of their fellow judges, and hence more likely to show both dampening and amplification.

But there are noteworthy counterexamples to our general findings. In five important areas, ideology does not predict judicial votes, and hence all three hypotheses are refuted. This is the pattern in cases involving criminal appeals, takings claims, challenges to punitive damages awards, standing to sue, and Commerce Clause challenges to congressional enactments. In two other areas, the first hypothesis is supported, but the second and third hypotheses are refuted, and hence ideological voting is unaccompanied by panel effects. These areas—the only ones in which judges are unaffected by other judges—are abortion and capital punishment. In both of these areas, judges apparently vote their convictions at a consistent rate and are not influenced by panel composition. The area of gay and lesbian rights similarly shows ideological voting without dampening or amplification—but because of the small sample size, we can say only that the second and third hypotheses are neither supported nor refuted.

We offer a number of other findings. We show that variations in panel composition lead to dramatically different outcomes, in a way that creates serious problems for the rule of law. In the cases we analyze, a panel composed of three Democratic appointees issues a liberal ruling 62 percent of the time, whereas a panel composed of three Republican appointees issues a liberal ruling only 36 percent of the time. The difference of 26 percent is strikingly large. Not surprisingly, mixed panels show intermediate figures. A panel composed of two Republican appointees and one Democrat issues a liberal ruling 41 percent of the time; a panel

composed of two Democratic appointees and one Republican does so 52 percent of the time.

These differences should not be overread. Despite their size, they certainly do not show that the likely result is foreordained by the composition of the panel. There is a substantial overlap between the votes of Republican appointees and those of Democratic appointees. The political affiliation of the appointing president is hardly everything. But there can be no doubt that the litigant's chances, in the cases we examine, are significantly affected by the luck of the draw.

To understand the importance of group dynamics on judicial panels, it is important to emphasize that a Democratic majority, or a Republican majority, has enough votes to do what it wishes. Apparently, however, a large disciplining effect comes from the presence of a single panelist from another party. Hence all-Republican panels show far more conservative patterns than majority Republican panels, and all-Democratic panels show far more liberal patterns than majority Democratic panels.

Our tale is largely one of effects from the political affiliation of the appointing president on individual voting and panel outcomes. But the tale is not unqualified. As noted, we find several areas in which the appointing president does not matter at all—even though the pool of cases studied here is limited to domains where it would be expected to play a large role. Outside of many of the domains we study, Republican and Democratic appointees are far less likely to differ. The absence of party effects in important and contested areas (for example, criminal appeals, takings, punitive damages, standing to sue, and Commerce Clause challenges) testifies to the possibility of commonalities across partisan lines, even when differences might be expected. And where party differences are statistically significant, they are usually not huge.

Note that in the entire sample, Democratic appointees issue a liberal vote 52 percent of the time, whereas Republicans do so 40 percent of the time. The full story emphasizes the significant effects of ideology and also the limited nature of those effects. We shall spend considerable time on the complexities here.

Among lawyers and law professors, there is also a great deal of speculation about whether some of the circuit courts, in some parts of the country, are more conservative than others. Disaggregating our data, we also provide evidence of how ideology varies by circuit, showing that by a simple measure, the Ninth, Third, and Second Circuits are the most liberal, while the Seventh, Eighth, and First are the most conservative. In terms of basic patterns, we find striking similarities across circuits. In *all* circuits, Democratic appointees are more likely than Republican appointees to vote in a stereotypically liberal direction. At the same time, however, a judge's vote is generally no better predicted by his or her own party than it is by the party of the other two judges on the panel.

We shall also investigate changes across time. Are courts becoming more liberal or more conservative? Is there a difference between the judicial appointees of President Reagan and President George W. Bush? What might be said about the appointees of President Clinton? What difference does a "big" decision, such as *Roe v. Wade*, make to judicial voting patterns over time? We shall give some reason to think that the federal courts are indeed becoming more conservative—and that there is no significant ideological difference among the appointees of Presidents Reagan, George H. W. Bush, and George W. Bush. But these questions are especially difficult to investigate, because the mix of cases changes over time, with the emergence of new areas of the law and with strategic decisions by prospective litigants about when to sue and when to settle.

Explanations and Implications

Our main goal is simply to present and analyze the data—and to show the extent to which the three central hypotheses, and several others, find vindication. But we also aim to give some explanation for our findings and to relate them to some continuing debates about the role of ideology on federal panels. Our data do not reveal whether ideological dampening is a product of persuasion or instead a form of collegiality. If Republican appointees show a liberal pattern of votes when accompanied by two Democratic appointees, it might be because they are convinced by their colleagues. Alternatively, they might suppress their private doubts and accept the majority's view. It is also possible that they are able to affect the reasoning in the majority opinion, trading their vote in return for a more moderate statement of the law.

In any case, it is reasonable to say that the data show the pervasiveness of what we shall call the “collegial concurrence”: a concurrence by a judge who signs the panel's opinion either because he is persuaded by the shared opinion of the two other judges on the panel or because it is not worthwhile, all things considered, to dissent. The collegial concurrence can be taken as an example, in the unlikely setting of judicial panels, of responsiveness to conformity pressures.¹² Such pressures make it more likely that people will end up silencing themselves, or even publicly agreeing with a majority position, simply because they would otherwise be isolated in their disagreement. We will discuss these issues at greater length after presenting the data.

We also find evidence within the federal judiciary of *group polarization*, by which like-minded people move toward a more extreme position in the same direction as their predeliberation views.¹³ If all-Republican panels are overwhelmingly likely to strike down campaign finance regulation, and if all-Democratic

panels are overwhelmingly likely to uphold affirmative action programs, group polarization is likely to be a reason. Finally, we offer indirect evidence of a “whistleblower effect”: A single judge of another party, while likely to be affected by the fact that he is isolated, might also influence other judges on the panel, at least where the panel would otherwise fail to follow existing law.¹⁴

We believe that our findings are of considerable interest in themselves, simply because they tell us a great deal about judicial behavior. We think that the findings also reveal something about human behavior in many contexts. A wide range of social science evidence shows conformity effects: When people are confronted with the views of unanimous others, they tend to yield.¹⁵ Sometimes they yield because they believe that unanimous others cannot be wrong; sometimes they yield because it is not worthwhile to dissent in public.¹⁶ In showing a tendency to conform, federal judges appear to act like other human beings do.

As we have mentioned, a great deal of social science evidence shows that like-minded people tend to go to extremes.¹⁷ In the real world, this hypothesis is extremely hard to test in light of the range of confounding variables. But our data provide strong evidence that like-minded judges also go to extremes: The probability that a judge will vote in one or another direction is greatly increased by the presence of judges appointed by the president of the same political party. In short, we claim to show both strong conformity effects and group polarization within federal courts of appeals. If these effects can be shown there, then they are also likely to be found in many other diverse contexts.

In fact, the presence of such effects both supports and complicates what is probably the most influential method for explaining judicial voting: the “attitudinal model,”¹⁸ to which we have previously referred. According to the attitudinal model, judges have certain “attitudes” toward areas of the law, and these attitudes

are good predictors of judicial votes in difficult cases.¹⁹ Insofar as party effects are present, our findings are highly supportive of this idea; in many areas, we provide fresh support for the attitudinal model. But that model does not come fully to terms with panel effects, which can both dampen and amplify the tendencies to which judicial “attitudes” give rise. Since panel effects are generally as large as party effects, and sometimes even larger, the attitudinal model misses a crucial factor behind judicial votes.

A disclaimer: The federal reporters offer an astonishingly large data set of judicial votes, including over two hundred years of votes ranging over countless substantive areas. Our own investigation is limited to areas that, by general agreement, are ideologically contested—enough to produce possible disagreements in the cases that find their way to the courts of appeals.²⁰ We have only scratched the surface. Of course, it would be extremely interesting to know much more.²¹ Might ideological voting and panel effects be found in apparently nonideological cases involving, for example, bankruptcy, torts, and civil procedure? How do the three hypotheses fare in the early part of the twentieth century, when federal courts were confronting the regulatory state for the first time? In cases involving minimum wage and maximum hour laws, did Republican appointees differ from Democratic appointees, and were panel effects also significant?

In the future, it should be possible to use the techniques discussed here to test a wide range of hypotheses about judicial voting patterns. One of our central goals is to provide a method for future analysis, a method that can be used in countless contexts. With suitable adaptations, the data that we have examined can also shed light on many other questions, including the ideological orientations of particular judges, not merely of large sets of appointees.