



9-2001

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Recommended Citation

Micheal W. Giles, Virginia A. Hettinger & Todd Peppers, Picking Federal Judges: A Note on Policy and Partisan Selection Agendas, 54 Pol. Res. Q. 623 (2001).

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RESEARCH NOTE

 **Picking Federal Judges:
A Note on Policy and
Partisan Selection Agendas**

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The importance of lower federal courts in the policymaking process has stimulated extensive research programs focused on the process of selecting the judges of these courts and the factors influencing their decisions. The present study employs judicial decisionmaking in the U.S. Courts of Appeals as a window through which to reexamine the politics of selection to the lower courts. It differs from previous studies of selection in three ways. First, it takes advantage of recent innovations in measurement to go beyond reliance on political party as a measure of the preferences of actors in the selection process. Second, employing these new measures it examines the relative effects of the operation of policy and partisan agendas in the selection process. Third, a more complex model of selection is assessed than in most previous studies—one that expressly examines the role of senators and senatorial preferences in the selection process. The results clearly suggest that the politics of selection differ dramatically depending upon whether or not senatorial courtesy is in operation. The voting behavior of Courts of Appeals judges selected without senatorial courtesy is consistent with the operation of a presidential policy agenda. Among judges selected when senatorial courtesy is in play, the linkage between presidential preferences and judicial outcomes disappears.

The lower federal courts play a significant role in the creation of public policy. Awareness of the importance of lower courts in the policymaking process has motivated a research program focused on the process of selecting the judges of these courts (Goldman 1997; Sheldon and Maule 1997; McFeeley 1987; Chase 1972; Grossman 1965). This largely qualitative scholarship has drawn a

Political Research Quarterly, Vol. 54, No. 3 (September 2001): pp. 623-641

rich picture of the roles played by the various actors in the process, the motivations at work, and the impact of the political context. The importance of the lower courts has also justified an active research program examining the factors influencing the decisions of the judges of these courts (e.g., Songer, Segal, and Cameron 1994; Songer and Haire 1992; Davis 1986; Rowland and Carp 1996; Carp and Rowland 1983). The latter has advanced our understanding of judicial decision making by explicating the roles played by case facts, background experiences, policy preferences, and higher court supervision.

While these research programs individually have been quite fruitful, the linkage between the two has not been well articulated. We have a richly textured understanding of the process by which lower court judges are selected but little evidence linking the elements of that process to judicial outcomes. Studies of decisionmaking in the lower federal courts have employed the party affiliation of the appointing President, combined in some studies with one or more background variables, as a surrogate measure for the policy preferences of the judges. A large body of literature examining the decisionmaking of both District Court and Court of Appeals judges has found that judges appointed by Democrats tend to be more liberal in their decisions than judges appointed by Republicans (Goldman 1966; 1975; Carp and Rowland 1983; Rowland and Carp 1996; Rowland and Todd 1991; Stidham and Carp 1987; Songer and Davis 1988; 1990; Songer and Haire 1992; Pinello 1998). While these results indicate that the party which controls the selection process makes a difference, little else can be concluded about the linkage between the politics of selection and judicial outcomes. The model of selection implicit in most studies of lower court behavior is simply too reductive to provide leverage on this larger question.

A few studies of judicial outcomes have assayed more complex and realistic models of the politics of selection by including a role for home-state senators (Rowland, Carp, and Stidham 1984; Songer 1982; Rowland and Carp 1996). These studies suggest, at a minimum, that the involvement of home-state senators in the selection process may condition the linkage between presidential preferences and judicial outcomes. For example, Rowland, Carp, and Stidham (1984) argue that liberal senators in Massachusetts (including the liberal Republican Brook) thwarted Nixon's efforts to appoint "law and order" judges in that state. Similarly, Songer (1982) finds that the relationship between the party of the appointing President and judicial outcomes is stronger among judges appointed where senatorial courtesy was not in play (i.e., no senator of the President's party from the state) than among judges appointed under the condition of senatorial courtesy. Judicial outcome studies also provide at least some support for a direct linkage between the preferences of home state senators and judicial outcomes. Songer (1982) finds a relationship between the liberalism of Court of Appeals judges and the liberalism of the home-state senator of the President's party.

While highly suggestive, these studies have two limitations. First, their scope is relatively limited. Songer (1982) focuses on outcomes in the Courts of Appeals between 1962 and 1971. Rowland, Carp, and Stidham (1984) examine decisions in District Court criminal cases in only four states. Rowland and Carp (1996) focus on the decisions of District Court judges appointed by Reagan and Carter in thirteen states. Second, and more importantly, these studies are limited by the absence of rigorous measures of preferences. Rowland, Carp, and Stidham (1984) and Rowland and Carp (1996) essentially make qualitative judgments about whether the preferences of senators are consistent with those of the President. Songer (1982) develops a rigorous measure of senatorial preferences based on roll-call voting, but has no similar measure of the preferences of the President. Without rigorous measures of the preferences of both Presidents and senators, the linkage between the politics of selection and judicial outcomes cannot be fully explored.

Efforts to explicate the linkage between the politics of selection and judicial outcomes must also confront the very different conclusions the two research programs have developed about the role of policy preferences in the selection process. In the most comprehensive study of selection to date, Sheldon Goldman (1997) concludes that in the postwar era, appointments to the lower courts have reflected a partisan and not a policy agenda. That is, Presidents have used appointments to the lower federal courts as a means of rewarding party faithful and shoring up party cleavages and not as a means to support their policy agenda (3). In Goldman's estimation only the Reagan administration viewed ". . . the courts as likely to affect the success or failure of its policy goals" and followed a policy agenda in selection (4, 361). For the Reagan administration, Goldman argues, it was not sufficient to be a loyal Republican. Successful candidates for appointment also had to provide evidence of conservative policy views congruent with those of the administration.

There is little in the selection literature to dispute Goldman's conclusion that partisan not policy concerns dominated the judicial selection process in the postwar era.¹ Chase (1972: 72-73) recounts how both Kennedy and Eisenhower saw judicial appointments as a means of shoring up intra-party cleavages—Kennedy by making appointments to supporters of Adlai Stevenson and Eisenhower to supporters of Taft. The selection literature describes Presidents Eisenhower (Chase 1972: 102; Navasky 1971: 265; Goldman 1997: 127-28), Kennedy (Navasky 1971: ch. 5; Chase 1972: 80-81; Goldman 1997: 167-68)² and Johnson (McFeeley 1987: 43, 54, 86-88; Goldman 1997: 170) as concerned about the position of their appointees to southern courts on civil rights. But, this concern was limited

¹ The selection literature also suggests that senators use judicial appointments to pursue a partisan rather than a policy agenda (Grossman 1965: 82; Richardson and Vines 1970; Tolchin and Tolchin 1971).

² Navasky (1971: 252-57) and Chase (1972: 88) portray the Kennedy administration in very different lights in terms of the importance they attached to judicial appointments.

to that single issue area and subject to override by the need to compromise with powerful, southern senators (Lyles 1996).³

In contrast to the selection literature, studies of judicial decisionmaking have attributed policy motivations in the selection of lower court judges not only to President Reagan, but also to Presidents Johnson (Rowland, Carp, and Stidham 1984; Songer, Segal, and Cameron 1994), Carter (Songer, Segal, and Cameron 1994: note 3; Songer and Haire 1992; Songer and Davis 1988, 1990; Baum 1998: 293), and Nixon (Rowland, Carp, and Stidham 1984; Songer, Segal, and Cameron 1994).⁴

Whether this conflict in the conclusions of the two research programs is real or only illusory is unclear. Selection research typically documents the expressed motivation of the Presidents and their staffs. One of the primary lessons of behavioralism is that actors are not always aware of their own motivations. Presidents and their staffs may consider the ideology of potential nominees without being aware of that criterion and without making its operation explicit in memoranda, procedures, or subsequent interviews with scholars. As Goldman (1997: 3) freely admits, the documentation of motivations is elusive.

On the other hand, the use of political party as a surrogate for policy preferences in most decisionmaking studies confounds policy and partisan motivations. Democratic and Republican party identifiers differ ideologically. On average Democratic identifiers are more liberal than Republican identifiers. This difference is particularly marked among the active party elites from which lower federal judges are typically selected (McClosky, Hoffman, and O'Hara 1960; Baer and Bositis 1988). Thus, a purely partisan selection strategy on average will produce systematic differences in the policy preferences of judges and in their decisions. Hence, the empirical finding in many decisionmaking studies that judges appointed by Democratic Presidents are more liberal than those appointed by Republican Presidents is consistent with the operation of either a policy or a partisan agenda in the selection process.

The present study employs judicial decisionmaking in the U.S. Courts of Appeals as a window through which to reexamine the politics of selection to the lower courts. It differs from previous decision-based studies of selection in three ways. First, it takes advantage of recent innovations in measurement to go beyond reliance on political party as a measure of the preferences of actors in the selection process. Second, employing these new measures it examines the relative effects of

³ McFeeley (1987: 58) recounts the following memo between White House advisor Cliff Carter and President Johnson. "Strom Thurmond is holding out . . . for a former law partner of his. . . . It is said Thurmond wants this badly and probably could be used as trade bait on Civil rights, endorsement by the South Carolina Democratic Convention, and insurance against unpledged electors."

⁴ Songer et al. (1994) follow Tate and Handberg (1991) in assigning ideological motivations to Johnson and Nixon.

the operation of policy and partisan agendas in the selection process, effects confounded in previous research. Third, a more complex model of selection is assessed than in most previous studies—one that expressly examines the role of senators and senatorial preferences in the selection process. The analysis does not address the expressed motivations of the actors involved in judicial selection. It focuses instead on determining if the behavior of the judges once appointed is consistent with the operation in the selection process of a partisan agenda or a policy agenda, and the influence of senatorial courtesy on either of these agendas. The answer to these questions lies not in focusing on whether judges' decisions reflect policy preferences but rather on *whose* preferences they reflect.

MODELING JUDICIAL SELECTION

A Policy Agenda Model of Selection

The President and his surrogates clearly control the selection of justices to the United States Supreme Court. A President's choice may be influenced by a Senate controlled by the opposite party or by his status as a "lame duck," but no other actors have the power to control the President's choice (Guliuza, Reagan, and Barrett 1994; Ruckman 1994; Segal 1987). The policy model assumes that Presidents seek to select judges with policy preferences as close as possible to their own. In the absence of constraints, the policy model predicts judicial outcomes to be strongly related to the President's own policy preferences. The presence of other actors in the selection process at the Court of Appeals level suggests the operation of presidential policy preferences may be attenuated in some circumstances. This is a possibility we return to in our discussion of senatorial courtesy below.

A Partisan Agenda Model of Selection

As noted above, the finding that federal judges appointed by Democratic Presidents are more liberal than those appointed by Republican Presidents is consistent with the operation of either a partisan or a policy agenda in the selection process. Given differences in the ideological center of gravity for the two parties, the implementation of a partisan agenda will produce ideological differences in the voting patterns of judges. How then can we distinguish the operation of preference maximizing by the President (i.e., the operation of a policy agenda) from the simple outcome of partisan selection?

If a partisan agenda is at work, then the policy preferences of the judges selected should reflect the preferences of the population from which the judges are chiefly drawn—state party elites. Under the partisan agenda the President is not selecting to maximize the fit of the judge to his own policy preferences. Rather, he is selecting to reward party loyalty and support in previous campaigns, to bridge or reflect intrastate cleavages within the party, and sometimes simply to

reward long-term personal friendships.⁵ Thus, under the partisan model the President selects a judge from the pool of state party elites with each selection based on idiosyncratic factors unrelated to the specific policy preferences of the President. On average, judges selected in this fashion should reflect the ideological preferences of the pool from which they are selected and not necessarily those of the selector.⁶

In summary, the partisan and policy agenda models produce very different expectations. If a partisan agenda is operative, then the behavior of the judges selected will reflect the policy preferences of the party elite in the state from which their appointments are made. On the other hand, the policy agenda model assumes that Presidents select judges from among state party elites whose policy preferences most clearly conform to their own. Hence, if the policy agenda model is operative, then knowing the policy preferences of the selector should tell us more about the behavior of the judges than simply knowing the preferences of the state party elites from which they are drawn.

Senatorial Courtesy

Though the President and his surrogates have substantial control over the selection process for Supreme Court nominees, selection studies paint a far different picture for the lower courts. Most notably, individual senators of the President's party are active participants in the selection of lower court judges. The power of senators is most apparent in filling District Court vacancies. The geographic jurisdiction of these courts is confined within state boundaries and the judges are routinely selected from persons residing in the state if not the district. Since the Courts of Appeals cover several states the claim of an individual senator to control over an appointment is arguably less than for District Courts (Goldman 1967: 186-214; Chase 1972: 43-44; Sheldon and Maule 1997: 184).⁷ However, seats on the Courts of Appeals in fact are often associated with a particular state, giving senators of the President's party a claim to influence if not control of the appointment. Even when the allocation of a circuit seat to a state is unclear

⁵ Goldman (1997) refers to selection based on friendship as reflecting a "personal agenda" but personal friendship is typically combined with support in previous political campaigns and membership in the same political party.

⁶ The operation of the partisan agenda is analogous to the President randomly sampling out of the pool of party elite within a state. The preferences of the party elite within a state are not homogeneous and judges selected by this process even in a single state may differ in their preferences. However, with repeated sampling the expected value of the preferences for the judges selected will be the mean preference for the pool of potential candidates, the state party elite.

⁷ Chase (1972: 99) recounts instances of the Eisenhower and the Kennedy (84) administrations winning in negotiations with senators but also instances in which senators held out for their Court of Appeals nominee against the best efforts of the administration (85).

upon vacancy, senatorial claims apply once the seat is assigned (McFeeley 1987: 55; Grossman 1965: 120; Sheldon and Maule 1997: 21). Thus, even for appointments to the Courts of Appeals Presidents cannot afford to alienate senators who can affect the success of presidential legislative initiatives (Grossman 1965: 37).⁸

The expectations for whether the President will operate under a policy agenda or a partisan agenda are less clear when the conditions for senatorial courtesy are present. At least some descriptions of the selection process suggest that where senatorial courtesy is operative, the senator essentially picks the judge. To the extent that this description is accurate, we would expect judges to reflect the policy preferences of the relevant senator rather than those of the President or of the state political elite.

DATA AND MEASUREMENT

Controlling the Legal Context

Assessing the partisan and the policy models rests on the assumption that the decisions of judges of the Courts of Appeals are affected by their policy preferences. The models simply differ on how those preferences emerge from the selection process. While a preference model has proven powerful in explaining Supreme Court behavior (Segal and Spaeth 1993), this has been less the case in the lower courts. Even assuming that judges are motivated by their preferences existing precedent and clear case facts control case outcomes in many lower court cases (Rowland and Todd 1991: 176). For example, criminal cases are routinely appealed to the Courts of Appeals and just as routinely rejected by both conservative and liberal panels. Even if one doubts the efficacy of precedent as an internal constraint, there is substantial evidence that lower court judges are responsive to oversight by higher courts (Songer 1987; Songer and Davis 1990; Songer, Segal, and Cameron 1994; Stidham and Carp 1982). A judge selected to reflect Eisenhower's policy preferences might vote more liberally than predicted from those preferences as a result of serving during a period of oversight by the liberally dominated Warren Court. Conversely, a judge appointed to maximize Johnson's policy preferences may vote more conservatively than expected as a result of the supervision of the Burger and Rehnquist courts. Thus in assessing models of the politics of selection it is important to focus on cases where ideological differences are most likely to be operative and to control for the legal context in which the judges are operating.

⁸ Johnson was even willing to give a powerful senator of the opposing party a voice in selecting judges. "We want to get Dirksen's help on the tax bill" (Goldman 1997: 173). Other Presidents were forced to reckon with senators of the opposing party who successfully opposed nominations (e.g., 315).

The present study focuses on judicial behavior in civil rights and civil liberties cases decided with dissent between 1953 and 1988 by judges appointed by Presidents Eisenhower through Reagan.⁹ The data are drawn from the Courts of Appeals data set.¹⁰ The unit of analysis is the vote of individual judges. Liberal votes are coded as 1 and conservative votes as 0. Only the votes of judges appointed by a President of their own party are included in the analysis.¹¹

Civil rights and civil liberties have been key issues distinguishing liberals and conservatives in the postwar period. Indeed, Carmines and Stimson (1989) have argued that racial issues like civil rights have been key to the shifting alignments of the Democratic and Republican parties during this era. If policy preferences are at work in judicial decisionmaking, we would expect to observe their operation in cases involving these issues. Of course not all civil liberties and civil rights cases escape the constraints of clear facts and existing case law. By focusing only on cases decided with dissent we hope to minimize the effects of these constraints.¹² In a case decided with dissent the law and/or facts are not sufficiently clear to produce agreement. It is in such cases that the operation of preferences is most likely to be detected.

To control for Supreme Court oversight, we include in the analysis a measure of Supreme Court liberalism in civil rights and civil liberties cases. These data are drawn from Epstein et al. (1996: Table 3-8). The data are lagged one year. It is the need to control for the changing legal context that requires the analysis to focus on the behavior of judges in individual cases. A score for average liberalism across the cases decided in a judge's career would fail to consider the possible effects of shifts in the legal context in which the decisions were made.

Measuring Preferences

The measurement of preferences is a key element in operationalizing both the policy and the partisan selection models. In the past, the measurement of congressional preferences has relied principally on interest group scores such as those compiled by the Americans for Democratic Action (ADA). Interest group

⁹ The selection of Eisenhower as the starting point of the analysis was determined by the availability of presidential policy preference measures. This is discussed later.

¹⁰ Donald R. Songer, The United States Courts of Appeals Database. National Science Foundation Grant SES-8912678.

¹¹ Cross-party appointments are relatively infrequent and are departures from the general processes under consideration here. In the present study only ten judges were eliminated from consideration by this restriction. See Chase (1972: 74-75) for a discussion of cross-party nominations under Kennedy and Goldman (1997: 69) for an example cross-party nomination under Truman.

¹² Songer (1982) has provided sound evidence that preferences are operative in unanimous as well as non-unanimous cases at the Courts of Appeal but there is also evidence that such differences are more evident in cases decided with dissent (Gottschall 1986).

scores have also been used as a basis for computing preference measures for Presidents (Zupan 1992). Poole and Rosenthal (1997) have recently developed new measures of ideological preferences for Congress. Their results indicate that congressional voting can be conceptualized largely in terms of a single ideological dimension with a second dimension rising to importance in a few historical eras. The scores of senators and congressmen on this first dimension are strongly correlated with traditional interest group measures (e.g., ADA) but overcome their principle shortcomings.¹³ The Poole and Rosenthal common-space scores are comparable across the chambers of Congress and over time. The preferences of senators from one era can be compared directly with those from a later time period. Likewise, scores for senators and members of the House share a common metric. Poole (1998) has extended the method to provide common-space estimates of the preferences of the Presidents since Eisenhower.

The present study uses the first dimension common space scores to measure the ideological preferences of the appointing President and relevant senators. Scores on this dimension are scaled from -1 for most liberal to $+1$ for most conservative. Absent senatorial courtesy the measure of senatorial preferences is assigned a value of zero. If senatorial courtesy is operative and there are two senators of the President's party in a state, senatorial preferences are measured as the mean of the common space scores of the senators.¹⁴

Berry et al. (1998) have developed annual measures of citizen and government ideology in the American states.¹⁵ Their measures are based on the interest group scores of each state's congressional delegation. We follow the lead of Berry et al. (1998) in using the congressional delegation as a basis for estimating the preferences of state party elites. However, for the reasons noted above we employ the common space measure of Poole and Rosenthal (1997) rather than the interest group scores used by Berry et al. (1998). We calculated for each judge the mean common space score for the state congressional delegation of the President's party in the year of the judge's appointment. If there is no congressman of the President's party in the state from which an appointment was made, the judge and the cases s/he decided are excluded from the analysis.¹⁶

¹³ See Groseclose, Levitt, and Snyder (1999) for a discussion of the weaknesses of interest group scores as measures of preferences.

¹⁴ In some states with two senators of the President's party, the senators rotate the appointments. To the extent that this occurs frequently and the preferences of the two senators are widely disparate, use of the mean will introduce error.

¹⁵ Berry et al. (1998) create summary scores that do not break down ideology by party within each state and, hence, are not appropriate for our purpose.

¹⁶ Berry et al. (1998) employ a very complex mechanism to estimate congressional delegation policy positions in states lacking a delegation from a particular party. We feel that the more appropriate approach for our purposes is simply to limit the analysis to cases where the requisite data is available.

Measuring Political Context

The effects of both the policy and partisan agendas on judicial behavior may be conditioned by the political context. When confronted with a Senate controlled by the opposing party the President and/or the senator may act strategically to insure confirmation and select a candidate whose policy position is closer to that of the opposition than they would if not so constrained (Lyles 1996).¹⁷ For example, Nixon's ability to select "law and order" judges arguably was constrained by a Democratic Senate and the shift to a more liberal chair of the Senate Judiciary Committee (Rowland, Songer, and Carp 1988: 193). Likewise, Clinton's appointments to the lower courts may have been more moderate than expected given his reences as a result of Republican control of the Senate during his second term (Baum 1998: 293). Unfortunately, the present data do not provide a means of assessing this possibility. For the data in this study, all of the Republican Presidents and none of the Democratic Presidents faced a Senate controlled by the opposite party. A simple measure of whether the Senate is controlled by the same party as the President is thus empirically confounded with the party of the President.

A second element of the political context that may condition appointment strategies is the election cycle. As the election year approaches there is substantial evidence that Presidents encounter increased difficulty in obtaining confirmation for their nominees for the Supreme Court, even when their party controls the Senate (Gulliuza, Reagan, and Barrett 1994; Ruckman 1993; Segal 1987). The Senate minority has many opportunities to delay hearings and confirmation votes, hoping for a victory by their own party in the upcoming election. Again, a President may act strategically under this condition and nominate a candidate closer in policy preferences to the minority than he would if not so constrained. Thus, a lame duck Democratic President is expected to appoint somewhat more conservative judges and a lame duck Republican President is expected to appoint somewhat more liberal judges than they appoint during the first three years of their term. To capture these possible effects two measures were created. The first takes the value of 1 for a judge appointed by a Democratic President in his fourth year and 0 otherwise. The second takes the value of 1 for a judge appointed by a Republican President in his fourth year and 0 otherwise.

ANALYSIS

Given the dichotomous nature of the dependent variable, judicial vote, logistic regression analysis is employed. Since multiple cases appear in the data set for

¹⁷ Contrary to the logic of the partisan model, these political conditions may force the selectors to consider the preferences of the potential candidates. The focus, however, is not on maximizing preference congruence but on identifying a co-partisan acceptable to the opposition.

each judge, robust standard errors are employed in all significance tests to compensate for the hierarchical structure of the data (Giles and Zorn 2000). The results of the initial analyses, which test the alternative presidential agendas, are presented in Table 1. In terms of the legal and political context variables, the results do not comport well with expectations. In each of the models, the liberalness of the U.S. Supreme Court in civil liberties cases has no effect on the probability of a liberal decision in the cases under study. The lame duck variables are signed in the direction opposite to that expected but are also statistically insignificant. Thus, lame duck status does not appear to constrain the exercise of preferences.

The results for the partisan agenda model appear in Column A of Table 1 and are consistent with expectations. Remembering that preferences are scaled from -1 for most liberal to +1 for most conservative, the negative coefficient for state party elite preferences is appropriately signed and statistically significant.

≡ TABLE 1.
EVALUATING PARTISAN AND POLICY MODELS OF SELECTION

| | A Partisan Agenda Model | | B Policy Agenda Model | | C Partisan and Policy Model | |
|------------------------------------|-------------------------------|---------------------|-----------------------------|---------------------|-----------------------------------|---------------------|
| | B | Δ in Probability | B | Δ in Probability | B | Δ in Probability |
| Presidential Preferences | | | -1.5718** (.3279) | -.298 | -1.2103** (.4877) | -.233 |
| State Elite Preferences | -4.4030*** (.8587) | -.427 | | | -1.8484 (1.2479) | -.188 |
| Supreme Court Civil Liberties % | .0045 (.0071) | .009 | .0022 (.0067) | .005 | .0022 (.0069) | .005 |
| Republican Lame Duck | -.3915 (.3986) | -.092 | -.2764 (.3652) | -.068 | -.1657 (.3881) | -.038 |
| Democratic Lame Duck | .2152 (.4824) | .046 | .6646 (.5360) | .143 | .1625 (.4374) | .036 |
| Constant | -.3898 | | -.4123 | | -.3930 | |
| PRE | .220 | | .261 | | .248 | |
| N | 832 | | 890 | | 832 | |

One asterisk indicates $p < .05$, two indicate $p < .01$, three indicate $p < .001$ one tailed. Robust Standard Errors in parentheses.

The change in probability column reflects the change in the probability of a liberal vote when the value of the independent variable varies and all other variables are held at the mean or mode. The presidential, partisan, and senatorial variables vary from mean for Democrats observed during the entire study period to the mean for Republicans observed during the entire study period. For President this is from -.47 to .32, for House members this is from -.20 to .22, for Senate members this is from -.26 to .24. The Supreme Court variable varies from its mean to ten percent more liberal. The lame duck variables vary from the modal value of zero to the non-modal value of one.

States with liberal political elites are more likely to have federal judges appointed who reach liberal decisions in civil liberties cases than are states with more conservative elites. Thus, as expected if a partisan agenda is at work in selection, federal judges broadly reflect the ideological preferences of the pool of candidates from which they are drawn, state party elites.

The results for the policy agenda model that appear in Column B of Table 1 are also consistent with expectations. The measure of the preferences of the President is appropriately signed and statistically significant. The more liberal (conservative) the President, the more liberal (conservative) are the judges appointed. Given the average difference in the preferences of Democratic and Republican Presidents, judges appointed by Democratic Presidents are 29.8 percent more likely to vote liberal in a civil liberties case than are judges appointed by Republican Presidents. The policy model also provides a small improvement in prediction over the partisan agenda model (.26 versus .22).

Do the policy preferences of the President matter once we take into account the preferences of the state party elites from which nominees are selected? Stated differently, do Presidents select candidates from the available pool of state party elites without regard to the policy preferences of the candidates, or do they select judges who tend to reflect their own policy preferences? This question is initially addressed in Column C of Table 1. The policy preferences of the President are again appropriately signed and statistically significant. A judge appointed by a Democratic President is 23.3 percent more likely to cast a liberal vote in a civil liberties case than a judge appointed by a Republican President. The relationship between state party elite preferences and judicial voting does not reach traditional levels of statistical significance, though it approaches that level (.07). The coefficient is appropriately signed and the effect of coefficient suggests that a judge selected from the average pool of Democratic state elites is 18.8 percent more likely to vote liberal in a civil liberties case than a judge selected from the average pool of Republican state elites. The analysis in Table 1 suggests that presidential policy preferences are more closely linked to judicial outcomes than are the preferences of the state political elite.

Both qualitative and quantitative treatments of the selection of federal lower court judges suggest that the politics of the selection process differ fundamentally depending upon whether or not senatorial courtesy is operative. The analysis in Table 2 provides a rigorous assessment of that suggestion. The model estimated uses dummy variables to provide conditional estimates of the effects of preferences on the behavior of the judges. The coefficients are directly interpretable as the effects of presidential, senatorial and party preferences when senatorial courtesy is and is not present.¹⁸ This approach is equivalent to but more easily interpretable than the more common multiplicative approach to interaction.

¹⁸ The effect of senatorial preference, of course, is already conditioned by the presence of senatorial courtesy. For a discussion of this approach to modeling interaction see Wright (1976).

The results of this analysis presented in Column A of Table 2 clearly confirm that the politics of selection are conditioned by the operation of senatorial courtesy.¹⁹ In the absence of senatorial courtesy, presidential preferences are significantly related to the decisionmaking of the selected judges. As the selecting President's preferences become more liberal (conservative), the probability of the selected judges deciding civil liberties cases liberally (conservatively) increases. Given the average difference in the preferences of Democratic and Republican Presidents, judges appointed by Democratic Presidents when senatorial courtesy is not operative are predicted to be 41.8 percent more likely to vote liberal than are judges appointed by Republican Presidents under similar conditions. The failure of state party elite preferences to achieve statistical significance among judges appointed when senatorial courtesy is absent provides clear support for the operation of a policy agenda in presidential selection of judges. The decisional behavior of judges selected absent the constraint of senatorial courtesy more closely conforms to the preferences of the appointing President than to the preferences of the party elite of the state from which they were selected.

The results when senatorial courtesy is operative differ substantially from those when it is not operative. The behavior of the judges selected under the condition of senatorial courtesy is unrelated to the preferences of the Presidents who formally nominated them. The voting behavior of these judges is also apparently unrelated to the preferences of senators, or of the party elite of the states from which they were selected. However, caution should be exercised in interpreting this result. The measure of state party elite preferences and the measure of senatorial preferences are strongly related. By and large senatorial preferences reflect the policy preferences of the other party elites within their state.

The results in Columns B and C of Table 2 clarify this relationship. Under the condition of senatorial courtesy if state party elite preferences, the measure of the partisan agenda, are excluded from the equation, then senatorial preferences have an appropriately signed and statistically significant effect on the behavior of the judges. Conversely, if senatorial preferences are excluded under the condition of senatorial courtesy, then the indicator for the partisan agenda becomes statistically significant. Under the condition of senatorial courtesy,

$$\text{Prob libvote} = a + b_1D_1(\text{pres}) + b_2D_2(\text{pres}) + b_3D_1(\text{partisan}) + b_4D_2(\text{partisan}) + b_5(\text{senate}) \\ + b_6(\text{SupCt}) + b_7(\text{Dlame}) + b_8(\text{Rlame}) + b_9(\text{Courtesy})$$

Where: $D_1 = 1$ if conditions for senatorial courtesy are met; 0 otherwise

$D_2 = 1$ if conditions for senatorial courtesy are not met; 0 otherwise

Courtesy = 1 if senatorial courtesy is present; 0 otherwise.

¹⁹ While the courtesy variable is included in the model for completeness, the substantive interpretation of its effect is relatively trivial. The results indicate that on average more liberal judges were selected under courtesy. This reflects the fact that for the period under study more judges were appointed under the condition of Democratic than Republican senatorial courtesy.

TABLE 2.
ASSESSING THE POLICY AND PARTISAN MODELS UNDER THE CONDITIONS OF
SENATORIAL COURTESY

| | A | | B | | C | |
|---------------------------------|-----------------------|-------------------------|-----------------------|-------------------------|------------------------|-------------------------|
| | B | Δ in Probability | B | Δ in Probability | B | Δ in Probability |
| NO SENATORIAL COURTESY | | | | | | |
| Presidential Preferences | -2.6333*** (.7557) | -.418 | -2.3041*** (.5955) | -.400 | -2.6306*** (.7651) | -.403 |
| State Elite Preferences | .1383 (1.9418) | .007 | | | .1479 (1.9357) | .006 |
| SENATORIAL COURTESY | | | | | | |
| Presidential Preferences | .0001 (.5045) | .000 | -.3762 (.4516) | -.050 | -.0017 (.4986) | .000 |
| Senatorial Preferences | -.6552 (.7869) | -.043 | -1.6374*** (.5182) | -.156 | | |
| State Elite Preferences | -3.1731 (1.9912) | -.236 | | | -4.4054*** (1.3385) | -.346 |
| Supreme Court Civil Liberties % | .0062 (.0070) | .007 | .0059 (.0068) | .009 | .0061 (.0070) | .006 |
| Republican Lame Duck | -.1627 (.3876) | -.020 | -.2427 (.3731) | -.040 | -.1557 (.3816) | -.018 |
| Democratic Lame Duck | .0199 (.4377) | .002 | .4161 (.5571) | .056 | .0726 (.4234) | .008 |
| Courtesy | .4996* (.2556) | -.069 | .2939 (.2426) | -.049 | .5393* (.2497) | -.070 |
| Constant | -.9460** | | -.8040* | | -.9443** | |
| PRE | .263 | | .276 | | .269 | |
| N | 832 | | 890 | | 832 | |

One asterisk indicates $p < .05$, two indicate $p < .01$, three indicate $p < .001$. One tailed test.

The change in probability column reflects the change in the probability of a liberal vote when the value of the independent variable varies and all other variables are held at the mean or mode. The presidential, partisan, and senatorial variables vary from mean for Democrats observed during the entire study period to the mean for Republicans observed during the entire study period. For President this is from $-.47$ to $.32$, for House members this is from $-.20$ to $.22$, for Senate members this is from $-.26$ to $.24$. The Supreme Court variable varies from its mean to ten percent more liberal. The lame duck variables vary from the modal value of zero to the non-modal value of one. The courtesy variable varies from the modal value of one to the non-modal value of zero.

presidential preferences are unrelated to the liberal/conservative decisionmaking of the judges. This holds regardless of whether senatorial preferences or the preferences of the state party elite are included in the model. Thus, when judicial appointments occur with senatorial courtesy in effect these data suggest that the President is unable successfully to pursue a policy agenda. However, since the policy preferences of senators and the party elite of their states are strongly correlated, it impossible to determine whether senators employ their own policy agenda or a partisan agenda when senatorial courtesy gives them an active role in the selection of judges of the Courts of Appeals.²⁰

Goldman (1997) attributes a policy agenda to Ronald Reagan. Some quantitative studies have also suggested that the concern for policy in the selection of lower federal judges is a recent phenomena but have suggested that Carter as well as Reagan appointments were driven by a policy agenda (Davis 1986; Rowland, Songer, and Carp 1988; Songer and Davis 1990; but see Note 1987). Are the results in Table 2 driven by the operation of policy preferences only under Presidents Carter and Reagan? This possibility was assessed by repeating the analysis in Table 2 first with judges selected by President Reagan excluded and second, with judges selected by Presidents Reagan and Carter excluded from the analysis. The outcomes of these analyses (not shown) are essentially no different from those in Table 2. Thus, these data suggest that the pursuit of a policy agenda by Presidents is not an isolated or recent phenomenon. While Reagan may have been more open in discussing the role of policy preferences in selection, a policy agenda appears to have been pursued by Presidents throughout the period under study.

SUMMARY

In his seminal work on the selection of federal judges Sheldon Goldman (1997) has argued that with the exception of Reagan, Presidents in the post-World War II period have generally followed a partisan agenda. That is, Presidents have used such appointments to reward and strengthen their political parties and have not attempted to maximize the policy congruence between themselves and the judges. The present study has provided a rigorous test of the operation of the policy and partisan agendas in the selection of judges to the Courts of Appeals. While Goldman's work focuses on documented motivations, the present study seeks to identify traces of the operation of these agenda in the behavior of the selected judges.

²⁰ A common suggestion to address multicollinearity is to collect different data that do not suffer from collinearity. We did this in two ways. First, we used an alternative measure for the state political elite (Erikson, Wright, and McIver 1989). We also attempted to increase our sample size by using the Amelia program to impute data for states for which there is no congressional delegation of the same party as the president (King, Honaker, Joseph, and Scheve 2000). Neither approach yielded substantially different results, and we retained our original measure of state elite preferences.

The results provide interesting insight into the politics of selecting judges of the lower federal courts. These data clearly suggest that the politics of selection differ dramatically depending upon whether senatorial courtesy is in operation. The voting behavior of Courts of Appeals judges selected without senatorial courtesy is consistent with the operation of a presidential policy agenda, not a partisan agenda. With presidential preferences taken into account, state party elite preferences are unrelated to subsequent judicial behavior. Thus, Presidents do not simply select co-partisans to be judges of the Courts of Appeals. From the pool of co-partisans within a state, they select nominees who reflect their own policy preferences.

Among judges selected when senatorial courtesy is in play, the linkage between presidential preferences and judicial outcomes disappears. This finding does not deny the validity of the documented instances where Presidents or their emissaries have wrested control of an appointment from a senator or forced a compromise. What it does suggest is that these are more likely aberrations than the rule. Even if Presidents do not hand over the appointment process to senators enjoying courtesy, these findings suggest that, at a minimum, Presidents under the condition of senatorial courtesy become more responsive to the political milieu of the state than is the case with appointments when senatorial courtesy is not a factor. Since senatorial courtesy is present in nearly 65 percent of the cases analyzed this is a substantial constraint on the appointment process.

The results of this analysis provide no support for the idea that a shift has occurred in the agenda operative in the selection of federal judges. Goldman and others suggest that a policy agenda has been operative only since President Reagan or perhaps President Carter. While not disputing Goldman's findings that Reagan more than his predecessors was open about his policy motivations in selecting judges, the present analysis suggests that policy preferences have been operative throughout the postwar period when the President is not constrained by senatorial courtesy. Eisenhower, Kennedy, Johnson, etc. talked less about policy in the selection process and did not build the institutional framework to assure the policy congruence of appointees as did the Reagan administration but in the end they selected federal judges who reflected their policy preferences whenever possible.

REFERENCES

- Baer, Denise, and David A. Bositis. 1988. *Elite Cadres and Party Coalitions*. New York: Greenwood.
- Barrow, Deborah, and Gary Zuk. 1990. "An Institutional Analysis of Turnover in the Lower Federal Courts, 1900-1987." *Journal of Politics* 52: 457-76.
- Baum, Lawrence. 1998. *American Courts: Process and Policy*, 4th ed. New York: Houghton Mifflin.

- Berry, William D., Evan J. Ringquist, Richard C. Fording, and Russell L. Hanson. 1998. "Measuring Citizen and Government Ideology in the American States, 1960-93." *American Journal of Political Science* 42: 327-48.
- Carmines, Edward, and James Stimson. 1989. *Issue Evolution: Race and Transformation of American Politics*. Princeton, NJ: Princeton University Press.
- Carp, Robert, and C. K. Rowland. 1983. *Policymaking and Politics in the Federal District Courts*. Knoxville: University of Tennessee Press.
- Chase, Harold. 1972. *Federal Judges: The Appointing Process*. Minneapolis: University of Minnesota Press.
- Davis, Sue. 1986. "President Carter's Selection Reforms and Judicial Policymaking." *American Politics Quarterly* 14: 328-44.
- Epstein, Lee, Jeffrey Segal, Harold Spaeth, and Thomas Walker. 1996. *The Supreme Court Compendium*. Washington, DC: Congressional Quarterly.
- Erikson, Robert S., Gerald C. Wright, and John P. McIver. 1989. "Political Parties, Public Opinion, and State Policy in the United States." *American Political Science Review* 83: 729-50.
- Giles, Michael, and Christopher Zorn. 2000. "Gibson Versus. Case-Based Approaches: Concurring in Part, Dissenting in Part." *Law & Courts* 9: 10-16.
- Goldman, Sheldon. 1966. "Voting Behavior on the United States Courts of Appeals, 1961-64." *American Political Science Review* 60: 374-83.
- _____. 1967. "Judicial Appointments to the United States Courts of Appeals." *Wisconsin Law Review* 86: 186-214.
- _____. 1975. "Voting Behavior on the United States Courts of Appeals Revisited." *American Political Science Review* 69: 491-506.
- _____. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*. New Haven, CT: Yale University Press.
- Gottschall, Jon. 1986. "Reagan's Appointments to the U.S. Courts of Appeals." *Judicature* 70: 48-54.
- Groseclose, Tim, Steven D. Levitt, and James M. Snyder, Jr. 1999. "Comparing Interest Group Scores Across Time and Chambers: Adjusted ADA Scores for the U.S. Congress." *American Political Science Review* 93: 33-50.
- Grossman, Joel. 1965. *Lawyers and Judges: The ABA and the Politics of Judicial Selection*. New York: Wiley.
- Guliuza, Frank, Daniel Reagan, and David Barrett. 1994. "The Senate Judiciary Committee and Supreme Court Nominees: Measuring the Dynamics of Confirmation Criteria." *Journal of Politics* 56: 773-87.
- King, Gary, James Honaker, Anne Joseph, and Kenneth Scheve. 2000. "Analyzing Incomplete Political Science Data: An Alternative Algorithm for Multiple Imputation." Unpublished.
- Lloyd, Randall. 1995. "Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts." *American Political Science Review* 89: 413-20.

- Lyles, Kevin. 1996. "Presidential Expectations and Judicial Performance Revisited: Law and Politics in the Federal District Courts, 1960-1992." *Presidential Studies Quarterly* 26: 447-72.
- McFeeley, Neil D. 1987. *Appointment of Judges: The Johnson Presidency*. Austin: University of Texas Press.
- McClosky, Herbert, Paul J. Hoffman, and Rosemary O'Hara. 1960. "Issue Conflict and Consensus Among Party Leaders and Followers." *American Political Science Review* 54: 406-27.
- Navasky, Victor S. 1971. *Kennedy Justice*. New York: Atheneum.
- Note. 1987. "All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals." *Columbia Law Review* 87: 766-93.
- Pinello, Daniel R. 1998. "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis." Paper presented at the Midwest Political Science Convention.
- Poole, Keith T. 1998. "Recovering a Basic Space From a Set of Issue Scales." *American Journal of Political Science* 42: 954-93.
- Poole, Keith T., and Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting*. New York: Oxford University Press.
- Richardson, Richard, and Kenneth Vines. 1970. *The Politics of Federal Courts: Lower Courts in the United States*. Boston, MA: Little, Brown.
- Rowland, C.K. and Robert A. Carp. 1996. *Politics and Judgment in Federal District Courts*. Lawrence: University of Kansas Press.
- Rowland, C.K., Robert Carp, and Ronald Stidham. 1984. "Judges' Policy Choices and the Value Basis of Judicial Appointments: A Comparison of Support for Criminal Defendants among Nixon, Johnson, and Kennedy Appointees to the Federal District Courts." *Journal of Politics* 46: 886-902.
- Rowland, C.K., Donald Songer, and Robert Carp. 1988. "Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges." *Law and Society Review* 22: 191-99.
- Rowland, C.K., and Bridget Todd. 1991. "Where you Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts." *Journal of Politics* 53: 175-85.
- Ruckman, P.S. 1993. "The Supreme Court, Critical Nominations, and the Senate Confirmation Process." *Journal of Politics* 55: 793-805.
- Segal, Jeffrey A. 1987. "Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics." *Journal of Politics* 49: 998-1015.
- Segal, Jeffrey A. and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. New York and Cambridge: Cambridge University Press.
- Sheldon, Charles H., and Linda S. Maule. 1997. *Choosing Justice: The Recruitment of State and Federal Judges*. Pullman: Washington State University Press.
- Songer, Donald. 1982. "The Policy Consequence of Senate Involvement in the Appointment of Courts of Appeal Judges." *Western Political Quarterly* 35: 107-19.

- _____. 1982. "Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals." *American Journal of Political Science* 26: 225-39.
- _____. 1987. "The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals." *Journal of Politics* 49: 830-41.
- Songer, Donald, and Sue Davis. 1988. "Carter's Nominating Commissions for the U.S. Courts of Appeals: An End Run Around Senatorial Courtesy?" *South-eastern Political Review* 16: 61-82.
- _____. 1990. "The Impact of Party and Region on Voting Decisions in the United States Courts of Appeals, 1955-1986." *Western Political Quarterly* 43: 317-34.
- Songer, Donald and Susan Haire. 1992. "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals." *American Journal of Political Science* 36: 963-82.
- Songer, Donald, Jeffrey Segal, and Charles Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38: 673-96.
- Stidham, Ronald, and Robert Carp. 1982. "Trial Courts' Response to Supreme Court Policy Changes: Three Case Studies." *Law and Policy Quarterly* 4: 215-34.
- _____. 1987. "Judges, Presidents, and Policy Choices: Exploring the Linkage." *Social Science Quarterly* 68: 395-404.
- Tate, Neal, and Roger Handberg. 1991. "Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88." *American Journal of Political Science* 35: 460-80.
- Tolchin, Martin, and Susan Tolchin. 1971. *To the Victor... Political Patronage from the Club-house to the White House*. New York: Random House.
- Wright, Gerald C. 1976. "Linear Models for Evaluating Conditional Relationships." *American Journal of Political Science* 20: 349-73.
- Zuk, Gary, Deborah J. Barrow, and Gerald S. Gryski. Multi-User Database on the Attributes of United States Appeals Courts Judges, 1801-1994. Ann Arbor, MI: ICPSR 6796.
- Zupan, Mark A. 1992. "Measuring the Ideological Preferences of U.S. Presidents: A Proposed (Extremely Simple) Method." *Public Choice* 73: 351-61.

Received July 14, 2000

Accepted for Publication September 13, 2000

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