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Jonathan P. Kastellec¹

Abstract

This article investigates two issues unexplored in studies of the relationship between panel composition and voting on three-judge panels of the Courts of Appeals: how often will panel composition influence case outcomes, and how has the relationship between panel composition and panel voting changed over time? The author shows that while long stretches of single-party control of the presidency in the first half of the twentieth century often produced a high rate of panels with three judges from the same party, frequent turnover of White House control in the past half century has helped ensure that a majority of panels are composed of at least one judge from each party. The author also presents the first systematic longitudinal analysis of panel composition and judicial behavior, showing that the relationship between the two is a relatively recent phenomenon. These findings have important implications for understanding collegial behavior on the Courts of Appeals.

Keywords

courts of appeals, panel composition, panel effects, voting, judging

On June 12, 2007, a divided three-judge panel of the Fourth Circuit ruled that the Bush administration could not indefinitely imprison a legal U.S. resident suspected of being an enemy combatant, rejecting the government's broad claims of constitutional and statutory authority to place suspected terrorists in indefinite military detention even if they were seized as civilians.¹ As news accounts noted, the two judges in the majority, Diana Motz and Roger Gregory, were appointed by President Clinton, while the dissenting judge, Henry Hudson, was appointed by President George W. Bush (Leonig 2007; Liptak 2007). Given that at the time of the decision the circuit was evenly split between Republican and Democratic appointees, it is plausible that had a different panel heard the case, the panel would have ruled in the government's favor. Indeed, two months later, the full circuit voted to vacate the panel's decision and rehear the case *en banc* (Smith 2007).²

As this case illustrates, and as scholars of the courts of appeals have long observed, the composition of three-judge panels on the U.S. courts of appeals has the potential to affect who wins and loses in a given case (see, e.g., Atkins 1973; Goldman 1968; Songer 1982). Given varying preferences among the judges in a circuit, and the fact that a panel decision represents the views of a majority of three judges, the assignment of judges to a particular panel may increase the probability of a certain outcome.

The relationship between panel assignment and case outcomes, in turn, will be influenced by the distribution of preferences in the judiciary as a whole, which is mainly a function of partisan control of the White House and the ability of a president to appoint like-minded judges to the federal bench.

If cases in the courts of appeals were decided by a single judge, as cases in district courts are, we would expect the distribution of case outcomes in the aggregate to closely follow the distribution of preferences in the circuit courts. In recent years, however, scholars have illustrated how panel decision making—that is, the fact that cases are decided by three judges, not one—creates incentives and collegial dynamics that belie a simple model of preference aggregation on a three-judge panel. These studies have moved beyond studying the voting behavior of appellate court judges in isolation from their panel colleagues and toward what Cameron and Cummings (2003) label a “contextual approach,” which takes into account how panel composition can affect both individual judicial

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decisions and, as a result, the final decisions of three-judge panels.³

At the theoretical level, formal models have illustrated how collegial decision making creates different incentives for judges and thus may affect case-by-case decision making, the creation and enforcement of legal rules, and judicial compliance with Supreme Court doctrine (Kastellec 2007; Kornhauser 1992; Lax 2007). At the empirical level, scholars have documented the existence of “panel effects,” in which a judge is influenced not only by her own legal views but also those of her colleagues. Studies reveal, for example, that in employment discrimination and sex discrimination cases, male judges are more likely to support claims of discrimination when one of their panel colleagues is a woman (Boyd, Epstein, and Martin 2010; Farhang and Wawro 2004; Peresie 2005). Similarly, in certain cases, the presence of a single “counter-judge”—one appointed by a president of the different party than the judge’s two colleagues—affects the voting behavior of the other two judges (Cross and Tiller 1998; Kastellec 2010; Sunstein et al. 2006, *inter alia*). The key insight of these studies is that unified panels—those with three judges from the same party—are much more likely to produce a case outcome in line with the ideological disposition of the panel than are mixed panels—that is, panels with a counterjudge.

Missing from these studies are answers to two important questions. First, *how often* will panel composition influence case outcomes? While many scholars have documented the differences between mixed panels and unified panels, no study has examined how often such panels are constituted. Assessing composition rates is crucial in evaluating the substantive impact of panel effects. To give an example, imagine a study that found that panels featuring three Democratic appointees vote in the liberal direction in 90 percent of First Amendment cases, while panels comprising three Republicans ruled conservatively 90 percent of the time. However, mixed panels ruled conservatively in 60 percent of cases. Both our positive and normative assessment of these findings would depend heavily on how often different panel types are constituted.

The second unexplored question is, Has the relationship between panel composition and panel voting changed over time? Understandably, most studies of panel effects have focused on decision making in recent decades. As a result, however, we have little understanding of whether panel effects are a recent phenomenon and, if they are not, whether the dynamics of panel decision making have changed over time.

With these questions in mind, this article makes two contributions to the burgeoning literature on panel composition and panel effects in the courts of appeals. I provide the first assessment of the rates of various panel configurations over time on the courts of appeals, based

on a sample of thousands of cases from 1925 to 2004. Focusing on the partisanship of judges, as defined by their appointing president, I examine how changes in partisan control of the presidency have affected the rate of various panel configurations. I show that while long stretches of single-party control of the presidency in the first half of the twentieth century led to low degrees of panel heterogeneity in many years, more frequent turnover of White House control in the past half century has helped ensure that a majority of panels are composed of at least one judge from each party. The same holds true when individual circuits are examined (although there is substantial variation across circuits).

Second, this article provides the first systematic longitudinal analysis of the relationship between panel composition and judicial behavior. Rather than focusing on a single issue area or a subset of cases in which partisan and panel effects are more likely to arise, I analyze a random sample of all published courts of appeals decisions from 1961 to 2002 and study how panel composition has affected individual judicial decisions and panel outcomes across this period. Examining aggregate patterns in courts of appeals decisions over this period, I show that the difference in voting between unified Republican and unified Democratic panels is a relatively recent phenomenon, appearing only in the 1980s. Similarly, the existence of panel effects is also a recent development and seems to exist mostly among Democratic appointees to the bench, and not Republican appointees.

These results have important positive and normative implications for the study of the Courts of Appeals. From a positive standpoint, on the one hand the results lend support to claims that the appellate courts are growing more politicized: examining voting patterns longitudinally reveals that unified Democratic and unified Republican panels have increasingly vote liberally and conservatively, respectively. On the other hand, the high rate of partisan heterogeneity documented here, combined with previous findings about how such heterogeneity can affect judicial voting, suggests that partisan control of the Courts of Appeals may be more elusive than standard theories would suggest. On the normative side, the rates at which panels are mixed call into question the potential benefits of proposals to replace the current practice of random assignment on appellate panels with a system designed to ensure a greater diversity of views on every panel. Considering that such panels usually constitute a minority of all three-judge panels, the overall evidence suggests that the partisan diversity on three-judge panels—induced by frequent turnover of the party of the president in the past fifty years—combined with the existence of panel effects helps ensure the moderation of judicial outputs in the aggregate. Finally, the historical changes documented in this article

suggest that studies of appellate court behavior can benefit from studying institutional and membership changes in the federal judiciary over time.

Studying Panel Composition and Voting

While no statute establishes procedures for how appeals court judges are to be assigned to panels, each circuit uses a system that resembles random assignment.⁴ The norm of neutral assignment on the courts of appeals helps prevent judge shopping by litigants, increases the legitimacy of judicial decision making, and helps circuits distribute caseloads among their judges (Brown and Lee 2000; Tiller and Cross 1999). “Neutral assignment does not, however, guarantee a neutral decision making process” (Brown and Lee 2000, 1066). Because Democratic and Republican appointees are likely to have different judicial philosophies (though the magnitude of the difference is easily overstated), the outcome of a random selection procedure in a given case may produce a panel predisposed to ruling in favor of one party over the other (Pinello 1999).

The innovation of recent studies has been to demonstrate that more than simple preference aggregation is at work in panel decision making. Instead, in many cases, the vote of a judge depends not just on her own legal preferences but also on those of her colleagues. Beginning with Revesz (1997), numerous articles have demonstrated that Republican appointees are more likely to vote liberally when sitting with two Democratic appointees than when sitting with at least one Republican appointee, and vice versa. Potential explanations for such behavior include collegial concurrences by judges in disagreement with the panel majority who choose not to author dissents either to sustain a norm of unanimity or to avoid an increase in their workload; group polarization dynamics through which three judges with similar preferences may be more predisposed to vote in accordance with those preferences; and a whistle-blower effect under which a counterjudge on a panel may threaten to dissent to a higher court and expose noncompliance by the majority, thereby inducing compliance (Farhang and Wawro 2004; Sunstein et al. 2006; Kastellec 2007).

The literature on panel composition has two main strands, both of which carry important normative implications for the proper functioning and institutional legitimacy of the courts of appeals. The first, which is decidedly pessimistic, focuses on the prospect of “justice by lottery” (Goldman 1968, 481) or “slot-machine justice” (Hasday 2000): the potential for the outcome of a broad range of cases to turn on which judges are selected for a three-judge panel. Sunstein et al. (2006), for example, find that panels composed of three Democratic appointees are

26 percent more likely to render a liberal decision than panels of three Republican appointees. Based on this divergence, they claim that “variations in panel compositions lead to dramatically different outcomes, in a way that creates serious problems for the rule of law” (p. 11). Tiller and Cross (1999, 215) argue that the “random assignment of judges to circuit court panels often produces ideologically unbalanced panels with either three Democratic or three Republican appointees controlling the outcome. Such imbalances often lead to case outcomes that reflect partisan interests.” The belief that the impact of panel composition on appellate outcomes poses a deleterious effect on the quality of judicial decision making has led to calls for scrapping the system of random assignment and replacing it with either one that mandates the presence of at least one Democratic and Republican appointee on every panel (Tiller and Cross 1999; Schanzenbach and Tiller 2008) or one based on a ranking of preferred judges by the litigants in each case (Hasday 2000).

The second strand of the literature is more optimistic and focuses on the finding that judges with minority viewpoints—for example, a Democratic judge on a panel with two Republican judges or a female judge on a panel with two male judges—may nevertheless influence decision making on a three-judge panel. Such influence can come in the form of a woman or counterjudge persuading her colleagues to support a particular litigant, even when that judge is outnumbered on a panel. Another form is the ability of a potential whistle-blower to constrain her colleagues from deviating from a higher court precedent. With respect to the former influence, Farhang and Wawro (2004); Peresie (2005); and Boyd, Epstein, and Martin (2010) find that in employment discrimination and sex discrimination cases, male judges are significantly more likely to rule in favor of the plaintiff when one of their panel colleagues is a woman. “Women appear to influence their male colleagues, modifying the content of decisions from what is rendered, *ceteris paribus*, by all-male panels” (Farhang and Wawro 2004, 325). Cameron and Cummings (2003) find that the presence of a nonwhite judge significantly increases the probability of a liberal panel decision in affirmative action cases. With respect to whistle-blowing, Cross and Tiller (1998) find that the presence of a judge on the D.C. Circuit whose preferences diverged from the majority affected the panel’s likelihood of upholding an agency decision with which it normally would be inclined to disagree, thereby following the Supreme Court’s doctrine set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (467 U.S. 837 [1984]). Thus, panel effects may both increase compliance on the courts of appeals and increase the ability of judges with minority viewpoints to influence their colleagues in the panel majority.

Both the prospect that homogenous panel composition may weaken the rule of law and the corresponding finding that panel diversity may lead to both improved representation on courts of appeals and greater compliance with doctrine makes the study of panel composition and judicial voting an important line of inquiry in judicial politics—both from a positive and normative standpoint. Yet our understanding of the relationship is limited in many important respects, which complicates our ability to generalize about the presence and importance of panel effects on the courts of appeals.

First, missing from the existing literature is any assessment of how often we should expect panel composition to matter; that is, how often a case might be decided differently had another panel heard it. To return to Sunstein et al.'s (2006) consternation about their finding that a unified Democratic panel was 26 percent more likely to rule liberally than a unified Republican panel, how much weight we should give to this result (as an empirical matter) and how concerned we should be about the discrepancy (as a normative matter) will depend greatly on how often such panels are constituted. If unified panels decided a significant proportion of cases on the courts of appeals, the answers to these questions might be very different than if such panels decided only a small percentage of cases. Similarly, our assessment of how much influence minority and women judges are likely to have on the macro level will depend on how often they sit on three-judge panels.

Second, most studies of panel composition and judicial voting examine a relatively narrow time period, with the majority analyzing cases decided in the past two to three decades.⁵ Certainly, for the purpose of both evaluating reforms and understanding current decision making on the courts of appeals, recent decades are the proper period of study. Still, analysis of judicial decisions in previous periods can help inform our current understanding of courts. In addition, evaluating decision making at different periods over time can reveal changes in decision making that are masked by pooled analyses. As Songer, Sheehan, and Haire (2000, 115) demonstrate, the relationship between judicial ideology and voting has changed since the beginning of the twentieth century, as Republican appointees voted slightly more liberally than Democratic appointees in the prewar period. And as recent political battles over lower court appointments suggest, both the level of ideological voting on the courts of appeals and the political salience of appellate court judging may in fact be greater now than in previous eras. Thus, studying early periods is both interesting in its own right and allows for an assessment of how decision making may have changed over time.

Finally, the majority of studies that examine panel effects only focus on a single legal issue.⁶ While this approach has the advantage of allowing one to control for case facts in a given area of the law, it makes generalizing

beyond specific issues difficult. In addition, many of these issues are politically charged, raising the possibility that ideological and panel effects may only manifest themselves in more politically salient areas of the law and not in more routine cases. Finally, some studies focus on the D.C. Circuit, whose focus on the review of agency policy sets it apart from the other circuits.

The exception to this single-issue focus is Sunstein et al. (2006), the most comprehensive study of panel effects to date. The authors analyze more than six thousand cases decided in more than twenty issue areas, allowing for a detailed examination of panel effects in several areas of the law. Nevertheless, this study only examines issue areas the authors deem to be controversial, the result of which may be a skewed picture of the courts of appeals' work as a whole (Provine 2006).

Thus, while existing studies have greatly increased our understanding of panel effects, we still lack an evaluation of the degree of partisan heterogeneity over time. We also lack a broad picture of the relationship between panel composition and judicial voting that spans both a long time frame and a representative sample of the types of cases heard every day by the courts of appeals.

Data and Analysis

My analysis proceeds on two tracks, both of which are primarily based on the United States Court of Appeals Database (hereafter, the Songer database), which consists of a random sample of all appellate courts cases (with published opinions) from 1925 to 2002 (Songer 1999; Kuersten and Haire 2007). The temporal scope of the database is unique, covering nearly 75 percent of the courts of appeals' existence. I first use the database to evaluate the rates at which various panel compositions have occurred over time. I then use the database to examine how panel composition affects voting on the courts of appeals, presenting aggregate voting rates over time. (For reasons explained below, I limit this analysis to the period of 1961 to 2002.) Web Appendix A has detailed information about the various data used in the article as well as coding procedures (see prq.sagepub.com/supplemental/).

Both analyses rely on the party of the appointing president as a proxy for measuring judicial ideology and for studying panel composition. This measure has the advantage of being both highly reliable and available for all judges across time. In addition, it is the party of the appointment that is most salient to public discourse on the courts of appeals, as seen by frequent references in journalistic accounts of appellate decisions. And with respect to studying rates of panel composition, it is easy to trace changes in such rates as a function of partisan turnover in control of the presidency, which subsequently allows for placing the administration of the appellate

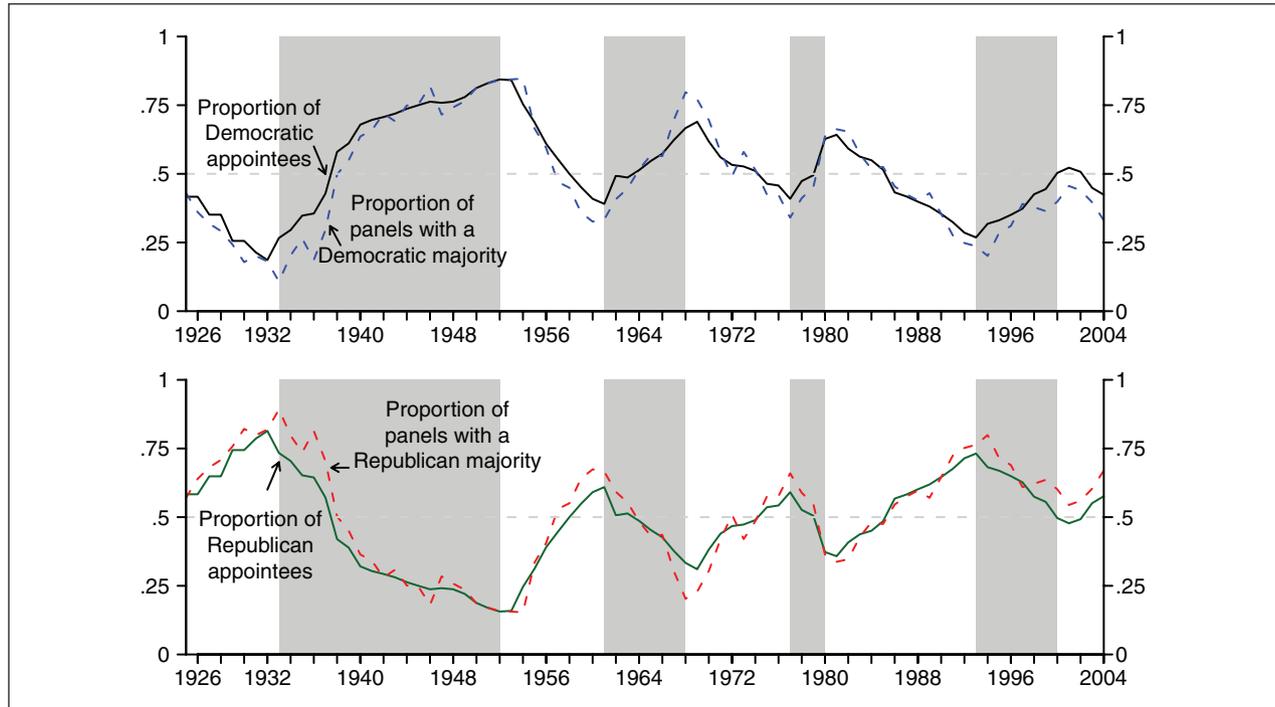


Figure 1. The partisan distribution of the U.S. courts of appeals and the rate of Democratic- and Republican-majority panels over time

The solid line in the top graph depicts the proportion of active Democratic-appointed judges in the federal judiciary as a whole, while the dashed lined depicts the estimated proportion of panels with a Democratic majority (i.e., either two or three Democratic appointees). The bottom graph depicts the same, but in terms of Republican appointees. Shaded regions indicate years in which the president was a Democrat.

courts within the framework of the broader American political system. Finally, some proposals for reforming panel selection procedures suggest using the party of the appointing president as a criterion for selection; using the measure allows for evaluating the merits of such proposals on their own terms (Tiller and Cross 1999; Schanzenbach and Tiller 2008).

I choose to present all the results that follow graphically, which allows for easy comparison both across time and circuits, where applicable (Kastellec and Leoni 2007). For reasons of presentational clarity, for the analyses related to rates of panel composition, I do not display estimates of uncertainty. Readers should keep in mind, however, that these rates are estimated with varying degrees of uncertainty, with greater uncertainty for circuit-level estimates due to smaller sample sizes compared to aggregate estimates across circuits. In the interest of properly expressing uncertainty, Web Appendix B (available at <http://prq.sagepub.com/supplemental/>) displays the actual estimates that appear in each figure, along with 95 percent confidence intervals.

Panel Composition Rates over Time

This first analysis relies on three data sources. The primary source is the Songer database, from which I retained every

case that was decided by a three-judge panel from 1925 to 2002.⁷ I then coded the party of the appointing president of each judge. To extend the analysis to 2004, I incorporated the cases analyzed in Sunstein et al. (2006) that were decided in 2003 or 2004. Taken together, this left me with roughly twenty thousand cases over eighty years with which to estimate panel composition rates.⁸ Finally, I obtained the proportion of active judges on the courts of appeals appointed by Democratic presidents from the Federal Judicial Center, creating a time series from 1925 to 2004. Further information about each data source and coding procedures can be found in Web Appendix A.

There are four possible panel configurations: three Republican appointees (RRR), three Democratic appointees (DDD), two Democratic appointees and one Republican appointee (DDR), and two Republican appointees and one Democratic appointee (RRD). The rates at which each will sit in a given year depends, of course, on the partisan makeup of the courts of appeals. I begin by examining the judiciary as a whole (analysis of individual circuits is presented below). The solid line in the top graph in Figure 1 depicts the proportion of active judges on the courts of appeals who were appointed by Democratic presidents, calculated yearly from 1925 to 2004. The shaded areas

depict years in which a Democratic president occupied the White House. Not surprisingly, control of the judiciary increases with the length of time one party holds the presidency, as each shift in presidential party sees the incoming party facing a judiciary stacked with appointees from the other party. The dashed line in the top panel depicts the estimated proportion of panels with a Democratic majority (that is, either DDD or DDR panels). The bottom graph presents the symmetrical picture for reference: the percentage of Republican appointees and the percent of Republican-majority panels.

If preferences on three-judge panels were simply aggregated, this graph would support a view of the courts of appeals in which the law will closely track the partisan distribution in the federal judiciary, particularly when it has been several years since a change in presidential party control. Most dramatically, by the time President Truman finished his term in 1953, which ended twenty consecutive years of Democratic control of the White House, Democratic-appointed judges held 84 percent of the seats and constituted majorities in the same percentage of cases. More generally, in many years there is what Velona (2005) calls an “exaggeration bias” in which the judges from the controlling party are majorities on a greater percent of panels than the percentage of judgeships they hold, due to the probabilities of selecting two minority party judges from a circuit.

The picture in Figure 1 begins to look a little different, however, when we factor the role of collegiality into decision making on the courts of appeals. If judges with “minority” viewpoints bring something different to the judicial table, then it will not only be of interest how often one party’s appointees constitute a majority on panels but how often panels feature at least one judge with a diverse viewpoint. That is, the key measure is not necessarily how often at least two Democratic appointees sit on a panel, but how often panels are mixed rather than unified. Figure 2 depicts the rate of mixed panels versus unified panels from 1925 to 2004, pooling cases from all circuits together. The top graph combines RRD and DDR panels into a single measure (labeled “mixed”) and contrasts them against the rates of unified Republican and unified Democratic panels. The next three graphs present the rates of RRD and DDR separately, as well as comparison of majority Democratic mixed panels and unified Democratic panels, and the same for majority Republican panels.⁹

The graph reveals that the proportion of mixed panels has usually been at well over 50 percent, especially since 1954, a year after President Eisenhower began to stock the bench after twenty years of Democratic control of the White House. Since then, the percentage has hovered in the region of 70 to 80 percent, with changes tracking the party that controls the White House. Following a switch

in presidential party, the proportion of mixed panels decreases, as the previous party’s nominees continue to constitute a majority of the judiciary. As the new president makes appointments, the proportion of mixed panels increases until these appointees make up a majority, at which point the proportion decreases until a switch in presidential party. Thus, the percentage of mixed panels fell below 50 percent towards the end of President Truman’s tenure. But since then, with party turnover in the White House occurring at most twelve years apart, the proportion of mixed panels has remained relatively high.

It is also important to consider the proportion of mixed panels in each circuit over time, since a high rate among the courts of appeals may mask a high rate of unified panels in particular circuits. The solid line in Figure 3 presents the estimated proportion of mixed panels for each circuit. The dotted line presents the proportion of active judges in the circuit who were appointed by Democratic presidents. Indeed, we see much greater variation at the circuit level, with the proportion of mixed panels approaching zero in some circuits in the years before 1950. Since then, however, the proportion of mixed panels has been well over 50 percent in most circuits.

Two factors help explain the low degree of heterogeneity in the first half of the twentieth century, followed by greater rates of mixed panels in the second half. As noted above, the Democratic Party controlled the White House from 1933 to 1952, allowing Presidents Roosevelt and Truman to stock the federal judiciary with Democratic appointments. At the same time, circuits were of smaller size, meaning it took fewer appointments (and hence less time) to reverse the control of a particular circuit. Since then, presidential party turnover has occurred more frequently, and circuits have grown secularly in size.

The Ninth Circuit provides a good example of these changes. In 1932 the circuit had four seats, only two of which were filled—both by Republicans. By 1935, Roosevelt had appointed enough judges (three) to give the Democrats the majority of the circuit’s seats, a majority they would hold until 1956. From 1945 to 1953, every judge on the circuit was a Democratic appointee, thereby ensuring unified panels in every case, except the relatively rare cases heard by judges sitting by designation who were appointed by Republican presidents. In 1980, by contrast, the last year before twelve years of Republican control of the White House, Democrats controlled fifteen of the circuit’s twenty-two seats. Even though the size of the circuit was expanded to twenty-eight in 1984, not until 1987 was President Reagan able to appoint enough judges to give Republicans a majority on the circuit. By the time the first President Bush left office in 1993, only 56 percent of the circuit’s judges had been appointed by Republican presidents, giving Republican appointees control of the circuit

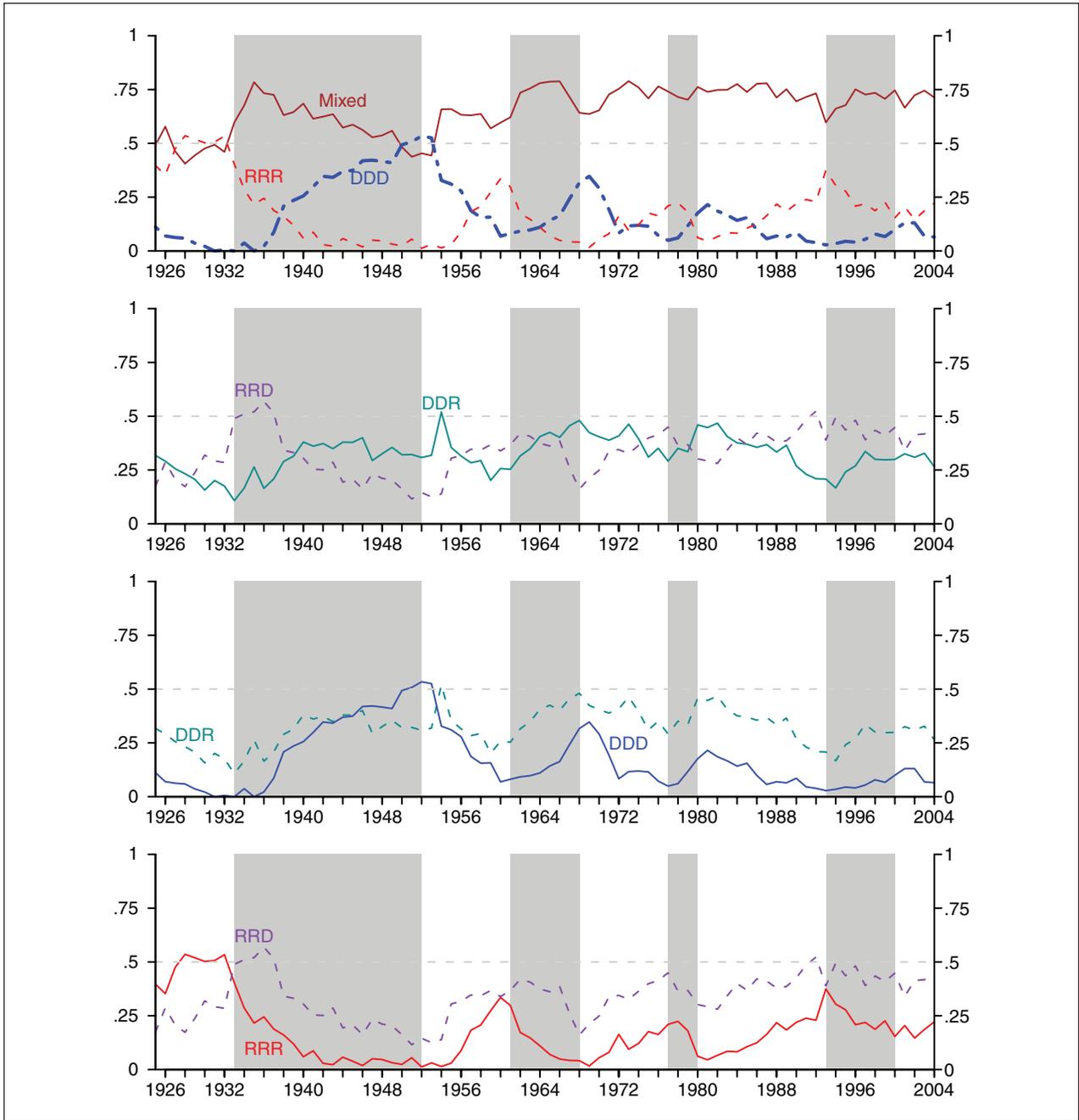


Figure 2. Rates of panel configurations over time
 Each graph depicts the estimated proportion of various panel types. The rate for mixed equals the sum of the rates of RRD and DDR panels. Shaded regions indicate years in which the president was a Democrat.

but leaving enough Democrats to ensure mixed panels in a majority of cases.¹⁰

While the Ninth Circuit is atypical in that it is the largest circuit by far, Figure 3 reveals a similar historical dynamic in many of the other circuits. Combined with the aggregate results, these patterns show that in recent decades the majority of cases have been heard by

heterogeneous panels. To understand the effects of such heterogeneity, I turn now to analysis of votes over time.

Panel Composition and Voting Rates over Time

As noted earlier, most studies of panel effects on the courts of appeals have examined either a single issue or

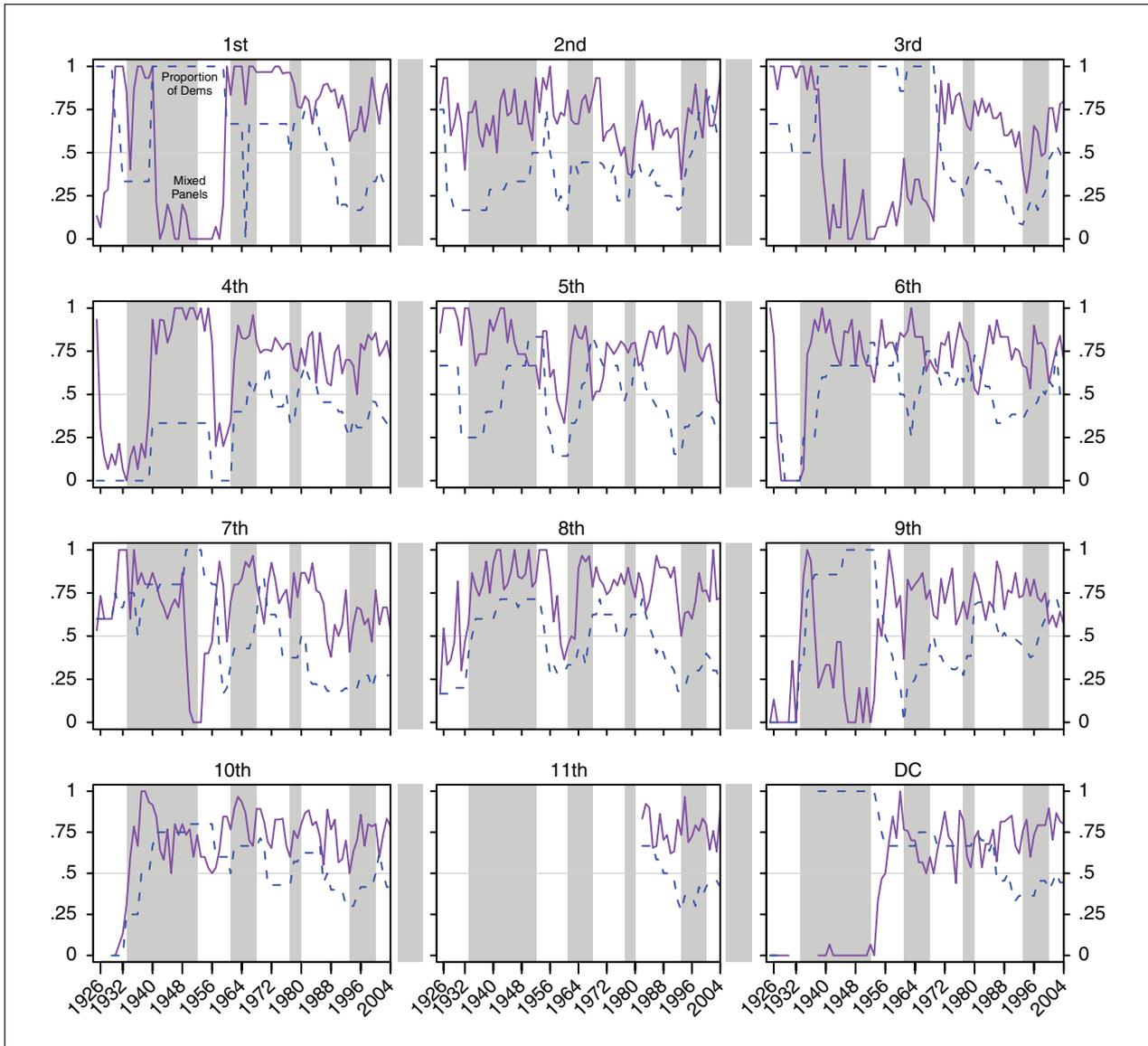


Figure 3. Rates of panel configurations over time, by circuit

For each circuit, the solid line depicts the estimated proportion of mixed panels and the dashed line depicts the proportion of active Democratic judges. The D.C. Circuit is coded as missing from 1931 to 1937, because in that period it heard most cases in panels of more than three judges. Shaded regions indicate years in which the president was a Democrat.

more controversial cases. An advantage of using the Songer database is that it comprises all types of appellate decisions, ranging from the controversial cases surveyed by Sunstein et al. (2006) to routine *per curiam* decisions. Thus, it provides a representative view of the courts of appeals' day-to-day dockets.

I selected for analysis only those cases heard by a panel of three judges, dropping all *en banc* cases. While the database runs from 1925 to 2002, Landes and Posner (2008) find a high error rate in the classification of cases decided before 1960. For this reason, I used only cases

decided after 1960.¹¹ I retained cases only in which the outcome was clearly liberal or conservative, as described in Web Appendix A.¹² For each case, I coded both the panel's decision and that of each judge on the panel, coding conservative decisions as 0 and liberal decisions as 1. This left me with about 11,500 observations on the case level and nearly 35,000 on the level of the individual judge.

The analytical strategy I employ to study how panel composition affects voting on the courts of appeals is similar to that of Sunstein et al. (2006), analyzing variation at

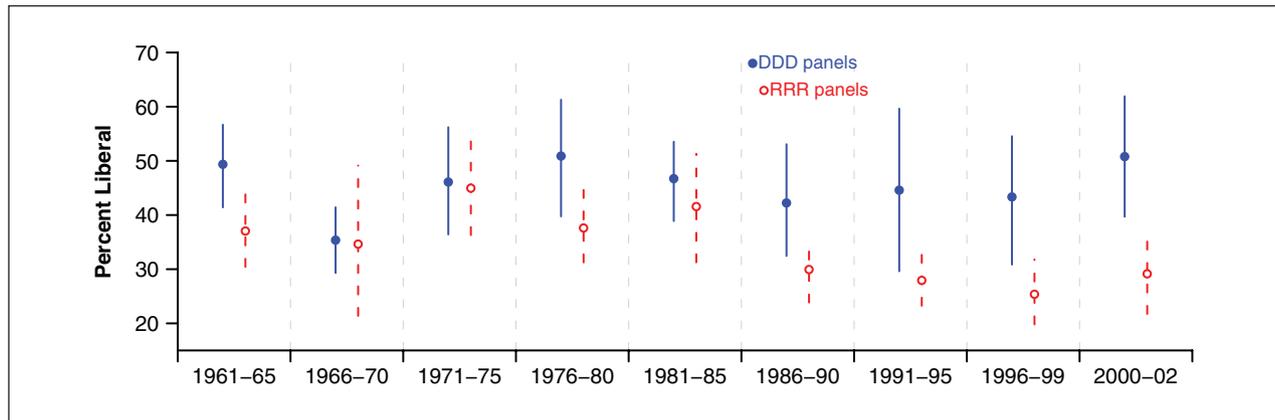


Figure 4. Comparing unified Democratic panels to unified Republican panels

The plot depicts the estimated percent of liberal decisions in each period, with open circles denoting panels with three Republican appointees and solid circles denoting panels with three Democratic appointees. Vertical lines indicate 95 percent confidence intervals.

the panel decision level and judge level based on the different configurations of panel composition, such as whether three Republican appointees sat on a panel and whether a Democratic appointee was joined by two fellow Democratic appointees or two Republican appointees. However, rather than pooling all cases, I perform separate analyses within each five-year period from 1961 to 1995, as well as 1996 to 1999 and 2000 to 2002. This strategy both ensures that a sufficient number of cases exists in each period to conduct meaningful analysis and allows for an examination of changes over time.

The statistical approach I take is straightforward: for each period, at the panel level, I estimate the percentage of liberal decisions made by a particular panel configuration. Uncertainty is expressed in the form of 95 percent confidence intervals depicted with vertical lines.¹³ At the judge level, I estimate the percentage of liberal decisions reached by either Democratic appointees or Republican appointees, based on their colleagues in a particular case. This approach allows for easy comparison of actual decisions to null hypotheses regarding the behavior of appellate court judges. If ideology played little or no role in judicial decision making, then in the aggregate we would expect to find that panels with a majority of Democratic appointees would not vote differently than panels with a majority of Republican appointees. If panel effects were small or nonexistent—that is, if judges voted independently of their colleagues' preferences, and voting on panels occurred as predicted by a median voter theorem—we would expect to observe little to no difference between panels with two Democratic (Republican) appointees and panels with three Democratic (Republican) appointees. Similarly, at the judge level, if votes were independent of a judge's colleagues, then we would expect to see little to

no differences in voting among Democratic or Republican appointees across the three possible configurations of their two colleagues (Republican/Republican, Republican/Democrat, and Democrat/Democrat).

Panel Votes

Do unified Democratic panels vote more liberally than unified Republican panels? I begin by analyzing the relationship between panel composition and panel votes, which determine which party wins in a given case and sets forth legal policy. Under most theories of judicial behavior, we would expect the sharpest divisions in votes to occur between unified Republican panels (RRR) and unified Democratic panels (DDD). Figure 4 depicts the estimated liberal rate among both types of panels over time. A striking result is that unified panels did not consistently diverge from another until the second half of the 1980s. From 1981 to 1985, both types of panels voted liberally in roughly 45 percent of cases. Since then, all-Republican panels have trended in the conservative direction, while all-Democratic panels have moved in the opposite direction. In the last period (2000–2002), unified Democratic panels voted liberally in an estimated 52 percent of cases, compared to only 29 percent for unified Republican panels.

This discrepancy is similar to that found by Sunstein et al. (2006), suggesting that the ideological divide among unified panels is not limited to more controversial areas of the law. This finding lends support to those who have sounded the alarm about the possibility that panel composition is determining judicial outcomes. However, it is important to note that in recent years even all-Democratic panels have reached the conservative outcome in about

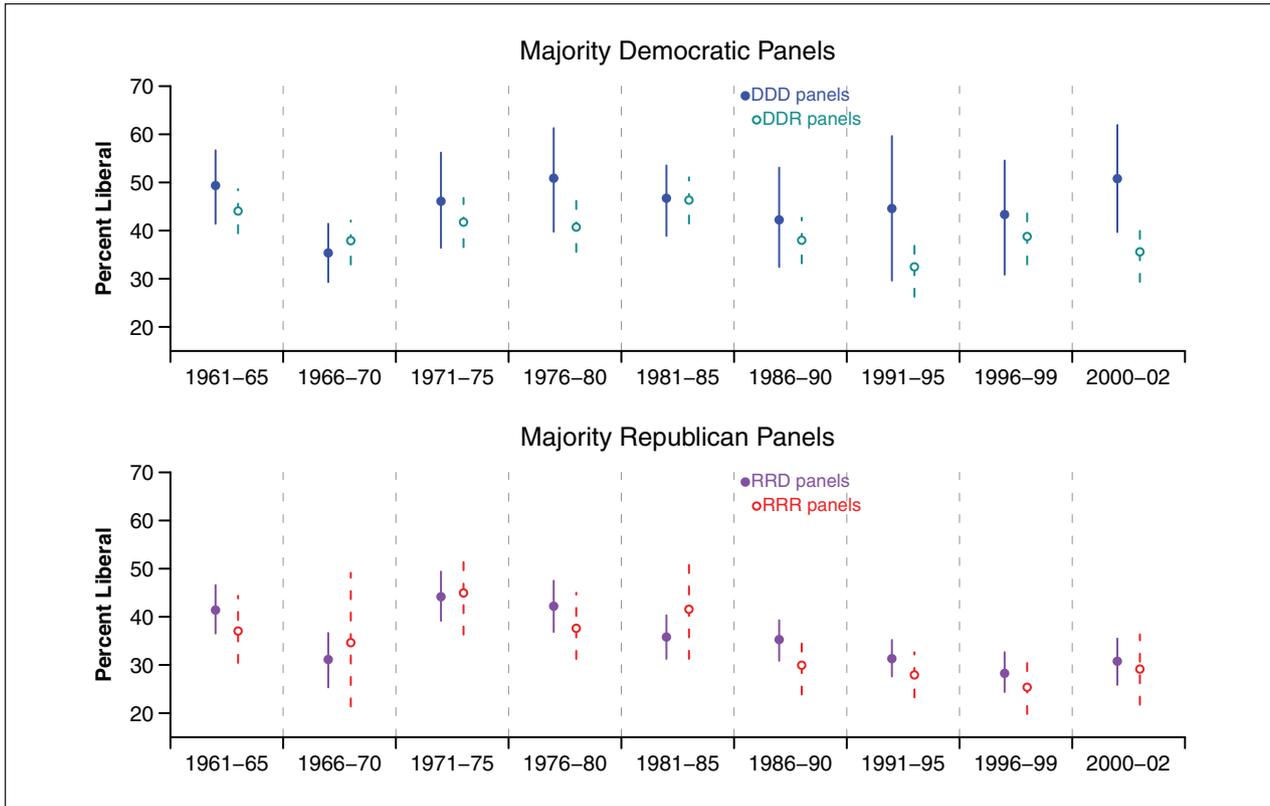


Figure 5. Comparing unified panels to mixed panels

The top plot depicts the estimated percentage of liberal decisions in each period, with solid circles denoting panels with three Democratic appointees and open circles denoting panels with two Democratic appointees and one Republican appointee. The bottom plot depicts the same, but with open circles denoting panels with three Republican appointees and solid circles denoting panels with two Republican appointees and one Democratic appointee. Vertical lines indicate 95 percent confidence intervals.

50 percent of cases, meaning that there is again substantial overlap in how unified panels are reaching decisions.

Do mixed panels vote more moderately than unified panels? A central question in the study of panel effects is to what extent the presence of counterjudges influence their colleagues. The top graph in Figure 5 plots the estimated percentage of liberal votes by unified Democratic panels and panels with two Democratic appointees and one Republican appointee (DDR), while the bottom graph does the same for panels in which Republican judges constitute a majority (RRR and RRD). Two patterns stand out. First, we again see little evidence of any differences among the panel types in the intervals comprising 1961 to 1985. In addition, panel effects only appear to be present among Democratic appointees, not Republican appointees. For majority Republican panels, the only substantively significant difference in voting rates between unified panels and those with one Democratic appointee occurs in the 1981 to 1985 period; however, in these years, RRR panels are estimated to vote *more* liberally than RRD panels, a counterintuitive result. By contrast, among majority-Democratic panels, beginning in the period of

1986 to 1990, DDR panels start to vote slightly more conservatively than DDD panels, culminating in an estimated 17 percent difference in 2000-2002. While the magnitude of this difference is not enormous, it does suggest that the presence of a Republican judge on a majority Democratic panel has had a moderating influence in recent years. However, no symmetrical effect among Republican appointees has seemed to exist.

Judge Votes

Do Republican and Democratic judges vote differently when sitting with different colleagues? While the high rate of unanimity on the courts of appeals means that case-level and judge-level analyses will lead to similar conclusions, studying the voting patterns of individual judges helps illuminate the underlying dynamics producing variation at the panel level. The top panel of Figure 6 depicts the estimated percentage of liberal decisions by Democratic appointees in each period, broken down by cases in which they sat with two Democratic appointees, one Republican and one Democratic appointee, and two

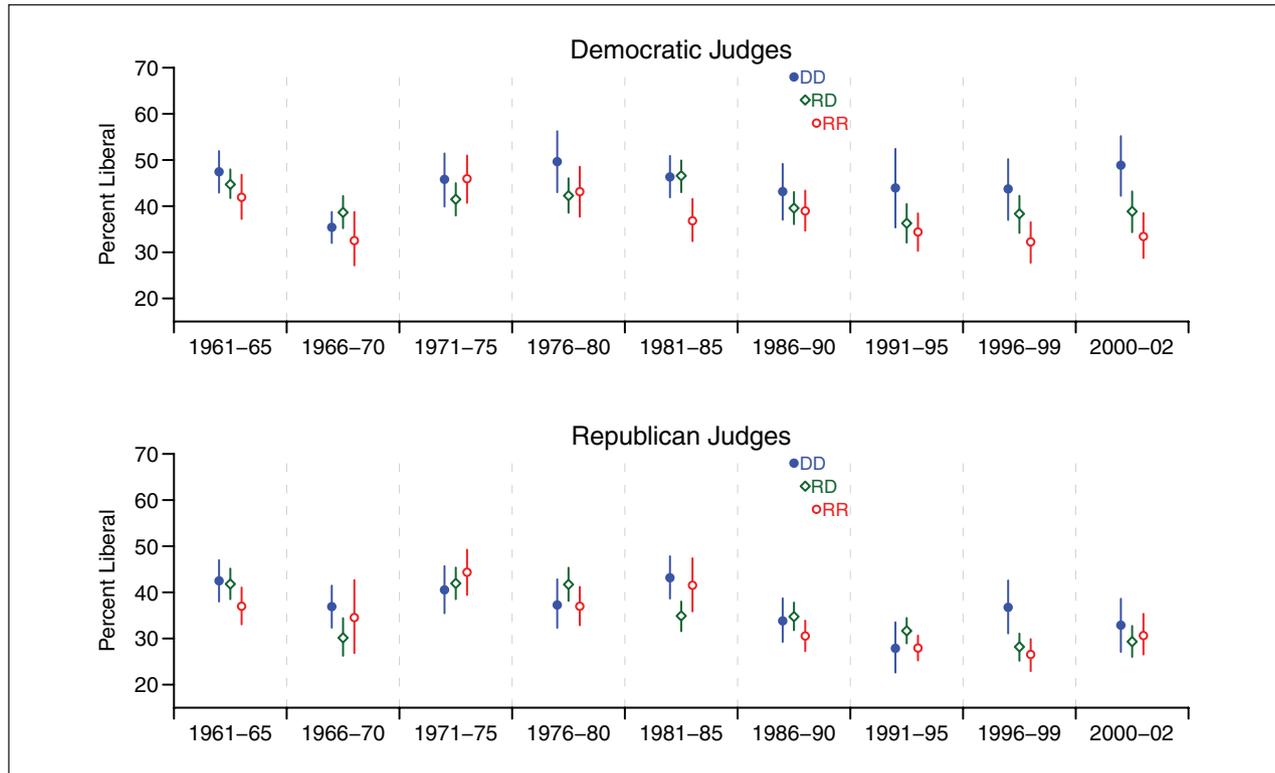


Figure 6. Comparing panels effects among Democratic and Republican appointees at the judge level

The top plot depicts the estimated percent of liberal decisions in each period by Democratic appointees, broken down by whether they sat with zero, one, or two Democratic appointees. The bottom plot depicts the same for Republican appointees. Vertical lines indicate 95 percent confidence intervals.

Republican appointees. If panel effects were operating consistently across time, we would expect to see a monotonic decrease in the percentage of liberal decisions for every Republican appointee on a panel. Among judges from either party, there is little systematic difference across colleagues before 1985. From that time on, the monotonic pattern becomes pronounced among Democratic judges. In particular, Democratic judges sitting with two Democratic colleagues are more likely to vote liberally than those sitting with at least one Republican colleague. In addition, panel effects appear to occur among Republican appointees in the period of 1996 to 1999, but not 2000 to 2002. Interestingly, Republican judges vote more liberally when sitting with two Democratic judges; there is no difference in voting rates among Republican judges sitting with either two Republican colleagues or one colleague from each party.

Discussion and Conclusion

Taking a longitudinal approach to the study of panel composition and judicial votes on the courts of appeals reveals two important findings. The first is that a meaningful relationship between panel composition and panel outcomes

is a relatively recent phenomenon. Until the second half of the 1980s, unified Republican panels on average voted very similarly to unified Democratic panels. Since then, the difference between the two have increasingly diverged. This finding gives support to those who believe the judiciary has become increasingly polarized in recent years. Relatedly, the data also reveal that the existence of panel effects is also a relatively recent phenomenon. The second important finding is that panel effects have been asymmetric and have occurred mainly among Democratic appointees in recent years.

While the goal of this article has been to document the nature of panel voting over time, it is worth considering some possible explanations for the patterns observed, which may suggest further opportunities for disentangling the causes of partisan and panel differences on the courts of appeals. With respect to the growing partisan polarization among unified panels since the 1980s, it is likely not a coincidence that this period corresponds with an increased emphasis on judicial ideology in the selection of federal judges. This period also coincides with growing party polarization in Congress (McCarty, Poole, and Rosenthal 2006), which, given the norm of senatorial courtesy, has likely increased polarization on the courts of

appeals. The presidential focus on judicial ideology is particularly true with respect to Republican presidents. As Teles (2008) documents, the conservative legal movement has worked since the 1970s to promote the selection of more conservative judges, and Republican presidents since Reagan have echoed this call in their nominations of federal judges. And there is evidence that recent Republican appointees vote more conservatively than the appointees of Presidents Eisenhower, Nixon, and Ford (Sunstein et al. 2006, 116). Even though President Clinton did not place a high priority on selecting liberal judges (Haire, Humphries, and Songer 2000), such polarization in the distribution of preferences across Democratic and Republican judges could easily explain the growing disparity between Republican and Democratic unified panels.

This polarization could also help explain the finding of asymmetry in panel effects between Republicans and Democrats. If Republican judges are more ideological, and hence less willing to compromise, they might be less susceptible to panel effects than Democratic judges. A competing explanation focuses on the role of the judicial hierarchy in inducing panel effects. Given that Republican appointees have constituted majorities on the Supreme Court and in most circuits in the past two decades, this asymmetry is consistent with a whistleblower effect in which Republican appointees constrain Democratic judges by threatening to dissent from non-complying decisions. The Supreme Court has moved in a conservative direction since the end of the Warren Court. If Democratic appointees were seeking to avoid precedents issued by a conservative Supreme Court or a conservative circuit, then they would be more likely to do so when sitting with two Democratic colleagues as opposed to with one Republican appointee. And as Kastellec (2010) demonstrates, Democratic appointees are particularly likely to vote differently when sitting with a single Republican counterjudge in Republican circuits—that is, in cases where a single Republican judge has both the full circuit and the Supreme Court on her side—a result that strongly suggests a hierarchical explanation for the asymmetry in panel effects.

Changes in caseload, coupled with the growing polarization on the courts of appeals, may also help account for the rise of partisan and panel effects over the past few decades. A necessary condition for panel effects is that Democratic and Republican judges, on average, vote differently in a given issue. Many of the areas of the law (though certainly not all) where Sunstein et al. (2006) uncover panel effects are those that have arisen due to relatively recent legislation (such as the Americans with Disabilities Act) or litigant reaction to recent changes in Supreme Court doctrine (such as recent Eleventh Amendment challenges surrounding the abrogation of state sovereign immunity). The introduction of such contentious

issues, combined with changes in membership on the courts of appeals, could help explain the increased partisan and panel effects we have seen in recent decades. To be sure, untangling caseload effects (which are also affected by litigant strategies) from the effects of membership change raises thorny methodological issues, but such an undertaking would help us understand these changing voting patterns.

The results presented above also inform normative debates surrounding the proper function of the courts of appeals. A persistent concern in recent years has been the potential for “slot-machine justice,” or a case being predetermined by panel selection. On one hand, analysis of aggregate vote patterns show that unified Republican and Democratic panels have increasingly diverged since the 1980s, with the latter more than 20 percent more likely to reach the liberal outcome in recent years. This trend would seem to support those who have called for reform procedures to ensure that at least one judge from each party sits on every three-judge panel. On the other hand, two patterns argue against the net benefits of such proposals. First, due to more frequent turnover in the party controlling the White House in the past fifty years, in most years a majority of panels are already mixed. Second, as seen in Figure 5, in recent years mixed panels with two Republicans have voted liberally at nearly identical rates to unified Republican panels. Thus, the benefits of requiring mixed panels to induce more moderate outcomes would only have resulted from adding a Republican judge to would-be unified Democratic panels. Unified Democratic panels, however, have composed less than 15 percent of all three-judge panels since the early 1980s (as seen in Figure 2). To be sure, from the perspective of a particular litigant who may lose her case because she drew three Republican appointees instead of three Democratic appointees, aggregate statistics are cold comfort. But instituting panel assignment reforms would carry a number of institutional and bureaucratic costs, and what these results suggest is that the benefits of reform might not be as great as its proponents believe (see, e.g., Wald 1999; Strauss 2008).

In conclusion, as many judges themselves argue, and as these results suggest, it is easy to overstate the influence of judicial ideology on judicial voting, both at the level of individual decisions and panel outcomes (Edwards 1991; Wald 1999). Even though unified Republican panels are substantially more likely to vote conservatively than unified Democratic panels, there remains a significant overlap between the two. And as noted above, increasing turnover in the party of the president has ensured that in most years a majority of panels include at least one judge from each party. This means that the overall magnitude of the discrepancy among unified panels is muted by the

fact that such panels sit much more infrequently than they did when one party controlled the White House for long stretches of time. While individual-level effects are always of interest in assessing judicial behavior, and the panel effects that many scholars have documented in the past decade are quite real and quite important, the fact that mixed panels hear a majority of cases implies that studies of panel composition should account not only for *how much* composition matters but *how often* it is likely to matter.

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Author's Note

The appendix is available online at prq.sagepub.com/supplemental/. This appendix, as well as replication data sets and code, can also be found at the author's Web site: http://www.princeton.edu/~jkastell/panel_effects_over_time_replication.html.

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Notes

1. *Ali Saleh Kahlah Al-Marri v. Wright*, 487 F.3d 160 (2007).
2. The Supreme Court eventually dismissed Al-Marri's case, after the Obama administration instructed the Defense Department in February 2009 to transfer custody of Al-Marri to the Justice Department.
3. Fewer than 1 percent of cases are decided *en banc* by either all the members of a circuit or a subset of members, meaning the vast majority of the Courts of Appeals' output is produced by three-judge panels (George 1999, 214).
4. The actual procedures employed for panel assignment vary across circuits and allow for some discretion in panel selection, which mitigates against truly random selection. For instance, judges can trade places on panels in some circuits, and the original judges in a case that requires additional hearings may be selected for such subsequent hearings. See Brown and Lee (2000) for an extensive review of circuit assignment procedures and for an extraordinary example of "panel packing": the assignment of judges to a panel in the hope of producing a particular result.
5. The exception is Sunstein et al. (2006), whose time frame runs from 1945 to 2005. Nevertheless, nearly 90 percent of the cases they analyze were decided from 1990 to 2005.
6. Issues analyzed include administrative law (Cross and Tiller 1998; Miles and Sunstein 2006), affirmative action (Cameron and Cummings 2003), asylum law (Fischman 2007; Law 2005), the death penalty (Songer and Crews-Meyer 2000), employment discrimination (Farhang and Wawro 2004), environmental law (Revesz 1997), obscenity (Songer and Haire 1992), and sex discrimination (Baldez, Epstein, and Martin 2006; Boyd, Epstein, and Martin 2010; Fischman 2007; Gryski, Main, and Dixon 1986; Peresie 2005). Note that some of these articles examine decision making on state supreme courts.
7. Such cases constitute the vast majority of observations in the database, with the rest mostly consisting of *en banc* cases.
8. The Songer database is technically a stratified random sample of all published appellate decisions, with an equal number of cases sampled from each circuit in each year. Accordingly, for all the analyses in the article, I weight each case according to the actual proportion of published opinions issued by the circuit in a given year compared to the total number of published opinions issued in all circuits in that year.
9. Depicting the four time series in various combinations prevents one from having to compare rates across different plots and also proves useful when considering these results in tandem with the analyses of voting behavior presented below.
10. The percentage of Republican-appointed judges reached a maximum of 62 percent in 1995, due to retirements among Democratic appointees following President Clinton's victory in 1992.
11. For 1925 to 1960, the database samples only fifteen cases from each circuit in each year. Thus, using only cases from 1961 on has the added benefit of increasing the precision of the estimates from the analyses of subsets I present below.
12. Landes and Posner (2008) also claim that the coding protocol in the Songer database mistakenly classifies many cases as having an ideological dimension when they in fact do not. I reran all the analyses presented below after adopting their coding suggestions and found no substantive differences in the results. I therefore choose to present the full sample of cases, based on the general coding in the Songer database (as described in Web Appendix A), to generate more precise estimates.
13. Because my objective is to explore patterns rather than conduct strict hypothesis tests, I focus mainly on substantive significance rather than statistical significance. There is a trade-off between decreasing the number of periods into which the data is broken down—which would increase the number of cases and reduce the size of confidence intervals—and using more intervals, which allows for a

greater understanding of variance over time, but with a corresponding loss in efficiency. In the interest of exploring such variance, I have opted for the latter.

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