Bargaining and Legal Development in the United States Courts of Appeals

Abstract

Examining the systematic and private records of a former D.C. Circuit Court Judge, we examine the process by which federal circuit court judges craft legal opinions. We discover that private and contextual factors influence legal outcomes. More specifically, we find that workload considerations strongly influence circuit opinions, that some visiting and senior judges effect the process differently than do active circuit court judges, and that panel effects play but a minimal role in the creation of opinions. In short, we move the literature on circuit court decision making forward by employing private archival material that illuminates how private and contextual features influence opinion writing and legal policy.

In 1964, the United States Court of Appeals for the District of Columbia equated drug addiction to mental illness.[1] The court suggested that just as the insane lack intent to commit crimes, drug addicts may lack the same intent. The court's decision, however, did not come without controversy—or guile. The three judge panel randomly assigned to hear the case (Warren E. Burger, J. Skelly Wright, and Carl E. McGowan) agreed privately to affirm the defendant's conviction by a one sentence unpublished order. Judge Wright, however, went beyond that agreement and circulated a draft opinion to his two colleagues which contained language suggesting that courts could treat drug addition as a mental illness. Burger reacted by calling Wright's proposed opinion a violation of their original agreement and argued that he was sneaking in a new legal defense for criminals. After a series of bitter exchanges, Wright refused to make any of Burger's suggested changes to the opinion, stating: "I think [my] draft speaks for itself. And so does this exchange of memoranda."

When judges write opinions, they make policy. Knowing this, they seek control over those opinions. And controlling a circuit court opinion can be a significant prize. Each circuit sets policy for large numbers of people. Indeed, the Supreme Court reviews less than one percent of all cases heard in the circuits each year, leaving circuit court judges the power and the motivation to craft legal policy. Burger recognized this, which explains why he moved so quickly and forcefully to blunt Wright's grab for power. Wright also understood, which explains his cold response to Burger once he locked up McGowan's vote. Each tried to effectuate their policy goals through the opinion.

Despite the importance of circuit courts and the opinions they write, scholars know relatively little about the process that leads to their drafting. Because obtaining private records of judges has been difficult and limited, our understanding of internal procedures on the circuits has been regrettably cramped. We say regrettable because these courts wield tremendous power because they rule on nearly every issue before the federal judiciary and are rarely audited by the Supreme Court. Just what factors lead judges to craft their opinions,

[1] *Castle v. United States*, 347 F.2d 492 (D.C. Cir. 1964).

however, remains unclear. Our extensive understanding about how Supreme Court justices craft opinions (Maltzman, Spriggs, & Wahlbeck 2000) may not apply to circuit court judges, as the institutional dynamics unique to the circuits prevent the wholesale application of Supreme Court research to them. Circuit court judges have larger workloads than Supreme Court justices and operate within an entirely different set of constraints. They sit on rotating three-judge panels, they decide cases with senior (i.e. semi-retired) judges from their circuit, and they often sit with visiting judges from other courts. While there are, to be sure, features similar to both levels of the judiciary (such as oral argument, opinion crafting, bargaining over opinion content, the interpretation and application of precedent and the like), circuit judges nevertheless must be studied in their own environments.

To examine the conditions under which circuit court judges make policy during the opinion writing process, we employ unique archival data culled from the private archives of Judge J. Skelly Wright of the District of Columbia Circuit (1962-1988). Wright's records provide empirical data on nearly every facet of the opinion crafting stage. These papers provide exhaustive data on bargaining and accommodation among judges on the D.C. Circuit for over 2,000 cases over 20 years. They include memos sent to all judges sitting on panels that heard cases , the dates those memos circulated, the results of private conferences, the responses of judges to majority opinion drafts, the author's response(s) thereto, and sua sponte behavior by judges. To our knowledge, no existing study of circuit courts is privy to such data. More specifically, we analyze the conditions under which judges *seek changes to majority opinion drafts*, as well as the subsequent decision by opinion authors to *accommodate their colleagues' suggested changes*. By examining the private workings of the D.C. Circuit we can shed light on how circuit judges make legal policy.

In what follows, we begin by discussing the process circuit courts follow when crafting opinions. We then theorize the conditions under which judges respond to draft opinions as well as the conditions under which opinion authors accommodate their colleagues' suggested changes. We next explain our data, present our results, and conclude with a discussion of

our findings.

Opinion Adoption in the Federal Circuit Courts

"The [federal] circuit courts play by far the greatest legal policy-making role in the United States judicial system" (Cross 2007, 2). United States Circuit Courts of Appeals are intermediate appellate courts that sit above U.S. District (trial) courts but below the Supreme Court.[2]

When a party files an appeal with the clerk of the circuit court that possesses jurisdiction over the legal dispute, the clerk dockets the case and randomly assigns it to a panel of three judges who will oversee and rule on the appeal (Breyer 1990, 29).[3] The parties then submit briefs to the three-judge panel. If the panel determines that the dispute would benefit from oral argument, the litigants each receive roughly 15 to 20 minutes to present their cases (Wald 1992). After oral arguments are held, the judges meet in brief "impression

[2]There are twelve federal circuits organized geographically (including the D.C. Circuit), plus a circuit court for the federal circuit, which hears nationwide disputes regarding patents, trademarks, and other specialized legal issues. When a circuit court renders a decision, it has a binding effect on all federal courts within its geographic boundary. For some courts, such as the Ninth Circuit which oversees the federal courts in nine states and two territories, this reach is broad. Circuit courts review decisions of federal trial courts (and administrative agencies) and are subject to review by the Supreme Court. According to the Administrative Office of the United States Courts, in 2008, the circuit courts of appeals disposed of 29,608 cases after oral hearings or submission on briefs, and a decade earlier in 1997, they terminated 25,840 such cases.(This number reflects cases terminated on the merits after oral hearings or submission on briefs. See `http://www.uscourts.gov/judbususc/judbus.html`. Table S-2.).

[3]Not all circuits randomly assign judges to panels, though most today do (Hall 2009). The D.C. Circuit assigned randomly during our sample.

conferences" (Coffin 1994, 129) to discuss the day's cases, during which time they state their positions (Wald 1992, 177). At the conclusion of the conference—when a disposition becomes clear—the presiding judge on the panel (the most senior) selects an opinion author.[4] The author then drafts an opinion which should reflect that conference disposition. Once the author completes the opinion, which can take from as little as one day to over a year, she sends it to the other judges on the panel with the hopes of gaining their acceptance (Coffin 1994, 191).

Generally speaking, judges receiving the opinion draft can respond two ways. They can join unequivocally in the opinion or they can seek changes to it.[5] If a judge likes the opinion draft, she can join it, thus signifying that she agrees fully with it, and seeks no changes (Coffin 1994). (This is akin to a "joinder" by Supreme Court justices (Maltzman et al. 2000).) For example, after Judge Mikva circulated his draft opinion in *General Teamsters Local Union No. 174 v. NLRB* (82-2401), Judge Wright responded: "I am pleased to concur" while Judge Ruth Bader Ginsburg, on the same day as Wright, replied: "Easy to read and utterly convincing. I concur, with appreciation."[6]

If a judge dislikes the opinion draft, she typically tries to bargain with the opinion writer to change the majority opinion draft. Consider *Vanguard Interstate Tours, Inc. v. ICC* (83-1671). After Judge Wright circulated his majority opinion draft, Judge Scalia responded with the following:

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[4]The presiding judge is not always the opinion assignor. Some circuits require the presiding judge's assignment to be approved by the Chief Judge, while other circuits assign authorship by rotation or lot (Coffin 1994, 168). In our sample, the presiding judge assigned opinions.

[5]Though judges can circulate separate opinions after receiving a draft majority opinion, our data suggest that they primarily circulate separate opinions after they try and fail to exact changes to that majority opinion.

[6]The online supplement provides illustrations of the archival documents from which this statement–and others described below–originated.

> "...I have one minor substantive suggestion: Somewhere on p. 15 or 16 you should make [the] point that [the] holder of temporary authority more certainly has [an] economic stake than does [a] mere applicant for permanent authority – & [the] latter is specifically given intervention rights under [federal law]..."

Of course, not all suggestions are so polite. Many appear as threats. Judge Wilkey's response to Judge Scalia's opinion in *Dana Corp. v. United States* (82-1022) serves as a good example. Scalia circulated an opinion that addressed the standard of review courts should apply when reviewing agency decisions. Wilkey thought Scalia's opinion wrongly broke with precedent. He threatened Scalia by stating that he would withhold his vote unless Scalia modified the majority opinion:

> "On initial review, while I agreed with most of AS's [Judge Scalia's] op[inion] & with [the] result, I was & remain unable to concur with parts of it...I hope we can work something out along these lines [described by Wilkey], because I simply can't accept AS's rationale either as [a] matter of logic or on precedent. If we cannot, I shall write [a] dissent along [the] lines of this memo..."

Once the majority opinion writer receives suggested changes from her colleagues, she has two choices: She can accommodate those judges or refuse to accommodate them. Indicative of the process are *Vanguard Interstate Tours*, described above, and *Zerilli v. Smith* (79-2466), which we discuss momentarily. After Judge Scalia made his suggestions in *Vanguard*, Judge Wright revised his opinion and circulated the following memo: "I have amended [my] proposed op[inion] in [the] above case to incorporate all [the] fine ideas in AS's memo..." After Judge MacKinnon made his suggestions, Wright again revised his opinion, stating: "I appreciate GEM's thoughtful comments on [the] proposed op[inion]. I have amended it to incorporate his suggested replacement[s]..."

In other instances, of course, judges refuse to accommodate their colleagues. In *Zerilli v. Smith*, Judge Robb told Judge Wright that his opinion went beyond what was necessary to resolve the case and asked Wright to scale it back. Wright refused, stating:

> "I fully understand RR's [Robb's] position. And I realize that at conference we probably had in mind something significantly less than what I circulated in way

> of opinion. However, after considering [the] fact that there was only [one] other case in [the] circuit[s] in this newspaper reporter area of law. . . and that case went the other way, I thought it might be useful, if not necessary to state our reasons in more detail. . . "

As these examples highlight, significant activity occurs during opinion writing. Equally clear is that such activity cannot be understood by looking simply at the final published opinions. Rather, to understand more fully how judges make law in the circuits requires an analysis of the conditions under which judges respond to draft opinions and accommodate their colleagues' suggestions.

Theory and Hypotheses

We start with the basic premise that circuit court judges seek to obtain their preferred policy outcomes and that this goal influences their behavior during the opinion writing process. We then examine how workload and other institutional and contextual features influence how judges craft law.

Ideology and Opinion Crafting

Nearly fifty years of empirical research on the circuit courts supports the belief that circuit judges—while not as free to do so as Supreme Court justices—pursue their policy goals when rendering decisions (Benesh 2002; Giles, Hettinger, & Peppers 2001; Goldman 1966; Songer & Haire 1992). Judges themselves suggest that ideological goals activate much of their behavior. Judge Patricia Wald once stated: "[T]he values by which judges make choices in areas of discretion will more often than not be in sync with that section of the political spectrum they inhabited in their former lives" (Wald 1992, 180). Howard's (1981) interviews with appellate court judges revealed that their personal views of justice played a significant role in how they decided cases.

Accordingly, we suggest that judges will respond to opinion drafts so as to improve the policy those opinions make. That is, a judge will be more likely to solicit changes to an opinion draft as the ideological distance between her and the opinion writer increases. At the

same time, opinion writers will decide whether to accommodate their colleagues' suggested changes based on the level of ideological agreement between themselves and responding judges. A majority opinion writer will be less likely to accommodate a responding judge as the ideological distance between her and the responder increases.

Panel Median Effects

We might suspect that panel effects motivate judges to behave differently. Panel effects occur when the composition of a three-judge panel influences the votes judges cast. That is, the presence of a particular judges (or judge "type") could lead the other judges to depart from sincere voting and vote differently. For example, recent evidence suggests that the presence of a female judge on a three judge circuit court panel can cause the two male judges to vote differently than they would have voted in the absence of a female (Boyd, Epstein, & Martin 2010). Sunstein, Schadke, Ellman, and Sawicki (2006) argue that the presence of a single Democrat-appointed judge sitting with two Republican appointees reduces the likelihood of the panel reaching a conservative outcome (and vice versa). The authors, much like Cross and Tiller (1998) before them, claim that panel effects (i.e., the presence of a whistleblower) cause this outcome. Likewise, Cross (2007) regresses the direction of a judge's vote on her ideology and the combined ideologies of her colleagues, finding that her colleagues' ideological concerns trump her own.[7]

While fully examining the role of panel effects is beyond this paper, we do believe that we should account for at least some contextual panel features that might drive judges' behavior. To do so, we look to whether the judge was the median judge on the panel. There

[7]There are, of course, equally compelling reasons to believe that panel effects do not exist, at least systematically. Sunstein et al. (2006) only finds panel effects in sex discrimination cases and affirmative action cases but not in other highly salient cases like abortion and capital punishment. Boyd et al. (2010) also find panel effects limited to cases of sex discrimination.

might be considerably different bargaining incentives for median judges than for non-median judges. Consider, first, the decision to bargain. The median judge on the panel might be more likely to bargain for changes than non-median judges. Knowing that she is the "swing" judge on the panel, the median judge might seek to exert power over the opinion by suggesting changes. At the same time, when the median is the opinion writer, other judges might be less inclined to seek changes to the opinion. Knowing that the median holds more power than they, these judges might simply take what the median offers them. In short, we expect that median judges will be more likely to make suggestions to draft opinions that non-median judges, and that non-median judges will be less likely to seek changes to opinions written by the panel median.

Consider, next, the decision to accommodate or reject suggested changes. One might expect that when the median judge seeks changes to a draft opinion, the opinion writer would be much more likely to accommodate those changes than if a non-median judge requested them. That is, one might expect greater responsiveness to a median judge suggesting a change than to a non-median suggesting a change. At the same time, when the median judge is the opinion writer, she might be more likely to reject changes made by other judges, given her influential status. Thus, we expect that opinion writers will be more likely to accommodate median judges than non-median judges; we also expect that median judge opinion writers will be less likely to accommodate their colleagues than non-median opinion writers.

Judge Workload

While policy is important, workload also influences judges' behavior (Hettinger, Lindquist, & Martinek 2006). It is difficult to overstate the caseload burden circuit court judges face. From 1997 through 2008, for every individual case decided by the Supreme Court, the circuits decided 132 cases. Judge Wald summarizes the general sentiment bluntly, noting: "[T]ime and docket pressures very definitely constrict the judge" (Wald 1985, 10). Having to read through numerous briefs each week stretching into thousands of pages, these

judges—even with the abled assistance of law clerks—simply do not have time to respond as fully as they might like to every draft circulation (Coffin 1994).

We suggest that workload influences judges as they craft and bargain over legal opinions. As Hettinger and her colleagues note, "Workload may matter because it is influential—if not determinative—of the time judges have to articulate disagreement with their peers" (2006, 40). Workload considerations will influence actors in each stage of the opinion writing process. Starting first with the judge who *reviews* the majority opinion draft, we expect that as her workload increases, she will be less likely to seek changes from the draft opinion. Turning next to the *opinion author* who has received suggestions from a responding judge, we believe that a heightened workload will lead the opinion author to take the path of least resistance and simply accept the changes proposed by the responding judge. To take the opposite tack—and reject the responder's changes—could ultimately generate additional work (in the form of responding to a separate opinion), which requires time the opinion writer lacks. That is, when an opinion author refuses to accommodate her colleagues, she may be inviting more trouble. It might be easier to placate the requesting judge than to deal with a separate opinion which could spell further trouble.[8]

Visiting and Senior Judges

Federal law allows Chief Judges in each circuit to assign federal district and circuit court judges to three-judge circuit court panels when the Chief determines there is a need for additional judges. In recent years, visiting judges participated in nearly 20% of cases decided on the merits in the circuits (Brudney & Ditslear 2001, 565). Circuit courts invite these judges to sit because "there are not nearly enough" judges to address ever increasing appellate court case loads (Id.).

[8]To be sure, the refusal to accommodate may be a simple and brief act, but, unless the suggested change is doctrinally offensive, the downstream consequences are likely to be greater than simply conceding to the change.

Yet, recent findings suggest that visiting judges are actually less likely than active circuit judges (Benesh 2006; Brudney & Ditslear 2001). Visiting judges are less likely to write majority opinions and to dissent from those opinions (Brudney & Ditslear 2001). Given the finding that these "guests" appear to be "comfortable with the role of filling out panel composition while not necessarily assuming coequal voice or responsibilities" (Brudney & Ditslear 2001, 598), we expect that a visiting judge will be less likely to seek changes in the opinion than a home judge. We also expect that, given their low profile and limited contributions, home judge opinion authors will be less likely to accommodate visiting judges. What is more, when visiting judges author opinions, we expect that home judges will be more likely to seek changes to their opinions, and that these guest authors will accommodate them.

Additionally, when an Article III judge reaches the age of pension eligibility, she has the option of remaining an active judge, retiring, or opting for "senior status" (Yoon 2005). By taking senior status, a judge has much more control over the number and type of cases in which he would like to participate (Yoon 2005). The purpose of the senior judgeship, then, is to open up a position for a new active judge while also enjoying the benefits of a veteran judge who can draw from experience and help out the active judges. One judge stated, for example, that senior status would give them "more time for reflection on the cases undertaken, less frustration in trying to keep up, and more piece of mind" (Yoon 2005, 533).[9] As such, we expect that a senior judge will be more likely to seek changes in the majority opinion than an active judge. And, for the same reasons, we expect that opinion writers will be more likely to defer to their experienced senior colleagues who can dedicate more time to each case. We have no theoretical expectation regarding whether senior judge opinion authors will accommodate the suggestions of their junior colleagues.

[9]We recognize that there is variance in how much work senior judges do. Our assertion, however, is that the *average* senior judge will have more time to devote to each case because of her decreased workload.

Additional Features Likely to Influence Opinion Crafting

Additional factors also may influence the opinion crafting process. For starters, the complexity of the case may matter. Circuit judges become adept at filtering cases that require significant work from those that do not. One of the first things a judge does with a case is to engage in "rational triage" to determine whether it is "light," "moderate," or "heavy" (Coffin 1994, 172-175). The heavy (i.e., complex) cases require more effort to shepherd. We expect that a judge will be more likely to seek changes to an opinion draft in a complex case. Similarly, we anticipate that a majority opinion writer will be more likely to accommodate her colleagues' suggestions in a complex case.

New judges may exhibit different behavior than their seasoned colleagues. Hettinger, Lindquist, and Martinek (2003a) find that freshman effects are strong on the courts of appeals (see also Kaheny, Haire, & Benesh 2008). Our own archival data suggest that freshman judges may stumble more than their colleagues. Consider (freshman) Judge Buckley's private note to his colleagues in *Abex Corp. v. Maryland Casualty Co.* (Nos. 85-5602, 85-5569, 85-5660): "I am still too new hereabouts to have [a] feel for our folkways . . . " As such, we expect that a freshman judge will be less likely than other judges to engage opinion authors. For the same reasons, we believe that opinion writers will be less likely to accommodate suggested changes made by freshman judges. At the same time, we expect other judges to be more likely to seek changes to a freshman's opinion, as freshman judges may produce weaker first draft opinions. And, we expect that freshman opinion authors will be more likely to accommodate their colleagues.

Unlike other circuit judges, Chief Judges have "internal" and "external" responsibilities beyond decision-making that keep them busy (Wasby 2003). Chief Judges must preside over cases and render decisions but also must attend to the needs of the circuit, supervise staff, participate in the Judicial Conference, oversee the district courts within the circuit, and engage in a host of additional administrative functions (Hettinger, Lindquist, & Martinek 2003b; Wasby 2003). These separate obligations take away from the judge's time to

decide cases and may lead Chiefs to be more sensitive to concerns of collegiality (Hettinger et al. 2006).[10] Accordingly, we expect that a Chief Judge will be less likely to seek changes in the majority opinion than other judges. For similar reasons, we expect that the Chief as opinion writer will be more likely to accommodate his colleagues than non-Chiefs. Owing to the elevated status of the Chief, we further expect that judges will be more likely to accommodate changes requested by him and less likely to seek changes when the opinion is drafted by the Chief.

Judicial qualifications may matter. The American Bar Association (ABA) Standing Committee on the Federal Judiciary evaluates prospective judicial nominees and issues summaries as to those nominees' qualifications for serving on the federal judiciary. During the time period under study the ABA provided four ratings—exceptionally well-qualified, well-qualified, qualified, or not qualified. We control for qualifications to determine whether judges rated as highly qualified make more demands on opinion authors, and to determine whether opinion authors are more likely to defer to these well qualified judges.

We look at the shared length of service between the opinion author and the responding judge because it is possible that as two judges serve together longer, they learn each others' preferences to such a degree that actual bargaining need not take place. Long-serving judges may simply anticipate the responses of their colleagues and, as such, need not suggest changes, as the opinion author will have made them preemptively.[11] We control as well for en banc cases because they involve the full complement of active circuit judges. As these

[10]Similar responsibilities apply to the Chief Justice of the United States. Maltzman et al. (2000) show that the Chief Justices is less likely to respond to opinion drafts with wait statements, threats, suggestions, will write statements, and dissents. They also find that Chief Justice Burger took more time to draft opinions, something they attributed to preemptive accommodation.

[11]As we note below, we also refit our models using each judge's length of service on a federal circuit court in lieu of the joint service variable.

cases often touch upon more salient issues—often involving circuit splits of national interest (George 1999)—judges may be more likely to seek changes in such opinions while opinion authors, owing to the heightened stakes, may be less likely to accommodate them.[12]

Data and Measurement

To examine how judges bargain and negotiate over the content of opinions, we analyzed summary case sheets contained in the archives of Judge J. Skelly Wright. These files are housed at the Library of Congress in Washington, D.C. We analyzed case sheets emanating from 2728 unique docket numbers across Wright's tenure as a circuit judge on the District of Columbia Circuit (1962-1988). Wright maintained these files for all cases in which he participated. Our data are split almost evenly across cases where Wright was merely a panel participant (1398 cases) and those cases where he was a majority opinion author (1330 cases).

Before describing the measurement of our variables, we pause to assess some potential concerns regarding our data source. We chose to focus on the D.C. Circuit—and on Wright's files—because we had unfettered access to the files of Judge Wright. And, since Wright's tenure stretched across time periods in which the circuits underwent interesting changes, we believed his papers promised to explicate numerous interesting phenomena that were likely to influence other circuits as well. After all, like all circuits, the D.C. Circuit hears oral arguments in cases and its judges bargain and negotiate over opinion content. A more practical consideration also led us to focus on the Wright papers. Few other contemporary circuit court judges who served as long as Wright allow unrestricted access to their archival

[12]In the context of the Supreme Court, Maltzman et al. (2000) find that coalition size influences a justice's response—and her colleague's decision to accommodate that response. For example, opinion writers are less likely to accommodate their colleagues' suggestions when they already have a majority. As we explain in the supporting information at the end of this paper, data limitations preclude us from including a similar variable.

records. Simply put, Wright's files are well organized, systematically maintained, and offer crucial insight into an important court. Thus, while we discuss some of the limitations of our approach in the conclusion, we believe that the approach is a reasonable method to examine internal circuit court dynamics.

We examine two aspects of the opinion crafting process: the decision to seek changes in a majority opinion draft and the decision by the opinion author to reject or accommodate her colleagues' suggested changes. As such, our first dependent variable takes on a value of 1 if the judge engages the opinion author by seeking substantive[13] changes to the opinion and 0 if she does not.[14] Our second dependent variable takes on a value of 1 if the opinion writer *rejects* the substantive changes proffered by her colleague and 0 if she accepts them.[15]

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[13]Stylistic changes, like the one Bork suggested in *Union Oil*, simply suggested changes to word choice and not to the underlying legal matter at hand. An intercoder reliability analysis of our coding of substantive and stylistic suggestions finds a 91% agreement rate, which corresponds to a κ statistic of 0.71. This represents, by a commonly-used metric, "substantial" agreement for our variable (Landis & Koch 1977, 165).

[14]We focus on the binary decision whether a judge joins the opinion or bargains directly for a better outcome. While circuit judges can circulate separate opinions—and may do so for bargaining leverage—they are unlikely to do so. Our data suggest that the circuit judges who circulate separate opinions largely do so *after* they have tried but failed to persuade majority opinion writers to accept their suggestions.

Our decision to omit separate opinions as bargaining tools is also forced by necessity. Wright's docket sheets summarized the changes a judge suggested to a majority opinion writer, as well as the author's response to the changes. A separate opinion, however, rarely provided Wright with information as to what changes that judge sought in the majority opinion; thus, we were unable to determine whether the opinion writer accommodated that judge. Simply put, we cannot examine whether judges accommodate separate opinions.

[15]We treat each round of requests (i.e., from each memo) as a single request. Partial

We code our independent variables in the following manner: *Responder-Author Ideological Distance* is the absolute value of the ideological difference between the opinion writer and the responding judge, using the Judicial Common Space (JCS) (Epstein, Martin, Segal, & Westerland 2007).[16]

To tap into the median panel effects that might motivate judges' decisions, we coded whether each judge in the case was the median judge or not. To examine which judge was the median, we again examined the Judicial Common Space (JCS) (Epstein et al. 2007). Using each judge's JCS score, we were able to determine the median judge on the panel or in the en banc case. *Responder Panel Median* equals 1 of the judge making a suggestion in a case was the median judge; 0 otherwise. *Author Panel Median* equals 1 of the judge who wrote the draft opinion in the case was the median judge; 0 otherwise.

To determine each judge's workload, we performed a series of searches on LexisNexis and counted the number of opinions written by a judge (for *Responder Workload*) or opinion author (for *Author Workload*) that were released within thirty days after the opinion author initially circulated the draft opinion.[17] Our goal was to account for the outstanding additional projects for which the judge was responsible at the time of the case (i.e., the other projects that were immediately on the judges' minds).

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accommodations by the opinion author are treated as accommodations. Our findings are identical if we disaggregate our accommodation dependent variable into an ordered variable consisting of complete accommodation, partial accommodation, and no accommodation. We opt for the dichotomous approach as our theory does not differentiate among levels of accommodation and the binary variable eases the exposition of our substantive results.

[16]For additional details concerning JCS scores, see the online supplement.

[17]Thus, if a draft was circulated on October 1st, we counted the number of opinions written by a judge/author up through October 31st. We count forward as opposed to backward so as to capture the extent to which a particular judge was busy while he was deciding whether to respond (if a judge) or reject a suggestion (if an author).

To examine whether the judge hailed from another court, we reviewed the Federal Judicial Center Biographical Directory. If the judge did not formally sit on the D.C. Circuit at the time of the first draft circulation, *Guest Responder* or *Guest Author* equals 1; 0 otherwise.[18] Similarly, to determine whether the judge had senior status, we examined the FJC website to determine whether the sitting judge took senior status before the circulation of the draft opinion. If so, *Senior Responder* or *Senior Author* takes on a value of 1; 0 otherwise.

To tap into case complexity (i.e., case "difficulty") we employ two indicators—the number of pre-draft memos circulated by the judges in a case and whether the court allowed the parties to offer oral argument in the case. Anecdotal evidence suggests that complex cases often provoke more circulated memos among the judges prior to the first opinion draft circulation. For example, in *Finley v. Hampton* (No. 71-1063) the panel could not agree on a disposition. Judge Robb wanted to affirm but Judges Leventhal and Wright were unsure. The judges circulated a host of memos to each other in an effort to come to terms on this difficult case. One such memo, from Judge Leventhal to Judge Wright, highlights their difficulty :

> This is [the] 'old case' on which I have been struggling, as I told you the other day. Somehow, it doesn't seem to write for reversal, notwithstanding my best efforts...I would at least like to see [the] path you think could go in another direction before I 'commit' myself. I should appreciate your comments."

After a series of exchanges among the judges, Leventhal finally circulated his draft opinion. We argue that in cases where the judges circulate increased numbers of pre-draft memos,

[18]Our guest judges were only from the federal circuit courts. Limitations in available data for measuring a district court judge's workload required that we exclude 255 observations where a responding judge was from a district court and 78 observations where the opinion author was from a district court—all told, this is only 5.2% of our data. The supporting online information contains additional details and discussion concerning this decision.

the case is likely to be more complex. *Number of Pre-Draft Memos*, then, is a count of the number of memos the judges circulated in each case prior to the circulation of the first opinion draft.[19]

Our second attempt to examine case complexity analyzes whether the case was orally argued. During the time period under study, the D.C. circuit employed internal rules that allowed it to determine whether the case required oral argument. The court could dispose of cases without a hearing when it determined that the appeal was frivolous, the dispositive issue(s) had already been authoritatively decided, or where the facts and legal arguments were adequately presented to the court such that oral argument would not significantly aid it. Consistent with the argument that oral argument is an information-gathering tool for judges (Johnson 2001), we suggest that cases without oral argument are likely to require less harvesting of information and are therefore less complex. To code this dynamic, we turned to Judge Wright's papers. Wright recorded whether each case before him had a hearing or not by noting "summary," "Rule 11(d)," or "Rule 11(e)" on the first page of his notes. We coded *Orally Argued Case* as 1 in all cases receiving oral argument and 0 in those cases submitted on briefs.[20]

We also examined the FJC Biographical Directory of Federal Judges to determine whether the responding judge was a freshman at the time the opinion draft circulated. Following standard practice (Hettinger et al. 2003a, 2006), we code a freshman judge as one

[19]We only count memos in which the judges discuss the substance (i.e., their views) of the case as opposed to the alternative: memos in which a judge simply reports the disposition of the conference and who was assigned to write the opinion.

[20]We do not believe that all non-orally argued cases lacked complexity. We simply argue that, on average, such cases will be less complex. Both of these approaches, while not perfect, appear stronger than, say, the eventual length of the court's opinion. Such a measure may be appropriate when examining later behavior by judges (Kaheny et al. 2008) but not *before* the final opinion is written.

who served less than two years at the time of the draft circulation. If so, *Freshman Responder* or *Freshman Author* takes on a value of 1; 0 otherwise. Next, to determine whether the judge was a Chief Judge, we returned to the FJC website and coded the identity of the Chief Judge of the D.C. Circuit from 1962 to 1988. If the responding judge or opinion author was Chief on the date the draft first circulated, then the variables *Chief Judge Responder* or *Chief Judge Author*, respectively, take on a value of 1; 0 otherwise.

To determine whether the responding judge or draft opinion writer was a well qualified judge (according to the ABA), we consulted the Attributes of U.S. Federal Court Judges Database compiled by Zuk, Barrow, Gryski, and Goldman, which provides information on the judge's ABA rating at the time of her nomination. Following Hettinger et al. (2006), *Well Qualified Author* and *Well Qualified Responder* take on values of 1 if the ABA rated the judge as exceptionally well-qualified or well-qualified, and 0 if she received a rating of qualified or not qualified. To calculate the number of days a judge served with her colleagues (*Responder-Author Joint Service*), we counted the number of days in which the two judges served in the same circuit (previous to the circulation date of the opinion draft).[21] We also code whether the circulated draft was in an en banc case. If so, the variable takes on a value of 1; 0 otherwise.

[21] As an alternative, we coded the length of a judge's judicial service on the circuit (number of years on the court). Kaheny et al. (2008) find that as a judge's tenure increases, so too does her responsiveness to her colleagues. We might expect, therefore, that longer serving judges will be more likely to accommodate the suggestions of their colleagues. The coefficient on this variable was not statistically significant, however. The results of all our other covariates remained unchanged when we included it.

Methods and Results

We estimate separate regression models for each of our dependent variables and report parameter estimates for these models in Tables 1 and 2.[22] **Why use robust SEs? Clustered on judge? Note that JSW = 1/3 of all these observations.** As the tables and figures below demonstrate, we find that judges seek changes to opinions and accommodate their colleagues based on their ideological goals and with workload considerations in mind.

The Decision To Engage

We first examine the decision of each judge to engage the opinion writer by making suggestions to the opinion draft. Parameter estimates for this model are reported below in Table 1. One noteworthy result that appears at the top of the table is the importance of ideological considerations. Consistent with our conjecture, we find that as the distance between two judges increases, so too does the likelihood of a responding judge seeking changes from the opinion author.

[Table 1 about here]

The top panel of Figure 1 illustrates. On the x-axis we plot the distance between a responding and the authoring judge. On the y-axis we display our model's estimate of the probability the responding judge seeks substantive changes in the draft majority opinion. As the thick black line makes clear, judges who are ideologically distant from the opinion author have a much higher likelihood of engaging the author and seeking changes to the

[22]For theoretical and empirical reasons described in the supplemental information, we do not treat these two decisions as formally related and, therefore, do not fit a Heckman-style selection model. After performing supplemental analyses to assess the consequence of this choice (which we describe in the supporting information) we find little reason to believe that any of our results are affected by this modeling choice.

opinion than ideologically close judges. When two judges are ideologically aligned (sample minimum), we estimate a 0.13 probability that the judge will seek changes. By contrast, when two judges are ideologically distant (sample maximum), that probability jumps to 0.20— a relative increase of 54%. *Nichols v. Board of Trustees* (82-1959) provides an example. Judge Spottswood Robinson circulated his draft of the majority opinion. Shortly thereafter, Judge Wright responded, stating "I am pleased to concur in [the] draft op[inion] circulated by [Judge Robinson] with his memo..." Judge Starr, however, sought changes:"[A]fter reading [through] your preliminary draft I must confess to harboring 2 points of concern..." Starr then discussed his problems with Robinson's draft. Perhaps not surprisingly, Judge Wright was an ideological ally of Robinson while Judge Starr was not.

[Figure 1 about here]

In terms of panel median effects, we find mixed results. On the one hand, we find little to support the claim that the median judge uses his or her leverage to exact changes. We argued that the median judge would be more likely to seek changes to an opinion. There is no evidence to suggest this is the case. Median judges were no more likely to seek to exact changes than their non-median colleagues. On the other hand, we find that opinions *written* by panel medians are somewhat less likely to observe change requests. When the opinion is written by a non-median judge, we estimate a 0.15 probability of a responding judge seeking changes. That probability drops to 0.12—a 20% relative decrease—when the opinion was written by the panel median.

Workload considerations, which we visually portray in the bottom panel of Figure 1, prove to be important. When we directly examine how workload influences bargaining, the results confirm our intuition. Judges with large workloads are less likely to engage opinion authors than judges with less work. Take, for example, a hypothetical judge with zero pending forthcoming opinions. For this individual, we estimate a 0.15 probability that she will make suggestions of an opinion author. As her workload increases, however, we observe a steady decline in this probability. Indeed, for high levels of workload at or near the sample

maximum of 9 forthcoming opinions, we estimate only a 0.07 probability that our judge will make suggestions to an opinion draft—a relative change of over 50%. Judges with less work have more time to digest opinion drafts and think of changes to make to those drafts.

As for visiting and senior judges, our data confirm existing findings that such judges play a passive role Benesh (2006). As the dot plot in Figure 2 demonstrates, visiting judges were much less likely than home judges to engage the opinion author. A visiting judge had only a 0.06 predicted probability of engaging the opinion author—well below the 0.15 estimated probability for a responding judge who calls the D.C. Circuit home. We also find that responding judges are more likely to engage an opinion author when the author is a visiting judge. We estimate a 0.21 probability that a judge engages a guest author but only a 0.15 probability that they engage a home circuit author, a relevant change of 40%.

We find similar results for senior judges, who were (contrary to our expectations) less likely to seek changes to opinion drafts than were active home judges. Senior judges were 40% less likely than non-senior judges to recommend substantive changes to the draft opinion. These judges may simply have less at stake than their active judge counterparts and, thus, bargain less.

[**Figure 2 about here**]

Contextual and institutional features also influence whether judges bargain over opinion content. For example, case complexity motivates judges to engage opinion authors. A judge had a 0.15 probability of engaging the opinion author in a case with oral argument, but only a 0.09 probability of doing so in a case without oral argument. Cases with pre-draft memos also observed (slightly) higher rates of engagement. As for freshman status, our next control, we observe that judges were more likely to seek changes to opinions written by such judges. A judge had a 0.15 probability of engaging a non-freshman opinion author, but a 0.20 probability of doing so to a freshman opinion author, a 33% change in probability. We argued that this dynamic occurs because freshman are still new to the folkways of the court

and its precedents and procedures. Conversely, opinions written by Chief Judges observe less bargaining.

The data further suggest that judges who, as nominees, had high ABA ratings, are much more likely to seek changes to the opinion draft than judges with average or low ratings. A judge rated as average or below average by the American Bar Association had a 0.15 probability of seeking changes to the opinion draft. A judge rated as a high quality judge had a 0.28 probability of doing so, an 87% relative increase. And, surprisingly, judges in en banc panels appear less likely to seek changes.

The Decision to Reject Changes

Similar empirical patterns emerge when we examine the conditions under which judges reject or accommodate their colleagues' suggestions. Parameter estimates for this model are reported below in Table 2. Here, too, we find robust evidence for the role played by ideology, workload, and contextual factors.

[Table 2 about here]

Beginning with ideology, we find that majority opinion writers are three times more likely to accommodate ideological allies than ideological foes (see top panel of Figure 3). A majority opinion writer has a 0.18 probability of rejecting suggestions made by an ideological foe (sample maximum), but only a 0.05 probability of rejecting a suggestion from an ally (sample minimum). Recall our example above, *Nichols v. Board of Trustees* (82-1959). Ideological considerations played a strong role in Starr's decision to bargain with Judge Robinson. Such considerations also led Robinson to refuse to accommodate Starr. The sum of these findings suggest, then, that judges most likely to *want* changes in an opinion (i.e., ideological foes) are often the same judges who are least likely to *get* them.

[Figure 3 about here]

We also argued that the median judge would be more likely to reject changes made by non-median judges, and that opinion writers would be more likely to accommodate sugges-

tions made by the median. Both of these claims fall flat. The coefficient on *Author Median* was non-significant. But perhaps more surprising, the coefficient on *Respondent Median* was positive and statistically significant, meaning that judges were more likely to *reject* suggested changes made by the median than by non-median judges. Indeed, we estimate the changes proposed by the panel median are 63% more likely to be rejected than changes proposed by other, non-median judges. One admittedly post hoc explanation for this is that median judge simply asks for too much from the opinion writer and therefore observes rejection. More research on this finding is required.

As in the case of the decision to engage the opinion author, workload considerations continue to be important factors during the accommodation stage. A majority opinion author is nearly four times more likely to accommodate her colleagues when the writer is burdened with significant other work. An author with many cases on his plate has only a 0.02 probability of refusing his colleagues' suggestions. On the other hand, a judge with a small workload has a 0.08 probability of refusing such requests. When authors are busy, they appear to accept recommendations rather than expend the time and resources to challenge those suggestions.

Judge characteristics also influence whether a judge accommodates his colleagues. We again find that judges rated as highly qualified by the ABA operate differently than judges rated as less qualified. A well qualified opinion author is 88% more likely to reject a substantive suggestion than is an author who was not rated as well qualified by the ABA. We had expected that opinion authors would be more likely to accommodate the suggestions of highly qualified judges. We fail to recover evidence to support this claim.

[**Figure 4 about here**]

Somewhat surprisingly, opinion writers were more likely to *ignore* changes sought by the Chief Judge. We can only speculate as to why this is the case, but it may have something to do with the Chief's additional responsibilities—judges may know that the Chief is less able than other judges to follow up with separate opinions. And, as with engagement, we

find that judges behave differently in en banc cases than in standard panel decisions. Judges were more likely to refuse accommodating their colleagues in en banc cases, likely due to the importance of such cases and the different dynamics that result from a full complement of judges.

Discussion

In this paper we turned to a novel but extensive source of data—the private archives of Judge J. Skelly Wright—to gain a firsthand account of how circuit court judges render decisions. The sum of our findings is both informative and somewhat disconcerting. To begin with, judges understand the importance of legal opinions, have strong incentives to shape those opinions, and often compete over the content of those opinions. Judges, in short, strongly pursue their policy goals in the circuits.

Yet, at the same time, our data may portend problems on the horizon. Judges burdened with increasingly onerous workloads are less likely to seek changes to majority opinions. When burdened with high workloads, judges become more likely simply to defer to their colleagues. This empowers majority opinion judges and may allow them to craft opinions that otherwise might not escape peer review. With increasing caseloads, modern circuit court judges may be stretched thin. Indeed, a recent Report of the Proceedings of the Judicial Conference of the United States calls for an additional nine permanent and three temporary judgeships to address the workload problem in the circuits (and an additional 51 judgeships at the district court level).[23] What is more, there are considerable problems arising from the failure of both political parties to address judicial vacancies. A recent report from the Administrative Office of the United States Courts shows that there are 79 federal judicial vacancies, 15 of which (19%) are on the circuit courts of appeals. Furthermore, there are 37 judicial "emergencies," 19% of which are from vacancies to the circuit courts.[24] In some circuits, the number of filings increased nearly 13% between 2010 and 2011. This

[23]See: `http://www.uscourts.gov/judconf/proceedings/2009-03.pdf`.

[24]See `http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx`.

all suggests, then, that workload concerns are salient, current, and potent, and must be addressed.

While we believe these findings make an important contribution to the literature on circuit courts, it is also important to consider potential limitations inherent in our approach. We recognize, of course, that our focus on the D.C. Circuit constrains some of the generalizability of our findings. The D.C. Circuit is different from other circuits in a number of respects, some more relevant than others. Nevertheless, we believed that in this case an in-depth examination of judicial behavior in the D.C. circuit was a better option than no examination at all. That is, while the D.C. Circuit is different than other circuits, it is charged with the same overall functions, suggesting that our findings can inform our understanding of the circuits more broadly.[25]

As archival data such as those which we employ here become more available, we hope scholars will take advantage of them to understand additional circuits and judges. Just as archival data has illuminated various aspects of Supreme Court decision making, we have every reason to believe that such data sources can broaden our understanding of the circuit courts. For now, however, we believe that our findings regarding the D.C. Circuit inform our understanding of circuit court behavior, and the opinion crafting process in those circuits.

The Administrative Office of the United States Courts defines a judicial emergency for circuit courts as any vacancy "where adjusted filings are in excess of 600 per judgeship" or any vacancy "in existence more than 18 months where adjusted filings are between 500 to 700 per panel."

[25]The supplement to this paper presents data on a variety of indicators that suggest as much.

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	Coefficient	Robust S.E.
Responder-Author Ideological Distance	0.460*	0.124
Number of Predraft Memos	0.085*	0.048
Oral Arguments Were Held	0.546*	0.172
Freshman Responder	-0.025	0.136
Freshman Author	0.328*	0.134
Guest Responder	-1.032*	0.329
Guest Author	0.420*	0.230
Senior Responder	-0.627*	0.175
Senior Author	0.048	0.228
Chief Judge Responder	0.008	0.131
Chief Judge Author	-0.660*	0.152
Well Qualified Responder	0.783*	0.085
Well Qualified Author	0.069	0.101
Responder Workload	-0.096*	0.028
Responder-Author Joint Service	-0.000	0.000
En Banc Case	-0.937*	0.156
Author Panel Median	-0.277*	0.102
Responder Panel Median	0.033	0.088
Constant	-2.444*	0.225
Observations	6111	
Log Likelihood	-2253.194	

Table 1: Logistic regression parameter estimates of a judge's decision to request substantive changes to a draft majority opinion (0 = no changes sought; 1 = changes sought). * denotes $p < 0.10$ (two-tailed test). Robust standard errors clustered on docket reported in parentheses.

	Coefficient	Robust S.E.
Responder-Author Ideological Distance	1.315*	0.304
Number of Predraft Memos	-0.213	0.156
Oral Arguments Were Held	-0.582	0.432
Freshman Responder	-0.179	0.348
Freshman Author	0.398	0.330
Guest Responder	-0.587	1.033
Guest Author	0.064	0.474
Senior Responder	0.689	0.451
Senior Author	-0.192	0.709
Chief Judge Responder	0.972*	0.312
Chief Judge Author	0.603	0.405
Well Qualified Responder	-0.227	0.214
Well Qualified Author	0.665*	0.244
Author Workload	-0.219*	0.079
Responder-Author Joint Service	-0.000	0.000
En Banc Case	0.935*	0.292
Author Panel Median	0.265	0.243
Responder Panel Median	0.492*	0.238
Constant	-2.031*	0.558
Observations	804	
Log Likelihood	-325.470	

Table 2: Logistic regression parameter estimates of a majority opinion author's decision to reject substantive changes sought by a colleague to a draft opinion (0 = changes accepted; 1 = changes rejected). * denotes $p < 0.10$ (two-tailed test). Robust standard errors clustered on docket reported in parentheses.

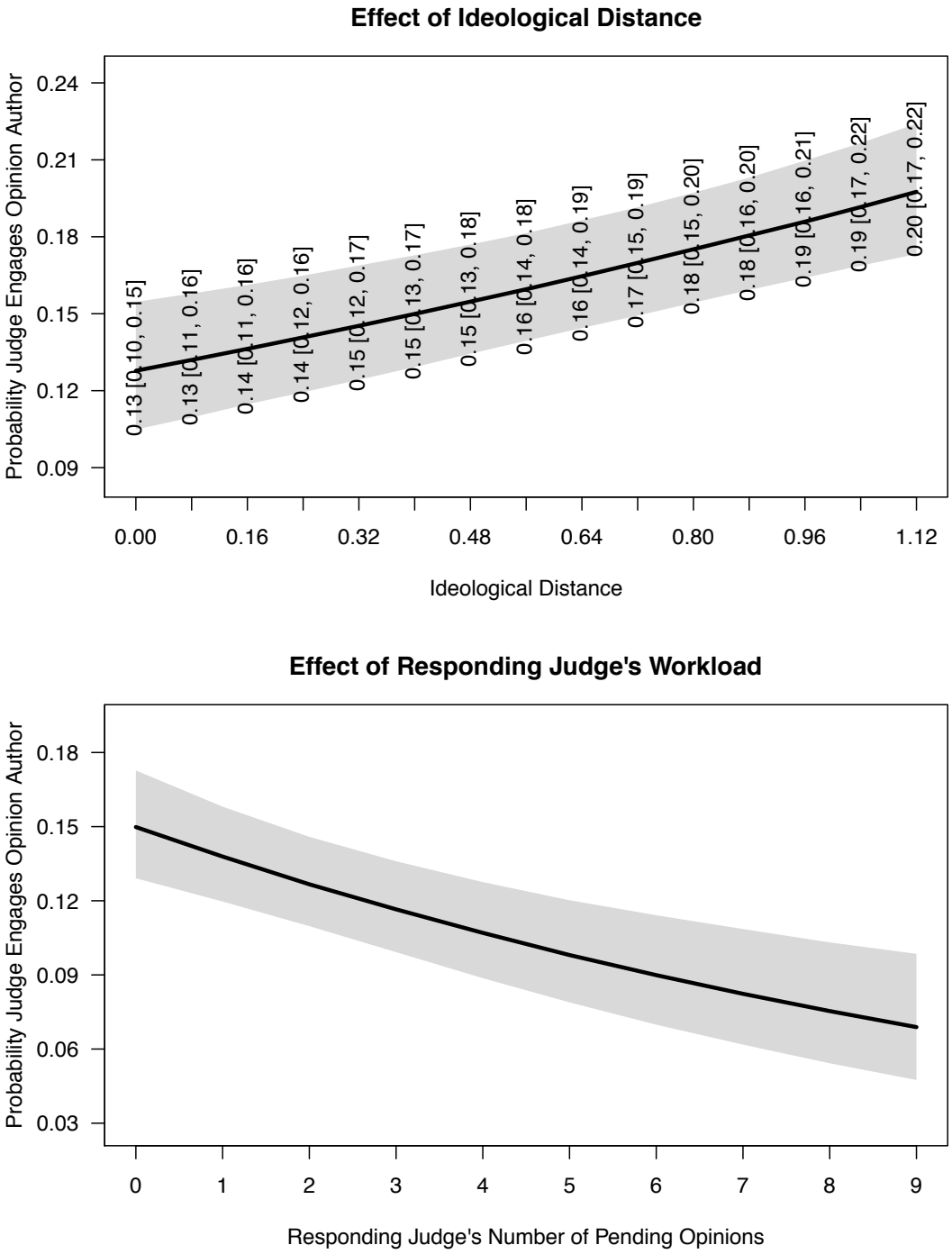

Figure 1: Predicted probability a judge makes substantive suggestions to a majority opinion draft, conditional on the amount of ideological distance between the judge and the opinion author (top panel) and the amount of the responding judge's workload (bottom panel). The thick black line is the point estimate and the shaded gray region represents the 90% simulated confidence interval around that estimate. All other variables are held at their mean or modal values, as appropriate.

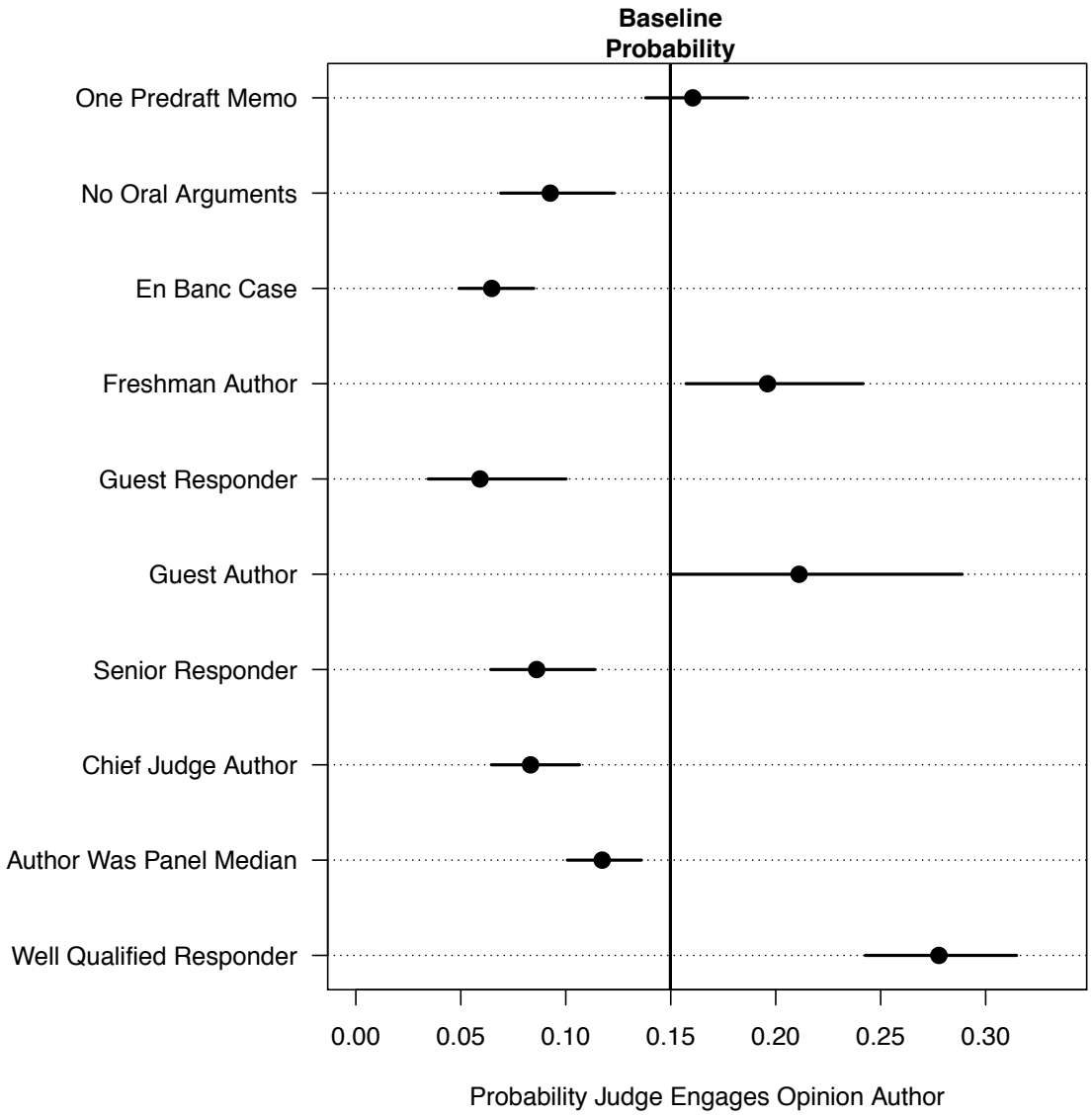

Figure 2: Predicted probability a judge makes substantive suggestions to a majority opinion draft. The solid dot is the point estimate and the horizontal whisker represents the 90% simulated confidence interval around that estimate. The vertical "Baseline Probability" line provides the predicted probability of rejection when all variables are held at their mean or modal values, as appropriate.

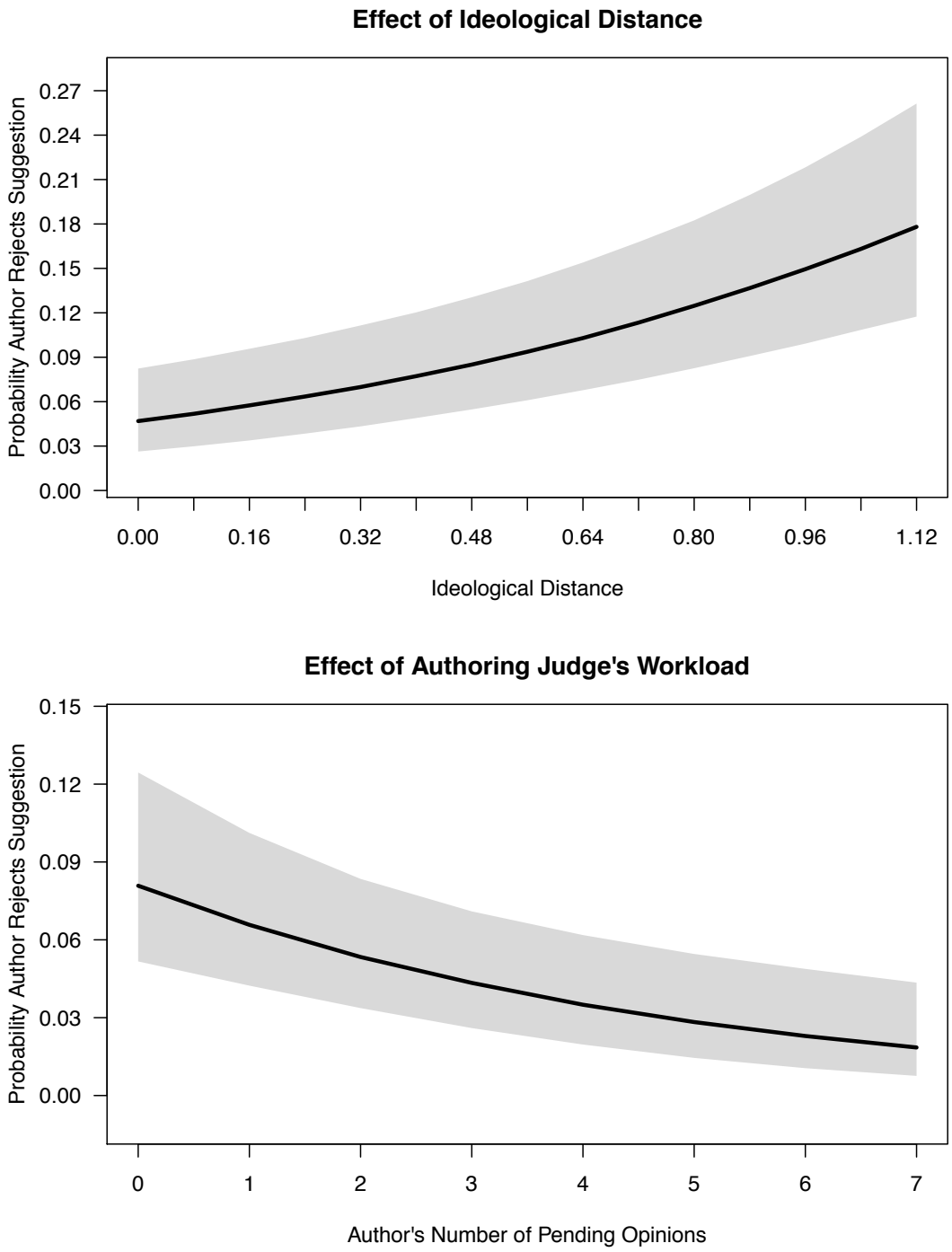

Figure 3: Predicted probability a majority opinion author rejects substantive changes sought by a colleague, conditional on the amount of ideological distance between the judge and the opinion author (top panel) and the amount of the responding judge's workload (bottom panel). The thick black line is the point estimate and the shaded gray region represents the 90% simulated confidence interval around that estimate. All other variables are held at their mean or modal values, as appropriate.

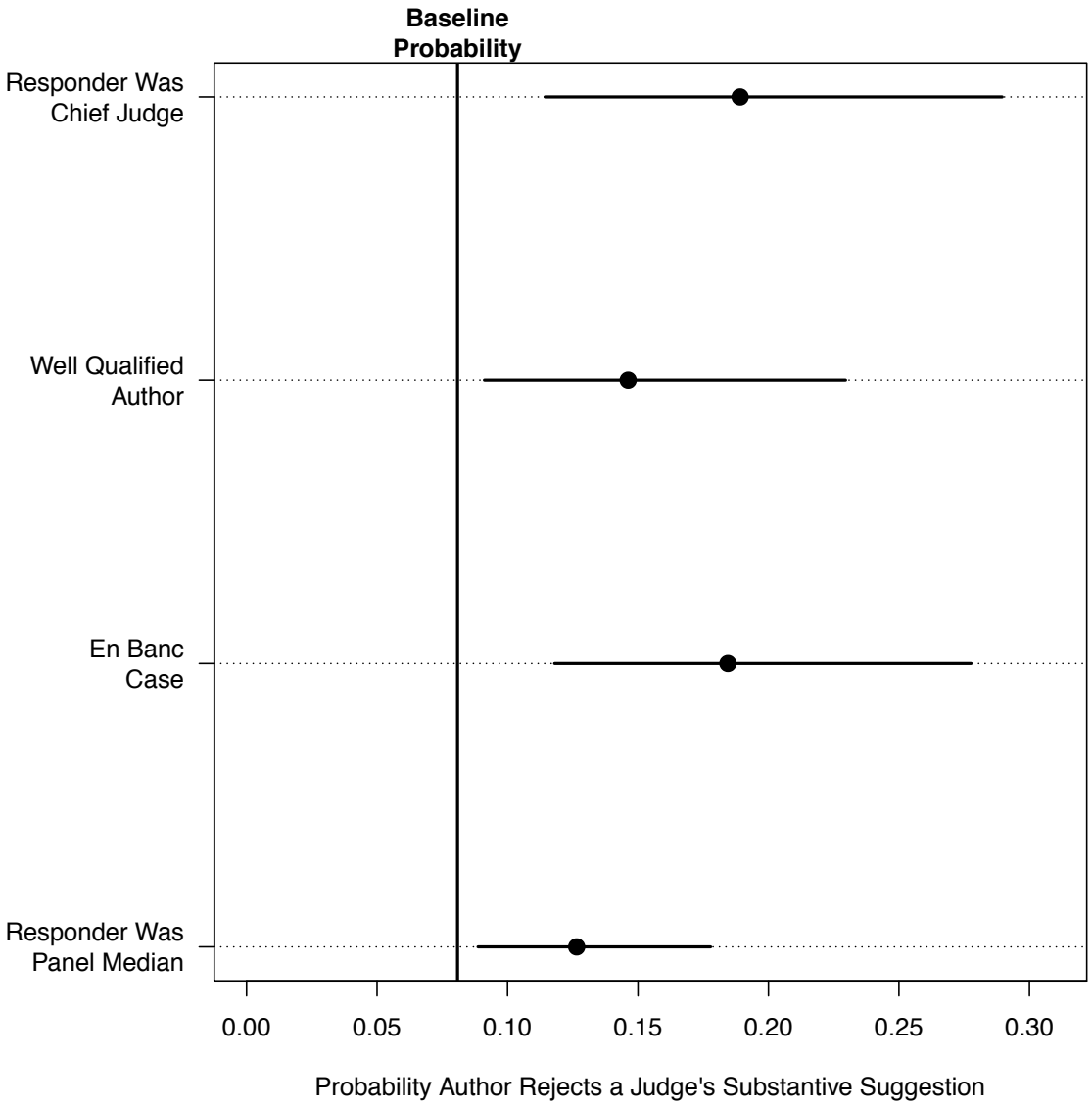

Figure 4: Predicted probability a majority opinion author rejects substantive changes sought by a colleague. The solid dot is the point estimate and the horizontal whisker represents the 90% simulated confidence interval around that estimate. The vertical "Baseline Probability" line provides the predicted probability of rejection when all variables are held at their mean or modal values, as appropriate.