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## A Winner's Curse?: Promotions from the Lower Federal Courts

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## ***A Winner's Curse?: Promotions from the Lower Federal Courts***

Stephen J. Choi, Mitu Gulati, & Eric A. Posner\*

### *Abstract*

The standard model of judicial behavior suggests that judges primarily care about deciding cases in ways that further their political ideologies. But judicial behavior seems much more complex. Politicians who nominate people for judgeships do not typically tout their ideology (except sometimes using vague code words), but they always claim that the nominees will be competent judges. Moreover, it stands to reason that voters would support politicians who appoint competent as well as ideologically compatible judges. We test this hypothesis using a dataset consisting of promotions to the federal circuit courts. We find, using a set of objective measures of judicial performance, that competence seems to matter in promotions in that the least competent judges do not get elevated. But the judges who score the highest on our competence measures also do not get elevated. So, while there is no loser's reward, there may be something of a winner's curse, where those with the highest levels of competence hurt their chances of elevation.

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\* Faculty at NYU and Duke, and the University of Chicago. For comments, thanks to Lee Epstein, Dan Klerman, Kim Krawiec and participants at a conference at the University of Chicago Law School on the The Behavior of Federal Judges. Thanks also to the nineteen judges in the 2012-2013 Judicial Studies LLM class at Duke for their insights on the questions addressed in this piece.

## 1. Introduction

Empirical research on judicial behavior has focused on the role that ideology plays in judicial decisions.<sup>1</sup> Many studies find that judges, particularly in cases involving politically salient topics, tend to vote in line with the policy preferences of the politicians who appointed them. In other words, politicians select judges who will advance their policy preferences rather than those who will act independently of them. Why? The literature isn't exactly clear on this issue, but the story seems to be that politicians derive utility not only from making policy that advances their ideological or political preferences, but also from having judges enforce laws so as to advance those same policy preferences. Some of this may be politicians trying to satisfy the policy preferences of the voters. But, for the most part, the view seems to be that politicians have ideological positions that judges can help advance, and keep doing so long after the politicians in question have left office.<sup>2</sup>

The view of politicians as selecting judges primarily to implement their policy preferences is incomplete. Normally, we expect voters to reward politicians for appointing competent officials rather than ideologically biased officials. We want our nuclear power plant inspectors, postal workers, police officers, and air-traffic controllers to perform their jobs competently, not so as to advance ideological goals that are not already incorporated in the law that they are supposed to enforce or comply with. Why wouldn't voters feel the same way about judges, who perform similar socially important functions? And even if voters and elected officials do want judges to decide cases in a certain ideological direction, it seems likely that they *also* want the judges to be competent.

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<sup>1</sup> For many years, the empirical research on this topic of judicial behavior was dominated by political scientists. But this is changing. See Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11 (2013).

<sup>2</sup> See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 26 (2005).

There are two reasons for this. First, a judge who lacks competence will not be able to implement ideological preferences effectively. Few other judges will be inclined to follow the pronouncements of a judge who is viewed as intellectually inferior. Thus, even politicians who want judges to advance ideological goals would not appoint such judges. Second, a judge who lacks competence will not be able to decide cases well, including non-ideological cases where the public very much wants competent decisions. We know that businesses care about the quality of legal systems from the fact that they opt into and out of legal systems through their incorporation decisions and their reliance on choice-of-forum and choice-of-law clauses in their contracts.<sup>3</sup> They would be furious with politicians who appoint judges for ideological reasons and ignore their level of competence.

Accordingly, we hypothesize that politicians who appoint judges (and we focus particularly on promotions) consider both the ideology *and* competence of candidates. And those are not the only factors that politicians are likely to consider. Politicians might also try to appeal directly to particular subsets of voters, independent of political party affiliation. For example, in recent years we have seen politicians of both parties seeking to appoint women and members of certain ethnic minorities. And we know that politicians appoint some judges for patronage reasons—to pay off loyal supporters. At the margins, there is inevitably going to be overlap between multiple factors; including ideology, competence, direct appeals to subsets of voters, and patronage. Often though, these factors will be in tension with each other and appointments should reflect tradeoffs between them. Take patronage, for example, where a President rewards his loyal supporters with a judicial appointment. Those loyal supporters will most likely share the President’s ideology (that

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<sup>3</sup> There is an extensive literature documenting and debating the reasons for certain jurisdictions dominating in the competition among U.S. states for business incorporation and choice of governing law. One of the primary explanations given is the quality of law and legal institutions. *E.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 39-40 (1993); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1476, 1485 (2009).

may well have been the basis for their support). That said, there will still be tradeoffs. The patronage appointee may share the President's ideology, but may not be as good as some other candidate at spreading that ideology. Importantly, these tradeoffs will be made in the context of a President who has a limited amount of political capital to spend on the various things he wishes to achieve, only one of which is making judicial appointments.

Although our focus is not the Supreme Court, we will, because of their prominence, use a few examples of Supreme Court appointments that illustrate the tradeoffs among the factors we have identified—ideology, competence, direct appeal to subsets of voters, and patronage. President Nixon told one of his subordinates to “Be sure to emphasize to all the southerners that Rehnquist is a reactionary bastard, which I hope to Christ he is.”<sup>4</sup>

President Reagan also emphasized ideological factors in his nominations of Scalia and Bork.<sup>5</sup> Yet Nixon had to withdraw numerous nominations because of their inadequate qualifications. Of G. Harrold Carswell, one of his defenders said “Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance?” Apparently not; Carswell did not get the position.<sup>6</sup> One of George W. Bush's nominees, Harriet Miers was withdrawn because of objections among conservatives that she lacked the competence to be an effective justice.<sup>7</sup> As for demographics, President Nixon sought a female nominee for what he regarded as the political benefits, and President Reagan nominated Sandra Day O'Connor for exactly that reason.<sup>8</sup> President Obama has similarly sought greater ethnic and gender diversity on the

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<sup>4</sup> JOHN A. JENKINS, *THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST* xvii (2012).

<sup>5</sup> These are discussed at length in NORMAN VIERA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* (1998).

<sup>6</sup> Epstein & Segal, *supra* note 2 at 66.

<sup>7</sup> ROBERT CARP ET AL., *JUDICIAL PROCESS IN AMERICA* 128 (11<sup>th</sup> ed., 2014).

<sup>8</sup> Epstein & Segal, *supra* note 2, at \_\_

Court, appointing two women, one of them Hispanic.<sup>9</sup> One of them, Sonia Sotomayor, was attacked on two fronts: that she was not smart enough for the Court and was likely to be biased along ideological grounds.<sup>10</sup> Before the modern era of appointments, regional diversity was also considered important. Finally, many presidents have rewarded political supporters with Supreme Court appointments. Multiple Supreme Court justices have played some role in the administration of the president or an earlier administration of the president of the same party.<sup>11</sup> Harriet Miers appears to have been a patronage nomination as well, having been a personal adviser to George Bush.<sup>12</sup>

In pursuing this theme, we attempt to fill a gap in the book by Lee Epstein, William Landes and Richard Posner, *The Behavior of Federal Judges*, that is the subject of this conference (ELP).<sup>13</sup> ELP supply a judicial utility function in their Chapter 1. But when, in Chapter 8, they get to the question of what politicians seek when they select judges, they do not offer a utility function of these politicians.

In that latter chapter, ELP examine whether judges in the pool of those with a high likelihood of promotion to a higher court (the “auditioners”) behave differently from those outside the pool. Although they examine various factors that may be relevant to promotion—including age, sex, race, length of time on the bench, prior profession, whether the judge attended Harvard or Yale, and so on—ELP do not describe a model of politician preferences vis-à-vis judicial selections. Implicitly though, they focus on the interest of politicians of both parties in satisfying voter preferences for having judges who will not go easy on crime. Judges who are seeking promotion, understanding voter preferences, will be

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<sup>9</sup> John Schwartz, *For Obama, a Record on Diversity but Delays on Judicial Appointments*, N.Y. TIMES, Aug 6, 2011.

<sup>10</sup> See Guy-Uriel Charles, Daniel L. Chen & Mitu Gulati, *Sonia Sotomayor and the Construction of Merit*, 61 EMORY L. J. 801 (2012).

<sup>11</sup> Epstein & Segal, *supra* note 2 at \_\_.

<sup>12</sup> Alex Markels, *Why Harriet Miers Withdrew as Supreme Court Nominee*, NPR.org, Oct 27, 2005, available at <http://www.npr.org/templates/story/story.php?storyId=4976787>

<sup>13</sup> LEE EPSTEIN, WILLIAM LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* (2013).

tougher on crime than their colleagues who don't have a realistic chance of promotion. As an empirical matter, ELP find results that are largely consistent with their premise -- judges who are in the auditioner pool tend to be tougher on crime than those who are not. For ELP, this is interesting because it suggests that that judges behave differently as a function of their probability of promotion.

What ELP do not tell us though is how much politicians care about the crime issue? Can judicial candidates raise their likelihood of promotion by being tougher on crime than their colleagues? And, if so, how much tougher do they need to be in order to improve their chances of promotion? Or is it just that politicians do not want to appoint someone who might be vulnerable to being attacked for being easy on crime (so that above a certain threshold of toughness being increasingly tough on crime does not affect the probability of promotion). We suspect that it is the latter. Politicians care about having judges who are tough on crime, but only up to a point. They also care about other things, such as whether the judge is competent, will appeal to key ethnic voting groups, will appeal to key contributors (whether they be unions or businesses) and so on. Our interest is in the degree to which politicians care about appointing judges who will be competent – an element of the calculus that gets almost no attention in the literature.

To set up our inquiry into the extent to which competence is important in judicial selections, it may help to ask how the pursuit of competence would play out if politicians cared only (or even primarily) about advancing a particularly political ideology. For example, ideas about free markets or originalism or scientology. If advancing these ideas was the goal, the politician would look for candidates where he could obtain private information regarding the candidate's true beliefs and he would make sure that these candidates were good at articulating their ideas in a way in which others would be persuaded to adopt them. This second element is important since spreading ideas is



difficult. Very few of us are any good at it, which means that those who are good at it end up having enormous influence – the proverbial superstar effect.<sup>14</sup> If pushing ideology is the primary goal of politicians – which is the impression much of the judicial behavior literature gives – then one should see politicians pursuing those who have demonstrated the ability to spread ideas in other contexts.

## **2. Modeling the President's Choice**

For our model we consider only one politician—the President. The simple model we use is one where the President is seeking to advance his political standing via his choice of judges. In nominating a judge, the president takes into account (1) ideology; (2) voter preferences (which would include competence, demographics and things like being tough on crime); and (3) patronage. Thus, we predict that among the group of people who are likely to be selected as a judge, those who do well along these dimensions are more likely to be selected than those who do not.

To test this prediction, we need to begin with a pool of likely candidates for selection. Unfortunately, the pool of people likely to be appointed to the federal district courts is unknown. Thus, we focus on the federal circuit courts, relying on the assumption that the relevant pool consists, in significant part, of sitting district judges.

Our argument has two steps. First, focusing on competence, we test the hypothesis that higher-quality district judges who are elevated also become higher-quality circuit judges. This evidence is needed to substantiate our assumption that there are observable quality variables that the president can use when deciding whom to elevate to the circuit

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<sup>14</sup> Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981).

courts. Second, we test the hypothesis that that the factors identified above account for the selection of circuit court judges.<sup>15</sup>

### **3. The Tests**

Our first tests examine what factors determine the quality of new circuit court judges. We focus on newly selected circuit court judges and their influence in their initial years as circuit judge. We use a dataset of all new circuit court judges confirmed by the Senate between 2001 and 2012.<sup>16</sup>

As a starting point, it is worth noting that it is not obvious that a president would pick a substantial number of his circuit judges from the ranks of the district court as opposed to making selections from practicing lawyers and academics. Institutional constraints on the degree to which they can show their biases while being judges means that district judges are unlikely to have done much work helping the politician's campaign or contributed large sums of money. Further, while district judges will have a track record based from which their ideological preferences and ability to be influential can be discerned, that track record can be assessed by not only the president, but by his opponents as well. And if the track record shows a strong ideological bias and a lack of competence, those facts will provide political opponents with ammunition. The plus side of promoting a district judge to a circuit position, however, is that there is little risk of incompetence – there is enough information that a President can access about district judge performances that he can easily assure himself that the judge in question will do a decent job at the circuit level. The choice to promote a district judge as opposed to someone from outside the

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<sup>15</sup> For purposes of our analysis, we put aside the tough-on-crime factor that ELP analyze.

<sup>16</sup> We include all the general jurisdiction circuits in our analysis and leave out the Federal Circuit because of its specialist nature (which in turn presumably impacts elevations to it in terms of factors such as interest group pressures).

federal judiciary then, as a theoretical matter, is likely to be less about ideology and more about competence.<sup>17</sup> Below, we examine the data to see whether that prediction holds up.

Table 1 reports the breakdown of our dataset between those new circuit court judges who were not formerly a district court judge and those who were district court judges.

**Table 1**

| <b>Year</b> | <b>Non-District Judge</b> | <b>District Judge</b> | <b>Percent District Judge</b> |
|-------------|---------------------------|-----------------------|-------------------------------|
| <b>2001</b> | 2                         | 2                     | 50.0%                         |
| <b>2002</b> | 6                         | 5                     | 45.5%                         |
| <b>2003</b> | 11                        | 1                     | 8.3%                          |
| <b>2004</b> | 4                         | 2                     | 33.3%                         |
| <b>2005</b> | 6                         | 1                     | 14.3%                         |
| <b>2006</b> | 7                         | 1                     | 12.5%                         |
| <b>2007</b> | 4                         | 2                     | 33.3%                         |
| <b>2008</b> | 4                         | 0                     | 0.0%                          |
| <b>2009</b> | 0                         | 3                     | 100.0%                        |
| <b>2010</b> | 7                         | 4                     | 36.4%                         |
| <b>2011</b> | 3                         | 4                     | 57.1%                         |
| <b>2012</b> | 5                         | 1                     | 16.7%                         |

An interesting aspect of the yearly breakdown of appointed circuit court judges is that in the initial year or two after the election of a new President (2001 and 2002 for Bush and 2009 for Obama), the fraction of former district court judges among all new circuit court judges is relatively higher compared with other years. If our assumption about former district judges being more competent at the task of judging (but less likely to be partisan) is correct, this may indicate that Presidents, early in their tenure, feel a greater need to select for competence.

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<sup>17</sup> The exception here would be an academic, like Robert Bork, with a long track record of publications.

We focus on measures of the quality of new circuit court judges. We focus on new circuit court judge performance for two reasons. First, we expect that for politicians with a limited re-election time frame (such as the President), obtaining immediate political returns from high-quality circuit court appointments is an important factor in determining whom to appoint to the circuit court. Second, because judges will slow down with age and fatigue over the years, quality is likely greatest in a circuit judge's earlier years on the bench. We use three separate proxies for quality at the circuit court level: number of published circuit court opinions, number of citations to these opinions, and number of opposing opinions.<sup>18</sup>

### **3.1. Published Opinions**

To examine the determinants of competence for the newly appointed circuit court judges, we first examine the number of published opinions, including majority, dissents, and concurrences, for the first three full years of each new circuit court judge in our dataset.<sup>19</sup> Writing opinions explaining decisions in the more difficult cases is a key part of a circuit court judge's job. We assume that it takes greater effort and skill to write more published opinions.<sup>20</sup> In comparison, we assume that judges expend only minimal effort on unpublished opinions. To a significant extent, the choice to write an opinion is one that the individual judge makes (this is especially true with dissents and concurrences). Judges who write more, other things equal, are therefore likely choosing to consume less leisure.

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<sup>18</sup> For debates over the extent to which these measures capture judicial quality, see the symposia in the following law reviews: University of Southern California Law Review (2004); Florida State Law Review (2005); Duke Law Journal (2009).

<sup>19</sup> We omit one new circuit court judge, Michael Chertoff, from our analysis throughout the paper. Chertoff was a circuit court judge for only one full calendar year (2004) after his initial appointment year. In January 2005, President Bush announced Chertoff's nomination to become Secretary of Homeland Security. Accordingly, the possibility of Chertoff's nomination may have affected his performance as a circuit court judge in the later months of 2004.

<sup>20</sup> Elsewhere, we have also examined more detailed information on opinions such as the number of pages written. Those numbers tend to be highly correlated with the numbers of opinions written. Stephen J. Choi & Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance*, 78 S. CAL L. REV. 23 (2004).

We estimate a multivariate regression model on judge level data using the log of the number of published opinions for each circuit court judge in their first three full calendar years as a circuit court judge as the dependent variable.

$$\begin{aligned} \text{Log}(\text{Number of Published Opinions})_i = & \alpha + \beta_{1i}\text{District Judge}_i \\ & + \beta_{2i}\text{District Judge 10 Years or More}_i \\ & + \beta_{3i}\text{Years Since Law School}_i + \beta_{4i}\text{Top 5 Law School}_i + \\ & + \beta_{5i}\text{Prior Law Professor}_i + \beta_{6i}\text{Prior Non-Federal Judge}_i \\ & + \beta_{7i}\text{Prior Prosecutor}_i + \beta_{8i}\text{Obama}_i \\ & + \text{Circuit Fixed Effects} + \text{Number of Years in Dataset} \\ & \text{Indicators} + \varepsilon_i \end{aligned}$$

As explanatory variables we include an indicator variable for whether the circuit court judge was a district court judge (District Judge). We also include an indicator variable for those who served as a district judge for 10 or more years. We conjecture that long-term district court judges may grow fatigued with the role of judging and may not be as productive compared with shorter-term district judges when they become circuit court judges (District Judge 10 Years or More). To control for legal experience (as well as roughly age), we include the number of years since graduation from law school (Years Since Law School). We include an indicator variable for whether the judge graduated from a top 5 law school as measured by U.S. News in 1987 (including Harvard, Yale, Columbia, Michigan, and Stanford) (Top 5 Law School).<sup>21</sup> We include indicator variables for whether the judge worked in the past as a full-time law professor (Prior Law Professor), a non-federal judge (Prior Non-Federal Judge), or prior prosecutor (Prior Prosecutor). We also include an indicator variable for judges appointed by Obama (Obama) as opposed to Bush.

Model 1 of Table 2 reports our results using robust standard errors. We include circuit fixed effects in Model 1 to control for circuit-level differences in publication norms.

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<sup>21</sup> This is the earliest year for which US news law rankings are available. We assume for purposes of analysis that the identities of the schools in the top 5 has remained largely stable over the period when most of the judges in our data attended law school (1980s and early 1990s).

Most judges have three full years of data. But judges appointed in 2010 only have 2 years and those appointed in 2011 have only 1 full calendar year of data. Accordingly, we also include indicator variables for the number of years each circuit court judge is in our dataset in Model 1 (with three years as the base category).

**Table 2**

|  | <b>Model 1</b><br><b>ln(Total Opinions)</b> | <b>Model 2</b><br><b>ln(Total Opinions)</b> |
|--|---|---|
| District Judge                                 | 0.373*<br>(2.54)                            | 0.601<br>(1.65)                             |
| District Judge 10 Years or More                | -0.342*<br>(-2.62)                          | -0.413+<br>(-1.89)                          |
| Years Since Law School                         | 0.00248<br>(0.41)                           | 0.00599<br>(0.92)                           |
| Top 5 Law School (US News 1987)                | 0.0825<br>(1.20)                            | 0.0243<br>(0.28)                            |
| Prior Law Professor                            | 0.269*<br>(2.27)                            | 0.190<br>(1.63)                             |
| Prior Non-Federal Judge                        | -0.0137<br>(-0.17)                          | -0.0942<br>(-0.89)                          |
| Prior Prosecutor                               | -0.00691<br>(-0.08)                         | 0.00825<br>(0.09)                           |
| Obama Appointee                                | -0.0841<br>(-0.66)                          | 0.504+<br>(2.01)                            |
| Contributed to Democrats                       |   | -0.180<br>(-1.24)                           |
| Contributed to Republicans                     |   | 0.142<br>(1.28)                             |
| District Judge x<br>Publications Per Case      |   | 4.692**<br>(2.92)                           |
| District Judge x<br>Average Positive Citations |   | 0.358**<br>(2.74)                           |
| District Judge x<br>Average Affirmed           |   | -0.989*<br>(-2.18)                          |
| Constant                                       | 4.551**<br>(25.72)                          | 2.463**<br>(7.19)                           |

|  |       |       |
|--|-------|-------|
| <i>Circuit Effects</i>                     | Yes   | Yes   |
| <i>Number of Years Indicator Variables</i> | Yes   | Yes   |
| <i>N</i>                                   | 76    | 66    |
| <i>R</i> <sup>2</sup>                      | 0.880 | 0.895 |

*t* statistics in parentheses; +  $p < 0.10$ , \*  $p < 0.05$ , \*\*  $p < 0.01$

From Model 1, we see that former district judges tend to write more opinions as circuit judges than do those who were appointed from outside the federal bench. But this effect is less for long-term (10 years or more) district judges. Prior law professors also write more opinions. Other things equal, district judges with less than 10 years of tenure have more influence compared with non-district judges who are elevated to the circuit court.<sup>22</sup> Model 1 suggests that former district judges would be the ones most likely to hit the ground running.

Model 2 adds in a number of variables to address the effect of politics on our productivity measure. To examine patronage, we also add an indicator variable for whether the circuit court judge made political contributions to a Republican candidate (Republican Contribution) or a Democrat candidate (Democrat Candidate) prior to becoming a federal judge as tracked by [open-secrets.org](http://open-secrets.org). Model 2 also adds variables to assess the importance of influence as a district judge in how effective a former district judge is after elevation to the circuit court. We use three measures of district court judge influence as obtained from our prior work on federal district court judges. These three measures are as follows:

*Publication Rate:* We define Publication Rate as the number of published opinions for a judge in 2001 and 2002 divided by the average number of filings per judge in that judge's district (total filings for the district divided by number of judgeships in that district).<sup>23</sup>

<sup>22</sup> As a robustness test, we replace the District Judge 10 Years or More indicator variable in Model 1 with the number of years the judge served as a district judge (District Judge Years) with those who were not previously a district judge serving 0 years. Unreported the coefficient on District Judge Years remained positive although significant at only the 10% level. The coefficient on District Judge Years was negative and significant at the 10% level, consistent with more experience as a district judge correlating with reduced performance as a circuit court judge.

<sup>23</sup> By published opinions, we mean opinions that are available in the published reports issued by West. Although West can publish whatever opinions it wants to publish, anecdotal reports suggest that West publishes whatever opinions judges choose to designate as published opinions. Roughly a

*Positive Citations:* We define Positive Citations as the average number of positive outside-circuit citations (including federal appellate and trial courts, and state courts) to a judge's published opinions from 2001 and 2002 as tracked by Westlaw.

*Affirmance Rates:* We define the affirmance rates for a judge as the number of non-overruled published opinions, including non-appealed opinions, divided by the total number of published opinions in 2001 and 2002.<sup>24</sup> The normal intuition might be the judges with low affirmances are likely to be worse; after all, they are being reversed more. However, judges have a degree of control over how to explain their decisions and can influence the likelihood of reversal (for example, by deciding whether to publish an opinion or not--unpublished opinions are less likely to get reversed). Hence, other things equal, a lower affirmance rate might indicate a higher degree of engagement; that is, a willingness to take risks. In prior research looking at the decisions of district judges on preliminary motions, we find some results consistent with this premise.<sup>25</sup>

We add to Model 2 interaction terms for District Judge x Publication Rate, District Judge x Positive Citations, and District Judge x Affirmance Rates.

The results from Model 2 provide support for the hypothesis that high-competence district court judges perform at a higher level once elevated to a circuit court judgeship. The coefficients on the District Judge x Publication Rate and District Judge x Positive Citations interaction terms are positive and significant at the 5% level in Model 2. District judges who published more and received greater numbers of positive citations for their district court opinions are more likely to publish opinions as a circuit court judge compared with other district judge appointees to the circuit court. The sum of District Judge and District Judge x Publication Rate is positive and significant at the 1% level and the sum of

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decade or so prior, it the importance of which opinions were published by West was magnified because the other opinions were not easily available from other sources. That is no longer the case – the formally unpublished opinions are also available online these days. However, the choice to send an opinion for inclusion in the print version is still an important one that reveals information about the authoring judge's view of the importance and quality of the opinion that was written. And that, in turn, is likely reflected in the choice of other judges as to what opinions to consult in making their decisions.

<sup>24</sup> We also collected data on appeal rates for individual judges from Westlaw. However, the data here are particularly noisy because of large variation in particular types of frivolous appeals.

<sup>25</sup> Stephen J. Choi, Mitu Gulati & Eric A. Posner, *How Well do Measures of Ability Predict Performance: A Case Study Using Securities Class Actions*, 33 INT'L REV. L. & ECON. 37 (2013).



District Judge and District Judge x Positive Citations is positive and significant at the 5% level, indicating that district judges who published more and received greater numbers of positive citations for their district court opinions are more likely to publish opinions as a circuit court judge compared with non-district judge appointees to the circuit court.

The coefficient on the District Judge x Average Affirmed interaction term is negative and significant at the 5% level in Model 2. District judges with a lower affirmance rate as a district judge, possibly indicating a greater willingness to take risks, correlate with a greater rate of production after elevation to the circuit court compared with other district judge appointees to the circuit court. The sum of District Judge and District Judge x Average Affirmed is not significantly different from zero however.

Note also from Model 2 that Obama appointees are more productive than Bush appointees (although the coefficient on Obama Appointee is not significantly different from zero in Model 1). This may be an artifact of the fact that Obama appointees in our data are all from relatively early in Obama's tenure as President compared with the Bush appointees (in other words, more of them are former district court judges). Bush may have also promoted the most effective district judges early in his tenure as President but the average influence of Bush appointees may then have diminished as Bush continued to appoint district judges to the circuit court later in his Presidency.<sup>26</sup>

A possible selection effect may exist in our data. Those district judges who are

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<sup>26</sup> It is possible that the number of district judges in a particular state may give the President a greater pool from which to select from. Moreover, a greater number of district judges may correlate with greater competition among the district judges and thus more development of human capital related to judging among such judges in this competition. To test this possibility we added to Model 2 an interaction term between District Judge and the Number of District Judge Seats in a particular state for each elevated district judge (based on the state in which the particular federal district court is located). Unreported, the coefficient on the District Judge x Number of District Judge Seats for the State interaction term is positive and significant at the 5% level. In contrast, the coefficient on District Judge x Average Positive Citations is no longer significantly different from zero. Note that the correlation coefficient between Number of District Judge Seats for the State and Average Positive Citation for the district judges is equal to 0.48. Thus, district judges from states with more competition among the district judges correlate with higher quality judges, including judges that receive a higher positive citation rate for their opinions as district judges.

elevated to a circuit court position may differ from non-elevated district judges in a manner not captured by our district judge interaction terms. To control for this possibility, we re-estimated Models 1 and 2 in Table 2 as the second stage in a two-stage Heckman model. For the first stage, we included both the pool of appointed circuit judges from our sample as well as those federal district judges active as of 2001 who were not elevated to the circuit court during the time period of our study. One limitation of our Heckman model is that we do not know the entire pool of possible candidates to the circuit court and thus include only the active district judges as possible candidates. For the first stage model (with appointment to the circuit court as the dependent variable), we included various individual characteristic variables which are defined for both the appointed circuit court judges and the pool of non-elevated district judges including: Years Since Law School (measured from date of appointment to the circuit court or 2006 in the case of non-elevated district judges), prior experience as a law professor, prior experience as a non-federal judge, prior experience as a prosecutor, female, minority, and whether the individual attended a top 5 law school as ranked by US News in 1987. For our instrument, we also included the fraction of the total number of seats in the circuit that were open in 2001 (Open Seat Ratio). We assume that Open Seat Ratio is correlated with the probability of elevation to the circuit court but not with the dependent variable of interest in the second stage model (in this case the log of the total opinions authored in the first three years as a circuit court judge). Unreported, we obtained qualitatively the same results as in Models 1 and 2 of Table 2.

### **3.2. Number of Opposing Opinions**

Our second measure of competence is the willingness of a judge to oppose other circuit court judges. We conjecture that writing a dissent or a majority opinion where there is a dissent takes extra effort on the part of the judge. For new judges, we suspect that the

willingness to cross swords with other judges is especially indicative because the new judge is establishing a reputation within the circuit. If the new judge demonstrates a willingness and ability to write strong opposing opinions in the early years, that can help establish the judge’s reputation (and causes others to be less willing to oppose this judge in later years).

We estimate a multivariate regression model on judge level data using the log of 1 + the number of opposing opinions (dissent or majority with a dissent) for each circuit court judge in the their first three full calendar years as a circuit court judge as the dependent variable.

$$\begin{aligned} \text{Log}(1 + \text{Number of Opposing Opinions})_i = & \alpha + \beta_{1i}\text{District Judge}_i \\ & + \beta_{2i}\text{District Judge 10 Years or More}_i \\ & + \beta_{3i}\text{Years Since Law School}_i + \beta_{4i}\text{Top 5 Law School}_i + \\ & + \beta_{5i}\text{Prior Law Professor}_i + \beta_{6i}\text{Prior Non-Federal Judge}_i \\ & + \beta_{7i}\text{Prior Prosecutor}_i + \beta_{8i}\text{Obama}_i \\ & + \text{Circuit Fixed Effects} + \text{Number of Years in Dataset} \\ & \text{Indicators} + \varepsilon_i \end{aligned}$$

We use the same explanatory variables as in Models 1 and 2 of Table 2. We report the results as Models 1 and 2 respectively of Table 3 below.

**Table 3**

|                                    | <b>Model 1</b><br><b>ln(1 + Total</b><br><b>Opposing</b><br><b>Opinions)</b> | <b>Model 2</b><br><b>ln(1 + Total</b><br><b>Opposing</b><br><b>Opinions)</b> |
|------------------------------------|--|--|
| District Judge                     | 0.398<br>(1.64)  | 1.612+<br>(1.84)   |
| District Judge<br>10 Years or More | -0.297<br>(-1.16)  | -0.573<br>(-0.79)  |
| Years Since Law School             | 0.00461<br>(0.32)  | 0.00539<br>(0.35)  |
| Top 5 Law School (US News 1987)    | 0.0203<br>(0.11)   | -0.00630<br>(-0.03)  |
| Prior Law Professor                | 0.304<br>(1.47)  | 0.227<br>(0.93)  |

|  |                    |                    |
|--|--------------------|--------------------|
| Prior Non-Federal Judge                        | -0.310+<br>(-1.70) | -0.289<br>(-1.34)  |
| Prior Prosecutor                               | -0.0169<br>(-0.09) | 0.118<br>(0.56)    |
| Obama Appointee                                | 0.0577<br>(0.15)   | 0.685<br>(0.84)    |
| Contributed to Democrats                       |                    | -0.274<br>(-0.81)  |
| Contributed to Republicans                     |                    | -0.0167<br>(-0.08) |
| District Judge x<br>Publications Per Case      |                    | 8.125+<br>(1.91)   |
| District Judge x<br>Average Positive Citations |                    | 0.263<br>(0.89)    |
| District Judge x<br>Average Affirmed           |                    | -2.098*<br>(-2.18) |
| Constant                                       | 1.465**<br>(3.45)  | -0.0243<br>(-0.02) |
| <i>Circuit Effects</i>                         | Yes                | Yes                |
| <i>Number of Years Effects</i>                 | Yes                | Yes                |
| <i>N</i>                                       | 76                 | 66                 |
| <i>adj. R<sup>2</sup></i>                      | 0.693              | 0.726              |

*t* statistics in parentheses; +  $p < 0.10$ , \*  $p < 0.05$ , \*\*  $p < 0.01$

From Model 1 note that former district judges tend to write opposing opinions (dissent or majority with a dissent) more than other judges. This is interesting because one might have expected former district judges, who are court insiders and already indoctrinated into court norms to be less willing to disagree. On the other hand, if writing opposing opinions takes greater effort and skill and former district judges are likely to have more of these characteristics in their early years on the circuit than their colleagues appointed from elsewhere, this is precisely the effect one would expect. The coefficient on District Judge however is significant at only the 10.8% level, just beyond conventional statistical significance. We do not find any evidence that long-term district judges (those

with 10 years or more experience on the district bench) act differently from shorter-term district judges.<sup>27</sup> Circuit court judges who held a prior non-federal judgeship also are less likely to write opposing opinions although the coefficient on Prior Non-Federal Judge is significant at only the 10% level in Model 1.

In Model 2 the coefficient on District Judge is positive and now significant at the 10% level, indicating that former district judges tend generally to write more opposing opinions compared with other newly appointed circuit court judges. Turning to our performance metrics for the former district judges, we find that the District Judge x Publications Per Case interaction term is positive and significant at the 10% level. Those circuit judges who published more as a district judge correlate with a greater number of opposing opinions during their first three years as a circuit court judge compared with other district judge appointees to the circuit court. The sum of District Judge and District Judge x Publication Rate is positive and significant at the 5% level, indicating that district judges who published more are more likely to write opposing opinions as a circuit court judge compared with non-district judge appointees to the circuit court.

We also find that the District Judge x Average Affirmed interaction term is negative and significant at the 5% level. There is some evidence that district judges who are affirmed less while on the district court, and thus are willing to take more risks, are more confident about crossing swords with their appellate court colleagues.<sup>28</sup> The sum of District Judge and District Judge x Average Affirmed is not significantly different from zero however.

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<sup>27</sup> As a robustness test, we replace the District Judge 10 Years or More indicator variable in Model 1 with the number of years the judge served as a district judge (District Judge Years) with those who were not previously a district judge serving 0 years. Unreported the coefficients on District Judge and District Judge Years are both not significantly different from zero. For our Total Opposing Opinions model we therefore find no evidence that longevity as a district judge affects the willingness to write an opposing opinion.

<sup>28</sup> We add to Model 2 of Table 4 an interaction term between District Judge and the Number of District Judge Seats in a particular state for each elevated district judge (based on the state in which the particular federal district court is located). Unreported, the coefficient on the District Judge x Number of District Judge Seats for the State interaction term is positive and significant at the 5%

To control for possible selection effects, we re-estimate Models 1 and 2 of Table 3 with a two-stage Heckman model similar to that used for our Total Opinion models discussed above. Unreported, we obtained similar qualitative results as in Model 1 of Table 4 except that the coefficient on District Judge in Model 1 is positive but now significant at only the 11.8% level and the coefficient on Other Non-Federal Judge in Model 1 is no longer significantly different from zero. We also obtained the same qualitative results as in Model 2 of Table 3, indicating that selection effects do not alter the relationship between our Publications Per Case and Average Affirmed measures of district judge quality and performance as a new circuit court judge.

### **3.3 Outside Circuit Citations**

Our final measures of judge competence are the number of outside circuit citations and law review citations for a circuit court opinion.<sup>29</sup> A judge whose opinions receive more citations, we conjecture, likely has greater skill and ability to articulate ideas about the law. For each majority opinion written by a new circuit court judge in our dataset, we collect from the LEXIS Shepard's service the number of outside circuit citations and number of law review citations. We collect outside citations and law review citations only during the first six full years after a circuit court judge is appointed to the circuit court.

We estimate a multivariate regression model on opinion level data using the log of 1 + the number of outside circuit citations for each opinion as the dependent variable.

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level. In contrast, the coefficient on District Judge x Average Affirmed is no longer significantly different from zero.

<sup>29</sup> For reasons of space and simplicity, we only report on the two most basic citation measures. However, we have reported elsewhere on multiple other citation measures such as invocations and inside circuit citations and state court citations. All of these measures tend to be highly correlated. Choi & Gulati, *supra* note 20.

$$\begin{aligned}
\text{Log}(1 + \text{Number of Outside Circuit Citations for an Opinion}) = & \alpha \\
& + \beta_{1i} \text{District Judge}_i \\
& + \beta_{2i} \text{District Judge 10 Years or More}_i \\
& + \beta_{3i} \text{Years Since Law School}_i + \beta_{4i} \text{Top 5 Law School}_i + \\
& + \beta_{5i} \text{Prior Law Professor}_i + \beta_{6i} \text{Prior Non-Federal Judge}_i \\
& + \beta_{7i} \text{Prior Prosecutor}_i + \beta_{8i} \text{Obama}_i \\
& + \text{Subject Matter Indicator Variables} \\
& + \text{Number of Years of Citation Data Indicator Variables} \\
& + \varepsilon_i
\end{aligned}$$

As in our earlier models, we include District Judge, District Judge 10 Years or More, Years Since Law School, Top 5 Law School, Prior Law Professor, Prior Non-Federal Judge, Prior Prosecutor, and Obama as explanatory variables. We add indicator variables for the subject matter of the opinion including Administrative Law, Election and Campaign Finance, Criminal, Capital Punishment, Church and State, Environmental, Federal Business Law, Federalism, Government Actions, Immigration, Intellectual Property, Labor-General, Labor-Rights, Private Law, Rights, Takings and Property, Tax, and Torts with Other as the base category (see appendix for definition of these subject matter categories). We report the results as Model 1 of Table 4. For some judges in our dataset, we had less than six full years of citation data (for example for a judge who was appointed in 2010). To control for the fewer number of years of citation data we add indicator variables for the number of years of citation data (including an indicator for five years of citation data, four years of citation data, and so on, with six years as the base category). We clustered the standard errors based on the individual judges writing the opinions. We then replaced the dependent variable with the log of 1 + the number of law review citations and report the results as Model 2 of Table 4 below.

**Table 4**

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| Model 1 | Model 2 | Model 3 | Model 4 |
|---------|---------|---------|---------|
|---------|---------|---------|---------|

|  | <b>ln(1+Outside Circuit Citations)</b> | <b>ln(1+Law Review Citations)</b> | <b>ln(1+Outside Circuit Citations)</b> | <b>ln(1+Law Review Citations)</b> |
|--|--|-----------------------------------|--|-----------------------------------|
| District Judge                                 | 0.290*<br>(2.00)                       | 0.431**<br>(5.86)                 | -0.666<br>(-0.69)                      | -1.591<br>(-1.38)                 |
| District Judge 10 Years or More                | -0.0822<br>(-0.50)                     | -0.325**<br>(-3.78)               | 0.169<br>(0.97)                        | 0.0202<br>(0.16)                  |
| Years Since Law School                         | 0.00224<br>(0.32)                      | 0.00288<br>(0.63)                 | 0.00346<br>(0.50)                      | 0.00365<br>(0.86)                 |
| Top 5 Law School (US News 1987)                | 0.0631<br>(0.81)                       | 0.0378<br>(0.70)                  | 0.0388<br>(0.46)                       | 0.0314<br>(0.56)                  |
| Prior Law Professor                            | 0.0415<br>(0.38)                       | 0.0257<br>(0.35)                  | 0.0894<br>(0.88)                       | 0.0196<br>(0.30)                  |
| Prior Non-Federal Judge                        | 0.0311<br>(0.32)                       | 0.0948<br>(1.61)                  | -0.111<br>(-0.94)                      | 0.0145<br>(0.20)                  |
| Prior Prosecutor                               | 0.162+<br>(1.73)                       | 0.120+<br>(1.92)                  | 0.0628<br>(0.58)                       | 0.0771<br>(1.10)                  |
| Obama Appointee                                | -0.403+<br>(-1.83)                     | -0.441*<br>(-2.40)                | -0.242<br>(-0.96)                      | -0.326<br>(-1.56)                 |
| Contributed to Democrats                       |  |                                   | -0.226<br>(-1.57)                      | -0.0636<br>(-0.56)                |
| Contributed to Republicans                     |  |                                   | 0.0201<br>(0.22)                       | 0.00844<br>(0.13)                 |
| District Judge x<br>Publications Per Case      |  |                                   | 1.090<br>(0.68)                        | 0.837<br>(0.60)                   |
| District Judge x<br>Average Positive Citations |  |                                   | 0.0761<br>(0.94)                       | 0.150+<br>(1.93)                  |
| District Judge x<br>Average Affirmed           |  |                                   | 0.664<br>(0.71)                        | 1.440<br>(1.20)                   |
| Constant                                       | 1.231**<br>(3.79)                      | -0.300<br>(-0.94)                 | 1.065**<br>(3.78)                      | -0.325<br>(-1.61)                 |
| <i>Subject Matter Controls</i>                 | Yes                                    | Yes                               | Yes                                    | Yes                               |
| <i>Number of Citation Years Controls</i>       | Yes                                    | Yes                               | Yes                                    | Yes                               |
| <i>N</i>                                       | 4017                                   | 4017                              | 3450                                   | 3450                              |
| <i>R</i> <sup>2</sup>                          | 0.117                                  | 0.171                             | 0.134                                  | 0.172                             |

*t* statistics in parentheses; +  $p < 0.10$ , \*  $p < 0.05$ , \*\*  $p < 0.01$

In Models 1 and 2, we find evidence that former district judges correlate with a



greater number of outside circuit citations and law review citations for a published circuit court opinion. The coefficients on District Judge in Models 1 and 2 are significant at the 5% and 10% levels respectively. As measured by the number of outside circuit and law review citations, former district court judges write higher quality circuit court opinions. This effect is diminished for district judges with more than 10 years of tenure. The coefficient on District Judge 10 Years or More is negative in both Models 1 and 2, although significant (at the 1% level) only in the model for law review citations (Model 2). Too much experience as a district judge even after controlling for the number of years from law school correlates with lower competence as reflected in citations.

Model 3 (Outside Circuit Citations) and Model 4 (Law Review Citations) of Table 4 adds our explanatory variables addressing politics and our district judge quality variables including Republican Contribution, Democrat Contribution, District Judge x Publications Per Case, District Judge x Average Positive Citations, and District Judge x Average Affirmed. Most interesting, for our purposes, is that for those circuit court judges who are former district court judges, the greater the number of average positive citations as a district judge correlates both with opinions that receive a greater number of outside circuit citations and law review citations. The coefficient on District Judge x Average Positive Citations, however, is not significant in Model 3 and significant at only the 10% level in Model 4. Weak evidence therefore exists that presidents who want their ideas spread through the judicial opinions would do well to promote those district judges with higher cite counts than those of their colleagues.<sup>30</sup>

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<sup>30</sup> We add to Models 3 and 4 of Table 4 an interaction term between District Judge and the Number of District Judge Seats in a particular state for each elevated district judge (based on the state in which the particular federal district court is located). Unreported, the coefficient on the District Judge x Number of District Judge Seats for the State interaction term is not significantly different from zero in Model 3 and positive and significant at the 10% level in Model 4. The District Judge x Average Positive Citations interaction term remains insignificant in Model 3. Unlike in Table 4, the District Judge x Average Positive Citations interaction term is also insignificant in Model 4.

To control for possible selection effects, we re-estimate the models of Table 4 with a two-stage Heckman model similar to that used for our Total Opinion models discussed above. Unreported, we obtained similar qualitative results as in Models 1 through 3 of Table 4. We also obtained similar qualitative results as in Model 4 of Table 4, with two exceptions. The coefficient on District Judge is negative and now significant at the 10% level. The coefficient on District Judge x Average Positive Citations is positive and now significant at the 5% level. After controlling for selection effects, the correlation between high average positive citations as a district judge and greater numbers of law review citations as a circuit court judge is strengthened.

The bottom line then seems to be that presidents who want their ideas spread through the judicial opinions would do well to promote those district judges more willing to take risks compared with those of their colleagues. Those judges are likely to both publish more and get cited more than their colleagues at the circuit level. .

### **3.4. Which District Judges Are Selected?**

Not all new circuit court judges are selected from the pool of existing district court judges. From our tests above, we found that among those district judges who are in fact selected for elevation to the circuit court, certain characteristics – including the publications per case, the average positive citations, and averaged affirmed measures of district court judge influence – correlate with certain measures of circuit court judge competence. We now examine how the Presidents select judges, given the measures we have.

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We replace the subject matter indicator variables in Models 3 and 4 with a single indicator variable for more hot button subject matter cases will receive a greater number of citations involving one of the following subjects: voting rights/campaign finance, abortion, capital punishment, individual rights, and labor rights (Hot Button). Unreported, the coefficient on Hot Button is positive and significant at the 1% level in both models. The other explanatory variables remain qualitatively the same as in Models 3 and 4 of Table 4. The District Judge x Average Positive Citations interaction term is positive and significant at the 5% level in Model 4.

To examine the importance of our proxies for circuit court competence in the selection of district judges for promotion, we look at summary statistics comparisons between the elevated district judges compared with non-elevated district judges. Table 5 reports our comparison of means and medians.

**Table 5**

|                                   | <b>Non-Elevated District Judges N</b> | <b>Mean</b> | <b>Elevated District Judges N</b> | <b>Mean</b> | <b>p-value</b> |
|-----------------------------------|---------------------------------------|-------------|-----------------------------------|-------------|----------------|
| <b>Publications Per Case</b>      | 416                                   | 0.025       | 15                                | 0.032       | 0.4130         |
| <b>Average Positive Citations</b> | 597                                   | 1.787       | 16                                | 1.625       | 0.7483         |
| <b>Average Affirmed</b>           | 597                                   | 0.916       | 16                                | 0.918       | 0.9535         |

|                                   | <b>Non-Elevated District Judges N</b> | <b>Median</b> | <b>Elevated District Judges N</b> | <b>Median</b> | <b>p-value</b> |
|-----------------------------------|---------------------------------------|---------------|-----------------------------------|---------------|----------------|
| <b>Publications Per Case</b>      | 416                                   | 0.012         | 15                                | 0.012         | 0.5610         |
| <b>Average Positive Citations</b> | 597                                   | 1.333         | 16                                | 1.301         | 0.8295         |
| <b>Average Affirmed</b>           | 597                                   | 0.952         | 16                                | 0.948         | 0.7198         |

The results in Table 5 suggest that, at least in terms of means and medians, the elevated judges are at the mean performance level – basically, they are picked from the middle range of judges in terms of the measures we set out.

We depict the distribution of the Publications Per Case (Figure 1), Average Positive Citations (Figure 2), and Average Affirmed (Figure 3) variables for the district judges. For each variable, we depict the distribution for all the district judges and the district judges

who were elevated to the circuit court.

[Insert Figure 1 here].

Note from Figure 1 that in terms of Publications Per Case, the district judges who were elevated to the circuit court are similar in distribution to the distribution for all district judges in our sample. Moreover, note that the superstars are not elevated. One might think that presidents who want to be influential in terms of getting their policies spread or establishing a legacy would specifically seek out the potential superstars. But that does not seem to happen. The very top of the distribution for the elevated district judges is below the top of the distribution for the all the district judges.

[Insert Figure 2 here].

We see a similar pattern in Figure 2 for the Average Positive Citations measure for district judges. Elevated district judges, whether early or later in a President's term, are near the middle of the distribution for all the district judges in our sample. Moreover, the top of the elevated judge sample is below the top of the distribution for all district judges.

[Insert Figure 3 here].

Figure 3 provides a different picture for the Average Affirmed variable for district judges. Elevated judges appear mostly at the top of the distribution of all district judges (with one elevated judge sitting as an outlier with a relatively lower Average Affirmed score). Note nonetheless, that the Average Affirmed variable is capped at 1 and the overall distribution of all district judges is skewed toward 1.

To test the importance of our proxies for circuit court competence in a multivariate model, we use the data from a set of prior studies on district court judges. Using this data, we estimated a logit model for elevation to the circuit court.

$$\begin{aligned}
\text{Prob}(\text{Elevation to Circuit Court}) = & \alpha \\
& + \beta_{1i}\text{Female}_i + \beta_{2i}\text{Black and Other Minority}_i \\
& + \beta_{3i}\text{Age in 2000}_i + \beta_{4i}\text{Experience in 2000}_i \\
& + \beta_{5i}\text{Prior Law Professor}_i + \beta_{6i}\text{Prior Non-Federal Judge}_i \\
& + \beta_{7i}\text{Prior Prosecutor}_i + \beta_{8i}\text{Top School}_i \\
& + \beta_{9i}\text{Publications Per Case}_i \\
& + \beta_{10i}\text{Average Positive Citations}_i \\
& + \beta_{11i}\text{Average Affirmed}_i \\
& + \beta_{12i}\text{Any Contribution}_i + \varepsilon_i
\end{aligned}$$

For independent variables we use judge characteristic variables from our earlier studies including a variables for female (Female), race (Black and Other Minority), age and experience measured in 2000 (Age in 2000 and Experience in 2000), whether the judge was a prior law professor (Prior Law Professor), prior non-federal judge (Prior Non-Federal Judge), or prior prosecutor (Prior Prosecutor), and whether the judge went to a top law school (Top School). We included variables that tracked our measures for what correlates with influence as a circuit court judge – Publications Per Case, Average Positive Citations, and Average Affirmed. Lastly, we included a variable in Model 1 for whether the district judge made any contributions to a political candidate before becoming a federal judge (Any Contribution) and whether the judge made a contribution to a democrat candidate (Democrat Contribution) in Model 2. Table 6 reports the models.

**Table 6**

|                | <b>Model 1<br/>Elevation to<br/>Circuit Court =1;<br/>=0 Otherwise</b> | <b>Model 2<br/>Elevation to<br/>Circuit Court =1;<br/>=0 Otherwise</b> |
|----------------|--|--|
| Female         | 0.561<br>(0.48)  | 0.692<br>(0.58)  |
| Black          | 0.716<br>(0.51)  | 0.791<br>(0.56)  |
| Other Minority | -1.075<br>(-0.57)  | -0.964<br>(-0.49)  |

|  |                     |                     |
|--|---------------------|---------------------|
| Age in 2000  | -1.107**<br>(-3.40) | -1.088**<br>(-3.34) |
| Experience in 2000                                       | 0.643**<br>(2.83)   | 0.638**<br>(2.79)   |
| Prior Non-Federal Judge                                  | 1.771<br>(1.31)     | 1.675<br>(1.25)     |
| Prior Prosecutor   | 2.722*<br>(2.20)    | 2.634*<br>(2.13)    |
| Prior Law Professor                                      | 5.200**<br>(2.67)   | 5.116**<br>(2.63)   |
| Top School   | -1.028<br>(-0.72)   | -1.122<br>(-0.77)   |
| Publications Per Case                                    | -0.0997<br>(-0.01)  | -1.397<br>(-0.08)   |
| Average Positive Citations                               | 0.0238<br>(0.07)    | 0.00395<br>(0.01)   |
| Average Affirmed   | -1.196<br>(-0.20)   | -0.932<br>(-0.15)   |
| Any Contributions  | 2.566<br>(1.59)     |                     |
| Democrat Contribution                                    |                     | 2.742+<br>(1.68)    |
| Constant   | 44.49**<br>(2.98)   | 43.60**<br>(2.90)   |
| <i>N</i>   | 292                 | 292                 |
| pseudo <i>R</i> <sup>2</sup>                             | 0.619               | 0.622               |
| <i>t</i> statistics in parentheses                       |                     |                     |
| + <i>p</i> < 0.10, * <i>p</i> < 0.05, ** <i>p</i> < 0.01 |                     |                     |

Table 6 tells us that high performers on our measures are not systematically the ones who get promoted. None of the coefficients on Publications Per Case, Average Positive Citations, and Average Affirmed are significant in the two models of Table 5. In contrast, note that whether a judge contributed to a democrat candidate prior to becoming federal judge is a significant explanatory variable for promotion to the circuit court (particularly for

judges appointed by Obama), providing support for the importance of patronage. But we see little impact of the variables that might capture a judge’s potential to spread ideology. Instead, what we see is that the judges who are selected are solidly in the middle range of performance. Note also that the results provide little indication that demographic variables played a role in elevation.

### 3.5 What Else Determines Who is Selected as a Circuit Court Judge

We now turn to the question of why the President would turn to non-district judges and middling competence district court judges for appointment to the circuit court. We lack information on the entire pool of non-district judges who are plausible candidates for appointment to the circuit court. We can nonetheless compare those appointees to the circuit court who were prior district judges with those appointees who were not prior district judges. This comparison allows us to determine whether the President looks for characteristics other than competence in his appointees. Table 7 makes this comparison looking at political contributions made prior to appointment as a federal judge.

**Table 7: Comparison of Elevated Circuit Judges**

| <b>Bush Appointees</b>                |   |                                     |                |
|---------------------------------------|---|-------------------------------------|----------------|
|                                       | <b>Not Prior<br/>District<br/>Judge</b> | <b>Prior<br/>District<br/>Judge</b> | <b>p-value</b> |
| Fraction with Any Contribution        | 0.628                                   | 0.286                               | 0.0255         |
| Fraction with Republican Contribution | 0.581                                   | 0.214                               | 0.0166         |

| <b>Obama Appointees</b>             |   |                                     |                |
|-------------------------------------|---|-------------------------------------|----------------|
|                                     | <b>Not Prior<br/>District<br/>Judge</b> | <b>Prior<br/>District<br/>Judge</b> | <b>p-value</b> |
| Fraction with Any Contribution      | 0.533                                   | 0.500                               | 0.8696         |
| Fraction with Democrat Contribution | 0.400                                   | 0.500                               | 0.6197         |

Table 7 suggests that those Bush appointees to the circuit court who were not prior district judges tended to be more political (as measured by their propensity to making political contributions prior to becoming a federal judge to either any party candidate or a Republican candidate). We do not find the same pattern for Obama. But this could be because we do not examine Obama appointees from later in his presidency. It may be that Presidents feel the need have more competent judges earlier in their term, when they are trying to build political capital with the voters. Later in their presidencies, when they are spending their capital, perhaps they can afford to engage in a larger number of patronage appointments.

#### **4. Circuit Court Judges on the Short List for the Supreme Court**

As discussed earlier, we found that Presidents tend to elevate relatively unremarkable district judges to the circuit court, eschewing those district judges with high productivity, opinion quality, and propensity to take risks (as measured by a lower affirmance rate) despite the correlation of these qualities with higher quality circuit court performance. A ready response to our finding is that it is unsurprising, given that everyone knows that Presidents care little about circuit court appointments (those tend to be decided by senators). What Presidents care about are the high profile appointments to the Supreme Court.



To examine whether our findings hold for elevations to the Supreme Court as well, we cannot use the same method we used for elevations to the circuit courts, where we looked at the set of judges who were elevated from the district courts and compared their performances against all the other sitting and active district judges. The reason for this is that there are too few appointments to the high court. For that reason, we use an alternative method to create the subset of those who were promoted. Instead of looking at full promotions, we instead look at the set of circuit level judges who make it on to the short list for promotion. We obtain the short list from the major news sources, who in turn obtain these names from sources that are often close to the President.(we borrow this methodology from ELP).

The data on federal circuit court judges that we use is taken from Choi and Gulati (2004).<sup>31</sup> Using that data on relative judge performance and information on the subset of judges who were on Bush and Obama's short-list for elevation to the Supreme Court, we examine whether a similar pattern exists for the selection of circuit court judges for the Supreme Court. We obtained the short lists for appointment by Bush and Obama using news reports from leading national news sources.<sup>32</sup>

The data for the circuit court level, similar to that for the district courts, has publication and citation information. The publication data is from 1998 to 2000. For each judge, the number of published opinions was adjusted so that all the circuits have the same mean number of total number of opinions written to control for the possible influence of circuit-based norms on publication rates. The outside citation data is collected in the same

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<sup>31</sup> See Choi & Gulati, *supra* note 20.

<sup>32</sup> For examples of newspaper reports of presidential shortlists that we used, see <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/01/AR2005070100756.html>. ; [http://www.nytimes.com/2009/05/28/us/politics/28select.html?\\_r=0](http://www.nytimes.com/2009/05/28/us/politics/28select.html?_r=0) ; [http://www.huffingtonpost.com/2010/04/12/sidney-thomas-on-supreme\\_n\\_534604.html](http://www.huffingtonpost.com/2010/04/12/sidney-thomas-on-supreme_n_534604.html). The candidates who were on the short lists of either Bush or Obama and who were also in the Choi & Gulati (2004) dataset were Samuel A. Alito, Jr., Emilio M. Garza, Emilio M. Garza, J. Michael Luttig, J. Harvie Wilkinson, Diane Pamela Wood, Sidney R. Thomas, and Merrick Garland.

fashion as for the district courts, as is collected up to May 31, 2003.<sup>33</sup> The one competence measure that we cannot replicate, however, is what might be described as a measure of independence. For the district courts, we looked at the willingness to cross swords with the circuit court. For the circuit courts though because there are so few appeals to the Supreme Court, we use an alternate measure – the willingness to cross swords with colleagues by writing opinions disagreeing with them. This independence measure is computed as the following:

$$\text{Independence} = \text{Opposite\_Party} - \text{Opposite\_Pool}$$

Opposite\_Party is defined as the number of opposing opinions written by the judge of interest against a judge of the opposite party divided by the number of opposing opinions written against a judge of either party from 1998 to 2000. Not all opposing opinions are driven by ideology. A judge who dissents at random would dissent 75 percent of the time against an opposite party judge if the background pool of majority opinions consisted of 75 percent opposite party authored opinions. To take into account the background pool of opinions, we define Opposite\_Pool as the total number of majority opinions authored by an opposite party judge divided by the total number of majority opinions authored by either an opposite or same party judge (not including the judge in question) from 1998 to 2000. A more negative independence score corresponds to a judge who writes opposing opinions against opposite-party judges more frequently than the background pool of majority opinions authored by opposite-party judges. We treat a more positive independence score as indicative of a more independent judge.<sup>34</sup>

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<sup>33</sup> To normalize the distribution, Choi & Gulati (2004) computed the Z-Score of the total number of outside circuit citations for each judge.

<sup>34</sup> This methodology is one that we have utilized elsewhere to calculate independence. See Choi & Gulati (2004); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Appointed Rather than Elected Judiciary* 26 J. L. ECON. & ORG. 290 (2008).

We depict the adjusted distributions for Total Opinions (Figure 4), Outside Circuit Citations (Figure 5), and Independence scores (Figure 6) for the circuit court judges in our data. For each variable, we depict the distribution for all the circuit judges and the judges on the short lists as well.

[Insert Figure 4 here].

Note from Figure 4 that in terms of Circuit Adjusted Total Opinions, the short-list circuit judges are similar in distribution to the distribution for all circuit judges in our sample. Similar with the elevated district judges, note that the superstar circuit court judges are not on the short list.

[Insert Figure 5 here].

We see a similar pattern in Figure 5 for the Outside Circuit Citations Z-Score measure for the circuit court judges. Short list circuit judges are near the middle of the distribution for all the circuit judges in our sample. Superstar judges from the circuit courts do not make it on to the short list.

[Insert Figure 6 here].

Figure 6 provides a different picture for the Independence score for circuit court judges. Short list judges all have an Independence score below zero, indicating that short list judges tend to oppose opposite party judges more than predicted by the underlying political composition of the circuit court in question. The one area where short-list circuit court judges stand out, therefore, is in terms of their partisanship—they tend to side more frequently with same party judges. Overall though, what we find is much the same for both elevations to the federal circuit courts and to the high court – the judges who get picked are those from the middle of the pack (at least in terms of our measures of competence). None of them comes from either the very bottom or the very top parts of the distributions.

## 5. Questions For Further Exploration

The key contribution of ELP's Chapter 8, is to show how judges in the auditioner pool appear to adjust their behavior to enhance their chances of promotion. Contrary to the standard model, which is all about judges voting in line with political preferences, ELP show that an important determinant of judicial behavior can be the desire for career advancement. That, in turn, means pleasing the political bosses who make those career advancement choices. Understanding judicial behavior under this model then, requires an understanding of what politicians are looking for in judges and what tradeoffs they make in the process of making their choices. Our interest in this project has been in one particular value, judicial competence, and in how the desire for achieving that value is balanced against other desires of the politician. Politicians, concededly, probably care more about advancing policy ideas than ordinary people (who don't care about them much at all). However, like the rest of us, they surely care a great deal about other things, such as making sure that they retain their jobs, get promotions, and keep their friends and well wishers happy. Understanding judicial behavior requires understanding the preferences of the people judges are trying to satisfy or keep happy; that means politicians and the people they are trying to satisfy. And that last set of actors, we conjecture, likely care about judicial competence.

The following are some questions that the research has raised for us.

Choices Among District Judges: When Presidents choose their promotion candidates from the pool of available district judges, one might expect them to pick from the very top of the distribution in terms of competence characteristics we have described. In particular, if one thinks that politicians are focused primarily on picking judges who will advance their ideologies, one would expect them to seek out judges who have the potential to be hugely influential in terms of spreading their ideas (the high performers on things

measures such as publication numbers). But instead they pick squarely from the middle of the distribution. This may relate to the unwillingness of Presidents to expend very much of their limited political capital on judicial appointments and particularly not lower court ones.<sup>35</sup>

Promoting from Within: The choice to promote a sitting district judges as opposed to making a lateral appointment from the practicing bar may reflect a balancing of competence versus patronage or ideology. The choice of a sitting district judges, we suspect, is a relatively safe choice because there is enough data on the judge for the President to make sure she will be competent. So long as the judge has not demonstrated strong political leanings, the President can secure senate confirmation without a significant expenditure of political capital. The downside for the President is that choosing a district judge may make it harder to engage in patronage.

Life Cycle of Presidential Appointments: One can view Presidents as being budget constrained in terms of the amount of political capital that they have to expend on various goals that they have, ranging from getting legislation passed to appointing judges who might help advance their ideology. Anecdotally, it has been suggested to us that Presidents tend to have less capital available to spend on judicial appointments early in their terms (when they often have legislation they want to get passed). They also want to be seen as making good solid appointments. Former district judges, with a good track record, tend to fit the bill as being safe and solid. Later in the President's term, however, there may be more room to engage in patronage or ideology driven appointments.

Experienced District Judges: One of the results that surprised us the most was the consistent finding across our competence variables that the district judges with more than

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<sup>35</sup> In conversations with those who have been involved in the judicial nomination process over the years, President Reagan is often mentioned as an exception in the he (and his advisers such as Attorney General Meese) cared a great deal about ensuring that their judicial appointees would not only advance a particular ideology, but also be highly influential.

10 years experience on the bench (before promotion) tend to perform worse than those with *less* than 10 years experience. One explanation here is that those who have been on the district bench for more than 10 years are the subset of those for whom this promotion is their last one. They are probably not the ones being groomed for possible promotion to an even higher court. If this explanation is right, it might explain why this subset of judges does not see the need to exert quite as much effort once they have gotten elevated.

Senators. The President must secure approval of the Senate for his nominations, and Senators may care about the same factors that presidents do—ideology, competence, patronage, and the favor of interest groups—while putting different weight on them. The President thus may be constrained in his choices. Under Senate rules, the senators from the state where the nominee resides (or possibly the state where the nominee will be located once appointed if the states are different) have the power to block or slow down Senate confirmation of the nominee, under what is known as the “blue-slip” procedure.<sup>36</sup> It is generally believed that senators are more attentive to patronage considerations than presidents are for federal judicial appointments, and that only senators from the same party as the president have effective blue-slip power.<sup>37</sup> If these assumptions are correct, nominees will be of lower quality when nominated for seats in the states of senators from the president’s party.<sup>38</sup> Our efforts to test this hypothesis failed to produce statistically significant results. However, we believe that further research on this hypothesis is warranted.

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<sup>36</sup> See Brannon P. Denning, *The ‘Blue Slip’: Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL OF RIGHTS J. \_\_ (2001).

<sup>37</sup> See Ed Whelan, *The Blue Slip Privilege and Seventh Circuit Nominee Victoria Nourse*, Nat’l Rev. \_\_ (2011).

<sup>38</sup> ELP use a variable they call “senatorial courtesy,” but as a way to measure the ideological influence of the senators from the state where the judge is located, not patronage considerations.

Figure 1: Publications Per Case Distribution for District Judges

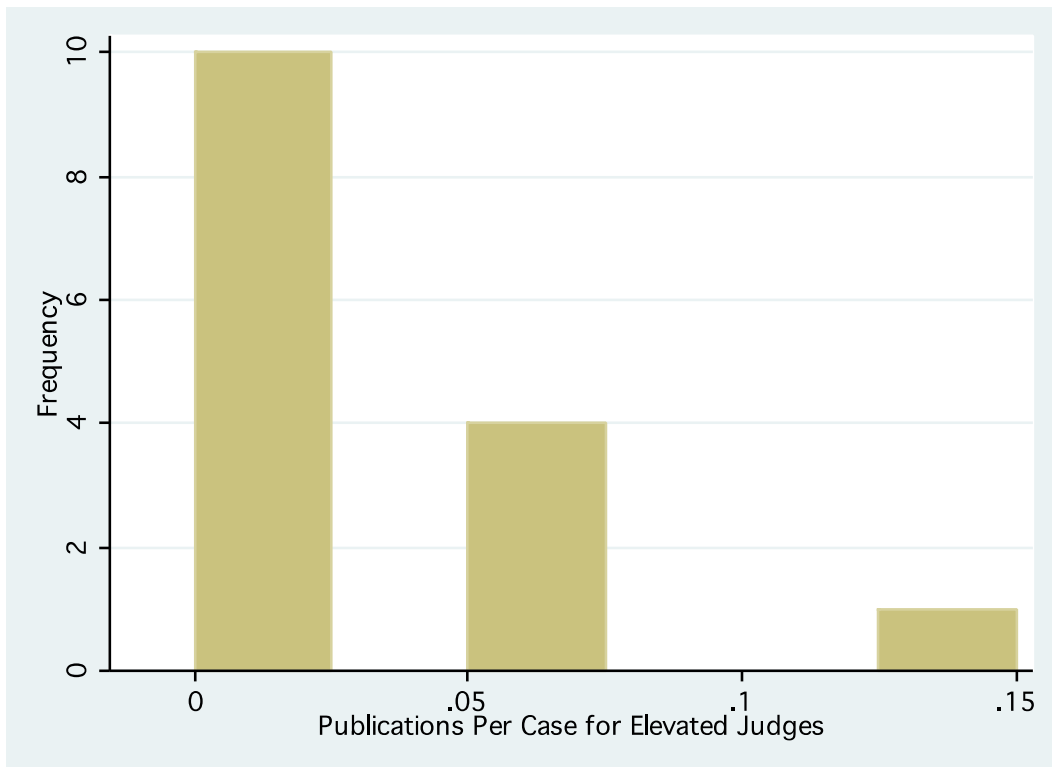
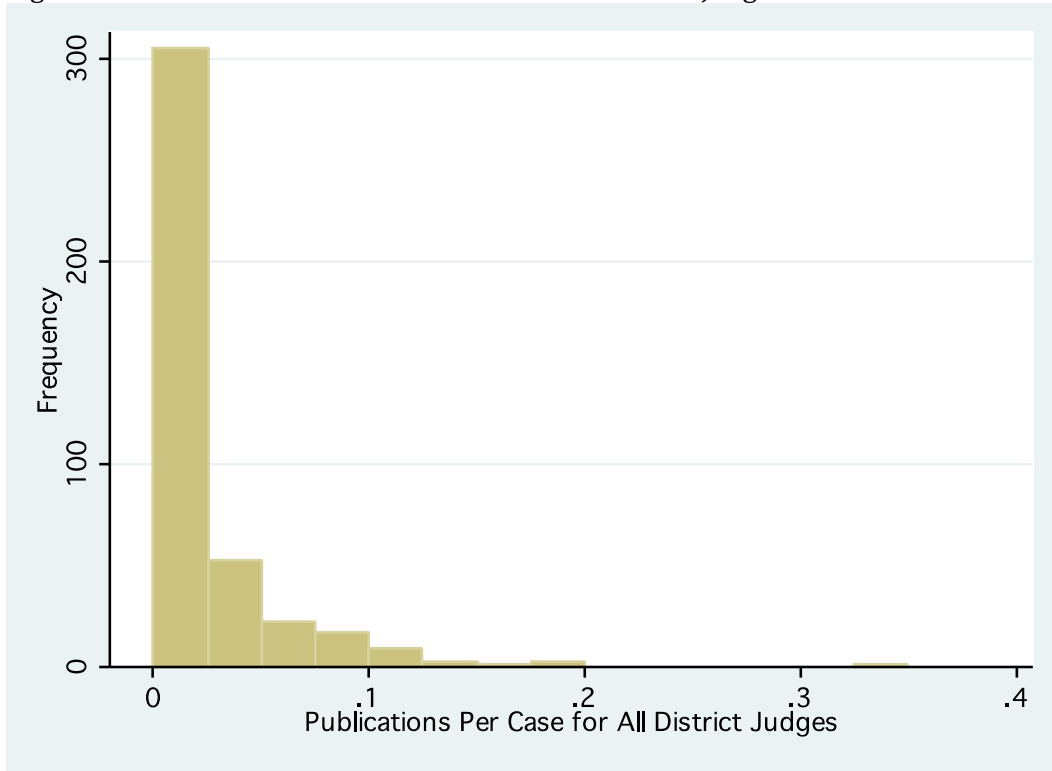


Figure 2: Average Positive Citation Distribution for District Judges

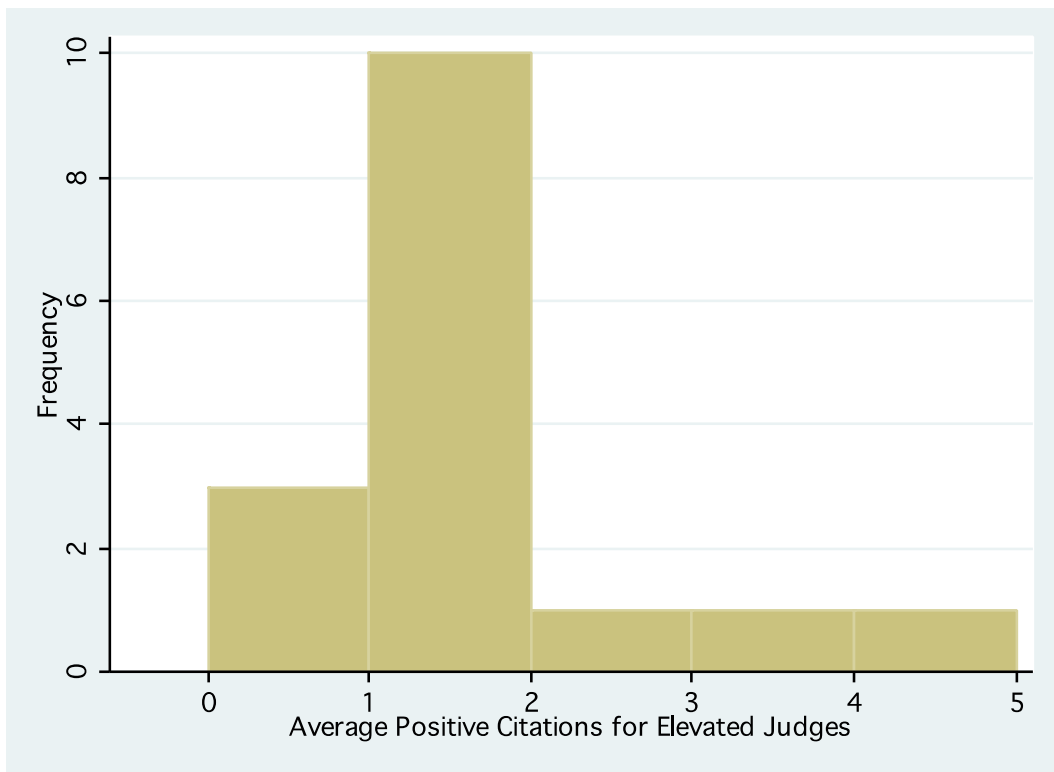
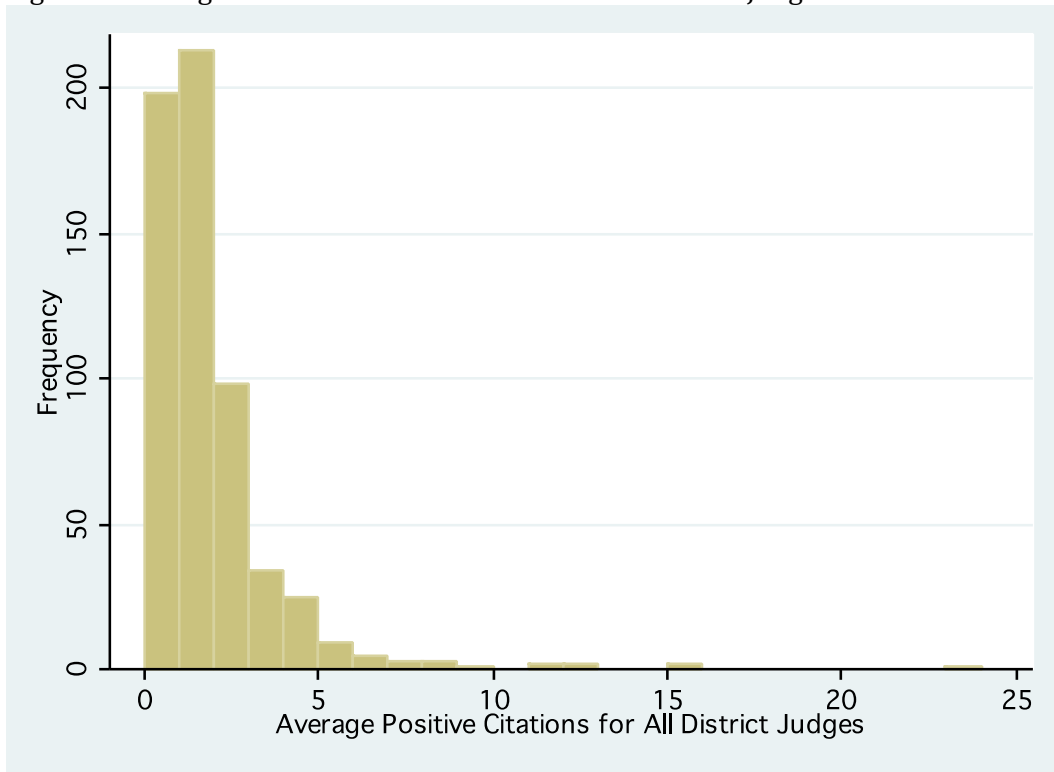




Figure 3: Average Affirmed Distribution for District Judges

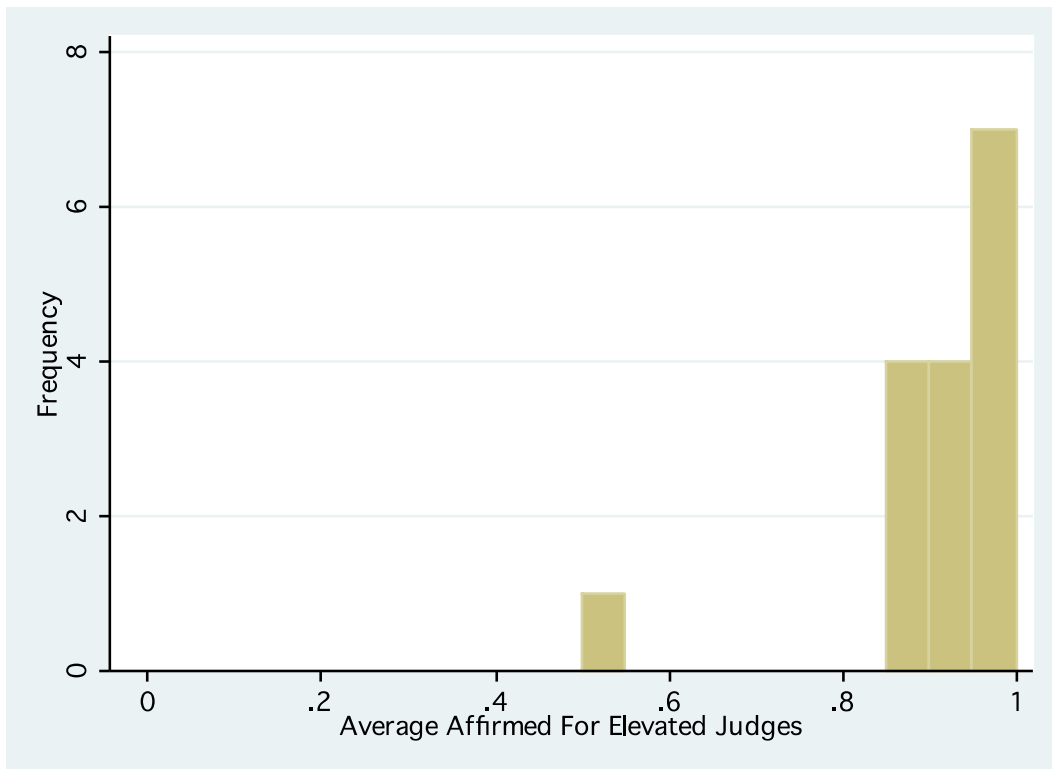
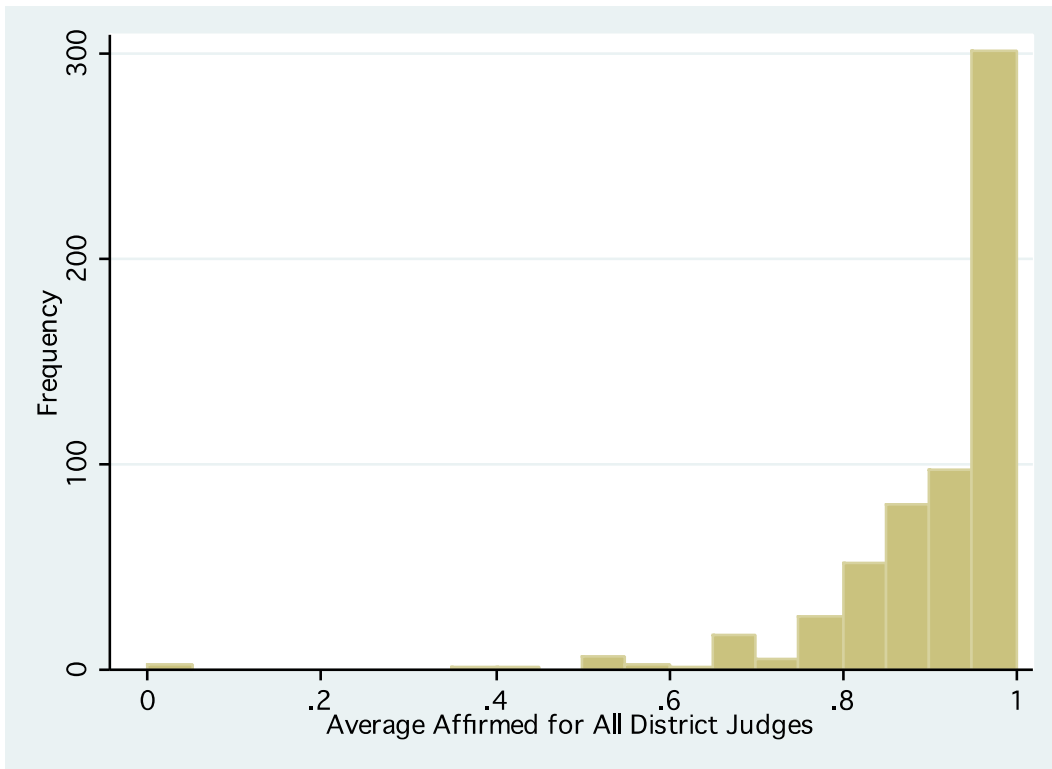


Figure 4: Circuit Adjusted Total Number of Opinions Distribution

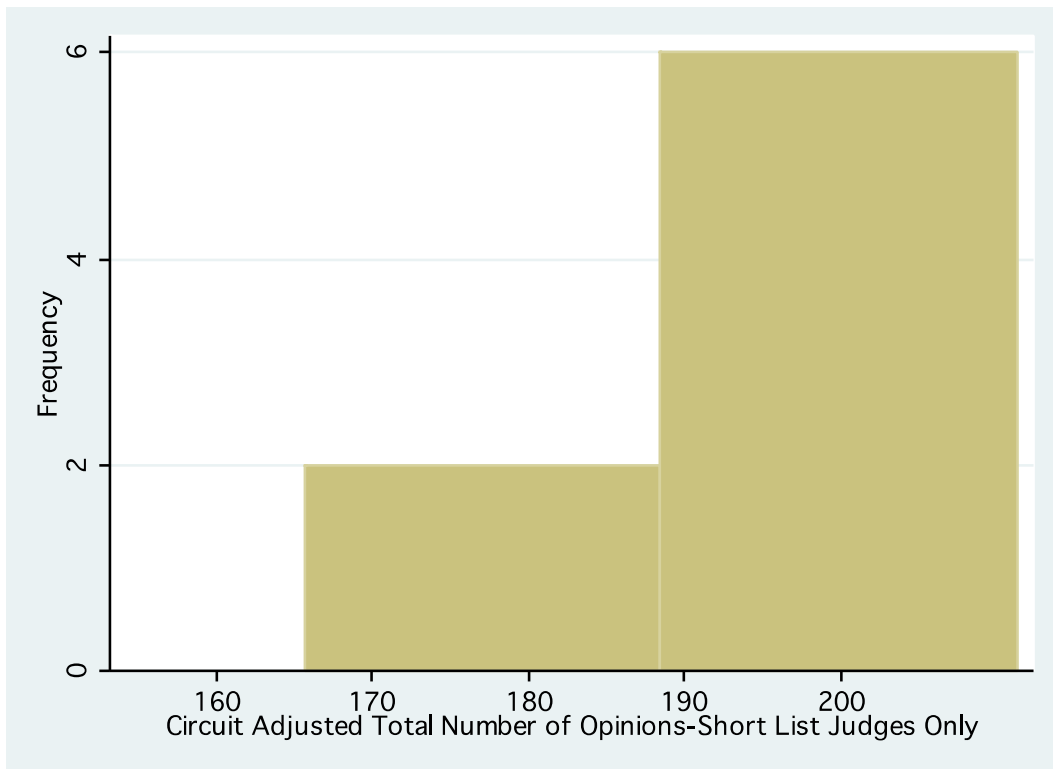
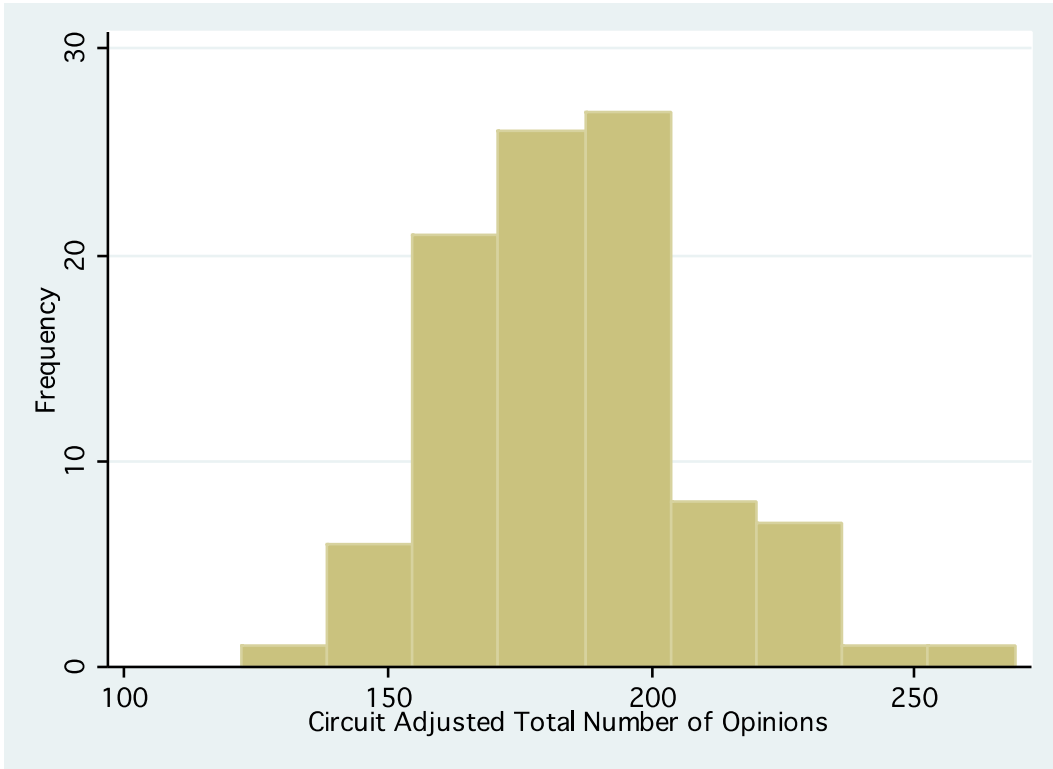


Figure 5: Total Outside Circuit Citations Z-Score Distribution

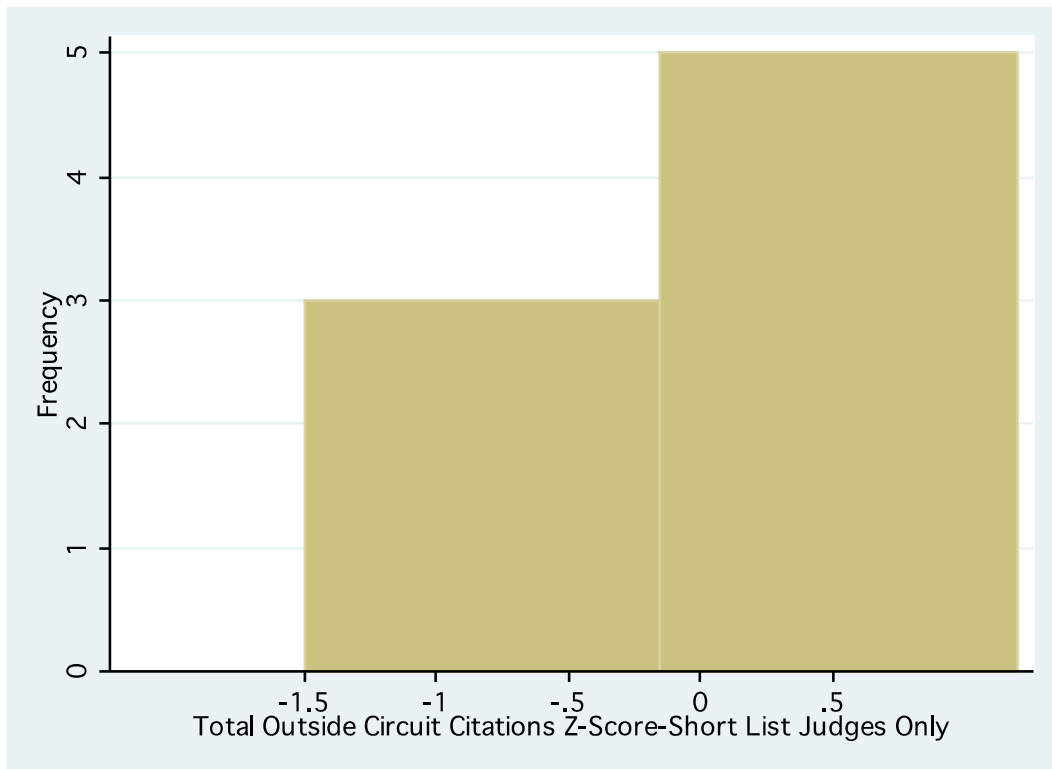
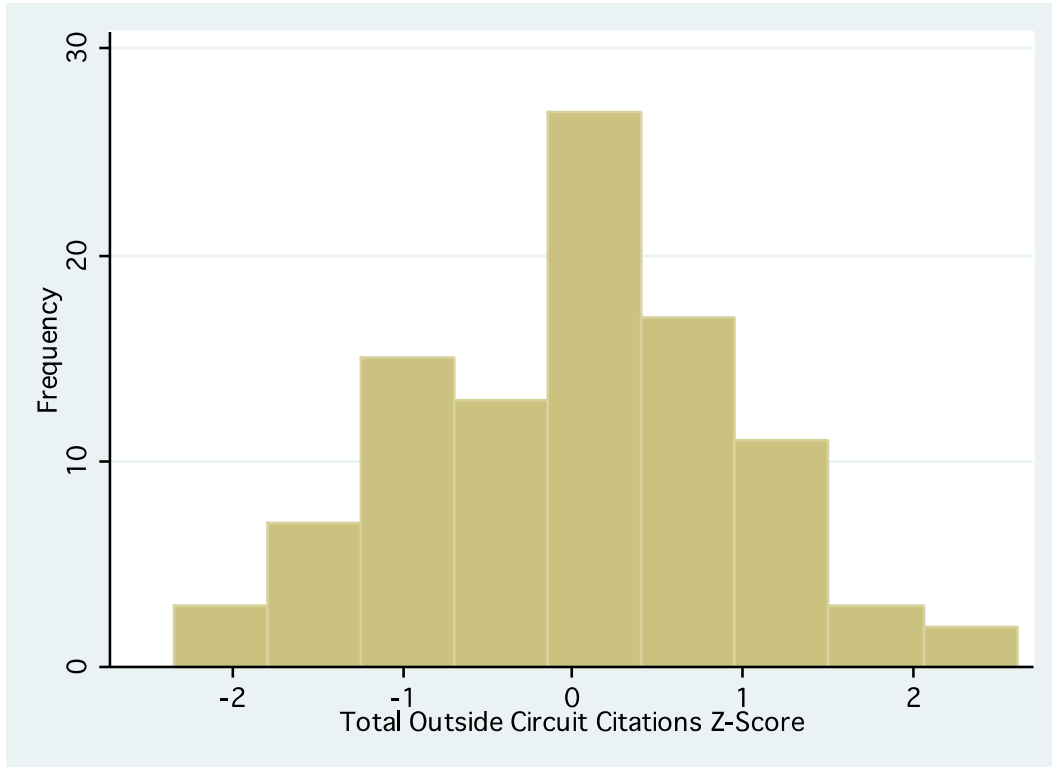
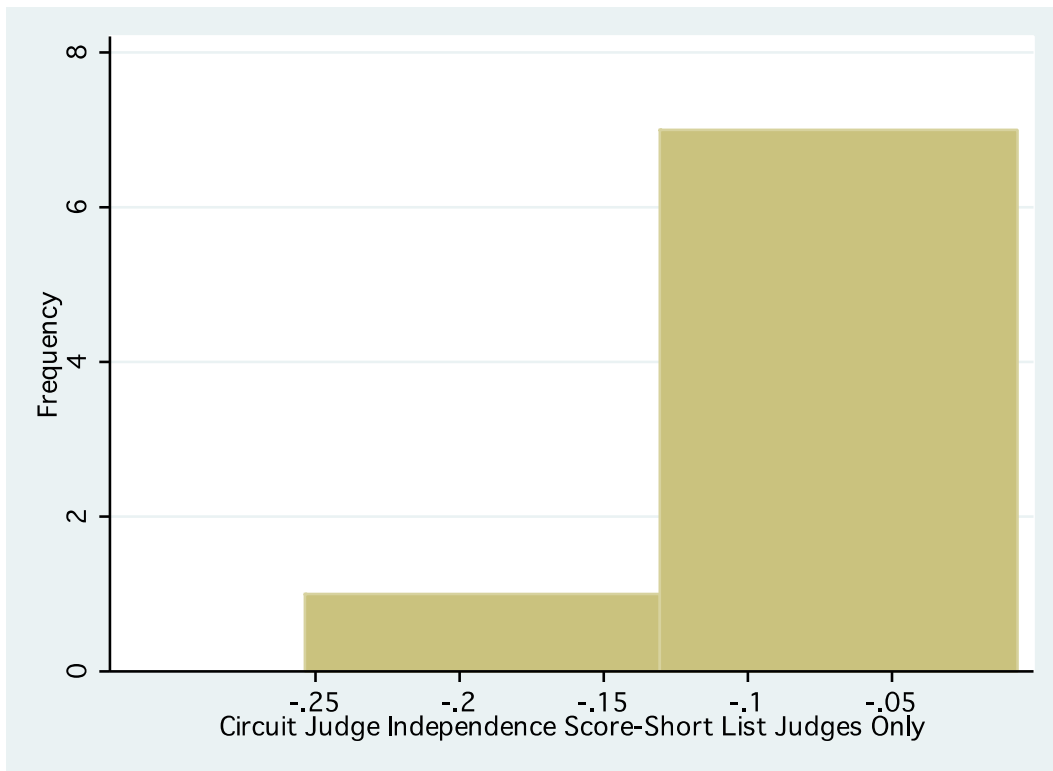
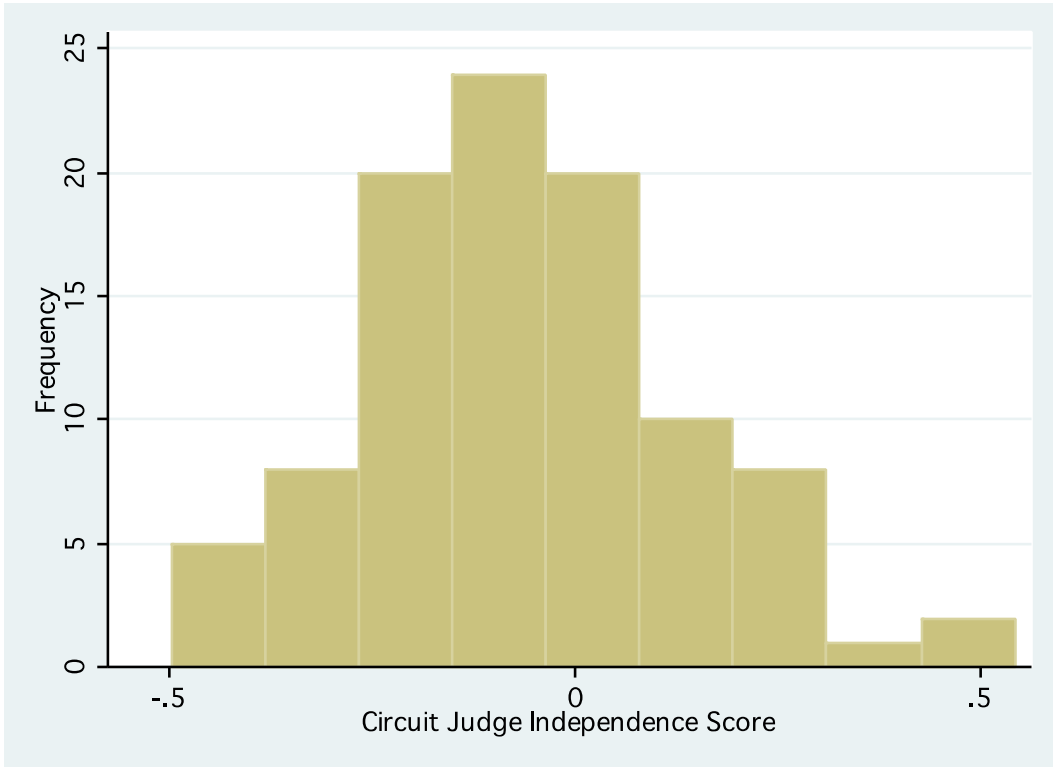


Figure 6: Independence =Score Distribution



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