

# Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals

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*We address an important aspect of judicial careers: the elevation of judges from the U.S. District Courts to the Courts of Appeals. We argue that the likelihood of a judge being elevated is a function of informational cues and signals regarding the nature of the judge and the judge's compatibility with presidential preferences. We also expect norms involving the intersection between geography and Senate politics to affect a judge's elevation chances. Using data on district court judges appointed between 1946 and 1995, we find that the likelihood of a judge being elevated is a function of the judge's ideological compatibility with the president, the judge's previous ABA rating, and Senate norms involving state "ownership" of appeals court seats. Blunt indicators of policy preferences trump direct signals when presidents decide whom to elevate, leaving judges little control over their career prospects and thus less incentive to slant their decisions in the direction of the president's preferences.*

One of the central questions underlying the judicial literature involves the extent to which courts and judges operate independently from external political pressures. The earliest justifications for the U.S. judicial system emphasized the importance of such independence. According to Hamilton, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution" (Hamilton, Madison, and Jay 1961, 466). Leading scholars now view judicial independence as either one of the essential institutional prerequisites for attitudinal decision making (Segal and Spaeth 2002) or a contributor to the rule of law in developing democracies (e.g., Thomas 1995). Judicial behavior may be influenced, however, by the likelihood of political retaliation (Helmke 2002; Spiller and Gely 1992) or, depending upon the nature of the selection process, by the need to seek reelection (Brace and Hall 1997).

For lower federal court judges in the United States, the possibility of moving to a higher court may also lead to strategic behavior. If ambitious judges are able to enhance their likelihood of being elevated to a higher court by deciding cases in a manner congruent with the preferences of the president in office, then this is an important means by which judges might be influenced by external political concerns. Alternatively, if a judge's decisions have little to do with the prospect of elevation, then this would suggest that they are relatively free to decide cases as they please.

Extant scholarship provides a wealth of information about the initial appointment (e.g., Chase 1972; Goldman 1997) and ultimate retirement (Nixon and Haskin 2000; Spriggs and Wahlbeck 1995; Zorn and Van Winkle 2000) of federal judges, but there is virtually no systematic knowledge regarding the career path of federal judges as they either remain on their initial court or move to a higher

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A previous version of this article was presented at the 2004 Annual Meeting of the Midwest Political Science Association. We are appreciative of the helpful comments provided by Nancy Scherer, Stephen Wasby, and the anonymous reviewers.

*American Journal of Political Science*, Vol. 50, No. 2, April 2006, Pp. 478–493

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ISSN 0092-5853

court. We examine the most common type of “promotion” in the federal courts—the elevation of U.S. District Court judges to the U.S. Courts of Appeals. The district courts supply an ample set of possible nominees for a president attempting to fill a vacancy on the U.S. Courts of Appeals. In fact, presidents have often turned to the district courts when appointing judges to the appeals courts; 43.6% of the appeals court judges serving from 1946 to 1995 were elevated from the district courts.<sup>1</sup> By examining the elevation of district court judges, we can assess, among other issues, the extent to which these judges can control their careers and thus have an incentive to adjust their behavior in order to please the sitting president.

In developing our model of the elevation of district court judges, we argue that the likelihood of a judge being elevated is a function of the combination of various informational cues and signals regarding the nature of the judge and the judge’s compatibility with the preferences of the president and the Senate. We also contend that norms involving the intersection between geography and Senate politics affect the chances of a district court judge filling an appeals court vacancy. With data on the careers of federal district court judges appointed between 1946 and 1995, we estimate a discrete-time duration model that allows us to assess the effect of our hypothesized variables (and additional controls, such as the age of the judge) on the probability that a district court judge will be elevated to fill a given appeals court vacancy. Our results indicate that elevation is a function of the judge’s ideological compatibility with the sitting president, the judge’s ABA rating at the time of nomination to the district court, and Senate norms involving senatorial courtesy and state ownership of appeals court seats. It appears that the desire to be promoted may not necessarily require the judge to behave strategically, although such behavior can enhance career prospects to a small degree.

## Moving Up the Judicial Ladder

Before turning to our specific hypotheses, we lay bare the assumptions that underly much of our argument. While it is likely that presidents pursue a number of goals when appointing judges (see Goldman 1997), our first simplifying assumption is that all presidents are interested in selecting judges who will hand down decisions that are compatible with the president’s policy preferences. This assumption rests on an extensive set of studies indicating that policy

concerns motivate the president when selecting judges (e.g., McFeeley 1987; Rowland and Carp 1996; Songer, Sheehan, and Haire 2000). A related assumption is that presidents want their judicial nominees to be confirmed by the Senate. While there may be scattered occasions when a president will receive some political gain from a failed nomination, a nominee generally does the president little good if he or she is not confirmed and thus never makes it to the bench. We also assume that presidents lack perfect information regarding both the likelihood of the nominee handing down favorable decisions and the confirmability of the nominee. Our final assumption is that district court judges are interested in being elevated to the appeals courts. Again, this is a simplifying assumption and it is possible that some district court judges might prefer to remain trial judges. However, we believe it is reasonable to assume that most district court judges would at least be willing to move up the judicial hierarchy.

When confronted with an appeals court vacancy, the president often chooses to nominate a sitting district court judge to fill the vacancy. Elevating district court judges to fill appeals court vacancies can be an attractive strategy since often there will be more relevant information about a district court judge than other types of potential nominees. First, the nature of the judge’s appointment to the district court may provide useful information. Being appointed by a Democratic president reveals that a judge likely has different policy preferences than a Republican appointee. Further, the fact that the judge has already been through the confirmation process once may provide information about the judge’s confirmability. Second, the observable behavior of the judge once on the bench can also provide useful information to the president regarding the judge’s likely behavior on an appeals court. Moreover, the policy-relevant behavior of district judges is manifested under a set of constraints that are relatively similar to the constraints that will be faced by an appeals court judge. In contrast, the record of potential nominees in other settings (e.g., as an elected official) may not provide as reliable an indicator of the policy choices they would make as a federal judge. The first element of our argument is that the cues and signals that can be taken from a district court judge’s appointment and career combine with the preferences of the president and Senate confronting the appeals court vacancy in question to determine the likelihood of the judge being elevated to fill the vacancy.

A second element of our argument flows more from the institutional features of the Senate and the Courts of Appeals than from the assumptions listed above. The regional nature of the appeals courts combines with Senate practices to yield appointment norms regarding which types of judges are most eligible to fill a particular appeals

<sup>1</sup>Based on data from the United States Courts of Appeals Judge Database, Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski (Co-Principal Investigators), NSF# SBR-93-11999.

court vacancy and which senators will play a disproportionate role in the confirmation of a nominee. We will take up each element of our argument in turn.

### **Informative Cues, Signals, and the Preferences of the President and Senate**

If aspects of a district court judge's initial appointment and subsequent behavior on the bench provide useful information to the president and his advisers, how will this information then shape the likelihood of the judge being elevated to fill an appeals court vacancy? For a president seeking to appoint appeals court judges who are likely to decide cases and set precedents in a manner that reflects the president's policy preferences, any information regarding the likely future decision making of a possible appeals court judge will be particularly important. This type of information consists of both blunt cues and relatively precise signals. Starting with the former type of information, a president will expect that a judge whom he appointed to a U.S. District Court will be more likely to hand down favorable decisions as an appeals court judge than a district court judge appointed by another president. After all, the president and his advisers presumably considered the compatibility between the judge's likely behavior and the president's preferences when the judge was appointed to the district court (Goldman 1997).

*H1:* A district court judge is more likely to be elevated to fill an appeals court vacancy if the president who initially appointed the judge is still in office.

At any given point in time, most judges serving in the district courts were appointed by a previous president. A second blunt cue that a president will likely rely on when considering elevating a district court judge is the partisan identification of the president who appointed the judge to the district court. A number of studies indicate that judges behave differently according to the partisan identification of the appointing president (Goldman 1975; Kuersten and Songer 2003; Rowland and Carp 1996). A Republican appointee, for example, is much more likely than a Democratic appointee to share the policy preferences of a Republican president. Thus, a district court judge appointed by a Republican president is more likely to decide appeals court cases in a manner compatible with a Republican president's preferences. Presidents will rely on this basic cue regarding the likely behavior of nominees.

*H2:* Elevation is more likely if the president confronting the vacancy is from the same party as the

president who appointed the judge to the district court.

The two cues discussed thus far are both blunt and beyond the control of the district court judge once they are sitting on the district court. There is a third type of information regarding the compatibility between the judge's preferences and those of the president, however, that is much more precise and under the control of the judge. During their tenures on the district courts, district court judges build up records that indicate their expressed policy preferences (Richardson and Vines 1970; Rowland and Carp 1996). For a president seeking to further his policy goals, a potential nominee's published decisions can signal the extent to which the judge would hand down favorable policy decisions if appointed to an appeals court.

*H3:* The more a judge's published decisions are in line with the preferences of the sitting president confronting the vacancy, the greater the probability of the judge being elevated.

Of course, the degree to which a judge's record of published decisions can be viewed as a reliable indicator of future behavior depends on the size of the record. When considering two judges who have records that are compatible with his preferences, a president can be more confident in the future behavior of the judge with the more extensive record. The raw number of decisions published will not directly affect the probability of a judge being elevated, but it will condition the effect of the compatibility of this record with the president's preferences. We expect that the more decisions the judge has published, the more that these decisions will shape the president's decision of whether to elevate the judge. Interestingly, district court judges largely determine whether their decisions are published (Rowland and Carp 1996, 118). Thus, they have a good deal of control over the direction and strength of the signals they send about their policy positions.

*H4:* The positive effect of the compatibility of the judge's decisions with the president will be magnified by the number of the judge's decisions which have been published.

Since nominations to the federal courts must be confirmed by the Senate, presidents will be constrained by Senate preferences when selecting nominees (Moraski and Shipan 1999). The positive effect of the compatibility of a district court judge's published decisions with the president's preferences will be conditioned by whether the Senate shares the president's preferences. When the president's party controls the Senate, a judge's ideological

compatibility with the president will have a greater positive effect on the likelihood of the judge being elevated to fill an appeals court vacancy. This positive effect will be diminished when the Senate is not controlled by the president's party.

*H5:* The positive effect of the compatibility of the judge's decisions with the president will be magnified when the president's party controls the Senate.

Evidence suggests that Senate confirmation votes are also a function of the perceived qualifications of the judicial nominee (Segal, Cameron, and Cover 1992). The more qualified a nominee is, the greater the probability that the Senate will confirm the nominee. The American Bar Association's Standing Committee on Federal Judiciary evaluates the professional qualifications of every judicial nominee and submits its ratings to the Senate Judiciary Committee. The president will generally prefer to select nominees who will be rated highly by the ABA and therefore more likely to be confirmed by the Senate. Qualitative evidence suggests that presidents do concern themselves with the merit of their judicial nominees (Chase 1972; Harris 1953; Richardson and Vines 1970). If the president is considering elevating a district court judge to an appeals court vacancy, then the ABA's rating of the judge when he or she was nominated to the district court should serve as a powerful cue indicating the type of rating that the judge might receive if nominated to an appeals court seat.<sup>2</sup> The higher the ABA rating when the judge was nominated to the district courts, the greater the chance the judge will get a good rating if nominated again to a new judicial position. Presidents will therefore prefer to elevate judges who have been rated highly before.

*H6:* The higher a judge's ABA rating when s/he was appointed to a district court, the greater the probability the judge will be elevated to fill an appeals court vacancy.

### Appointment Norms, Geography, and Competition

Norms involving the intersection between geography and Senate politics also play a crucial role in the selection of judges to the U.S. Courts of Appeals. With the exception of the Federal and D.C. Circuit Courts, the U.S. Courts of

Appeals are organized into geographical circuits. There is a strong expectation that the nominee to an appeals court seat should come from one of the states within the given circuit. A nominee to fill a vacancy on the Fifth Circuit Court of Appeals, for instance, should come from Louisiana, Mississippi, or Texas. This norm is so strong that in the 50 years covered by this study there is not a single example of a district court judge being elevated to a numbered circuit court outside of their geographical circuit.

Furthermore, for each of the appeals courts specific judgeships usually are associated with specific states. While there are a nontrivial number of exceptions, the norm is that an appeals court vacancy created by a death or resignation of a judge from a given state will be filled by someone from that state (Richardson and Vines 1970). On the other hand, a president may have more discretion as to the state from which to choose his nominee when the vacancy is created by legislation that adds a seat to the circuit.<sup>3</sup> We expect that when a vacancy is created by the death or resignation of an appeals court judge, and the vacancy is thus attached to a particular state, district court judges from that state will have a greater chance of being elevated than judges from other states in the circuit.

*H7:* A judge is more likely to be elevated to fill an appeals court vacancy when the vacancy is associated with the state in which the judge serves.

A second norm resulting from the intersection of geography and Senate politics is that of "senatorial courtesy" (Carp and Stidham 1998; Harris 1953; Rowland and Carp 1996). Under this norm, a nomination to the lower federal courts should be acceptable to the senators from the state associated with the vacancy. If a nominee is unacceptable to these senators, the Senate typically will fail to confirm the nominee (Goldman 1997). Therefore, a president must consider the preferences of the home state senators when selecting a judicial nominee.<sup>4</sup> Specifically, a president's choice of nominee will be less constrained when the home state senators share the same policy preferences as the president. The president's choice will be more constrained and confirmation difficulties will be

<sup>2</sup>Between 1953 and 2000, 92.3% of appeals court judges elevated from the district courts attained an equal or better ABA rating upon their nomination to the appeals court. Haire (2001), however, finds the ratings are not necessarily indicative of the quality of judicial performance.

<sup>3</sup>It is entirely possible, however, that when Congress creates a new judgeship there is an informal understanding as to which state within the circuit will "get" this seat. Unfortunately, we have no way of knowing when such agreements exist. To test whether ignoring such potential understandings affects our results, we conduct both Chow and heteroskedasticity tests. The results indicate that our model is stable across "old" seats and new seats.

<sup>4</sup>There is some disagreement over the exact nature of this norm. Here, we conceptualize senatorial courtesy broadly and include both home state senators, regardless of partisan affiliation (see Binder and Maltzman 2002).

more likely if he nominates a judge from a state in which the senators do not share the president's preferences.<sup>5</sup> Assuming that presidents seek to avoid such constraints and confirmation difficulties, we hypothesize that the ideological positions of the senators from a given state affect the likelihood a district court judge from that state will be elevated to fill an appeals court vacancy.

*H8:* The greater the ideological distance between a president and the senators from a given state, the less likely the president is to elevate a judge from that state.

Finally, the appointment norms resulting from the geographic nature of the numbered courts of appeals also affect the degree to which a district court judge is competing with other judges to be elevated to an appeals court vacancy. The appeals courts vary in the number of district court judges located within the circuit, and states vary in the same manner. Regarding elevation to an appeals court, a district court judge is in "competition" with other district court judges, particularly those of the same party, in his or her state and circuit. There is a partisan component to this competition because, as we discussed above, presidents will rely heavily on partisan cues when elevating a district court judge. Democratic appointees, for example, are primarily competing with other Democratic appointees, not their Republican colleagues.

*H9:* The larger the number of district court judges within a judge's state who were appointed by a president of the same party as the judge, the less likely the judge is to be elevated to fill a given vacancy.

*H10:* The larger the number of district court judges within a judge's circuit who were appointed by a president of the same party as the judge, the less likely the judge is to be elevated.

## Data and Methods

We began constructing our dataset by assembling data on all federal district court judges appointed between 1946 and 1995.<sup>6</sup> For each of these 1,305 judges, we identified

<sup>5</sup>In addition, by elevating a district court judge from a state in which the home state senators and the president are ideologically compatible, the president creates a district court vacancy that will be easier to fill with a judge who shares the president's preferences.

<sup>6</sup>We are ultimately forced to exclude 93 judges for whom we could not find an ABA rating.

all the vacancies on the relevant appeals court during the district court judge's tenure.<sup>7</sup> By "relevant vacancy," we refer to an appeals court vacancy occurring within the judge's circuit.<sup>8</sup> For a judge on the Nevada District Court, for example, we identified all the vacancies occurring on the Ninth Circuit Court of Appeals during the judge's career.<sup>9</sup> We then structured the data so that for each district court judge there is an observation for each relevant appeals court vacancy that opened and was filled between the judge's appointment to the district court and the end of their tenure as a district court judge.<sup>10</sup> In short, the unit of analysis is the judge—vacancy dyad. The dependent variable in our analysis is whether the judge was elevated (i.e., nominated by the president and confirmed by the Senate) to fill the vacancy in question.<sup>11</sup>

<sup>7</sup>There were 380 vacancies on the Courts of Appeals (excluding the Federal Circuit) during this time period. We utilized the Federal Judicial Center's *History of the Federal Judiciary* (<http://www.fjc.gov>) to determine the timing and duration of appeals court vacancies.

<sup>8</sup>For 18% of the elevations (excluding elevations to newly created seats and the D.C. Circuit), a judge who was located within the circuit but not the specific state associated with the seat was appointed to fill the vacancy. Thus, we need to include all intracircuit dyads in our data since there is a meaningful "risk" that a judge from one state within a circuit could be appointed to fill a vacancy associated with another state. By including the *Same-State Vacancy* variable, we control for the fact that this type of cross-state appointment is less likely. Given how frequently the norm that states "own" seats on appeals courts is discussed in the literature (e.g., Howard 1981; Slotnick 2005; Tarr 1994), it is interesting that a number of elevations violate this norm.

<sup>9</sup>In our data, there are only three instances in which a judge from a district court other than the D.C. District Court was elevated to fill a vacancy on the D.C. Appeals Court. Thus, while there is a nonzero risk of the judge from the Nevada District Court being elevated to fill a D.C. Court of Appeals vacancy, this risk is very small. For this reason, we choose to exclude the dyads involving a D.C. Circuit vacancy and a judge from a court other than the D.C. District Court.

<sup>10</sup>An alternative approach would be to structure the data so that there is one observation for each month of a vacancy that occurs during a district court judge's career. The advantage to this approach would be that variables could vary over the duration of the vacancy. It is not obvious, though, that the values of the variables in months in which the vacancy is not filled matter nearly as much as the values of the variables when the president does select someone to fill the vacancy.

<sup>11</sup>The data for our dependent variable were derived from the *History of the Federal Judiciary*. We do not include failed elevation attempts (i.e., instances in which a district court judge is nominated to an appeals court but not confirmed by the Senate). Our focus is on actual elevations, as opposed to such failures. Furthermore, we do not have the data on failed nomination attempts. To test whether the "rare" nature of our dependent variable is problematic for the purposes of model estimation, we also estimated our model using King and Zeng's (2001) "rare events logit model." The results from this model estimation are substantively the same as the results presented here.

There are a number of issues raised by the structure of our data. First, there are judges whose tenure ends due to reasons other than elevation to an appeals court. In addition to elevation, a judge's tenure on a district court can end as a result of death, retirement, resignation, impeachment and removal by Congress, or assumption of senior status. Second, for the vast majority of district court judges in our data there are several relevant vacancies that occurred during their tenure. This means that for any given judge we have multiple observations in our data. As a result, we might expect the error associated with a judge for one observation (e.g., the first relevant vacancy they experience) might be correlated with the error associated with a second observation for that judge (e.g., the second vacancy they experience).

We deal with these issues by treating the data as competing risks, discrete-time duration data (see Box-Steffensmeier and Jones 1997). Duration data are data in which the researcher is interested in the timing and occurrence of an event. With duration data, time is of central concern and can be either continuous or broken up into discrete units. Our duration data is of the discrete variety as the unit of time under analysis is the appeals court vacancy.

To illustrate this, consider the career of Judge Robert Chapman. Nixon appointed Chapman to the South Carolina District Court in 1971. Chapman continued as a district court judge as, over time, seven vacancies on the Fourth Circuit Court of Appeals opened and were filled. When an eighth vacancy arose on the Fourth Circuit, Reagan appointed Chapman to fill it, and we thus have eight observations for Chapman in our data. The first observation is for the first Fourth Circuit vacancy occurring after Chapman had been appointed to the district court. Each following observation corresponds to a subsequent vacancy.<sup>12</sup> The vacancy therefore acts as the unit of time; but it is a discrete unit.

Our duration data also have a competing risks element to them. While we are only interested in elevations, there are competing risks in the sense that a judge cannot be elevated at time  $t$  if they have retired at time  $t-1$ . The typical way to treat competing risks duration data is to estimate a model in which the outcome of interest is the dependent variable and all other outcomes are only used to determine where the data should be censored. If Judge Chapman had retired right before the eighth vacancy we would only include observations for the first seven vacancies. Often researchers are interested in all the different outcomes or forms of risk and therefore estimate separate models for each (e.g., Zorn and Van Winkle 2000).

<sup>12</sup>Vacancies are ordered by the date on which the vacancy was filled.

In this project, we are only interested in the elevation of judges so we simply estimate a single model and treat all other outcomes (e.g., retirements and deaths) as censoring points.

By treating our data as being in duration format, we are also able to address the issue of the nonindependence of residuals associated with a given judge. We simply account for "duration dependence" on the right-hand side of the model (see Beck, Katz, and Tucker 1998). After experimenting with a number of functional forms, including splines and dummy variables, we conclude that the best way to account for duration dependence is by simply including the number of relevant vacancies for which the judge has been passed over as a linear variable.

We estimate our discrete-time duration model as a probit model (see Box-Steffensmeier and Jones 1997). To account for the issue of the nonindependence of errors associated with a given vacancy, we estimate our model with robust standard errors that allow for errors to be correlated within a given vacancy.<sup>13</sup> Additional modeling issues involving potential selection effects and the decision to pool our data are discussed in Appendices A and B.

## Independent Variables

*Same President* indicates whether the president who makes the appointment to fill the vacancy is the same president who nominated the judge in question to the district court.<sup>14</sup> *President of Same Party* equals one if the president who makes the appointment to fill the vacancy is of the same party as the president that appointed the judge to the district court.<sup>15</sup> We measure the congruence of the

<sup>13</sup>If one district court judge is appointed to fill a vacancy on an appeals court, then other district court judges within that circuit cannot be elevated to that same vacancy. We cannot use a conditional logit model here, however, because our choice set is open-ended (i.e., someone other than a district court judge can get appointed to fill a vacancy).

<sup>14</sup>Basic background data on district court judges come from *History of the Federal Judiciary*.

<sup>15</sup>If the same president who appointed the district court judge is still in office, both *Same President* and *President of Same Party* equal one. We believe that the partisan identification of the appointing president is a better indicator of a judge's preferences than the partisanship of the judge (of course, these two indicators correlate very highly; 91.5% of the judges in our data were appointed by a president of the same party as the judge). During our time period, Republican judges appointed by Democrats decided 48.0% of their published cases liberally. Democratic judges appointed by Republicans decided 43.1% of their published cases liberally. If we estimate our model using the judge's partisanship instead of the appointing president's, the results are substantively the same as those reported in Table 2. The only difference is that the interaction term involving the number of opinions published just becomes significant.

judge's published decisions with the president's preferences (*Presidential Compatibility with Judge's Record*) as the proportion of liberal decisions made by the judge if a Democratic president is in office and the proportion of conservative decisions if a Republican president is in office.<sup>16</sup> We expect the effect of *Presidential Compatibility with Judge's Record* to be conditioned by the size of the record. We measure *Opinions Published* as the number of opinions that the judge has published through the year in which the vacancy was filled. We then interact *Opinions Published* with *Presidential Compatibility with Judge's Record* and expect a positive coefficient for this interaction term. We also include *Opinions Published* in the model separately as a main effect (see Friedrich 1982).

We include two independent variables flowing from our two hypotheses regarding the president's consideration of the potential confirmability of district court judges nominated to appeals court seats. We interact *Unified Government* (which equals one when the Senate is controlled by the president's party) with *Presidential Compatibility with Judge's Record* and expect a positive coefficient. The *Previous ABA Rating* of the judge is simply the rating the ABA gave the judge when he or she was nominated to the district court. This rating is a three-point scale ranging from 0 (Not Qualified) to 2 (Well-Qualified).<sup>17</sup>

<sup>16</sup>All of our independent variables are measured in the year the vacancy in question was filled. Data on the direction and number of a judge's published decisions were derived from the decisions published in the Federal Supplement, the primary outlet for published federal district court decisions. The data include all cases published in the Supplement in each of 26 specific case categories which include all categories in the general areas of civil rights and liberties, criminal rights, and economic liberalism from 1945 to 1995, excluding cases lacking an ideological dimension. While most decisions are not published, the best evidence suggests that "the vast majority of published opinions are explications of discretionary policy decisions that directly or indirectly allocate value beyond the litigants of record" (Rowland and Carp 1996, 19). For more on the district court data, see Rowland and Carp (1996).

Some might speculate that the decision to publish a decision might be influenced by a desire on the part of a district court jurist to draw attention to him or herself in an attempt to position themselves for a promotion to the appellate courts. If this were the case, we would anticipate, for example, greater publication rates for Republican judges when the GOP controls the White House. Under Democratic administrations in our time period, the percentages of decisions published by Democrats and Republicans are 49.8% and 46.4%, respectively. During Republican administrations, the percentages of decisions published by Democrats and Republicans are 50.0% and 47.8%, respectively. There is thus no indication that judges systematically increase their number of published decisions in order to facilitate promotion.

<sup>17</sup>Sheldon Goldman graciously provided these ABA scores. There have been two changes in ABA ratings over time. First, the ABA used the "exceptionally well-qualified" score for a while, but dropped it in the 1980s. For the purposes of consistency over our time period, we have collapsed "exceptionally well-qualified" into the "well-qualified" category. Second, the ABA used to give split rat-

We also hypothesize that a judge is most likely to be elevated to fill an appeals court vacancy if the vacancy is linked to the state in which the judge presides. *Same-State Vacancy* equals one if the departing appeals court judge is from the same state as that in which the district court judge is seated, and zero otherwise. If the vacancy results from the creation of a new judgeship by Congress, then *New Seat* equals one. If both *Same-State Vacancy* and *New Seat* equal zero, then the vacancy is one created by a departing appeals court judge from a different state than the district court judge under analysis.<sup>18</sup> We measure *President-Home State Senator Distance* as the absolute value of the difference between the president's DW-NOMINATE score and the average DW-NOMINATE score for the two senators from the state in which the district court judge in question is seated.<sup>19</sup> The coefficient for this variable should be negative in direction. *State-Level Competition* and *Circuit-Level Competition* are measured as the number of district court judges of the same party as the judge under analysis in the judge's state and the judge's circuit, respectively. Both of these variables should exert a negative effect on the likelihood of a district court judge being elevated.

In addition to the independent variables suggested by our hypotheses, we include a number of controls. Goldman (1997) concludes that presidents prefer to nominate judges who are middle-aged. We control for this influence by including *Age* (the age of the judge in years

ings in the case where the committee could not reach a consensus. In this situation, we simply utilize the majority's rating.

<sup>18</sup>These data were derived from *History of the Federal Judiciary*. Seats on the D.C. Circuit Court of Appeals are not tied to states in the same manner as seats on the other appeals courts. Therefore, D.C. District Court judges are coded as zero for both *Same-State Vacancy* and *New Seat*. Even though some of the vacancies on the D.C. Court of Appeals are the result of the creation of new seats, we code *New Seat* as zero for all D.C. judges because the logic motivating the inclusion of this variable does not apply to D.C. judges. A D.C. judge should be just as likely to be elevated to fill a new seat as an existing seat. Given that there is no theoretical basis for *Same State* and *New Seat* to effect the elevation of D.C. judges, we set both of these variables to zero for these judges and include a dummy variable indicating that the judge is in the D.C. district (*D.C. Judge*). The inclusion of *D.C. Judge* allows these judges to have a different baseline probability of elevation than judges who face vacancies associated with other states. It is important to note that the decision to include or exclude D.C. judges from our analysis has no substantively meaningful effect on the results.

<sup>19</sup>We use the first dimension of the DW-NOMINATE scores (see Poole and Rosenthal 1997). There are no home state senators for D.C. District Court judges and thus no senatorial courtesy-related constraint on a president's decision to elevate a D.C. judge. For these judges, *President-Home State Senator Distance* is set at zero. The *D.C. Judge* variable we include in our model absorbs any difference in the effect of a zero value on this variable for D.C. judges and zeros for judges on other district courts. Therefore, the estimate for *President-Home State Senator Distance* remains the same, regardless of the value that this variable takes on for *D.C. Judges*.

TABLE 1 Descriptive Statistics

Independent Variable	Stand.		Range
	Mean	Deviation	
Same President	.199	.399	0–1
President of Same Party	.510	.500	0–1
Presidential Compatibility with Judge's Record	.502	.229	0–1
Pres. Compatibility × Opinions Published	12.2	18.2	0–425
Pres. Compatibility × Unified Government	.283	.304	0–1
Previous ABA Rating	1.47	.536	0–2
Same-State Vacancy	.213	.409	0–1
New Seat	.320	.467	0–1
President–Home State Senator Distance	.461	.261	0–1.26
State-Level Competition	9.27	8.20	0–36
Circuit-Level Competition	27.0	13.0	2–71
Number of Opinions Published	24.3	33.4	0–465
Unified Government	.592	.491	0–1
Age	57.7	7.90	33–83
Age <sup>2</sup>	3388	903	1089–6889
Seniority	7.66	5.41	0–34
Seniority <sup>2</sup>	87.9	111	0–1156
D.C. Judge	.023	.151	0–1
Pension Eligible	.113	.317	0–1
Duration	8.58	7.01	1–46

N = 13,627.

when the vacancy is filled) and  $Age^2$ . We also include *Seniority* (the number of years since the judge was appointed to the district court) and  $Seniority^2$ . We include both variables as quadratic functions because we expect curvilinear effects (see Bratton and Spill 2004).

Given the relatively unique nature of the D.C. District Court, we include a dummy variable denoting whether a judge serves on this court (*D.C. Judge*). It is possible that whether a judge is eligible to retire with full benefits will affect the likelihood of elevation, and we therefore include *Pension Eligible* in our model. As mentioned earlier, we also include a variable, *Duration*, which consists of the number of vacancies that have opened and then been filled on the relevant appeals court since the judge in question was appointed to the district court. In other words, *Duration* is our time variable and the units of time are discrete in nature. Descriptive statistics for all the independent variables are presented in Table 1.

## Results

Of all the district court judges in our data, 133 (10.2%) were elevated to an appeals court during the 1946 to 1995 time period. On average, these judges were elevated to the seventh relevant vacancy that opened up during their tenure on the district court. There is substantial variation in the number of relevant appeals court vacancies occurring before elevation, however. Bailey Aldrich, for example, was elevated to the first relevant vacancy to open during his career as a district court judge while Robert Manley Parker was not elevated until the 27<sup>th</sup> vacancy occurring during his tenure. The results of our model explaining the elevation of district court judges to the appeals courts are presented in Table 2. Overall, the results are supportive of most of our hypotheses and the set of independent variables we include is jointly significant.

The estimate for *Same President* is in the predicted direction (positive) but is statistically insignificant. We therefore cannot conclude that a district court judge is more likely to be appointed to fill an appeals court vacancy when the president who initially appointed the judge is still in office. The positive and statistically significant estimate for *President of Same Party*, however, reveals that the probability of a judge being elevated increases if the president in office at the time of the vacancy is a member of the same party as the president who initially appointed the judge to the district court. We argue that this partisan component of the decision to elevate a judge flows from a president's desire to appoint like-minded judges to the appeals courts.

The extent to which the judge's published decisions are congruent with the president's preferences (*Presidential Compatibility with Judge's Record*) also exerts a positive and significant effect on the judge's chances for being elevated to an appeals court vacancy. Judges deciding cases in a conservative manner, for example, are more likely to be elevated when a Republican president is in office. The decisions published by a district court judge act as a signal to the president regarding the relevant preferences of the judge and thus their likely future behavior on an appeals court.<sup>20</sup>

<sup>20</sup>It has been suggested to us that *Presidential Compatibility with Judge's Record* may matter most for judges of the same party as the president and from the state associated with the vacancy. On a theoretical level, we expect that when a president selects a judge from the other party, a different state, or both, that the president is considering the judge's preferences every bit as much as under other scenarios. Nevertheless, we tested this hypothesis by estimating our model while including *Presidential Compatibility with Judge's Record* × *President of Same Party* × *Same-State Vacancy*. The coefficient estimate is positive and on the cusp of statistical significance



**TABLE 2** Discrete Time Duration Model of the Elevation of District Court Judges to the Appeals Courts

Independent Variable	Coefficient	Stand. Error	p Value
Same President	.052	.134	.349
President of Same Party	.928	.125	.000
Presidential Compatibility with Judge's Record	.773	.272	.002
Pres. Compatibility $\times$ Opinions Published	.007	.005	.083
Pres. Compatibility $\times$ Unified Government	-.565	.294	-
Previous ABA Rating	.293	.073	.000
Same-State Vacancy	1.10	.116	.000
New Seat	.527	.110	.000
President-Home State Senator Distance	-.272	.131	.019
State-Level Competition	-.026	.008	.001
Circuit-Level Competition	-.009	.004	.021
<i>Component Terms</i>			
Number of Opinions Published	-.005	.003	.129
Unified Government	.251	.189	.184
<i>Controls</i>			
Age	.291	.089	.001
Age <sup>2</sup>	-.003	.001	.000
Seniority	.197	.045	.000
Seniority <sup>2</sup>	-.007	.002	.003
D.C. Judge	-.023	.384	.952
Pension Eligible	-.235	.326	.471
Duration	-.025	.010	.017
Constant	-11.2	2.43	.000
Number of Observations	13,627		
Wald Test (Chi-squared, 20 deg. of freedom)	227		.000

For the variables resulting from our hypotheses, the p values are for one-tailed tests. For component and control variables, two-tailed test values are reported. For estimates that are not in the hypothesized direction, no p value is reported.

We also expect that amongst district court judges who are compatible with the president's preferences, those who have published a large number of opinions will be

( $p = .08$ , two-tailed test). The main effects for *Presidential Compatibility with Judge's Record*, *President of Same Party*, and *Same-State Vacancy* are all still positive and significant. Thus, *Presidential Compatibility with Judge's Record* exerts the expected, positive effect for all judges, although this effect may be a bit larger for judges in the state associated with the vacancy and who were appointed by a president of the same party as the president in office.

most likely to be elevated. The coefficient estimate for *Presidential Compatibility  $\times$  Opinions Published* is positive as anticipated and is close to statistical significance. The size of a judge's record may affect the extent to which a president considers the ideological content of the record, although the evidence does not allow us to formally draw this conclusion.

The coefficient estimate for *Presidential Compatibility  $\times$  Unified Government* is not in the predicted direction. There is no support for our hypothesis that the ideological compatibility between a judge and the president will have a greater positive effect when the president's party controls the Senate.<sup>21</sup>

While partisan control of the Senate may not affect the career trajectory of a judge, the constitutional requirement that the Senate confirm all judicial nominees does play a role. The results of our analysis reveal that the *Previous ABA Rating* of a judge when s/he was appointed to a district court has a positive and statistically significant effect on their likelihood of being elevated to an appeals court in the future. The higher the judge's rating, the greater the probability of the judge being elevated to fill a given vacancy. The president is more likely to nominate a judge who was previously rated highly because the previous rating is a predictor of the rating the judge will get if nominated for an appeals court seat, which affects whether the Senate confirms the nominee. We should note, however, that a Chow test reveals that the effect of *Previous ABA Rating* is not statistically significant for observations occurring during the last three administrations in our analysis (Reagan, Bush, and Clinton). While ideological considerations still exert an effect on the elevation of district court judges, perceived judicial qualifications may no longer play an important role. This may be due to the criticism and controversy surrounding ABA ratings during the 1980s and 1990s. Although this criticism came from conservative sources, the diminishment of the effect of ABA ratings occurred under all three of these presidents, not just the Republicans.<sup>22</sup>

The nature of the appeals court vacancy also contributes to the odds of a district court judge being elevated to fill the vacancy. There are three possible scenarios: the vacancy is connected to the district court judge's state, the vacancy is connected to another state in the circuit, or the vacancy is a new seat unconnected as of yet to a

<sup>21</sup>We also tested whether the size of the judge's record conditions the effect of *Presidential Compatibility with Judge's Record  $\times$  Unified Government* and whether *Unified Government* conditions the effect of *Same Party*. The results do not support either conditioning effect.

<sup>22</sup>See Appendix B for more details on tests of coefficient instability over time.

particular state. *Same-State Vacancy* and *New Seat* represent the effect of the first and last scenarios. The middle scenario is the reference or baseline category. The positive and significant estimates for these two variables reveal that a judge is more likely to be elevated to a same-state or newly created vacancy than a vacancy connected to another state. A Wald test reveals that a judge is more likely to be appointed to fill a same-state vacancy than a new seat.<sup>23</sup>

We expect the norm of senatorial courtesy to influence a district court judge's chances of elevation. Specifically, we hypothesize that the degree to which the president is compatible with the preferences of the senators from the judge's state will affect whether the judge gets elevated. Our results provide evidence for this effect as the estimate for *President-Home State Senator Distance* is negative and statistically significant. A judge from a state with senators who are ideologically incongruent with the president is less likely to get elevated than a judge from a state with senators who share the president's policy preferences. Thus, while the preferences of the entire Senate do not seem to affect the likelihood of a given judge being elevated, the preferences of the two home state senators do play a role. We should point out that while we have couched this discussion in terms of the career prospects of individual judges, the results for this variable indicate that the prospects for elevations are poor for all judges within a state represented by senators who are ideologically distant from the president.

The results of our model indicate that *State-Level Competition* decreases the probability of a district court judge being appointed to fill an appeals court vacancy. If, for instance, there are a large number of Republican appointees sitting on the district courts within a state, then the probability of any one of these judges being elevated decreases. The number of same-party district court judges within a circuit (*Circuit-Level Competition*) also acts to diminish the likelihood of a judge from that party being elevated to a given vacancy.

*Age* and *Seniority* behave in the manner we expect. The positive estimate for *Age* and negative estimate for *Age*<sup>2</sup> indicate that *Age* initially exerts a positive effect on the likelihood of elevation. As the judge gets older, however, age eventually decreases the judge's chances of becoming an appeals court judge. Specifically, our results show that, holding everything else constant, a judge is most likely to be elevated when they are between 48 and

49 years old.<sup>24</sup> *Seniority* also exerts an initially positive and then later negative influence on the probability of being elevated to an appeals court vacancy. A judge who has served on a district court for 13 years is most likely to be appointed to fill a vacancy. In short, the best case scenario for someone desiring to move up the federal judicial hierarchy is to be appointed to a district court when they are 35 or 36 years old and then hope that a vacancy arises in the relevant appeals court 13 years later.

Finally, the estimate for *Pension Eligible* is insignificant while the negative and significant estimate for *Duration* reveals that the more relevant vacancies that have occurred and been filled during a district court judge's tenure, the less likely it is that the judge will be selected to fill a subsequent vacancy. In other words, the more times that the judge has been passed over, the less likely it is that they will ever become an appeals court judge. Essentially, this result reveals that there is negative temporal dependence.

To provide a feel for the substantive effect sizes of the statistically significant variables in our model (with the exception of *Age* and *Seniority*), we present predicted probabilities in Table 3. We generated these probabilities by varying the independent variable of interest while holding all other variables constant at their means.<sup>25</sup> For dichotomous and ordinal variables, the probability of a judge being elevated to fill a vacancy is calculated for all possible values of the independent variable. For independent variables that can be considered to be interval-level, we generate predicted probabilities for values that are a standard deviation below and above the mean. The first column of the table contains predicted probabilities of a judge being elevated to fill a given vacancy in his or her career. The second column contains predicted probabilities of a judge being elevated at some point during a district court career spanning 13 vacancies (the mean value for a full career) on the relevant appeals court.

These predicted probabilities suggest that of the nominal and ordinal-level independent variables, *Same-State Vacancy* has the greatest effect on the likelihood of a judge being elevated. Amongst the interval and ratio-level independent variables, the effect sizes are relatively similar.

<sup>24</sup>This result is obtained by solving for the maximum of the quadratic function. Activists claim that Reagan sought out younger judges than previous presidents (Scherer 2003). To test this conjecture, we interact *Age* and *Age*<sup>2</sup> with a variable noting whether the president in office is Reagan and include these interactions in our model. The coefficients for the interaction terms are statistically insignificant, suggesting that for the Reagan administration the effect of the age of a judge is similar to the effect under other presidents.

<sup>25</sup>The values for the two interaction terms are set at the product of the values of the two component variables.

<sup>23</sup>The test indicates that *Same-State Vacancy*'s coefficient is larger than *New Seat*'s ( $p < .001$ ).

TABLE 3 Predicted Probabilities

Independent Variable Value	Probability of Elevation to a Given Vacancy	Probability of Elevation During an Average Career
President of Same Party		
0	.001	.022
1	.020	.260
Presidential Compatibility w/Judge's Record		
$-\sigma(.27)$	.004	.052
$+\sigma(.73)$	.009	.112
Previous ABA Rating		
0	.002	.022
1	.004	.053
2	.010	.117
Same-State Vacancy	.036	.494
New Seat	.009	.108
Seat Linked to Different State	.002	.024
President–Home State Senator Distance		
$-\sigma(.20)$	.008	.094
$+\sigma(.72)$	.005	.064
State-Level Competition		
$-\sigma(1)$	.011	.136
$+\sigma(17)$	.003	.044
Circuit-Level Competition		
$-\sigma(14)$	.009	.106
$+\sigma(40)$	.004	.056
Duration		
$-\sigma(2)$	.010	–
$+\sigma(16)$	.004	–

Note: All other independent variables held at their means. Probability of Elevation During an Average Career is the probability of a judge being elevated over the course of 13 relevant vacancies. For this latter type of probability, *Duration* varies from one to 13.

Obviously, all these predicted probabilities are quite small. This is a function of the fact that the baseline probability of a given district court judge being elevated to fill a given relevant appeals court vacancy is quite small.

The probabilities associated with a judge being elevated over a career, however, are larger. If, for instance, there is a Republican president in office for the first 13 vacancies encountered by a Republican appointee, that judge has a 26% chance of being elevated to one of those vacancies, holding everything else constant. If the judge had instead been appointed by a Democrat, the likelihood of reaching an appeals court is approximately 2%.

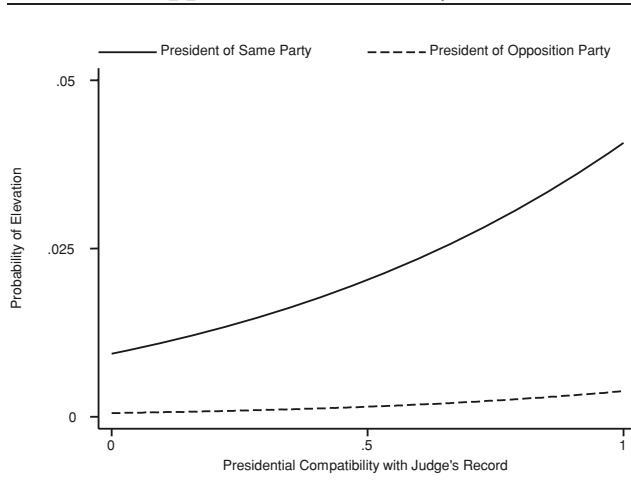
### The Relative Importance of Different Indicators of Judicial Preferences

A substantial body of research indicates that when selecting judges presidents seek individuals who share the pres-

ident's policy preferences (Goldman 1997; Rowland and Carp 1996; Songer, Sheehan, and Haire 2000). Existing research, however, is much less clear regarding the sources of information that a president relies on when determining whether someone will hand down decisions that are compatible with the president's agenda. The results of our model provide new, interesting evidence regarding the relative importance of blunt cues (i.e., the identity and partisan affiliation of the president who initially appointed the judge to the district courts) versus more precise signals (i.e., the ideological direction of a judge's published decisions) about the ideological compatibility between a judge and a president.

Figure 1 compares the substantive effect sizes of the party of the president who appointed the judge to the district court and the nature of the judge's district court record. Presidential compatibility with the judge's record is on the x-axis, where a value of zero indicates extreme

**FIGURE 1** The Effect of the Compatibility of a Judge's Record with Presidential Preferences on the Probability of the Judge Being Elevated to Fill an Appeals Court Vacancy



Note: *President of Same Party* equals one if the president in office for the appeals court vacancy is of the same party as the president who appointed the district court judge, and zero otherwise. *Presidential Compatibility with Judge's Record* ranges from zero (completely incompatible record) to one (completely compatible record).

incompatibility between the president and district court judge's decisions, and one indicates that the two are perfectly compatible. Predicted probabilities are presented for two situations; one in which the president in office is of the same party as the president that initially appointed the district court judge and one in which the president is of the other party.<sup>26</sup> These predicted probabilities clearly reveal that whether the president in office is from the same party as the president who initially appointed the judge exerts a larger effect than the president's compatibility with the judge's record. In other words, this blunt cue regarding president—judge compatibility appears to affect the president's nomination decisions, and thus judicial careers, much more than precise signals. A Republican appointee with a highly liberal decision record is less likely to be elevated by a Democratic president than a Democratic appointee with a highly conservative record as a district court judge.<sup>27</sup>

<sup>26</sup>The values for the two interaction terms are determined by multiplying *President Compatibility with Judge's Record* with the average value of the other variable in question. All other independent variables are set at their means.

<sup>27</sup>While our measure of *Presidential Compatibility with Judge's Record* is based on a judge's published decisions across all issue areas, it is possible that presidents care only about decisions in a subset of such decisions (e.g., abortion or civil rights). It is impor-

## A Controllable Career Path?

It is reasonable to expect that judicial careers, like other careers, may be somewhat controlled by the judges themselves. Our results indicate that there is one factor affecting the probability of a district court judge being elevated that the judge can control—the decisions published by the judge. Theoretically, a judge's decisions could be slanted in the direction of the sitting president's preferences or the judge could choose only to publish decisions that conform with these preferences. Based on our model, such behavior will increase the probability of the judge being elevated to fill an appeals court vacancy and thus district court judges may have an incentive not to operate in a manner fully independent from the executive branch.

However, factors that are out of the control of the judge once they have been appointed to a district court have a greater effect on that judge's chance for elevation. These factors include the partisan affiliation of the president who appointed the judge to the district court, the judge's ABA rating upon nomination to the district court, the nature of the appeals court vacancy at hand, and the number of judges in the judge's state and circuit. Judges, themselves, play only a small role in their chances for promotion to an appeals court; politics, geography, and competition largely determine elevation.

We should make it clear that we are not claiming that judges have no control over the entirety of their judicial careers. It is quite possible that a district court judge became a district court judge precisely because he or she engaged in behavior that made them a more attractive candidate for the president. That is, individuals may have a good deal of control over their prospects of becoming a district court judge. Our results indicate, though, that factors that are no longer under the control of a sitting district court judge play a large role in the probability that the judge will be elevated to an appeals court.

## Conclusion

Which district court judges would be most likely to be elevated by a president who is assumed to be concerned

tant to recognize, though, that only a fraction of a district court judge's decisions are published, and these tend to be the decisions that are legally or politically most interesting. Thus, less important decisions are already being excluded from our data. In addition, by including only cases in a few issue areas, we would base our measure of a judge's preferences on a very small set of published decisions. If the president is really just concerned with a subset of a judge's published record, though, then this would attenuate the effect size of *Presidential Compatibility with Judge's Record*.

with leaving behind appointees who will support the policy preferences of the president long after he has left office? We began to answer this question by arguing that the likelihood of a judge being elevated is a function of the combination of various informational cues and signals regarding the nature of the judge and the judge's compatibility with the preferences of the president. We also posited that norms involving both geography and Senate politics affect the chances of a district court judge filling an appeals court vacancy. Our statistical analysis supported most of the specific hypotheses, although we found little evidence that the effect of the compatibility of a judge's decisions with presidential policy preferences is conditioned either by the size of the published record or Senate preferences.

If judges are strategic, they may ask themselves what they can do to increase their chances for elevation. From the standpoint of a given district court judge, two results stand out. First, the chance of elevation for any given judge is small. From the vantage point of the sitting judge, most of the factors that will have the greatest impact on whether they are elevated are uncontrollable. The one thing that a sitting judge can do is to make and publish liberal decisions if a Democratic president is in office and do the opposite if a Republican is in office. Our data suggests that such a strategy will increase the chance that a judge will be elevated, but the increase will be relatively small. In contrast, a series of factors that are beyond the influence of a judge, including who is president, when a vacancy occurs, in which state it occurs, and how much competition he or she faces from other judges, will have a cumulative impact on the chance for elevation that will dwarf the significance of the opinion writing of the judge. Thus, while the answer to the question, "who gets elevated?" appears to be the result of complex, rational calculation on the part of the sitting president, from the vantage point of a given district court judge it appears closer to Machiavelli's notion of *fortuna*.

This result has important implications for our understanding of the independence of the federal courts. If the compatibility of a judge's record with the president's policy preferences has a major impact on the likelihood of the judge getting elevated, then there is a serious incentive for judges to consider presidential preferences when deciding cases. If, on the other hand, a judge's elevation prospects are linked solely to factors that cannot be controlled by the judge then a judge is relatively free to decide cases based on some combination of legal and attitudinal concerns. Our results lean somewhat towards the latter scenario, although a judge's record is not irrelevant. It therefore appears that the desire to move up the judicial hierarchy may not necessitate strategic or deferential be-

havior on the part of the judge, although such behavior can enhance career prospects.

## Appendix A

### Selection Effects

We utilize a conventional probit model to model the probability or risk of a district court judge being elevated to a relevant vacancy. It is possible, though, that the president may first decide whether or not he wants any district court judge to fill the vacancy before proceeding to choose the specific district court judge. In other words, the president may on occasion look only at potential nominees who are not district court judges. This initial decision would then constitute a selection mechanism. While we do not theoretically expect such a selection effect, if such a selection mechanism exists then there are two potential problems.

First, if an independent variable in the main equation (the equation predicting whether a given judge is elevated to a given vacancy) is also a predictor in the selection equation (the equation predicting whether the president elevates *any* district court judge to fill a vacancy), then ignoring the selection equation can lead to a misleading estimate for the variable in the main equation. If the presence of unified government, for example, makes the president more or less likely to look at district court judges, then the estimates for any variables in our main equation that capture the effect of unified government will be biased. For example, we include *Presidential Compatibility with Judge's Record*  $\times$  *Unified Government* and expect a positive coefficient for this variable. But, if the existence of unified government causes the president to seek nominees other than district court judges and this selection effect is unaccounted for, then the estimate for the interaction term may in fact be negative. Of course, the simplest solution to this problem is to include *Unified Government* in the model, which we do.

The second potential problem involves the error terms of the main equation and the hypothetical selection equation. If these error terms are correlated across the two equations, then the coefficient estimates in the main equation may be inconsistent. The solution here is to estimate a probit model with selection, in which both the main and selection equations are estimated and the errors are allowed to be correlated (since the bivariate normal distribution is employed). This approach also solves for the first problem we identified. Thus, we estimated our model as a probit model with selection (see Dubin and Rivers (1990) for a discussion of selection models in which the main equation involves a dichotomous dependent variable).

**TABLE A1 Probit Model (with Selection) of the Elevation of District Court Judges**

Independent Variable	Coefficient	Stand. Error	p Value
Same President	.238	.133	.038
President of Same Party	.863	.114	.000
Presidential Compatibility with Judge's Record	.619	.258	.008
Pres. Compatibility × Opinions Published	.003	.007	.324
Pres. Compatibility × Unified Government	−.393	.312	—
Previous ABA Rating	.275	.076	.000
Same-State Vacancy	1.08	.108	.000
New Seat	.528	.119	.000
President–Home State Senator Distance	−.431	.155	.003
State-Level Competition	−.028	.006	.000
Circuit-Level Competition	−.008	.004	.037
Number of Opinions Published	−.003	.005	.535
Unified Government	.088	.204	.668
Age	.259	.085	.002
Age <sup>2</sup>	−.003	.001	.001
Seniority	.197	.042	.000
Seniority <sup>2</sup>	−.007	.002	.001
D.C. Judge	−.022	.380	.954
Pension Eligible	−.196	.302	.516
Duration	−.021	.012	.074
Constant	−10.3	2.31	.000
<i>Selection Equation</i>			
Unified Government	−.336	.024	.000
New Seat	−.192	.026	.000
D.C. Vacancy	−1.51	.121	.000
Constant	.071	.017	.000
Number of Observations	13,627		
rho	.908		.068
Likelihood Ratio Test of rho = 0 (Chi-squared, 1 deg. of freedom)	3.07		.080

For the variables resulting from our hypotheses, the p values are for one-tailed tests. For component variables, control variables, and variables in the selection equation, two-tailed test values are reported. For estimates that are not in the hypothesized direction, no p value is reported.

The main equation (explaining whether a specific judge is elevated to fill a vacancy) includes all the independent variables that our traditional probit model includes. It is less obvious which variables should be included in the selection equation (explaining when the president will consider district court judges in general for an appeals court seat). We ultimately include all the independent variables that are vacancy-specific or time-specific. The judge-specific variables (which represent the majority of our variables) are not appropriate to include in the selection equation. We thus include *Unified Government*, *New Seat*, and *D.C. Vacancy* (equals one if the vacancy is on the D.C. Court of Appeals) in the selection equation.

The main equation results are very similar to the results generated by a traditional probit model that does not account for selection. The only meaningful difference is that the coefficient estimate for *Same President* just becomes statistically significant. The estimated rho (the parameter defining the correlation between the error terms in the two equations) is large but is not quite significant.<sup>28</sup> The similarity across the results of this model and the model presented in Table 2, as well as the lack of a clearly significant rho, imply that selection does not represent a problem for our analysis.

<sup>28</sup>The estimate for rho is quite unstable across slightly different model specifications, varying from negative to positive. This further supports the lack of a meaningful selection effect.

## Appendix B

### Assessing Our Decision to Pool the Data

Some scholars suggest that over time there have been significant changes to the manner in which federal judges are selected. Some claim that Senate confirmation hearings and votes have become more contentious (e.g., Silverstein 1994) and others argue that the whole selection process is now more ideological (e.g., Wolfe 1991). While there is little consensus on whether selection dynamics have in fact changed over time (see Guliuzza, Reagan, and Barrett 1994; Melone 1991), we nevertheless examine whether our model applies equally over time or instead captures only features of the judicial selection process of the last few decades. While much of the relevant literature focuses on changes in confirmation politics, potential changes in nominations is of greater relevance for our analysis. We test two potential structural breaks in our model: 1964 (start of the civil rights era, see Scherer 2005) and 1981 (start of the Reagan administration, see Goldman 1997; Scherer 2005).

To assess whether our results differ before and after 1964, we generated a dummy variable equaling one if the observation occurred in or after 1964 and then interacted this dummy variable with all of our independent variables.<sup>29</sup> We then estimated our model with both the original independent variables and the new interaction terms (this is a type of Chow test). The estimates for the interaction terms reveal whether the effects of the independent variables change from 1964 on. A Wald test reveals that we cannot reject the null hypothesis that all of the interaction terms have coefficients of zero, although it is a close call ( $p = .036$ ). Individually, only two of the 17 coefficients for the interaction terms achieve statistical significance. Specifically, these results suggest that *Age* and *Age*<sup>2</sup> do not exert statistically significant effects until 1964. None of the other independent variables differ in a significant manner across these two time periods.<sup>30</sup> We urge caution in making much of the change in the effect of the age of the judge, as only 4% of our observations fall before the 1964 breakpoint. Furthermore, the results of the second

<sup>29</sup>The interaction terms for three of the independent variables (*Unified Government*, *D.C. Judge*, and *Pension Eligible*) cannot be included due to collinearity and model convergence issues. The exclusion of these variables is not particularly troublesome as they are only controls.

<sup>30</sup>We also tested whether the effect of *Presidential Compatibility with Judge's Record* only changed after 1964 for southern judges. The results indicate that the effect of *Presidential Compatibility with Judge's Record* stays the same before and after 1964, regardless of whether the judge is from the South.

structural break test imply that there in fact has been no change to the effect of these two variables.

We repeated this procedure with the 1981 break point.<sup>31</sup> The results of a Wald test indicate that we cannot reject the null hypothesis that the coefficients for all the interactions are equal to zero. Only one of the 19 interaction terms is individually significant. *Previous ABA Rating* has a positive and significant effect before 1981 and an insignificant effect on and after 1981. This may be due to the criticism and controversy surrounding ABA ratings during the 1980s and 1990s.

We also need to assess whether the explanatory power of our model changes over time. In other words, it is possible that the coefficients remain constant over time but the size of the error variance changes as a function of time. We test for this possibility by estimating our model as a heteroskedastic probit model in which the two temporal dummy variables are included as explanatory variables in the variance equation. The results of this model estimation reveal that the variance of the error term does not change after either of the possible structural breaks. The explanatory power of our model remains constant over time.

In sum, there appears not to have been a major break in our model in either 1964 or 1981, although a few coefficients do exhibit some instability. Taken together with the stability of the error variance in our model over time, we conclude that with one caveat (involving ABA ratings) our model is applicable throughout the latter half of the twentieth century. Overall, our results provide little support for the notion that the nature of federal judicial selection has fundamentally changed over the last few decades.

It has also been suggested that Republican presidents and Democrat presidents behave differently when it comes to selecting judges. As with the other supplementary analyses, we performed a Chow test in order to determine whether our data can be pooled across presidents of different parties. The only meaningful result here is that for Republican presidents the estimate for *Same President* is positive and significant while it is not for Democratic presidents. The results of a heteroskedastic probit model indicate that our model fits observations occurring under Republican and Democratic presidents equally well.

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<sup>31</sup>The interaction term for *D.C. Judge* cannot be included as it is a perfect predictor. The exclusion of this variable is not particularly troublesome as it is only a control variable.

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