

Online Appendix for “The Interplay of Ideological Diversity, Dissents, and Discretionary Review in the Judicial Hierarchy: Evidence from Death Penalty Case”

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A-1 Supplementary Figures

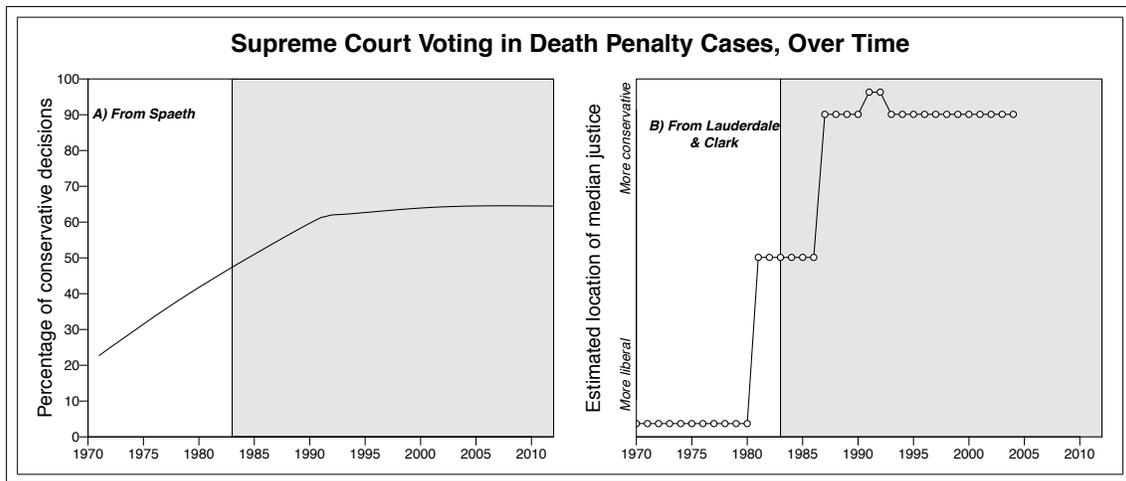


Figure A1: *The increasing conservatism of the Supreme Court in death penalty cases, over time.* The left plot depicts a summary of the proportion of conservative decisions in each term from 1970 to 2012, as estimated from Spaeth et al. (2010). To smooth out year-to-year variation that arises from the small number of cases per term, we present a lowess line (span=1) to show the trend over time. The shaded region indicates the years in which we have data (1983 to 2012). The right plot depicts the ideal point of the median justice in death penalty cases from 1970 to 2004, as estimated by Lauderdale and Clark (2014). Both time series show a Supreme Court that has become increasingly conservative over our period of study.

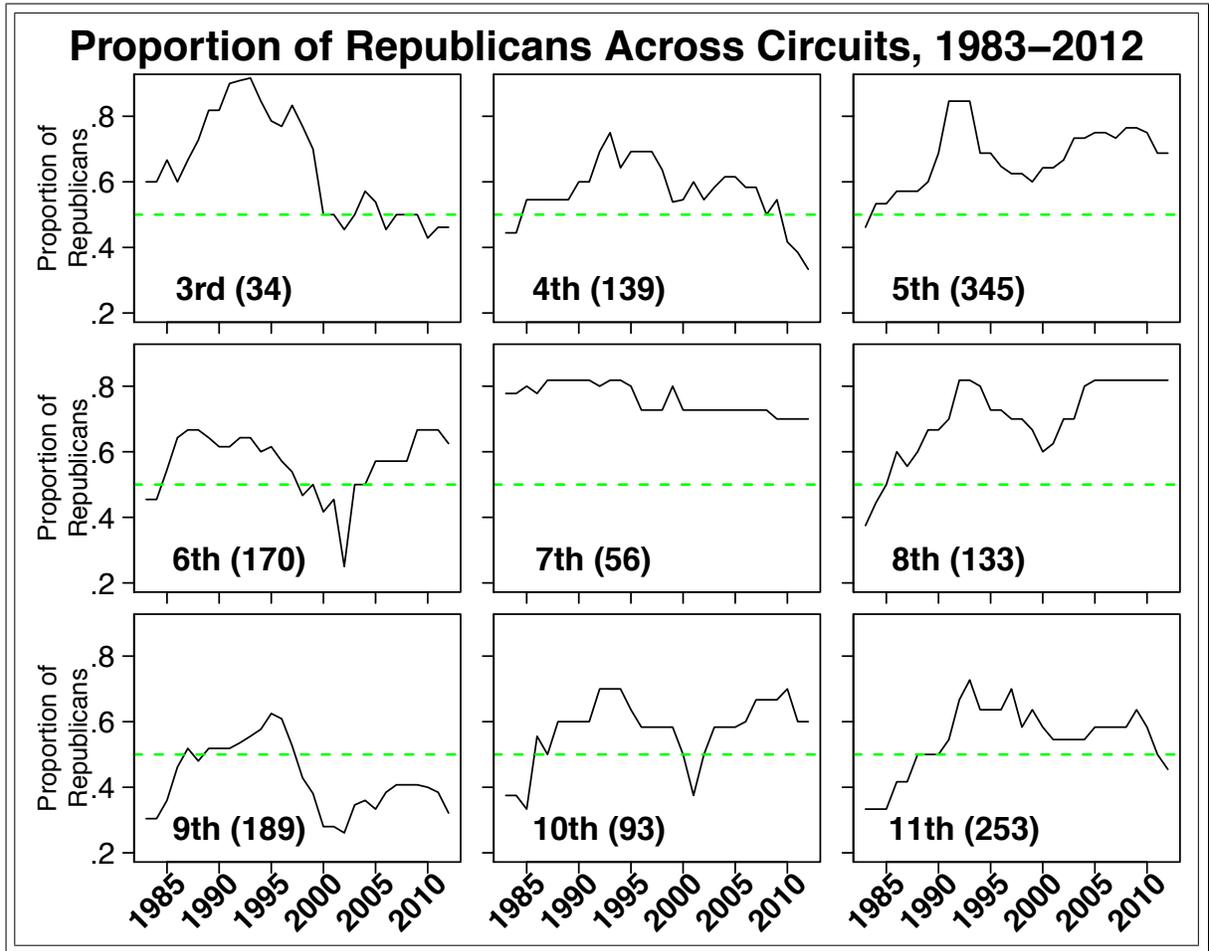


Figure A2: *The proportion of active Republican judges in each circuit in which death penalty cases in our sample were heard, from 1983 to 2012. The numbers in parentheses depict the number of cases heard in each circuit, in our data (note that these samples are partly a function of the dissent and en banc rates in each circuit, due to our sampling strategy.)*

A-2 Case selection and coding procedures

Our data come from death penalty cases heard by three-judge panels in the Courts of Appeals between 1983 and 2012. We define a death penalty case to be one where a death row inmate is a party and the primary question before the Court would have a direct bearing on his pending execution. We exclude, for example, cases brought by death row inmates about prison conditions (because the defendant’s execution is not in question). We also exclude all cases where the defendant is petitioning to be put to death and all habeas corpus cases brought by a next friend.

We collected the data by searching Westlaw and reading the results. Following the protocol used by Fischman (2013), we used the following Westlaw search: (CAPITAL /S (PUNISHMENT MURDER CRIME OFFENSE)) (SENTENC! /S DEATH). Using these terms, we collected all death penalty cases in 1989, 1999, and 2009. These years served as a pilot dataset; from them we learned the frequency with which judges dissent in death penalty cases and the frequency of *en banc* review. From the pilot dataset, we learned that dissent occurs in about 14% of cases and that unanimous decisions are reviewed *en banc* about .64% of the time. Because each of these events occur infrequently, we use a choice-based approach to collect cases from the remaining years, collecting all cases where we observe dissent, all cases reviewed *en banc*, and a random sample of unanimous cases that were not reviewed.

We implement this as follows. For all years between 1983 and 2012 (except 1989, 1999, and 2009), we used the Westlaw search terms (CAPITAL /S (PUNISHMENT MURDER CRIME OFFENSE)) (SENTENC! /S DEATH) & SY,DI(DISSENT!) to collect all death penalty cases in which one or more judges dissented. Then, we collected a random sample of cases in which no judges dissented; we collected approximately as many unanimous cases as there were non-unanimous cases in that year.

We collected all three-judge panels’ decisions that were reviewed *en banc* using the Westlaw search terms (CAPITAL /S (PUNISHMENT MURDER CRIME OFFENSE)) (SENTENC! /S DEATH) & SY,DI(BANC % “BANC DENIED”) (again, for all years between 1983 and 2012 except 1989, 1999, and 2009). Thus, our finalized dataset includes every death penalty case heard by a three-judge panel in 1989, 1999, and 2009; for all other years, our data includes all non-unanimous decisions, all unanimous decisions that were reheard *en banc*, and a random sample of unanimous decisions that were not reheard *en banc*.¹ Note that if a case was not reheard *en banc*, it is coded 0. That is, we don’t have information on whether *en banc* was requested by the litigants or by a judge on the circuit (cf. Giles, Walker and Zorn (2006)).

We are thus left with a dataset that is not representative of the population of death penalty cases—it over-represents non-unanimous cases and cases reheard *en banc*, and under-represents unanimous cases not reheard *en banc*. To correct for this, we weight all our

¹In some instances, *en banc* review is not preceded by a decision by a three-judge panel of the Courts of Appeals; e.g. if the full circuit decides to directly review a district court decision. We did not include such cases.

	Population		Sample		Weights	
	Not reviewed	Reviewed	Not reviewed	Reviewed	Not reviewed	Reviewed
Unanimous	85.18	0.54	48.4	3.3	1.76	0.17
Non-unanimous	12.13	2.16	41.8	6.5	0.29	0.33

Table A-1: Rates of dissent and *en banc* review in the population (left) and in our sample (center). Weights correct for over- and under-representation of various types of cases.

observations with inverse population proportions. Table A-1 provides population and sample proportions, as well as weights, for all relevant classes of cases. For example, 48.4% of our sample consists of unanimous cases that were not reviewed *en banc*. In an average year, however, 85.18% of cases are decided unanimously and not reviewed *en banc*. Since these cases are underrepresented in our sample, they receive a weight greater than 1—specifically, a weight of $\frac{85.18}{48.4}$, or 1.76. Cases from 1989, 1999, and 2009 all receive a weight of 1. Cases from other years receive the appropriate weight for all analyses we perform.

Some cases are reheard by the panel, and are amended, superseded, or otherwise changed upon rehearing. When this happens, we use the last decision—that is, the decision the panel ultimately reaches. On very few occasions, the appeals of sentences of multiple defendants are heard in a single case. In most of these cases, the court is deciding one legal question that would apply to multiple defendants (such as the constitutionality of lethal gas, as in 147 F.3d 1158). In those instances we combine the defendants into a single observation in our data. In contrast, in a handful of cases the circumstances of the case are such that the court could reach different outcomes for each defendant. (An example of such a case is 998 F.2d 1426, in which the court held that defendants’ inability to cross-examine an eyewitness was harmless error as to the capital sentences of three defendants but was not harmless error as to the capital sentence of a fourth defendant). In such cases, we treat each defendant as a unique observation.

In addition, in some instances, the same defendant appears in multiple cases, decided over a period of months or years. As a robustness check, we reran all analyses including each defendant only once (alternatively keeping only the first case and only the last case for those defendants who appear multiple times). All results were statistically and substantively the same throughout (these results can be implemented using the paper’s replication files.)

Relief is coded as 1 if the judge or panel grants total relief on any claim. As an example, we discuss a common claim raised. Many cases concern competence of the defendant’s attorney. For the defendant to prevail on a claim of incompetent representation, he must show that the attorney’s performance was deficient and that the deficiency was prejudicial. By total relief we mean that relief is only coded as 1 if both of these statements are found to be true. If the judge or court rules that the attorney’s performance was deficient but not prejudicial, the defendant loses his claim and relief is coded as 0. (For an example of such a case, see *Belmontes v. Ayers* (529 F.3d 834), where the majority believes counsel’s performance was both prejudicial and deficient, but the dissenter disagrees.)

A judge is coded as dissenting if he writes or joins a dissenting opinion or an opinion

concurring in part and dissenting in part. (A judge who dissents without an opinion is not coded as dissenting. This happens only twice in our data.) The judge is coded as dissenting “consistently” if his vote on relief is opposite to the vote of the panel majority.

Party of the appointing president

Information on each judge’s party of the appointing president was gathered from the appeals court judges attribute database (Gryski and Zuk 2008); for district court judges sitting by designation, the same information was taken from the district court judges attribute database (Gryski, Zuk and Goldman 2008). In some cases, either a judge from the Federal Circuit or a non-Article III judge (for example, one from the U.S. Court of International Trade) sat on a three-judge panel. We used the biographical database of the Federal Judicial Center to identify the judge’s appointing president and the president’s party.

Modeling Judges’ Votes

As noted in footnote 4 in the paper, an alternative approach to modeling the outcomes of the three-judge panels in our dataset is to instead model the votes of the individual judges on the panel. As a robustness check, we selected all the observations in which a judge was in the *partisan majority* of the panel—i.e. a Republican judge on a majority-Republican panel, and a Democratic judge on a majority-Democratic panel. We drop judges in the partisan minority so as to effectively replicate the panel-level models, which estimate how panel majorities vote differently with and without a counter-judge present.

Table A-2 presents two logit models in which the votes of the individual judges are the dependent variable. We separate the observations by whether a judge is a Democrat and in the panel majority, or is a Republican and in the panel majority. The key predictor is whether a *counter-judge is present*. As in the models presented in Table ?? in the paper, we include as controls the direction of the lower court’s decision, the proportion of Republicans on the circuit, and year and circuit fixed effects. Since many judges in our dataset hear multiple cases, we also include random effects for judges, which helps account for heterogeneity across individual judges that might not be captured by partisanship. For Democratic judges on the panel majority, Model (1) shows that they vote more conservatively in the presence of a Republican counter-judge, while Model (2) shows that Republican judges on the panel majority vote more liberally in the presence of a Democratic counter-judge.

References

- [1] Gryski, Gerald S. and Gary Zuk. 2008. “A Multi-User Data Base on the Attributes of U.S. Appeals Court Judges, 1801-2000.”
- [2] Gryski, Gerald S., Gary Zuk and Sheldon Goldman. 2008. “A Multi-User Data Base on the Attributes of U.S. District Court Judges, 1789-2000.”
- [3] Fischman, Joshua B. 2013. “Interpreting Circuit Court Voting Patterns: A ‘Social Interactions’ Framework.” *Journal of Law, Economics, & Organization*. Forthcoming.
- [4] Giles, Micheal W., Thomas G. Walker and Christopher Zorn. 2006. “Setting a Judicial

	(1)	(2)
	Democratic judges	Republican judges
<i>Intercept</i>	-1.55 (1.46)	.77 (.87)
<i>Counter-judge is present</i>	-0.75* (.21)	.70* (.15)
<i>Liberal lower vote</i>	3.01* (.30)	1.70* (.19)
<i>GOP circuit proportion</i>	-4.83* (1.63)	1.20 (1.37)
<i>N</i>	1,189	1,996

Table A-2: *Logit models of judges' voting in death penalty cases.* * indicates $p < .05$. Each model includes circuit and year fixed effects, along with judge random effects.

Agenda: The Decision to Grant En Banc Review in the U.S. Courts of Appeals.” *Journal of Politics* 68(4):85266.

- [5] Lauderdale, Benjamin E. and Tom S. Clark. 2014. “Scaling Meaningful Political Dimensions Using Texts and Votes.” *American Journal of Political Science*. Forthcoming.
- [6] Spaeth, Harold J., Lee Epstein, Theodore W. Ruger, Keith E. Whittington, Jeffrey A. Segal and Andrew D. Martin. 2010. “The Supreme Court Database.” <http://supremecourtdatabase.org> .