Fungible Justice: The Use of Visiting Judges in the United States Courts of Appeals

Dissertation

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By

Jeffrey Budziak, B.A., M.A.

Graduate Program in Political Science

The Ohio State University

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Dissertation Committee:

Lawrence Baum, Advisor

Gregory A. Caldeira

Kathleen McGraw
ABSTRACT

This dissertation seeks to determine the consequences of the use of visiting judges in the United States Courts of Appeals. Judges nominated to serve in the lower federal judiciary are appointed to positions divided vertically between trial and appellate courts and horizontally between geographically defined regional circuits. Regularly, however, judges transcend these distinctions and provide judicial services in a structural level or geographic region to which they were not appointed. A substantial number of cases disposed of in the United States Courts of Appeals now make use of these “visiting judges”.

Court of appeals panels employing a visiting judge deviate from the court’s typical decision-making environment. I theorize that the use of these visitors will alter the behavior of court of appeals judges in ways currently unrecognized by existing theories of judicial behavior. Specifically, I hypothesize that the availability of visiting judges will lead some court of appeals judges to strategically pursue their most preferred legal policy. I also hypothesize that the presence of a visiting judge will affect the behavior of judges serving in the courts of appeals in ways consistent with psychological theories of small group behavior.
To test these hypotheses, I perform three separate analyses. First, using data collected on the number of visits made in each regional circuit court of appeals from 1997 through 2009, I examine whether circuit chief judges strategically select visitors who share their policy preferences. Second, I examine the role of visiting judges in the decision-making process by analyzing their voting behavior in a sample of cases decided between 1997 and 2002. Third, I examine the normative consequences of the visiting judge process. Using citation patterns to measure judicial quality, I investigate whether cases decided using a visiting judge are cited differently than cases decided by panels that do not employ a visitor.

The results indicate that visiting judges induce both strategic and psychological group effects in the courts of appeals. Circuit chief judges are more likely to select visitors who share their policy preferences. While the presence of a visiting judge does not appear to change the voting behavior of court of appeals judges, cases decided by panels employing visitors are cited differently than cases decided by panels composed of three court of appeals judges. The results suggest that visiting judges should not be treated as fungible with court of appeals judges from their home circuit, and that their continued use has important implications for the development of legal policy in this level of the federal judiciary. The results also demonstrate the need for scholars to expand current theories of judicial behavior to properly incorporate insights gained from psychological theories of small group behavior, particularly when examining judicial behavior in the United States Courts of Appeals.
DEDICATION

For Lauren.
ACKNOWLEDGMENTS

I would not have reached the end of my graduate career, culminating in this dissertation, without the continued support of my family, friends, and colleagues. All of my past and future successes are a testament to those who have surrounded me throughout my life. While I lack the capacity to thank everyone who has helped me during my tenure at Ohio State, in this section I would like to acknowledge many of those who have made this project possible.

First, I want to thank my family, including my parents, Lee and Barb Budziak, and my sister, Jackie, whose continued support, devotion and patience has helped me become the person I am today. Each day I have a renewed appreciation for being raised in a home by not only two wonderful parents and sister, but by three excellent people. The daily example set by my family is a constant source of inspiration and guidance on how to live my life. I still find myself thinking that if I ever grow up, I hope to be like them. I can think of no better role models. Thank you all.

In terms of my professional development, I am indebted to many of the faculty of the Department of Political Science at the University of Dayton. In particular, I owe a great deal of gratitude to Jason Pierce, whose willingness to invest his time and effort on a twenty year old college student has shaped my career and changed my life in ways I otherwise could not have imagined. Jason has provided me with invaluable consul
throughout my academic career and continues to serve as my first example of what a scholar and educator should be. I can only hope to one day repay to future students all that he has given to me. Thank you, Jason.

My professional development has also been shaped substantially by my colleagues. I remain amazed by the quality of scholars and people I am fortunate enough to work with on a daily basis at Ohio State. While there are too many to mention, I especially wish to acknowledge Sarah Bryner, Chris Devine, Kyle Kopko, Chris Kypriotis, Danny Lempert, Steve Nawara, and Kathleen Winters for all of their support and assistance, both professionally and personally.

I also wish to thank the members of my dissertation committee, Greg Caldeira, Kathleen McGraw and Larry Baum for all of their helpful comments and feedback, and for their contributions to my graduate career. I am particularly indebted to Larry Baum, who has taught me more than I ever imagined I would know. Larry has taken the time to explain to me the principles of judicial behavior, how to conduct oneself as a scholar, the best ways to reach difficult students, why college baseball managers bunt far too often, and a variety of other things, both professional and not. Larry has generously given me much of his time and attention; this has certainly made me both a better scholar and a better person. Thank you, Larry.

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world cares about judicial decision-making in the courts of appeals. In a career where the weight of work and life is sometimes difficult to keep in harmony, Lauren has always been my balance. Above all else, this is for her.
VITA

1983………………………………………...Born in Cleveland, Ohio

2002………………………………………...Diploma, Brecksville-Broadview Heights
High School (Broadview Heights, Ohio)

2006………………………………………...B.A., Political Science, Summa Cum Laude,
University of Dayton (Dayton, Ohio)

2006 to 2007………………………………..University Fellow, The Ohio State
University (Columbus, OH)

2006 to 2010  ................................................. Graduate Teaching Associate, Department
of Political Science, The Ohio State
University (Columbus, Ohio)

2010 to present……………………………...University Fellow, The Ohio State
University (Columbus, Ohio)

2008………………………………………...M.A., Political Science, The Ohio State
University (Columbus, Ohio)

Publications


Fields of Study

Major Field: Political Science

Primary Areas of Interest: American Politics, Judicial Politics, and Quantitative Methodology
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CHAPTER 1: VISITING JUDGES IN THE U.S. COURTS OF APPEALS

The battle to end racial segregation in American public education was formally won on May 17, 1954, with the Supreme Court’s announcement of Brown v. Board of Education (347 U.S. 483). While this now famous decision offered an important legal victory to opponents of racial segregation, many questions remained unanswered. Primary among these was the question of how schools would integrate. In Brown, the Court failed to offer any real answer, instead calling for additional arguments the next term to address the process of school integration. In the decision known as Brown v. Board of Education II (349 U.S. 294), the Court ruled that school integration should henceforth take place with “all deliberate speed” (301).

The first major battle over school integration after Brown came in Little Rock, Arkansas in the fall of 1957 (for a full history see Anderson 2010). In compliance with the Court’s integration rulings, the Little Rock School Board approved a plan to gradually integrate the Little Rock Schools, beginning in the fall of 1957. With the beginning of the 1957 school year drawing near, opponents of integration found a renewed passion and began looking for any way to delay or stop the implementation of the school board’s plan. Arkansas Governor Orval Faubus, claiming that forced integration could lead to mass violence, sought an injunction to delay the Little Rock School Board’s plan. This injunction was ultimately granted by the Pulaski County Chancery Court. In reaction,
proponents of integration immediately filed suit in the United States District Court, asking the court to lift the injunction.

The fate of the injunction would lie in the decision of the District Court Judge for the Western District of Arkansas, Judge John E. Miller. Judge Miller was an important part of Governor Faubus’ strategy to stall or prevent integration. Prior to the injunction being granted, Governor Faubus had received an informal commitment from Miller that he would likely sustain any injunction, providing much needed time for possible legislative action to overturn the school board’s plan (Jacoway 2007, 98). This knowledge gave Governor Faubus supreme confidence in his decision to pursue a litigation strategy. However, upon learning of the injunction, Judge Miller called the Chief Judge of the Eighth Circuit, Archibald Garner, and asked to be relieved of his duties in the case. Judge Garner complied, and although Judge Miller never offered any explanation for his request¹, he was soon relieved from all duties pertaining to questions of school integration in Little Rock.

With Judge Miller no longer available to serve, it would be up to Chief Judge Garner to choose a replacement. To fill this unexpected void, Judge Garner chose District Court Judge and fellow North Dakotan Ronald Davies. Judge Garner had already reassigned Davies on a temporary basis from his position as judge for the District of North Dakota to Arkansas to help to fill a vacancy created by the retirement of a District

¹ There is much speculation as to why Judge Miller asked to be removed from the case. Explanations include a backlog of cases and attorneys’ complaints about traveling to Fort Smith to do business with the judge. Jacoway (2007) suggests another possibility: “...the day after Miller recused himself, the United States Senate approved unanimously a bill that Arkansas Senator John L. McClellan had proposed that would add an additional judge to the Eighth Circuit Court of Appeals. As the Arkansas Gazette reported the next day, ‘Reliable sources indicate that it would go to federal District Judge John E. Miller of Fort Smith’...” (99). For Judge Miller, perhaps being tangled in an emotionally-charged public battle over school integration would fatally injure the possibility of receiving a long desired promotion.
Court judge there. Davies was serving as what is known as a “visiting judge”. The decision to have a judge from North Dakota, only in Arkansas on a temporary assignment, rule on questions related to school integration in Arkansas shocked and dismayed Governor Faubus. The governor publicly campaigned against the assignment of Judge Davies, arguing that he was an “alien” judge who had only ever been in Arkansas “a few days.” At one point, Governor Faubus would go so far as request that Judge Davies recuse himself from all future proceedings because of his “personal bias” in favor of the plaintiffs. Much to the chagrin of Governor Faubus, Judge Davies refused to step aside. Even worse for the governor, unlike Judge Miller, Judge Davies would prove a formidable foe. On September 8th, 1957, Judge Davies stayed Governor Faubus’ injunction and instead asked the Attorney General of Arkansas to file an injunction to have National Guard troops guarding the entrance to Little Rock Central High School removed (Baker 1957, A1). It was this decision that ultimately put Little Rock Schools on the path to integration. The presence of Judge Davies of North Dakota, rather than Judge Miller of Arkansas, undoubtedly changed how Little Rock and how the nation would address questions of school integration.

While this serves as a particularly vivid example, the presence of Judge Davies in Arkansas is nonetheless emblematic of the important services provided by temporarily reassigned “visiting judges” in the lower federal judiciary. The institution of the visiting judge has changed greatly over time, beginning as a radical deviation from an entrenched judicial culture and growing into a commonplace procedure used liberally throughout the

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judiciary today. The reliance on visiting judges is particularly common in the U.S. Courts of Appeals, where visitors have become the primary method by which the lower federal judiciary has come to cope with ever-expanding caseloads. Since 1997, visiting judges have been responsible for 277,479 case participations in the appeals courts, or roughly 23% of the appellate court docket. While there may be good reason to question whether the courts actually face a “caseload crisis” (see Posner 1985) or whether the use of visiting judges is an effective form of caseload relief, one thing is clear: the practice of the visiting judge has become a primary feature of the U.S. Courts of Appeals.

The goal of this dissertation is to provide the first thorough, systematic study of the visiting judge process. Prior analyses have examined the use of visitors primarily through the lens of judicial administration - how are visiting judges used to help deal with caseloads in the U.S. Courts of Appeals? While the use of visiting judges has important implications for judicial administration, I argue that the visiting judge process has more pronounced implications for the study of judicial behavior.

The behavior of court of appeals judges is typically examined through one of several predominant models of judicial decision-making. Underlying these models of judicial behavior are several crucial assumptions (Segal and Spaeth 2002, 92-96). And while these assumptions may be reasonable for specific institutions (namely the Supreme Court), there is good reason to question their validity when applied to behavior in the courts of appeals. I argue that the institutional structures governing this level of the judiciary enhance the importance of small group dynamics in the decision-making process. Previous research has approached judicial decision-making as a largely
individualistic effort. I argue that group dynamics are crucial to understanding judicial behavior in the U.S. Courts of Appeals.

The importance of group dynamics is demonstrated most clearly by the presence of visiting judges. These visitors substantially alter typical group dynamics of the courts of appeals. Unlike regular court of appeals judge, visitors are not permanent group members. Visitors are drawn from other courts and are regularly characterized as “inferior” to full status appellate judges. As a result, judges and legal commentators alike suggest that visiting judges affect the behavior of judges serving in the courts of appeals. It is my intention to provide a comprehensive examination of these propositions. I engage in several empirical analyses structured around three questions central to the visiting judge process. First, I investigate the question of how visiting judges are selected. To do so, I examine the factors that lead chief judges to select certain judges to serve as visitors, but not others. Second, I examine how visitors behave when serving on the Courts of Appeals, and how their presence affects other panel members. To do so, I examine the voting behavior of visiting judges and the active court of appeals judges serving with them. Third, I attempt to determine the normative consequences of the use of visiting judges. By engaging in a unique form of citation analysis, I uncover the possible normative limitations of using visiting judges. Examining these three questions provides a unique opportunity to gain valuable insight into the behavior of judges serving in the U.S. Courts of Appeals.

**Types of Visiting Judges**

A visiting judge is any judge temporarily reassigned from her appointed jurisdiction to serve on another court of which she is not a permanent member. All
federal judges are eligible to serve as visitors. Generally speaking, judges used as visitors can be classified by three different dimensions: Home-Circuit or Out-of-Circuit, Appellate Court or District Court and Active or Senior.\(^3\)

**Home-Circuit or Out-of-Circuit**

The first classification is based on whether the judge is reassigned to a position within or outside of her home (appointed) circuit. The lower federal judiciary is comprised of ninety-four districts, organized into twelve regional circuits (with the Federal Circuit’s jurisdiction defined by subject matter). Each of these circuits has one Court of Appeals, responsible for hearing all appeals from each district within the circuit. Most federal judges are appointed to a position within a specific regional circuit.\(^4\)

Judges can serve as visitors within their home circuit or in another regional circuit. The requirements for and expectations of visiting judges vary substantially depending on whether a visitor is serving within or outside of her home circuit. Any assignment which temporarily reassigns a judge to another position within that judge’s home circuit is said to be an *intracircuit* assignment, while any assignment reassigning a judge to another position outside of that judge’s home-circuit is said to be an *intercircuit assignment.*

\(^{3}\) There are two exceptions to this classification system. First, judges from specialized courts, such as the Court of International Trade, are eligible to serve as visitors. These judges do not fit clearly into the simplified “Appellate or District Court” classification. Second, Supreme Court justices can, but rarely do, serve as visitors in the lower federal judiciary. In perhaps the most famous case of a visiting Supreme Court justice, then Associate Justice William Rehnquist agreed to serve as a district court judge, only to be overturned by the 4th Circuit Court of Appeals (see “Rehnquist Case Overturned in VA.” *The Washington Post*, November 9, 1986).

\(^{4}\) Two exceptions exist. First, Supreme Court justices are not appointed to a position within a regional circuit. Second, judges serving on specialized courts (e.g. The Court of Appeals for the Federal Circuit) whose jurisdictions are defined by subject matter, not geography, are also not appointed to any specific regional circuit.
assignment. The difference between intracircuit and intercircuit assignments is crucial for understanding the visiting judge process.

*Appellate Court or District Court*

The second dimension by which visitors can be classified is the visitor’s regular position. Currently, there are 677 authorized district court judgeships and 167 authorized court of appeals judgeships. All judges serving in the lower federal judiciary are appointed to either the district court or appellate court level. Visitors are eligible to be drawn from either level and can traverse boundaries in either direction: district court judges are permitted to be temporarily reassigned in the courts of appeals while appellate court judges are eligible to serve as visitors in district court. However, it is much more common for visitors to “move up” (district court judges serving in the courts of appeals) than “move down”.

*Active or Senior*

The last dimension by which visiting judges can be classified is whether the visitor is an active or senior judge. Beginning in 1919, Congress created the option for judges in the lower federal judiciary to take “senior status.” Senior status is a form of semi-retirement for federal judges. Judges may opt to take senior status once they reach the age of 65 and the sum total of their age and years of experience on the federal bench reach 80. When a judge takes senior status, their seat is considered vacant and another

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6 See 28 U.S.C. §§ 371(b) and 28 U.S.C. §§ 372(c) for the formal requirements of being a senior judge.
judge may be confirmed to fill the vacancy. The judge taking senior status (the senior judge) will continue to hear cases, but are only required to do so on a part time basis. Senior judges are required to maintain a caseload one-fourth the size of the typical caseload of an active judge, but are permitted to hear as many cases as they desire. In exchange for this service, senior judges retain their salary, a staffed office and at least one law clerk.

The classification scheme outlined above produces eight theoretically possible types of visiting judges. These types are summarized in Table 1.1. Throughout my analysis of the visiting judge process, I exclude two of the eight types of judges (those with Xs in Table 1.1). The first excluded type is *Home-Circuit Active Appellate Judges*. These judges are not visitors, but are rather full time court of appeals judges.

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Table 1.1: The Different Types of Visiting Judges Used in the U.S. Courts of Appeals
The second type excluded is *Home-Circuit Senior Appellate Judges*. Here the distinction is a bit less clear. Home-circuit senior appellate judges share many characteristics of other types of visiting judges. Like all other visiting judges, home-circuit senior appellate judges are not full members of the courts of appeals. These judges have formally vacated their positions and are thus eligible to be replaced with full time appellate judges. Yet, in many ways, home-circuit senior appellate judges are quite distinct from the other types of visitors. The defining characteristics of visiting judges are their *temporariness* and their service to a court *outside of their appointed jurisdiction*. The requirement that all senior judges keep a caseload at least one quarter the size of a full court of appeals judge undermines the notion that home-circuit appellate seniors are “temporary”. Most senior judges fulfill their caseload obligations through service to their home circuit. From 1997-2010, 17.2% of all appeals were terminated using a home-circuit senior appellate judge. For some senior judges, however, a caseload a quarter the size of a typical appellate judge is only a portion of the total number of cases they actually hear. Some judges take senior status yet continue to hear a full caseload. This is typically done to help provide caseload relief to the circuit; another full time judge can be appointed to the vacated position. These judges are “senior-in-name-only” and work in a manner nearly identical to that of full time appellate judges. As a result, it is difficult to view these judges as “temporary” members. Additionally, unlike all other types of visitors, home-circuit senior appellate judges are not providing service to a different court. Home-circuit senior appellate judges were once members of the circuit court of
appeals in question. This substantially distinguishes home-circuit senior appellate judges from all other types of visitors.

For the reasons outlined above, home-circuit senior appellate judges are largely absent from this analysis. Although this chapter provides some descriptive information about their usage, they are not included in any of the empirical analyses. From this point forward, the phrase “visiting judges” is meant to encompass the six types of judges with check marks in Table 1.1. A few words are in order about these six visiting judge types. I discuss visiting judges, both as a collective (again, including all six types) and as individual types. Whenever I intend to discuss the collection of all six types, I use the phrase “visiting judges”. I also use the phrase “visiting judge” to describe any generic visitor that could be a member of any of the six types. When I discuss a specific type of visiting judge, I use the complete descriptive name (e.g. out-of-circuit senior district visitor). At times it may be appropriate to collapse types into broader groups. For example, I could examine the effect of home-circuit active district judges, home-circuit senior district judges, out-of-circuit active district judges and out-of-circuit senior district judges as four separate types. However, there may be theoretical reasons to lump these four types together as “district court judges” and examine their joint effect. When I collapse these types into larger groups, the group name will make clear which types of judges appropriately fit. If I refer to a group as “out-of-circuit visitors”, this would include all judge types described as “out-of-circuit”. In Table 1.1, this would include all judge types with a check mark in Column 2. Groups can also be organized along two dimensions, meaning a group labeled “home-circuit district visitors” will include both home-circuit active district judges and home-circuit senior district judges. While this
nomenclature is undoubtedly cumbersome, this system provides the most effective way of accurately communicating the content of each analysis.

**History of Visiting Judges**

The development of the visiting judge process can best be characterized as the gradual acceptance of “judicial mobility” in the lower federal judiciary (for an excellent history of the visiting judge process, see Fish 1973, 14-17, 24-39 and 58-61). Rather than one definitive legislative action authorizing the use of visiting judges, the mobility of lower court judges emerged slowly, primarily as a form of caseload relief. Beginning in overburdened urban district courts, the practice of the visiting judge would soon spread to other districts, then to appellate courts, before encompassing the entire lower federal judiciary. As a result of this steady progression, the visiting judge process has changed dramatically from its inception to the form in use today.

Peter Fish, in his definitive history of federal judicial administration, notes that, “no aspect of the federal judiciary more clearly symbolized its historic administrative system than the immobility of the inferior court judges” (1973, 14). From the passage of the Judiciary Act of 1789 until just prior to the Civil War, lower federal judges were truly immobile\(^7\): no judge was permitted to serve outside her appointed jurisdiction. These limitations were driven largely by fears of unfamiliar judges imposing foreign legal interpretations on local communities. At no time during this period were jurisdictional boundaries ever trespassed.

\(^7\) During this era Supreme Court justices were literally “mobile” because of the requirement that they “ride circuit”. Obviously this type of mobility is different in kind than the type discussed above.
Visiting judges did not emerge in the lower federal judiciary until the middle of the nineteenth century, and even then their use was severely limited. While Congress would allow judges to serve in jurisdictions other than their own, they were permitted to do so only to assist a judge who was medically impaired or disabled. The first official recognition of visiting judges came in 1850, when Congress permitted district court judges to serve in their home or adjacent circuit to aid a district court judge suffering from medical illness\textsuperscript{8}. The process was not expanded again until 1907 when Congress enacted legislation allowing the Chief Justice of the United States to assign any lower federal judge to any circuit in order to assist a medically impaired judge, but only after all other in-circuit options had been exhausted\textsuperscript{9}. While these actions helped to grow the notion of “judicial mobility”, the use of visiting judges remained limited to relatively unusual circumstances.

The most important change in the use of visiting judges came in 1913\textsuperscript{10}. It was at this time that Congress first recognized the possibility of reassigning judges from one jurisdiction to another as a solution to mounting caseload concerns facing many judicial districts. Rather than viewing visiting judges as an emergency, stopgap measure, Congress began to view judicial mobility in the lower federal judiciary as creating a new, efficient and, most importantly, free source of judicial labor. Facing tremendous growth in caseloads, judges and attorneys from the Second Circuit were able to convince Congress to permit district court judges to be reassigned \textit{only} to the Second Circuit to help provide caseload relief (Fish 1973, 14-15). As one might expect, judges from many

\textsuperscript{8} 9 Stat. 442.
\textsuperscript{9} 34 Stat. 1417.
\textsuperscript{10} 38 Stat. 203.
of the other judicial circuits quickly petitioned for similar treatment. However, Chief Justice Edward White, opposed to the concept of judicial mobility and seeing the possibility of its substantial expansion, severely limited the spread of visiting judges by refusing to assign intercircuit visitors. Until Chief Justice White left office, visitors continued to be used almost exclusively as temporary relief for medically impaired judges (Fish 1973, 15).

The judicial mobility movement received a jumpstart with the appointment of William Howard Taft to the position of Chief Justice in 1921. Taft, a former Court of Appeals Judge and longtime judicial reform advocate, strongly favored the use of visiting judges as a tool to ease caseload concerns in overburdened circuits. Chief Justice Taft, with the help of the Attorney General, would propose the creation of 18 permanent at-large district court judges, whom he alluded to as a “flying squadron”, available to provide caseload relief wherever overburdened courts existed\(^\text{11}\). The notion of divorcing federal judges from geographic jurisdictions proved too radical a proposal to garner the necessary support of Congress. Representatives were simply unwilling to deviate from the pattern of regional representation in the judiciary – a defining feature since the founding of the nation (Fish 1973, 28). Undeterred, Taft and advocates of a mobile judiciary shifted their attention to the expansion of the 1913 Act permitting the use of intercircuit visiting judges in the Second Circuit to include all judicial circuits. While Taft and his colleagues would ultimately win expansion, several provisions of the 1913 Act, particularly the lack of oversight in the visiting judge assignment process, were

unpopular among federal judges. The remedy to these concerns came in the form of the Judicial Conference of the United States.

An organizational conference designed to tend to the administrative concerns of the lower federal judiciary was a goal of judicial reform advocates for much of the early part of the twentieth century. With Congress supportive of expanding judicial mobility to include all circuits of the lower federal judiciary, many questions began to arise as to how such assignments would be managed, and the need for an administrative organization became clear. Would judges be forced to consent to an assignment as a visiting judge? Would chief judges of the circuits have any control over whether their judges would be used as visitors? A conference of judges appeared capable of providing answers to these questions. The Judicial Conference of the United States, consisting originally of the Chief Justice and experienced judges from each judicial circuit, became law on September 14, 1922. The explicit purpose of the conference was to deal with the question of judicial mobility. As Fish (1973) notes, “other purposes of the Act, especially those involving the contemplated functions of the conference of senior [veteran] circuit judges, remained obscure” (34). At its inaugural meeting the conference established the Committee on the Need and Possibility of Transferring Judges to deal with questions of judicial mobility (Fish 1973, 58). And while the responsibilities of the Judicial Conference would grow and change over time, the committee (ultimately to be renamed the Committee of Intercircuit Assignments in 1941) continued to serve as the primary administrative organization for managing the visiting judge process. Although

12 42 Stat. 839.
13 42 Stat. 837.
Congress bestowed on the Chief Justice the formal power to make an intercircuit assignment, it is the Committee that is largely responsible for coordinating the process.

**Rules for Visiting Judges**

The rules created to structure the visiting judge process are designed primarily to clarify under what conditions different types of judges are eligible to serve as visitors. The most important distinction is whether the visitor will be the product of an intracircuit assignment. For intracircuit assignments, senior (both former appeals court and district court) judges and active district court judges are eligible to serve. The Judicial Conference plays no formal role in the intracircuit assignment process. Rather, the formal responsibility to make intracircuit assignments falls to the chief judge of the circuit. The chief judge has the option to designate and assign any senior judge to perform such judicial duties within the circuit as the senior judge is willing to undertake. For active district court judges, the chief judge may designate and assign any such judge within the circuit to sit upon any court whenever the business of that court requires. Unlike in the case of senior judges, active district court judges do not have the option to refuse the assignment.

In the case of intercircuit assignments, the Judicial Conference and the Chief Justice do have official roles. Only the Chief Justice of the United States possesses the

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formal authority to designate active and senior judges to serve in courts outside of their home circuits\textsuperscript{17}. In order to obtain an intercircuit assignment, a chief judge must submit a request for assistance on behalf of a specific court to the Judicial Conference (specifically the Committee on Intercircuit Assignments). The committee reviews the petition and makes a recommendation to the Chief Justice\textsuperscript{18}. In the case of an intercircuit assignment of an active judge (whether it be a district court or court of appeals judge), the approval by the chief judge of both the lending circuit and the chief judge of the lending court (in the case of a district court visitor) is required\textsuperscript{19}. However, no statutory requirement exists requiring the consent of the judge being assigned. In the case of an intercircuit assignment of a senior judge, nearly opposite requirements exist: chief judges are not required to consent to the assignment of a senior judge, but the senior judge does have the right to approve (or reject) an intercircuit assignment. With that being said, “it would be unusual to assign any judge, senior or active, without first consulting with that judge” (Stahl-Reisdorff 2006, 12).

While the rules regulating the eligibility of judges to serve as visitors are extensive (particularly for intercircuit assignments), the manner by which specific judges are selected to visit is actually quite informal. For both intra- and intercircuit assignments, circuit chief judges are responsible for the selection of visitors. Almost inevitably visitors are selected through direct communication between possible judges and the chief circuit judge or by “word of mouth” to a chief circuit judge that a particular judge might be interested in serving. Jean S. Breitenstein, chairman of the Subcommittee

\begin{footnotes}
\item[17] Id. §§ 291(a), 292(d) (active judges); id. 294(d) (senior judges).
\item[18] http://www.uscourts.gov/judconf_jurisdictions.htm#Intercircuit
\end{footnotes}
on Improvements in Judicial Machinery, testifying before the committee in 1968, noted that “when it comes to…getting judges to serve in cases of need, I am frank to say that it has been up to the chief judge.”

The guidelines for the use of visiting judges produced by the Federal Judicial Center concur, claiming, “in practice, most courts have already identified an available visitor” (Stahl-Reisdorff 2006, 20) when making or requesting an assignment. However, if a chief judge does not have a specific judge in mind to serve as a visitor, she can choose to contact the Committee on Intercircuit Assignments. The Committee maintains a list of judges who have volunteered to serve as visitors. The only categorical rule concerning the selection of visiting judges is that they should be employed only if the business of the circuit dictates their necessity.

**Use of Visiting Judges**

The extent to which visiting judges have been employed in the lower federal judiciary has varied substantially over time. At the 1927 Judicial Conference of the United States, the names of judges available to serve as visitors were first collected (Fish 1973, 59). However, judges willing to serve as visitors were scarce, and the use of intercircuit assignments became highly contentious. While circuit leaders were quite happy to receive visitors, few were excited about the possibility of losing their judges to more congested courts. In addition, the judges themselves, still weary of long distance travel, were hesitant to serve as visitors. This hesitation was only exaggerated by the reception awaiting visiting judges, where lawyers complained about the instability

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introduced by the presence of a visitor. Responding to these complaints, by 1931 the conference “deemed undesirable,…except where absolutely necessary” the use of intercircuit assignments (Fish 1973, 61). By the early 1930s, the Conference appeared to be incapable of managing the visiting judge process. Over time, the practical management of the visiting judge process has fallen largely to circuit chief judges. As these judges have come to play a more active role in the process, the role of the Conference has become a more passive one, largely that of a record-keeper which provides some guidance to the more active participants on questions relating to visiting judges.

The Judicial Conference has provided information about the use of visiting judges since its first annual Report of the Proceedings of the Judicial Conference of the United States in 1923. However, it was not until 1975 that the report began to provide detailed information about visiting judges in the Courts of Appeals. More importantly, it was not until 1975 that the report began providing information on the number of cases heard by visiting judges – the best way to measure their contributions to the appellate courts.

Figure 1.1 displays the use of all visiting judges in the U.S. Courts of Appeals from 1975-2010. The figure includes all types of visiting judges. The solid line represents the total number of appeals terminated in the Courts of Appeals while the dashed line represents the number of appeals terminated with the help of visiting judges. Several notable patterns emerge. First, the growth rate of the visiting judge process is similar (albeit slightly lesser) to the growth rate of the total appellate caseload for much of the series. For much of the series, visiting judges (excluding home-circuit senior judges) helped terminate between 10% and 20% of federal appeals.

18
Perhaps the most interesting feature of Figure 1.1 is the decreased use of visiting judges (both in terms of real numbers and as a ratio to the appellate caseload) beginning in the late 1990s and early 2000s. Despite the continued, near linear, growth of the total appellate caseload, the use of visiting judges has failed to keep pace, actually declining in recent years. This is surprising, given that the use of visiting judges is couched almost exclusively in terms of relieving expanding dockets. While there is no obvious explanation to this pattern, several possibilities exist. First, the use of visiting judges may


Figure 1.1: Total Appeals Terminated by Visiting Judges, 1975-2010
have reached a critical mass, where the expanded use of visitors may actually hinder
court efficiency. A second possibility is that, in contrast to the stated purpose of the
visiting judge process, chief circuit judges may employ (or not employ) visiting judges
for reasons other than caseload relief.

Although the total number of visiting judges employed nationally has declined in
recent years, this is not true in all courts of appeals. In fact, circuit courts of appeals vary
substantially in the extent to which they employ visiting judges. Table 1.2 breaks down
the use of visiting judges by circuit from 1997-2009. Some circuits (primarily the 2nd, 6th
and 9th) frequently utilize visiting judges. These circuits use a substantial number of
visitors and allow these visitors to participate in a substantial number of cases. Compare
this to the Court of Appeals for the District of Columbia (D.C.) where visiting judges are
rarely used. Judge Henry Edwards of the D.C. Circuit indicated that “ensuring timely
opinions, consistency in the law of the circuit, and improved collegiality among the
members of the court” contributed to the decision of the D.C. circuit to stop using visiting
judges in 1991. This unequal distribution of visiting judges across the courts of appeals
reinforces two important points. First, circuits are not equal in their ability to deal with
growing caseloads without employing additional resources. Second, circuit chief judges
have substantial discretion in the use of visiting judges. The D.C. circuit essentially
stopped using visitors because of the concerns of the chief judge. While visitors play an
important role through the lower federal judiciary, that role is exacerbated in particular
circuit courts of appeals.

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### Table 1.2: The Frequency of Visiting Judge Use by Circuit, 1997-2010

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Source: Annual Report of the Proceedings of the Judicial Conference of the United States, Table V-2. Various years. Numbers in parentheses ( ) are the total number of visitors used.
The unequal use of visiting judges does not only apply to the total number of visitors employed in each circuit. The types of judges being used as visitors also vary substantially. Figure 1.2 displays the use of visiting judges, broken into four categories:

Figure 1.2: Total Appeals Terminated in the Courts of Appeals by Type of Visiting Judge, 1975-2010

active appellate court visitors, active district court visitors, senior appellate court visitors, and senior district court visitors. Again, the senior appellate court category excludes home-circuit senior judges. The use of the different types of visiting judges has remained relatively stable over time, particularly as the contributions of each group relate to each other. Active appellate court judges consistently provide the least amount of service as visitors. Of all the types, the use of out-of-circuit senior appellate judges has undergone the most significant change. The Conference reported that out-of-circuit senior appellate judges participated in a total of 29 appeals in the 1978 fiscal year. By 1984, that number had climbed to 833. Even with the expansive caseload growth observed in this time period, the growth rate of the usage of these visitors is striking.

Of the categories displayed above, district court judges, both senior and active, provide more service as visitors than their appellate brethren, with active district court judges playing the largest role. Of these four categories, district court judges undoubtedly bear the greatest burden. This is true only when excluding resident senior judges as a type of visiting judge. From 1997-2010, resident seniors annually participated in over 15,000 appeals (15039), or 17.2% of cases terminated in the courts of appeals. Grouping resident senior judges with all other visitors, 22.7% of all appeals terminated from 1997-2010 were done so using a nonpermanent member of the appeals court.22

22 Data are from Tables B and V-2 to the Administrative Office of the United States Courts report “Judicial Business of the United States Courts.”
Overview of the Dissertation

Despite their pervasiveness, scholars have paid relatively scant attention to visiting judges. As Benesh (2006, 315) observes, “we (political scientists especially) know woefully little about these [visiting] judges….it is about time that we started paying attention to them and their peculiar characteristics that may well affect how they decide cases.” In the following chapters, I provide an extensive examination of the effects of visiting judges for judicial behavior in the U.S. Courts of Appeals. Chapter 2 discusses the appropriateness of the application of theories of small group behavior to the study of judicial behavior in appellate courts. This chapter details the institutional rules and procedures governing the decision-making environment of the courts of appeals. I demonstrate that the structure of the courts of appeals heightens the importance of small group interaction in the decision-making process. I show that group membership matters, both in terms of strategic behavior and in terms of psychological process, for judges serving in the courts of appeals. I then discuss the consequences of employing visiting judges for this group interaction. Visiting judges are temporary group members who do not experience the repeated group interaction typical of permanent group members. In addition, because of the hierarchical nature of the federal judiciary, visitors drawn from other courts are regularly perceived as being of lower status than the permanent members with whom they serve.

From this theoretical perspective, I derive three primary hypotheses. First, I argue that visiting judges create the opportunity for appellate judges to pursue policy goals. Judges interested in pursuing policy goals can use the visiting judge process to alter their ideological composition of the decision-making group and thus obtain favorable policy
outcomes. Second, I argue that, in comparison to their full status colleagues, the role of visiting judges in the decision-making process will be reduced. Regular group members, perceiving status differences, will be less influenced by visiting judges. In addition, visitors, cognizant of this perception, will defer to regular group members. Third, I argue that visiting judges will negatively affect the quality of the decision-making process. Member familiarity and group stability are theorized to help facilitate higher quality decision-making. Visiting judges, by reducing member familiarity and group stability, will harm the quality of the decision making process.

Chapter 3 tests the first hypothesis. This chapter examines how visiting judges are employed in the Courts of Appeals. I hypothesize that chief judges will use the visiting judge process to pursue their policy goals by selecting visitors who share their policy preferences. To test this hypothesis, I examine visitation patterns for all active district court and appeals court judges. Specifically, I model the likelihood of a judge serving as a visitor for a specific circuit in a given year. The results demonstrate that chief judges do pursue policy preferences in their selection of visiting judges. A judge is significantly less likely to serve as a visitor in a court of appeals as the ideological distance between that judge and the circuit chief judge increases. This result is particularly pronounced for the use of district court judges, where chief judges have almost complete discretion in their selection of visitors.

Chapter 4 examines the behavior of visiting judges in the Courts of Appeals. Visiting judges are perceived as being inferior to regular appellate members for several reasons. The salience of these status differences suggests that visiting judges will play a reduced role in the decision-making process. To examine this possibility, I examine the
voting behavior of visiting judges serving in the courts of appeals. The results are mixed. While visiting judges do play a reduced role in the formal aspects of the decision-making process (opinion writing), the effect of group ideological preferences (i.e. panel effects) is not significantly different for groups using a visiting judge and groups employing three full status (non-visitor) members. Regular appellate judges are just as likely to be influenced by visitors as they are by their full status colleagues. Further, visitors are no more likely to be influenced by full status panel members than their full status colleagues. The results paint a nuanced picture of visiting judge behavior and question how deferential visitors are in the decision-making process.

Chapter 5 examines the effect of visiting judges on the quality of decision-making. To assess the quality of the decision-making process, I perform a citation analysis on a random sample of appellate cases. The results demonstrate that visiting judges collectively do not negatively affect the decision-making process. However, when examining visiting judges by type, I show that some do appear to harm the quality of the court’s output. Cases decided by panels employing visitors from other circuits, particularly appellate court visitors from other circuits, are more likely to be cited negatively than cases decided by panels without a visiting judge. This finding gives some credence to commentators skeptical of the visiting judge process.

Finally, Chapter 6 offers a brief discussion of the implications of these findings for the study of judicial behavior in the courts of appeals. In it, I argue that the results demonstrate the need for more robust theoretical development that incorporates small group dynamics in any explanation of how court of appeals judges behave. I also offer some discussion of possible avenues for future research.
CHAPTER 2: THE SMALL GROUP PERSPECTIVE IN THE U.S. COURTS OF APPEALS

In this chapter I explore the study of judicial behavior in the United States Courts of Appeals. I begin by examining existing theories of judicial behavior. I investigate how the institutional context of a court, or the rules, procedures, and decision-making environment, structures how judges pursue their goals. I suggest that current conceptualizations of institutional context, particularly as it relates to group membership, are incomplete when applied to the courts of appeals. As a result, our understanding of how institutional context affects judicial behavior remains incomplete.

The reason for this is simple: most theories of judicial behavior are developed primarily to explain the behavior of judges serving on the United States Supreme Court. As a result, the effect of many institutional factors on judicial behavior remains unexplored. Primary among these are the effects created by the rules and norms inherent to group decision-making, which I refer to as “group membership”. Group membership can affect judicial behavior in two ways. First, group membership can motivate judges to behave strategically, which I term strategic group effects. Second, group membership can affect judicial behavior through non-strategic psychological processes typically associated with social psychology theories of small group behavior, which I term
psychological group effects. Theories of judicial behavior have largely ignored the latter and have instead focused primarily on the former when incorporating group membership.

Unlike the Supreme Court, decision-making in the courts of appeals takes place in groups with unstable memberships. I argue that by relying exclusively on strategic group effects to incorporate group membership, most theories of judicial behavior are insufficient explanations of judicial behavior in the courts of appeals. To account for this limitation, I expand on existing theories by directly incorporating insights derived from theories of small group behavior. The result is a perspective incorporating both psychological and strategic approaches to the study of judges.

The importance of both types of group effects for the study of judicial behavior in the courts of appeals is amplified by the frequent utilization of visiting judges\textsuperscript{23}. Visiting judges are temporary group members whose presence substantially alters the typical decision-making environment. I derive a set of predictions about the behavior of visiting judges and the appellate judges with whom they serve. Subsequent chapters are devoted to subjecting these predictions to rigorous empirical analysis.

**Theories of Judicial Behavior**

The study of judicial behavior, at its core, is an attempt to explain the choices judges make. Scholars have typically used frameworks centered on the concept of goals (Baum 1997, 11-13; Epstein and Knight 1998, 50-51; Rhode and Spaeth 1976, 70; Segal and Spaeth 2002, 92) to examine judicial decisions. In their most basic forms, these

\textsuperscript{23} To be clear, the term “visiting judges” is meant to include all possible types of visitors outlined in Table 1.1 (p. 8) except home-circuit senior appellate judges. For the purposes of discussion, these judges are not treated as visitors.
theories share a common set of noncontroversial assumptions. All assume that judges (1) have goals they wish to realize and (2) make efforts to attain these goals in their work as judges. From this perspective, judicial behavior is a function of the goals judges wish to pursue and the efforts they make in pursuit of those goals.

The study of judicial behavior, in practice, is an attempt to explain the choices appellate court judges make. Even though a majority of judges work in trial courts, the policymaking function of appellate courts has led scholars to develop theories of judicial behavior to explain the choices of appellate court judges. Aside from extraordinary circumstances, all appellate courts employ multiple judges working together to collectively make decisions. Appellate courts are therefore small groups, broadly defined as “a system” or “a complex pattern of dynamic relations among a set of people using a set of technologies to accomplish a set of purposes-in-common” (Arrow and McGrath 1995, 376). Even with enormous variation in their institutional structures, all appellate courts fit this definition. The study of judicial behavior can then be properly thought of as the study of individuals working in small groups.

Judicial Goals

The institutional context of a court is theorized to affect judicial behavior by affecting both the goals judges pursue and their behavior in pursuit of their goals. Much of the theoretical development in the study of judicial behavior has focused primarily on the judges’ goals (see Baum 1997, 16-20). Some scholars theorize that judges pursue goals similar to those of most individuals (see Baum 1997; Baum 2006), broadly thought of as “economic motivations” (Posner 1993). Others have suggested that judges are
primarily focused on making decisions with fidelity to the law (Gilman 2001). Still others argue that judges are motivated primarily by their policy preferences when making decisions (Segal and Spaeth 1993, 2002).

Despite reaching substantially different conclusions, each perspective uses a court’s institutional context to draw inferences about the goals judges are likely to pursue. In the abstract, the types of goals available to judges are nearly limitless. Examining a court’s institutional context allows scholars to determine which goals are likely to be relevant to their work as judges. Most theories of judicial behavior have relied on the institutional context of the United States Supreme Court to determine the goals judges are most likely to pursue (Segal and Spaeth 2002, 92-96). Supreme Court justices are appointed to lifetime terms with pay constitutionally-protected from reduction. Because the Court is generally considered to be the apex of a legal career, justices are assumed to lack ambition for a higher office. In addition, the Court sits atop the federal judiciary, meaning its members are not obligated to follow precedents set by other courts. The Supreme Court is also the only court in the federal judiciary with a discretionary docket. This allows the justices to hear only the most legally ambiguous cases. These institutional characteristics, taken together, have led scholars to conclude that judges primarily pursue policy goals, or are “single-minded seekers of good legal policy” (George and Epstein 1992, 325). This assumption underlies both the attitudinal (Segal

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24 The only way to remove a federal judge is through the impeachment process. While lower federal court judges have been removed in this manner (albeit rarely) only once has a Supreme Court justice (Samuel Chase in 1804) been formally impeached. Even then, Justice Chase was acquitted of all charges.

25 While this was not always the case (for example, Charles Evans Hughes left the Court to run as the Republican nominee for President against Woodrow Wilson in 1916), it is quite rare today for a justice to consider another office. The last justice to leave the Court in pursuit of a different office was Arthur Goldberg, who resigned from the Court in 1965 to become the Ambassador to the United Nations, and only after much convincing by President Johnson.
and Spaeth 1993, 2003) and strategic models (Epstein and Knight 1998; Hammond et al. 2005; Maltzman et al. 2000; Murphy 1964) of judicial behavior – the dominant paradigms on the subject today.

**Group Effects**

Scholars have also recognized that a court’s institutional context can shape *how* judges pursue their goals. Judicial behavior is not completely unconstrained. Judges work in the context of a court, whose rules, norms and procedures structure their choices and behavior. The institutional context of appellate courts is particularly important because, unlike trial courts, appellate courts are small groups. Scholarship has examined two different paths by which group membership can influence behavior: through *strategic group effects* and non-strategic group effects, or what I term *psychological group effects*.

The effect of group membership has most commonly been incorporated in theories of judicial behavior by examining how group structures induce judges to behave strategically. Strategic behavior developed primarily in the field of economics, emerging as a manifestation of the rational choice paradigm (Simon 1955). Strategic behavior is a description of how individuals make choices in response to constraints and incentives imposed by the decision-making environment (Arrow 1951; Black 1948; Ricker 1982). Individuals engaging in strategic behavior are assumed to possess well-ordered, stable preferences and the ability to make calculations among the available choices to arrive at the outcome closest to their optimal preference. Rather than being driven by psychological processes beyond their locus of control, theories of strategic behavior (and
rational choice perspectives broadly) view actors as being largely in control of their own decision-making calculus.

Shortly after their development in economics, strategic theories of behavior began to be imported by other disciplines, with political science being primary among them (see Farquharson 1969; Downs 1957). With many similarities to economics, strategic behavior appeared particularly well-suited to the study of politics. Unlike psychology and (to a lesser extent) sociology, political science is a discipline that developed to explain how resources are distributed. If the study of politics is truly “who gets what, when and how?” (Lasswell 1936), it should not be surprising that political scientists have been quick to borrow from economics. Political science is also a discipline focused, at least in part, on the behavior of individuals operating within institutions. For these reasons, the popularity of strategy as an explanation of political behavior has only appeared to grow over time (for just a few examples, see Calvert and Fenno 1994; Krehbiel and Rivers 1990; Riker 1965; Riker and Ordeshook 1968; Shepsle 1979).

The impact of strategic behavior has not been lost to the study of courts (Epstein and Knight 1998; Hammond et al. 2005; Maltzman et al. 2000; Murphy 1964). Prior to the pronounced expansion of strategic theories in the study of judicial behavior, the attitudinal model (Segal and Spaeth 1993, 2002) represented the dominant explanation of judicial behavior. Proponents of the attitudinal model assert that judges, much like other policymaking actors, possess well-defined, stable policy preferences. Strategic models of

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26 The incorporation of strategic theories of behavior into the study of appellate courts is rooted in a lengthy history (see Murphy 1964 for the most well known example). The chronology conveyed here is intended to capture how and when different theories of judicial behavior came to dominate the discipline. While strategic theories have a lengthy history, only recently have they come to dominate the study of judicial behavior.
judicial behavior share this assumption. However, strategic models represent an important theoretical development in the study of judicial behavior by placing renewed emphasis on the question of how judges pursue their goals. Strategic theories recognize that judicial policy is the result of a collective choice. This has led scholars to give greater consideration to how group member preferences will ultimately affect the likelihood of a particular policy being enacted. Strategic judicial behavior has been demonstrated in a variety of contexts, including agenda-setting (Caldeira et al. 1999), opinion assignment (Rohde 1972; Brenner 1982; Walhbeck 2006), bargaining (Wahlbeck et al. 1998; Lax and Cameron 2007), and voting on the merits (Johnson et al. 2005).

The importance of group membership does not necessarily need to manifest itself through strategy. The group structure of the appellate court itself, independent of the preferences of the other group members, can also shape how judges pursue their goals. There is good reason to believe that these non-strategic group effects, or what I term “psychological group effects”, influence judicial behavior. The study of decision-making in small groups has developed primarily in the field of social psychology (Arrow, McGrath and Berdahl 2000; Burke 2003; Levine and Moreland 1990; Shaw 1971). Inherent to these theories is the notion that group membership induces psychological responses in individual members and thus influences behavior (Arrow and McGrath 1993, 1995; Guzzo 1996; Littlepage and Silbiger 1992). In this conceptualization, group members may not be aware of how group effects alter their behavior. Individuals operating outside of a group context (like most trial court judges) therefore behave differently than members subject to group rules and pressures. Research has demonstrated that many factors related to group membership, including status (Lee and
Tiedens 2002), socialization patterns (Moreland and Levine 1982, 1984, 1988), and familiarity (Devine et al. 1999; Gruenfeld et al. 1996; Harrison et al. 2003; McGrath 1991), among others, have the potential to influence how groups make decisions.

The importance of psychological group effects has also been demonstrated in a variety of contexts within the field of political science. Group membership alters the voting behavior of legislators (Caldeira and Patterson 1987, 1988; Caldeira, Clark and Patterson 1993), leads individuals to join public interest groups (Cook 1984; Rothenberg 1988), and changes individuals’ patterns of political participation and vote choice (Zuckerman 2005). Recently Page (2007) highlighted the important role diversity plays in increasing the effectiveness of group decision-making. Psychological group effects have also been demonstrated in the study of appellate courts. Early investigations of appellate court behavior envisioned group membership effects being driven primarily by psychological processes (Ulmer 1971). Research in judicial behavior derived from this perspective was frequently couched in the language of small group theory. Walker (1973) examined how the use of temporary judges affected the decision-making process of the Washington State Supreme Court. Murphy (1966, 1565-1572) investigated how a judge’s professional reputation may influence the behavior of her colleagues. Danelski (1961, 497-508) demonstrated that chief justices can engage in a variety of leadership behaviors to affect policy-making on the Supreme Court, while Snyder (1958, 237-238) examined how the introduction of a new group member can change the Court’s decision-making process.

Despite the insights afforded by these analyses, over time the study of judicial behavior has grown increasingly individualistic (Baum 1997, 7-8). As a result, less
attention has been paid to psychological group effects. At this point, many of the inferences gained by the application of theories of small groups are absent from discussions of appellate court behavior (for exceptions, see Martinek 2010; Wrightsman 1999, 2006).

There are many possible explanations as to why psychological group effects no longer play a central role in the study of judicial behavior. Appellate courts (and particularly the U.S. Supreme Court) are guarded institutions where outside observers are not privy to the decision-making process. Pragmatically, it may be easier to ignore the types of group effects that seemingly require first-person access. Another possible explanation stems from the highly stable group membership of the Supreme Court. Many psychological group effects are predicated on the notion that member change is particularly consequential for the group decision-making process. Supreme Court membership is highly stable over time. In the last 60 years, only 28 natural courts\textsuperscript{27} have occurred. The lack of change is even more pronounced when examining the Court’s membership within a term. Of the 28 changes to the Supreme Court’s composition over the last 60 years, only 10 have occurred during a term, meaning nearly all cases heard during a Court’s term are heard by the same nine-member panel. This minimal variation during the term and limited variation across terms has severely restricted the opportunities available for scholars to systematically examine how group membership (and specifically membership change) affects judicial behavior at the Supreme Court.

\textsuperscript{27} A “natural court”, in the parlance of Supreme Court scholarship, is a period in which there is no membership change. So, for example, from the time Stephen Breyer joined the Court in 1994 to the time John Roberts joined in 2005, Court membership remained stable. This time period (1994-2005) represents one natural court.
The highly stable membership of the Supreme Court may therefore lend itself to embracing strategic group effects and minimizing the role of psychological group effects in theories of judicial behavior. In the following section, I examine the implications of this approach when theories of judicial behavior are applied to judges serving in United States Courts of Appeals. Unlike the Supreme Court, the rules and procedures governing the courts of appeals produce unstable groups with constantly changing memberships. Because of this unique decision-making environment, I conclude that theories of judicial behavior explaining judicial behavior in the court of appeals need to account for both types of group effects. Without explicitly doing so, any description of judicial behavior in the courts of appeals is incomplete.

**Theories of Judicial Behavior and the U.S. Courts of Appeals**

The basic structure of the United States Courts of Appeals has remained unchanged since their creation with the passage of the Evarts Act in 1891 (see Songer et al. 2002, 5-12). There are currently twelve regional judicial circuits, each containing a number of district courts and one circuit court of appeals. Each court of appeals has jurisdiction over and is responsible for reviewing all cases appealed from district courts within the circuit’s geographic boundaries. No states are divided between circuits, and all circuit boundaries cover geographically contiguous areas (save territory not connected to the continental United States). Each court of appeals is formally composed of a fixed number of judges. In terms of membership, appeals courts currently range from a low of six in the First Circuit Court of Appeals to a high of twenty-nine in the Ninth Circuit.
Rather than hear appeals en banc\textsuperscript{28}, judges sit in three-member panels. Three members of the court of appeals are assigned to a panel and sit together to hear appeals over a specified period of time (known as a calendar). After completing their service together, judges are reassigned to different panels with new member compositions. The goal of this system is to have panel membership rotate equally among all of the judges appointed to the circuit court of appeals. Formally, the chief judge of the circuit assigns members to panels. In practice, it is the clerk of the court who is responsible for filling panels by using some form of random assignment\textsuperscript{29}. Aside from random assignment, the only other rule imposed on panel assignments is that all judges within a circuit court of appeals are expected to serve on the same panel at some point during their tenure on the bench. The decision of the panel is based on a majority voting rule. Panels are bound by the principle of \textit{stare decisis} - members are expected to respect the precedents set by the decisions of previous panels within their circuit and those made by the United States Supreme Court. If the losing litigant is unsatisfied with the decision, she can petition for all the judges of the court of appeals to hear her appeal en banc. While this provides an additional possibility of review, such petitions are rarely granted.

\textit{Judicial Goals in the U.S. Courts of Appeals}

In terms of the judges’ goals, many of the Supreme Court’s institutional features are not shared by the courts of appeals. Court of appeals judges lack the ability to control their docket and thus may be forced to hear less legally ambiguous appeals. They are

\textsuperscript{28} “En banc” review simply means that all judges assigned to the court will hear the case together.

\textsuperscript{29} While notable exceptions exist (see Brown and Lee 2000 for an example) there is little evidence to suggest that panel assignments are not random.
bound by the principles of *stare decisis*. Further, unlike the Supreme Court, court of appeals judges can be formally reversed and have the opportunity to pursue “higher office”. As a result, court of appeals judges could be motivated by a wider variety of goals than Supreme Court justices.

Practically, the goals of court of appeals judges are likely to be more similar than different than those of Supreme Court justices. Like Supreme Court justices, court of appeals judges are nominated by the President and confirmed by the Senate to lifetime appointments with salaries constitutionally protected from reduction. Although court of appeals judges can be reversed, the probability is likely too small and the psychological costs too insignificant to substantially affect judicial behavior (Klein and Hume 2003). The possibility of being promoted to the Supreme Court is even more improbable than reversal (Hettinger et al. 2006, 24-25), although the psychological benefit is presumably much greater (Posner 2008, 145-146). Perhaps most significantly, much like the Supreme Court, the courts of appeals is a policy-making body. The decisions made by court of appeals judges bind both district courts and future panels within that circuit.

Understanding the court’s policymaking function, presidents tend to nominate individuals for service on the court who have devoted substantial portions of their careers to questions of public law. As a result, individuals serving in the courts of appeals may be intrinsically motivated by policy goals. Even if individuals selected to serve in the courts of appeals are not inherently motivated by the desire to influence policy, the policymaking function of the court is likely to foster such a motivation. There is
therefore good reason to believe the courts of appeals are likely to pursue similar goals to Supreme Court justices\textsuperscript{30}, independent of context.

\textit{Group Member Effects in the U.S. Court of Appeals}

The institutional context of the courts of appeals plays a much more important role in structuring how judges pursue their goals. As discussed above, the structure of the Supreme Court may justify the exclusion of psychological group effects in favor of a strategic conceptualization. However, the use of rotating three-member panels makes membership change the rule, not the exception, in the courts of appeals. This produces a substantially different decision-making environment than is typical of the Supreme Court. This difference may have important implications for the study of judicial behavior in the courts of appeals. As theories of small group decision-making demonstrate, group effects can alter the behavior of court of appeals judges in ways current theories of judicial behavior fail to recognize.

The choice of scholars to focus exclusively on a strategic conceptualization of group effects is particularly ill-suited to the study of the courts of appeals. The structure of these courts seemingly undermines both the incentive to behave strategically and the likelihood of succeeding in strategic behavior. As Baum (1997, 96-98) notes, strategic behavior is more costly than other forms of behavior. Strategic behavior requires information, time and effort that not all judges have or may be willing to expend. Court of appeals judges face burgeoning caseloads filled with many policy-irrelevant cases,\textsuperscript{30}

\textsuperscript{30} The fact that 9 of the last 10 justices appointed to the Supreme Court have been drawn directly from the courts of appeals is another reason to suspect that judges on both courts might be similarly motivated.
limiting a judge’s motivation to behave strategically. Strategic behavior is also contextual - judges with no hope of seeing their goals achieved\textsuperscript{31} may lack the motivation to engage in this costly form of behavior. And these possible limitations exist without considering the likelihood of success when behaving strategically. Judges may be quite poor at strategic behavior. Recent analyses provide reason to be skeptical; the results are mixed in their support for the strategic model in the courts of appeals (for example, compare Van Winkle 1997 and Hettinger et al. 2004). This has led some scholars to question the wisdom of applying theories of strategic behavior to the courts of appeals (Bowie and Songer 2009).

With that being said, completely ignoring strategic group effects is both unnecessary and inappropriate. After all, judges in the courts of appeals \textit{can} behave strategically, and many undoubtedly do. The preceding discussion illustrates only that relying \textit{exclusively} on strategic group effects to account for the importance of the group structure is needlessly restrictive when studying judicial behavior in the courts of appeals. Any theoretical perspective needs to account for both psychological and strategic group effects.

To see how both psychological and strategic group effects can play an important role in explaining judicial behavior in the courts of appeals, I turn to the example of “panel effects”\textsuperscript{32}. Panel effects are a phenomenon in the courts of appeals that have been

\textsuperscript{31} Imagine one lonely liberal (conservative) Supreme Court justice serving with eight conservative (liberal) colleagues.

\textsuperscript{32} “Panel effects” is the name given to the phenomenon demonstrating that the behavior of a judge in the court of appeals is a function both of the judge’s preferences and the preferences of the other two judges serving on the panel. For example, Revesz (1997) finds that a D.C. circuit judge’s votes in environmental cases could be predicted as accurately by the ideological composition of the panel as the judge’s own ideological preferences.
demonstrated in a variety of contexts. Most of the panel effects literature has focused on ideological panel effects, where the individual votes of judges are heavily influenced by the ideological preferences of the other two panel members. One of the primary explanations for this phenomenon is the “whistleblower” hypothesis (Cross and Tiller 1998), where judges in the ideological minority of three-judge panels act as “whistleblowers” by filing dissenting opinions which alert the reviewing court when the panel majority has ignored the reviewing court’s preferences (Kastellec 2007; Kim 2009; Revesz 1997). This interpretation fits clearly into a strategic conceptualization of group effects. Panel composition matters, but only as part of a policy-outcome calculus.

There are also panel effects in the courts of appeals which emerge independent of ideology. Diversity of panels, particularly in terms of gender (Boyd et al. 2010; Farhang and Wawro 2004; Kim 2009; Massie et al. 2002.; Peresie 2005) and race (Cameron and Cummings 2003; Farhang and Wawro 2004) also affect panel members’ behavior. What makes these effects distinct is that unlike ideological panel effects, there is no clear strategic explanation for why this type of group member composition should affect judicial behavior. Even controlling for ideological preferences, panel members are still disproportionately affected by the presence of minority (both gender and racial) group

33 An alternative explanation is that the presence of a dissenting voice sufficiently changes the group dynamic to produce otherwise unexpected voting patterns. This is a plausible alternative, but is not typically the explanation provided by scholars examining the phenomenon.

34 The best strategic explanation for gender and racial panel effects is a long term reciprocal strategy, whereas a judge agrees to support the preferences of the minority (in terms of gender and race) member in exchange for future support. This explanation appears implausible. First, there is no evidence of “reverse” panel effects, which might be expected in reciprocal behavior. Second, the rotating panel structure of the court of appeals means that judges will not regularly sit together, undermining the wisdom of a long term reciprocal strategy.
members. Other member dynamics typically associated with psychological processes, such as group pressures (see Sunstein et al. 2004), appear to provide better explanations.

Panel effects are not the only way that group effects can influence judicial behavior in the courts of appeals. Nevertheless, the phenomenon does provide an instructive example of how both psychological and strategic group effects can influence the behavior of court of appeals judges. The importance of incorporating both types of group effects is perhaps clearest when examining the phenomenon of visiting judges. In the following section I use the perspective developed here to examine how the presence of visiting judges can affect both strategic and psychological group effects in the courts of appeals. I then derive a set of hypotheses designed to examine the utility of this theoretical perspective.

The Small Group Perspective and Visiting Judges

Visiting judges have become a staple of the United States Courts of Appeals (see Chapter 1, pp. 17-23). Despite their pervasiveness, the decision to use a visiting judge still represents a deviation from the typical courts of appeals decision-making environment. If panels are a type of small group, then panels employing visiting judges are small groups with temporary members. Examining the use of temporary group members from the perspective of strategic and psychological group effects, I theorize that visiting judges affect judicial behavior in the courts of appeals in several important ways. Specifically, I argue (1) that visiting judges create an opportunity for strategically-minded judges to pursue their policy preferences, (2) that visitors are less active in the decision-making process, (3) that regular court of appeals judges will be able to exert undue
influence over visitors, and (4) that the decision to use visiting judges as a source of caseload relief is normatively questionable.

Above I have defined courts as small groups. Simply stating that courts are groups does little to help understand the role of group effects in the decision-making process. To help provide some conceptual clarification, Arrow and McGrath (1995) provide a useful framework for defining group membership. In their conception of small groups, the authors differentiate between standing group members, whom they describe as “those persons who share an explicit and ongoing set of relations both with the groups and with other members”, and acting group members, or “persons involved in a particular work session or…group interaction” (377). For Arrow and McGrath, the acting group is most commonly either a subset of the standing group or is the entire standing group working together. This is not, however, always true. As the authors note, “an acting group may also include transient visitors who are not considered standing group members. Such persons are not regular members, but they are some kind of member, at least of the acting group on this occasion” (377).

This framework helps define the roles of different types of judges in terms of small group behavior. Each circuit court of appeals can be thought of as a “standing group”, with each panel representing an “acting group”. Active home-circuit appeals judges are regular group members while visiting judges are the “transient visitors” who are temporary acting group members, but are not considered members of the standing group. Differences in judges’ roles lead to divergent predictions about the small group decision-making process.
Strategic Group Effects and Visiting Judges

The use of visiting judges creates the opportunity for strategic behavior in the courts of appeals. As noted above, each three judge panel is drawn from the circuit court of appeals. This structure creates the opportunity for strategic group effects; policy-minded judges are constrained in their pursuit of these goals by the preferences of other group members. Judges with policy goals shared by a majority of their panel are much more likely to succeed in securing their preferred outcomes than judges in the ideological minority. For judges in the ideological minority of the panel, the three-judge, majority-rules structure makes it essentially impossible to achieve a preferred outcome. The likelihood of facing this position is exaggerated depending on the collective ideological composition of the court. Because panels are randomly drawn, the likelihood of being assigned to a panel with an ideological compatriot is determined by the distribution of preferences of all the court’s judges. In the extreme case of a sole judge in the ideological minority, she will never be in the ideological majority of a panel.

Visiting judges induce strategic group effects by changing the distribution of the court’s collective preferences. It is not immediately evident that visitors will necessarily change the distribution of preferences. If visiting judges were chosen randomly, on average, this would not change the distribution. Of course, visiting judges are not chosen randomly. Chief circuit judges (see Chapter 1, pp. 15-17) are largely responsible for managing the visiting judge process and none have publicly claimed to select visitors

35 This is only true “on average” because it assumes that, on average, the ideological distribution for each court of appeals mirrors the ideological distribution of preferences for all judges eligible to serve as visitors. Obviously this will rarely be the case for specific courts in specific years (for example, the ideological preferences of the 9th Circuit Court of Appeals are skewed much more liberally than the federal judiciary as a whole), but in expectation, the total net effect on the distribution of preferences would (theoretically) be zero.
in such a manner. Nor has any chief circuit judge claimed to select visitors by matching the ideological preferences of visitors to that of the court, which would also leave the distribution of preferences undisturbed.

How chief circuit judges select visitors is then crucial for understanding strategic group effects in the courts of appeals. Assessing their own behavior in the selection of visitors, chief judges emphasize the importance of caseloads. Both in the decision to use a visitor and in the selection of specific individuals, chief judges stress that caseload considerations are the driving motivation (Cohen 2002, 192; Stahl-Reisdorff 2006, 7-12; Wasby 2003, 74). The self-reported behavior of chief judges is consistent with the “managerial judge” model of judicial behavior (Resnick 1982), which emphasizes the role that non-political, administrative goals play in the decision-making process. This perspective has been applied primarily to the lower federal judiciary, where judges have limited control over their caseloads. It is unsurprising that chief judges would invoke managerial concerns; they, more than other judges, are charged with maintaining the administrative health of the court.

If chief judges are primarily motivated by policy goals, they could select visitors in a strategic manner, systematically altering the court’s distribution of ideological preferences. Even if chief judges do not engage in strategic panel assignment\(^{36}\), they still have the opportunity to select visitors who share their policy preferences. While chief judges deny strategic calculations in their administrative behavior, recent evidence

\(^{36}\) Richardson and Vines (1970) note a chief judge could have influence over the decision-making of the court by “structuring the panels according to his preferences” (170). However, over time the job of assigning judges to panels has increasingly fallen to the clerk of the court. Research on panel assignments demonstrates that, with rare exceptions, judges are in fact randomly assigned (Atkins and Zavonia 1974).
(George and Yoon 2008) suggests that they may use their administrative position to help secure their policy goals. As a result, I expect the following:

Strategic Chief Judge Hypothesis: As the ideological distance between a chief judge and a possible visitor increases, the likelihood of that judge serving as a visitor decreases.

If court of appeals judges are motivated by policy goals, visiting judges provide an opportunity for chief judges to behave strategically through their administrative powers. The manner by which chief judges select visitors will provide important insight into the role of strategic group effects in the behavior of court of appeals judges.

Psychological Group Effects and Visiting Judges

Strategic behavior is not the only way that the visiting judge process affects judicial behavior in the courts of appeals. Visitors may also influence the decision-making process through psychological group effects. Visiting judges are typically perceived to be of lower status than regular panel members, are temporary group members who have not been socialized into the group structure, and are largely unfamiliar with other group members. Each of these factors contributes to visitors affecting the decision-making process in ways not captured in strategic theories of judicial behavior.

Formally speaking, visiting judges are equal to their full status colleagues. Visitors are equals in the decision-making process and are eligible to author the panel’s opinion, concur or dissent. Despite their formal equality, visiting judges are also distinct from regular panel members. District court visitors serve in a different “vertical” level of the federal judiciary and out-of-circuit visitors serve in a different “horizontal”
jurisdiction. These distinctions have led appellate court judges to perceive some visitors, particularly visiting district court judges, as being of lower status than regular panel members. As one fifth circuit court of appeals judge impolitely noted, “I don’t think the quality of district judges equal[s] the quality of circuit judges. But no one questions him. After all, he is volunteering his services. It wouldn’t be sporting to say it” (quoted in Howard 1981, 268).

Most commentators focus (although not exclusively) on visiting district court judges when discussing differences in status among panel members (Collins and Martinek 2011; Brudney and Ditslear 2001; Saphire and Solimine 1995)37. Most of the quotations provided by appellate judges criticizing the visiting judge process are specific to district court visitors. For example, one ninth circuit judge suggests that “when they come in to argue, and we exchange views, there is a slightly different orientation because the judge [is sensitive] to the hierarchy…a visiting district court judge sometimes feels ‘Well, I’m only a district judge, and these guys are circuit judges’” (quoted in Cohen 2002, 193). Another comments on the “temerity required of a district judge in dissenting from the opinion of an appellate court panel on which he sits by designation” (quoted in Saphire and Solimine 1995, note 3, 380). These quotations highlight the intuitive appeal of focusing on district court judges - status differences are frequently rooted in hierarchy. However, the theoretical perspective developed here suggests that focusing exclusively on district court judges to assess the effects of group member status may be inappropriate. The appropriateness of doing so depends on what criteria court of appeals judges use to

37 The reason for this may be pragmatic – as Figure 1.2 (pp. 22) demonstrates, there are many more district court visitors than appellate court visitors.
assess the status of visitors. If appellate court judges rely primarily on hierarchical relationships to assign status, focusing on district court judges is reasonable. If, however, appellate court judges focus on some characteristic common to both district court and appellate court visitors, then such a focus is overly restrictive.

Determining how court of appeals judges make these assessments is difficult. The quotations presented above are suggestive of the importance of hierarchy when assigning status. In this way, district court judges appear distinct from other types of visitors. In many other ways, however, visiting district judges are more similar than different from other types of visitors. All visiting judges are temporary members of a group with otherwise fixed membership. If “otherness” is the determining factor in assigning status, it may be unfair to treat out-of-circuit visitors differently than district court visitors. Given these difficulties, I treat all visitors as being perceived as being of lower status. This represents the least restrictive assumption and most consistent theoretical position. Rather than assuming that only district court judges are perceived differently, I allow these distinctions to be clarified through the empirical analyses of later chapters.

The perception of differences in status is also apparent to visitors. Just as court of appeals judges are skeptical of the service rendered by visitors, visitors may approach the process with reservation. Visiting judges are unlikely to be familiar with other group members, the decision-making rules and norms of the court on which they are serving, or the legal precedents governing the decision-making of the court. As a result, visitors may perceive themselves as being of lower status than regular panel members. The accuracy of these perceptions notwithstanding, what is clear is that the structure of the lower
federal judiciary leads judges to perceive visitors as having a lesser status than regular court of appeals judges.

Research in the fields of sociology and social psychology has examined the effect of status differences in the behavior of small group members (Berger and Zelditch 1977; Balkwell 1994; Knottnerus 1997; Lee and Tiedens 2002). The central finding is that status differences produce inequalities within small groups, particularly when those status differences are rooted in hierarchical distinctions. Status differences cause the behavior of group members to vary based on their status relative to other group members. Higher status individuals tend to dominate small groups. They participate more frequently in all forms of group behavior (Pauchet 1982), fail to differentiate among lower status individuals (Goodwin et al. 2000), and are more likely to accept the suggestions of other higher status members and reject those of lower status members (Strodtebeck et al. 1957). By comparison, lower status individuals tend to be less active in the group decision-making process, take on fewer and less difficult tasks, and experience greater degrees of self-doubt (Foschi 1996) when working with high status group members.

The behavior of visitors and regular panel members should therefore be affected by status differences in several ways. Visitors should be deferential to regular panel members, playing a decreased role in the dynamics of the small group. The lack of participation should be apparent in both formal (e.g. task completion) and informal (ability to influence other judges) aspects of the decision-making process. I therefore expect the following:

**Visitor Formal Deference Hypothesis:** Visitors will be less likely to author a dissenting opinion than regular panel members.
Visitor Informal Deference Hypothesis: A regular panel member’s ideological preferences will more strongly affect the vote choice of a visiting judge than the choice of a regular panel member.

Related to the idea of deference is the ability to exert influence. If visitors are in fact deferential, they are unlikely to exert the type of influence over the decision-making process than less deferential panel members. In addition to being disproportionately influenced by regular panel members (the Visitor Informal Deference Hypothesis), visitors should have less influence on regular panel members. As a result, I expect:

Visitor Influence Hypothesis: A visiting judge’s ideological preferences will less strongly affect the vote choice of a regular panel member than the ideological preferences of another regular panel member.

Previous research examining visiting judges has focused primarily on the behavior of visitors\textsuperscript{38} with respect to the formal aspects of the decision-making process. In terms of participating in group interactions, Owens and Black (2009) demonstrate that visitors are more likely to join opinions without requesting any changes than other panel members, leading the authors to conclude “that visiting judges contribute little to the opinion crafting process” (31). This lack of participation is reflected in opinion writing patterns. Green and Atkins (1978) show that visitors are just as likely as regular panel members to author majority opinions, but are less likely to concur or dissent. This result is mirrored in Saphire and Solimine (1995), Benesh (2006) and Owens and Black (2009), although Brudney and Ditslear (2001) find that visitors are less likely to write majority

\textsuperscript{38} Previous analyses of visiting judges tend to examine the behavior of active home-circuit district court judges, with Green and Atkins (1978), Benesh (2006) and Owens and Black (2009) being exceptions.
opinions as well as concurrences and dissents. In terms of actual voting patterns, however, there is no evidence to suggest that visitors are any less ideologically consistent in their vote choices (Collins and Martinek 2011).

The results paint a mixed picture of how visiting judges affect the formal aspects of the court of appeals decision-making process. Although visitors are less active, their voting patterns are similar to those of regular panel members. While these results are largely consistent with the predictions generated by theories of small group behavior, this research is limited by focusing exclusively on the behavior of visitors in the formal aspects of the decision-making process. Visiting judges can affect the decision-making process in more informal ways. In addition, regular panel judges are expected to treat visiting judges differently. Neither of these predictions has yet been fully examined.

The possible deference of visitors in the formal aspects of the decision-making process underlies broader criticisms directed at the visiting judge process. Many judges and legal commentators fear that visiting judges are not just failing to do their share of the work, but are actually undermining the quality of the decision-making process. Examples of these criticisms abound. Judges characterize visitors as creating “severe problems” (Wasby 1980, 374) and contend that, among other things, visitors fail to reduce caseload problems39, undermine the consistency of circuit law40, distress litigants and attorneys41 and threaten the legitimacy of the court’s decision42. Legal

39 “This kind of thing [visiting] is a real distraction for them [visiting judges]. They have a helluva time getting their share of the work done, so that slows us down some” (quoted in Cohen 2002, 197).
40 “The presence of a whole lot of strangers dabbling in writing law” is likely to cause the circuit to “lose harmony of decision and integrity of precedent” because such strangers lack “long, continuous exposure” to circuit precedents (quoted in Wasby 1980, 374)
41 “What [the use of visiting judges] means is that a lot of decisions by the Ninth Circuit are not decisions by the Ninth Circuit. It reduces the predictability of decisions for lawyers…” (quoted in Cohen 2002, 192).
commentators largely agree, hypothesizing that visitors lead to “… reduced collegiality within panels, restraint on the candid and robust exchange of views between all members of a panel…” (Saphire and Solimine 385, 1995).

The criticisms leveled against the use of visiting judges, in one way or another, all speak to the effect of visiting judges on the collegiality of the decision-making process (Edwards 1998, 1335). In the context of appellate judging, collegiality represents the set of group interactions which leads to the work of the panel being completed by the collective members. Court of appeals judges stress the importance of this collegial interaction as vital for effective decision-making, referring to collegiality as “the hallmark of an effective appellate court,” and noting that collegiality “promot[es] a cohesive court, with shared information, circulated experience, and maximized efficiency.” Because collegial decision-making is inherently a group enterprise, psychological group effects may have a pronounced effect on the quality of collegial interaction.

In addition to being perceived as having a lesser status than regular panel members, visitors are also temporary members. Research in social psychology has consistently demonstrated the negative consequences of using temporary members for

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42 “It’s terrible when two circuit judges divide and the district judge is the swing man…” (quoted in Howard 1981, 268).
43 This is a slightly different conceptualization of collegiality than the conventional use of the term. Here collegiality represents more than congenial working relationships among colleagues. A collegial panel is thus not necessarily one where all members are friends. In fact, under this conceptualization of collegiality, judges do not have to actually like each other, although doing so undoubtedly aids collegial decision-making.
45 Testimony of Judge Richard Tallman before the Senate Committee on the Judiciary, September 20, 2006.
successful group decision-making. These limitations are driven primarily by a lack of complete socialization into the group and subsequent unfamiliarity with group members. Temporary members are rarely fully socialized into the group (Moreland and Levine (1982, 1984, 1988). This prevents temporary members from engaging in role negotiation, leading temporary members to take secondary roles in the group, isolate themselves when completing tasks, and become “relatively malleable, because they are alone and therefore feel especially vulnerable to group pressure” (1988, 164). The failure of temporary members to be fully socialized also undermines group member familiarity, which has been shown to increase group effectiveness. Familiarity alleviates pressures related to social acceptance. This allows members to express alternative viewpoints and contribute information to the decision-making process which might otherwise be suppressed. Poorly socialized group members are less likely to feel this acceptance. In addition, familiarity plays an informational role, allowing members to become acquainted with the rules, norms and content structuring the group’s decision-making process. Gruenfeld et al. (1996) demonstrate that membership familiarity increases group effectiveness and leads to higher levels of satisfaction among group members with their group working experience. Harrison et al. (2003) examine both membership familiarity and temporal pressures as they relate to group performance, demonstrating that groups with members who are familiar with each other initially outperform groups with unfamiliar members, but the effect of this difference should lessen over time.

The temporariness of visiting judges should undermine the effectiveness of panel decision-making. According to one Ninth Circuit judge, “you have a judge you don’t know, you are not familiar with his habits…I think it is easier to work with two people
whom you know well than with one that you do and one that you don’t” (quoted in Cohen 2002, 199). I therefore expect the following:

Visitor Quality Hypothesis: Cases terminated with the aid of visiting judges will be of lower quality than cases terminated using three court of appeals judges.

Despite abundant criticism, the notion that visiting judges undermine the quality of the decision-making process has rarely been subject to empirical analysis. To the extent that it has, preliminary results support critics’ fear. Scholars have demonstrated that panels using visiting judges are more likely to have their decisions reviewed en banc (Alexander 1965; Solimine 1988). However, the uniqueness of en banc review makes it a questionable indicator of quality. Further investigation is needed before any definitive conclusions can be drawn.

Hypotheses

The three-judge rotating panel structure means that the study of judicial behavior in the U.S. Courts of Appeals is truly the study of individuals making decisions in small groups. Existing theories of judicial behavior incorporate group membership, but do so in a restrictive manner. These theories envision group membership affecting judicial behavior by changing the distribution of preferences of the court which policy-oriented judges need to account for when pursuing their preferred outcome, which I have termed “strategic group effects”. I argue that this conceptualization of group effects is artificially

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46 En banc review is rarely utilized in the courts of appeals. In 2010, of 53,663 appeals, only 44 were granted en banc review (see the 2010 Annual Report of the Proceedings of the Judicial Conference of the United States, Table S-1).
limited; psychological pressures associated with group decision-making can also influence behavior, which I termed “psychological group effects”. I argue that any theory of judicial behavior applied to the courts of appeals that fails to take these dynamics into account is incomplete.

Visiting judges have the ability to alter both strategic and psychological group effects. Examining theories of strategic behavior and social psychological theories of small group decision-making, I have derived a set of predictions about the effects of visiting judges. In summary below, I restate these predictions as a single collection of hypotheses.

**Strategic Chief Judge Hypothesis:** Chief judges, motivated by policy goals, will select visitors with similar preferences. As a result, as the ideological distance between a chief judge and a possible visitor increases, the likelihood of that judge serving as a visitor decreases.

**Visitor Formal Deference Hypothesis:** Visiting judges will be deferential to regular panel members in the formal aspects of the decision-making process. Visitors will be less likely to author a dissenting opinion than regular panel members.

**Visitor Informal Deference Hypothesis:** Visiting judges will be deferential to regular panel members in the informal aspects of the decision-making process. A regular panel member’s ideological preferences will more strongly affect the vote choice of a visiting judge than the choice of a regular panel member.

**Visitor Influence Hypothesis:** Visiting judges have less influence on regular panel members than other regular panel members. A visiting judge’s
ideological preferences will less strongly affect the vote choice of a regular panel member than the ideological preferences of another regular panel member.

**Visitor Quality Hypothesis:** Visiting judges will undermine the quality of the decision-making process. Cases terminated with the aid of visiting judges will be of lower quality than cases terminated using three court of appeals judges.

Subsequent chapters are devoted to testing these hypotheses. Chapter 3 tests the *Strategic Chief Judge Hypothesis*. I examine visitation patterns for all active, home-circuit district court judges and all active, out-of-circuit appeals court judges from 1997-2009. I model the likelihood of a judge serving as a visitor for a specific circuit in a given year. Chapter 4 tests the *Formal and Informal Visitor Deference Hypotheses* as well as the *Visitor Influence Hypothesis*. Relying on a panel effects framework, I examine the voting behavior of visiting judges serving in the courts of appeals from 1997-2002 in a random sample of cases. Chapter 5 examines the *Visitor Quality Hypothesis*. To do so, I perform a citation analysis on a random sample of appellate cases from 1997-2002. Chapter 6 concludes by reviewing the findings and discussing the implications of the results for the study of judicial behavior in the U.S. Courts of Appeals.
CHAPTER 3: THE USE OF VISITING JUDGES IN THE U.S. COURTS OF APPEALS

The importance of group membership for understanding judicial behavior in the United States Courts of Appeals is enhanced by the court’s institutional context. As detailed in Chapter 2, the unique decision-making environment of the courts of appeals leads to two types of group effects: strategic group effects, where group membership induces judges to behave strategically, and psychological group effects, where group membership affects behavior through psychological processes and pressures. In this chapter I examine how the use of visiting judges creates strategic group effects. Specifically, I test the hypothesis that circuit chief judges will be more likely to select visitors with shared ideological preferences, which I have termed the Strategic Chief Judge Hypothesis. Examining the use of active home-circuit district court judges and active out-of-circuit appeals court judges, I present evidence that chief judges are more likely to select visitors with shared ideological preferences. However, this effect is only observed in the selection of home-circuit district court judges, where circuit chief judges are completely unconstrained when selecting a visitor. In the case of out-of-circuit appeals court visitors, which require approval from the Judicial Conference of the United States, no such effect exists. The results demonstrate that the rules and guidelines
structuring the visiting judge process have the ability to induce or limit strategic behavior among circuit chief judges.

**Strategic Groups Effects and Visiting Judges in the U.S. Courts of Appeals**

The use of visiting judges has the potential to induce strategic behavior in the U.S. Courts of Appeals. By altering the distribution of ideological preferences of a given circuit, visiting judges can change how policy-minded circuit judges are able to pursue their goals. This is particularly true for circuit chief judges, who have become primarily responsible for the management of the visiting judge process (see Chapter 1, pp. 13-16). Formally, only the Chief Justice of the United States can reassign out-of-circuit visitors from one circuit to another. A chief wishing to use an out-of-circuit visitor must file a “Certificate of Necessity” with the Judicial Conference of the United States, which reviews the petition and makes a recommendation to the Chief Justice as to whether or not the transfer should be approved. While anecdotal evidence suggests that the Conference does occasionally reject such petitions (Fish 1973, 45), the general consensus is that chief judges exercise substantial control over the use of out-of-circuit visitors. This control is only heightened when a chief decides to employ a home-circuit visitor - there are no formal constraints on how home-circuit district court judges are employed within their circuit. Chiefs are permitted to reassign home-circuit district court judges to

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47 For the purposes of this analysis, senior home-circuit appeals judges are again not considered visitors. Chiefs have almost the same freedom to assign senior home-circuit appeals judges as they do home-circuit district court judges. The only limitation is that the former can reject an assignment (assuming they have fulfilled their required caseload) while the later must consent to all intracircuit assignments.
any post within the circuit so long as the business of the circuit requires. Chiefs are therefore faced with two questions when considering the use of visiting judges. First, chiefs must decide when to use visiting judges. Second, chiefs must decide which visiting judge to use. The answers to these related questions provide important insight into how visiting judges affect the behavior of chief judges (and thus all judges) in the courts of appeals.

Circuit chief judges have opportunities to engage in strategic behavior when making administrative decisions. One such opportunity is the assignment of judges to particular panels – an administrative decision managed by the chief judge of the circuit or the judicial council (Wasby 1980, 70). As Richardson and Vines (1970) argue, a chief judge could have influence over the decision-making of the court by “structuring the panels according to his preferences” (170). At least one noteworthy instance of strategic manipulation of panel assignments – the nonrandom assignment of 5th Circuit Court of Appeals judges in civil rights cases – has been demonstrated (Atkins and Zavonia 1974). However, over time circuits have enacted formal and informal rules designed to limit the extent to which chief judges can manipulate panel assignments (see Cheng 2008, 523 at note 17 for a discussion of different circuit rules). There is no evidence that chief judges regularly or systematically alter panel assignments.

49 As detailed later in the chapter, circuit chief judges are chosen exclusively based on seniority and age. Aside from being more senior, chief judges should not be systematically different than all other courts of appeals judges. The selection mechanism does not allow judges to self-select into the role of chief judge. Therefore, unless the motivation to engage in strategic behavior is correlated with seniority, there is no reason to believe the results of this analysis would not generalize to all court of appeals judges if they were able to affect the selection of visiting judges.
This does not mean that chief judges are never strategic when making administrative decisions. George and Yoon (2008) have examined a different form of strategic behavior among chief judges – departure from the position of chief judge. Unlike the United States Supreme Court (where the Chief Justice is independently appointed) or in many state judicial systems (where chief judges are similarly appointed or elected) chief judges in the courts of appeals are selected solely on the basis of age and tenure. Since 1982 the position of the chief judge, once vacant, passes to the most senior active judge who is no older than sixty-four, has served for at least one year, and has not served previously as chief judge (George and Yoon 2008, 25). These requirements allow a strategic chief judge to plan her departure to ensure an ideologically like-minded successor. If the ideological preferences of the most senior active judge differed from the ideological preferences of the circuit chief judge, the chief could purposefully delay her departure until the would-be successor was no longer eligible to assume the position of chief (presumably upon reaching the age of sixty-four). A strategic chief could also expedite her departure to ensure a like-minded successor does not reach the statutorily-defined age limit. George and Yoon examine the extent to which chief judges engage in these forms of behavior. Their results demonstrate that, under certain conditions, the ideological preferences of a successor matter, providing evidence that chief judges do make strategic calculations when deciding to depart from their position.

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50 Prior to 1982, once the chief judgeship became vacant it was passed to the most senior active judge under the age of sixty-nine.
51 Chief judges can only delay their departure so long. Once a chief judge has served for seven years or reaches the age of seventy, she is required by statute to vacate the office.
The alternative to the strategic perspective is that chief judges use other criteria to make decisions concerning the use visiting judges. Rather than being motivated by policy preferences, one plausible alternative is that chief judges employ visitors based on workload considerations – the stated purpose of the visiting judge process. Doing so would be consistent with the “managerial judge” perspective (Resnick 1982), which asserts that judges are frequently motivated by non-political administrative goals, with workload considerations at the forefront. The managerial judge model has become particularly prominent as an explanation of judicial behavior for judges serving in the lower federal judiciary. Unlike the U.S. Supreme Court, where the justices exercise substantial control over their workload, lower court judges lack the ability to effectively control their caseloads (see Cohen 2002 for one attempt to deal with these growing concerns). With nearly 60,000 new appeals commenced each year,52 simply disposing of cases quickly has become an important motivation for court of appeals judges, and seemingly has the possibility of becoming their primary motivation. This motivation should be particularly salient for circuit chief judges, who, more than other judges, are charged with maintaining the administrative health of the court. As Resnick (1982) notes “…because of increasing case loads, many judges have become concerned with the volume of their work….during the past decade, enthusiasm for the ‘managerial movement’ has become widespread” (379). The portions of the United States Code regulating the use of visiting judges create a structure designed to inspire chiefs to behave as managerially.

52 See Table 1.2, pp. 21.
The strategic and managerial perspectives offer competing visions of chief judge motivation when engaging in administrative decision-making. In terms of managing the visiting judge process, chief judges face the two central questions. Chief must decide (1a) when to use a visiting judge and (1b) which visitor to select. One may naturally assume that these are separate, ordered decisions. A chief judge first decides to use a visitor and then selects a specific visitor among the universe of eligible judges. While this conceptualization has an intuitive appeal, chief judges may not make decisions about visitors in this manner. A chief judge, for example, could also make the decision simultaneously, choosing to use a visiting judge only after selecting a specific visitor for service. It is not obvious whether chief judges are making one collective decision or two unique decisions when employing visiting judges.

The distinction between the question of using any visitor and the selection of a specific visitor is further blurred when deriving expectations from the managerial and strategic perspectives. Managerial considerations would seemingly best inform the decision to use a visiting judge, while strategic considerations would mostly likely affect the selection of a specific visitor among the eligible pool. Again, while this interpretation has an intuitive appeal, it may needlessly restrict how strategic and managerial considerations could affect the visiting judge process. If the collective preferences of the court of appeals judges for a particular circuit differ substantially from those of the circuit chief judge, a strategic chief could employ many visitors, figuring that almost any change

53 As I discuss below, the hypothesis that chief judges use the visiting judge process as a socialization tool provides a useful example of this type of decision process. A chief judge could decide to use a visiting judge and then select an inexperienced district court judge in an effort to socialize the visitor into the life of the circuit. However, chiefs may also decide, in order to achieve harmony within the circuit, a new district court judge will be used in the court of appeals that year. In that case, the selection of specific visitors comes at least concurrently with, if not prior to, the decision to use a visitor.
in the ideological distribution of the court would be more likely to lead to her preferred policy outcome. Conversely, if the court’s preferences matched those of the chief, a strategic chief judge would be unlikely to use any visitors, seeing no benefit to changing the ideological distribution. Moreover, if a managerially-motivated chief judge considers the working conditions of a court when choosing to use a visitor, she may also consider the working conditions faced by possible visitors when selecting a visitor among the pool of eligible judges.

The difficulty of determining whether the decision to use a visitor and the selection of a specific visitor are in fact two distinct questions leads me to model the two simultaneously. Analyzing the decisions separately or as part of a two-stage model implies that these decisions are ordered; for the reasons outlined above, this is a difficult assumption to make. Modeling the decisions together requires the least restrictive assumptions concerning how chief judges are motivated in managing the visiting judge process. This specification allows both managerial and strategic considerations to (theoretically) affect both the decision to use a visitor and the selection among possible visitors. If chief judges do in fact make these decisions in a two-stage process, the results should determine whether chief judges strategically select visiting judges, controlling for the decision to use a visitor at all. This specification creates the most effective test for the Strategic Chief Judge Hypothesis and allows for the clearest inferences concerning the extent to which visiting judges create strategic group effects in the courts of appeals.

54 Methodologically, a plausible alternative would be to analyze these decisions in a two-stage framework, such as a selection (Heckman 1979) or zero-inflated count (see Greene 1994; Lambert 1992) model. As Long (1997) notes in his discussion of two-stage models (in this case zero-inflated models), “this is done [changing the error structure] by assuming that 0’s can be generated by a different process than positive counts” (242). For this particular analysis, the viability of this assumption is unclear.
Hypotheses

To examine whether visiting judges induce strategic behavior among chief judges in the courts of appeals, I focus my primary analysis on the use of active home-circuit district court judges. Later I expand the analysis to also include active out-of-circuit appeals court judges. Focusing first on active home-circuit district court judges provides several important advantages. Effectively examining the selection of a specific visiting judge requires observations for the universe of possible visitors. The universe of all judges theoretically eligible to serve as visitors in the courts of appeals is large. Focusing on one type of visiting judge helps reduce the scope of the necessary data collection. More importantly, chief judges are completely unconstrained in their assignment of active home-circuit district court judges. Out-of-circuit visitors must be approved (in practice) by the Judicial Conference of the United States. Even senior home-circuit district court judges reserve the right to refuse an assignment as long as they fulfill their required 25% caseload. Neither of these restrictions applies to active home-circuit district court judges. If chief judges are in fact strategic in their selection of visitors, it is reasonable to assume this should be most clearly observable when their decision is totally unconstrained. For this reason, I focus my first hypotheses on these visitors. For the purposes of simplicity, active home-circuit district court judges will simply be referred to as “district court judges” in the hypotheses below.

Strategic models of judicial behavior predict that chief judges will be motivated primarily by their desire to make legal policy consistent with their preferences. The ability to manage the visiting judge process affords chief judges a unique opportunity to pursue these goals. Rather than choosing district court judges based on administrative
considerations, a strategic chief judge will be primarily concerned with the policy preferences of visitors. By infusing the court of appeals with district court judges who are ideologically compatible, a chief judge may be able to sway the ideological balance of the circuit and thus move the collective decisions of the court to more closely approximate her preferences.

*Strategic Chief Judge Hypothesis:* As the ideological distance between a chief judge and a district court judge increases, the district court judge is less likely to be used as a visitor.

In contrast to strategic models of judicial behavior, a managerial perspective asserts that chief judges will be motivated primarily by the administrative concerns of the court. When deciding whether or not to employ a district court judge, chief judges motivated by managerial concerns should be more likely to do so when workload concerns of the court of appeals dictate. As such, all district court judges will be more likely to be employed (and will be employed more frequently) when a particular court of appeals is facing working conditions unfavorable to the efficient disposition of cases.

Several components comprise the working conditions of each court of appeals. The most obvious factor is the total workload itself. The total number of appeals commenced each year varies dramatically by circuit. For example, in 2009 the U.S. Court of Appeals for the Ninth Circuit received a total of 12,211 new appeals, which constitutes roughly 452 new appeals for every active circuit judge. Compare this to the Circuit Court of Appeals for the District of Columbia, which received just over 1,000
appeals, or roughly 122 per active circuit judge\textsuperscript{55}. As these data suggest, the judicial “work-rate” is far from uniform across circuits. If chief judges are motivated by managerial concerns, they should be more likely to turn to district court judges when the court of appeals work-rate is high. As a result, I expect:

*Court of Appeals Work-Rate Hypothesis:* As the work-rate of the court of appeals increases, a district court judge is more likely to be used.

A second important component of the working conditions facing each court of appeals is the number of vacancies on the court. Although a specific number of judgeships are authorized for a particular court of appeals, courts can go years without operating at full strength\textsuperscript{56}. Operating at less than full capacity may undermine the ability of the court to quickly and effectively dispose of cases. A chief judge motivated by managerial considerations may turn to district court judges to help bridge the gap created by vacancies at the court of appeals. The problem of judicial vacancies is likely exacerbated in courts of appeals with fewer authorized judgeships; a higher percentage of the judicial workforce is absent.

*Court of Appeals Vacancy Hypothesis:* As the percentage of the court of appeals judgeships vacant increases, a district court judge is more likely to be used.

A final component of the working conditions facing the courts of appeals stems from an alternative option for caseload relief – home-circuit senior appellate judges.

Senior judges are an attractive option to chief judges concerned with the disposal of


cases. The requirement that senior judges maintain a caseload equivalent to at least 25% of that maintained by an active court of appeals judge makes senior judges a useful alternative for a managerial-oriented judge concerned with workload. The number of home-circuit senior appellate judges may alleviate the need to use district court judges, particularly as their number increases compared to the number of judges serving on the courts of appeals. As a result, I expect:

Court of Appeals Senior Judge Hypothesis: As the ratio of home-circuit senior appellate judges to active court of appeals judges increases, a district court judge is less likely to be used.

In addition to workload considerations, different circuits may simply have different norms concerning the use of visiting judges. Some circuits may be open to the practice, while others may be skeptical of its implications. Recall the decision of the Circuit Court of Appeals for the District of Columbia to ultimately stop using out-of-circuit visiting judges altogether in 1991 (see Chapter 1, pp. 20). I include a dummy variable (fixed effects) for each circuit, save one, to account for these possible norms.

The preceding discussion suggests that chief judges may be motivated by managerial concerns when making the decision to employ a visiting district court judge for assignment in the courts of appeals. However, chief judges may also be motivated by managerial concerns when selecting among district court judges eligible for service. From a managerial perspective, not all district court judges are equivalent. After all, a chief judge is the chief judge of the entire circuit, not just the court of appeals. Chief judges motivated by managerial goals will be interested in selecting district court judges
in a manner consistent with the managerial concerns of the district courts as well as in the
court of appeals.

As outlined above, workload is frequently a concern for managerial judges. Not
all district court judges face the same working conditions. Much like the court of
appeals, district courts face wide discrepancies in caseloads, vacancies and the
availability of senior judges to serve as an alternative form of workload relief. Chief
judges motivated by managerial concerns should select district court judges who serve in
districts with favorable working conditions. Similar to the conditions for the court of
appeals, these three components paint a picture of the collective working conditions of
the district courts. Managerial chief judges will be less likely to select a district court
district from a district with a higher judicial work-rate. Managerial chief judges should be
less likely to select district court judges from a district facing a high vacancy rate. Lastly,
a managerial chief judge will consider the availability of home-circuit senior district court
judges as possible replacements for the district judge asked to visit in the court of
appeals. These three hypotheses are outlined below:

- **District Court Work-Rate Hypothesis:** As the work-rate of the district court
  increases, a district court judge is less likely to be used as a visitor.

- **District Court Vacancy Hypothesis:** As the percentage of district court
  judgeships vacant increases, a district court judge is less likely to be used as a visitor.

- **District Court Senior Judge Hypothesis:** As the ratio of home-circuit senior district
court judges to active district court judges increases, a district court judge is more
likely to be used as a visitor.
A final workload consideration facing chief judges when selecting among district court judges is the age of the prospective visitor. Managerial chief judge may prefer younger visitors to secure an efficient disposition of cases.

*Age Hypothesis:* As the age of a district court judge increases, the judge is less likely to be used as a visitor.

Finally, chief judges may have managerial goals aside from workload concerns when selecting among eligible district court judges. As the formal leader of the circuit, a chief judge may be motivated to ensure a collegial working environment for the judges of the circuit (Wasby 2003, 70-76). Proponents of the visiting judge process argue that the designation of district court judges in the court of appeals can serve as a socialization tool to integrate newer judges into the life of the circuit and thus promote a comfortable working environment (Cohen 2002, 200). If chief judges do in fact use the visiting judge process to socialize new district court judges, experience should be inversely related to service as a visitor. Judges with little experience should be asked to serve more frequently than their more experienced colleagues.

However, it is equally plausible that chief judges motivated by managerial concerns would prefer judges with more, not less, experience, when selecting among possible visitors. Because visiting requires that a judge maintain her work in both the district and appellate courts, chiefs may be hesitant to ask inexperienced judges to take on such a difficult obligation early in their career. By selecting inexperienced judges who are unable to maintain this balance, a chief could actually exacerbate the workload problems of the circuit as a whole. As a result, while a district court judge’s level of
experience may be related to service as a visitor, the direction of the relationship is not specified.

*Experience Hypothesis: As the level of experience of a district court judge increase, the likelihood of serving as a visitor changes.*

**Measurement and Methodology**

Testing these hypotheses requires a measure of district court judge participation in their home circuit court of appeals. To develop this measure, I have coded the number of case participations per year for district court judges in their home circuit court of appeals from 1997-2009 using the LexisNexis U.S. Federal and State Case search engine\(^57\) (for more on LexisNexis and on all specific coding decisions, see Appendix 1, pp. 177-180). To construct the measure of participation, I searched each district court judge by name for each full year the judge served from 1997-2009\(^58\) and then assigned the number of cases participated in for that year. The search was limited to the district court judge’s home circuit. The variable, *Number of Visits*, is a count, taking the value of the number of cases heard by each district court judge in their home circuit court of appeals for the calendar year. I also created a dichotomous variable, *Visit*, which takes the value of zero if a judge did not visit in the calendar year and a value of one if the judge made one or more visits.

Most of the information necessary to construct the workload variables for the district courts and courts of appeals is available from The Administrative Office of the


\(^{58}\) Only complete judicial service years are included in the analysis. So, if a judge served from July of 1998 through July 2007, only the years 1999-2006 are included. By excluding partial years I avoid the possibility of incorrectly treating the inability to serve and the lack of service as equivalent.
U.S. Courts. Caseload measures were collected from the appropriate years of the Annual Report of the Director: Judicial Business of the United States Courts\textsuperscript{59}. The numbers of authorized judgeships and vacancies were collected from the Authorized Judgeships List\textsuperscript{60} and the Archive of Judicial Vacancies\textsuperscript{61}. The number of senior judges serving in a given court, as well as the age and years of experience of all district court judges used in the analysis, were collected from judicial biographical information maintained by the Federal Judicial Center\textsuperscript{62}.

To create a measure of ideological distance between district court judges and chief judges, I use Judicial Common Space (JCS) scores (for discussion see Appendix 1 pp. 180). JCS scores are particularly useful for this analysis as judges serving in different levels of the federal judiciary must be compared in a common “ideological space” – the primary benefit of the scores (Epstein et al. 2007, 306-307). To create the ideological distance measure, I have taken the absolute value of the difference between the JCS score for the current chief judge and the JCS for the district court judge (Boyd 2010). For the ease of coding the ideology measure, years in which the chief judgeship of a circuit changed hands during the year are excluded from the analysis. The resulting measure, \textit{Ideological Distance}, takes the value of zero if the chief judge and district judge are ideologically indistinguishable and increases as the ideological distance between the two increases. Circuit-level variables (\textit{Court of Appeals Work-Rate, Court of Appeals Percent Vacant, Court of Appeals Senior Judge Ratio}) are included to control for the

\textsuperscript{59} http://www.uscourts.gov/Statistics/JudicialBusiness.aspx
\textsuperscript{60} http://www.uscourts.gov/JudgesAndJudgeships/AuthorizedJudgeships.aspx
\textsuperscript{61} http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx
\textsuperscript{62} http://www.fjc.gov/history/home.nsf/page/judges.html
decision of a chief judge to use a (any) visiting judge. Variables specific to each district
(District Court Work-Rate, District Court Percent Vacant, District Court Senior Judge
Ratio) and district court judge (Age, Experience, Ideological Distance) are included to
determine how chief judges select among judges eligible to serve as visitors.

Two related dependent variables, Visit and Number of Visits, will be used in the
analysis. The first, Visit, is dichotomous, so logistic regression is employed. The second,
Number of Visits, is a count. Because this dependent variable is a count of outcomes,
linear regression is likely to produce inefficient estimates (King 1988, 840). Scholars
(King 1988, 1989; Long 1997) have demonstrated that count data are more efficiently
modeled when the data are assumed to follow a poisson distribution. For the purposes of
this analysis, I estimate a negative binomial regression model. A basic poisson
regression model requires the data to be equidispersed (Long 1997, 230), meaning that
the conditional mean of the data is equivalent to the conditional variance. This is
regularly not the case when the dependent variable suffers from positive contagion,
meaning the presence of one count increases the probability in observing another. In the
case of visits to the court of appeals, the scheduling calendar makes it very likely that
once a district court judge is designated to visit, she will be used to hear more than one
case. As a result, the negative binomial specification is more appropriate.

For both models, allowing each district court judge to appear in the sample
multiple times creates the possibility of non-constant variance, which can artificially
deflate the size of the standard errors (Kennedy 1998, 119-121). To account for this
possibility, I estimate robust standard errors, clustered by district court judge.
Results

The results are presented in Table 3.1. Column 1 presents the results of the logistic regression which examines whether or not a district court judge visited their home circuit court of appeals in a given year. Column 2 presents the results of the negative binomial regression which examines the extent to which a particular visiting judge is used. In terms of the statistical significance of the variables, the models are very similar. For ease of interpretation both models will be discussed together, noting any differences that exist between the two.

I first turn my attention to the question of whether or not to employ a district court judge. Do the working conditions of the court of appeals affect the likelihood that a district court judge will be used? The answer appears to be yes. Although Court of Appeals Work-Rate fails to achieve conventional levels of statistical significance in both models, Court of Appeals Percent Vacant and Court of Appeals Senior Ratio significantly affect the likelihood of visiting. As the percentage of vacant court of appeals seats increases, a district court judge is more likely to be used. In addition, as the ratio of available court of appeals senior judges to active judges increases, a district court judge is less likely to be employed. This conforms to the conventional wisdom that chief judges can turn to senior judges to help alleviate workload concerns. These variables are constructed to collectively represent the “working conditions” facing the court of appeals. To examine if working conditions broadly affect the decision to employ designated district court judges, a Wald Test assesses if the variables, taken together, have a joint
Table 3.1: Model of the Selection of an Active Home-Circuit District Court Judge to Serve as a Visiting Judge

<table>
<thead>
<tr>
<th>Model</th>
<th>Did A Judge Visit?</th>
<th>Number of Case Participations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-3.416**</td>
<td>-3.311**</td>
</tr>
<tr>
<td></td>
<td>(1.101)</td>
<td>(1.056)</td>
</tr>
</tbody>
</table>

**Decision to Use a District Court Judge**

*Managerial Behavior Hypotheses*

- Court of Appeals Work-Rate: -0.0003 (0.0006)
- Court of Appeals Percent Vacant: 3.000*** (0.600) 2.815*** (0.525)
- Court of Appeals Senior Ratio: -0.839* (0.407) -1.347*** (0.401)

**Selecting Among District Court Judges**

*Managerial Behavior Hypotheses*

- District Court Work-Rate: -0.0005* (0.0002) -0.0001 (0.0003)
- District Court Percent Vacant: 0.240 (0.443) -0.210 (0.440)
- District Court Senior Ratio: 0.195 (0.182) 0.114 (0.167)
- Age: -0.023** (0.009) -0.006 (0.008)
- Experience: -0.034*** (0.010) -0.040*** (0.010)

*Strategic Chief Judge Hypothesis*

- Ideological Distance: -0.652*** (0.192) -0.591*** (0.182)

<table>
<thead>
<tr>
<th>Observations</th>
<th>6207</th>
<th>6207</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Clusters</td>
<td>902</td>
<td>902</td>
</tr>
<tr>
<td>Log-Pseudoliklihood</td>
<td>-3145.6091</td>
<td>-9318.3553</td>
</tr>
<tr>
<td>Ln(α)</td>
<td>-</td>
<td>1.788 (0.055)</td>
</tr>
<tr>
<td>A</td>
<td>-</td>
<td>5.979 (0.331)</td>
</tr>
</tbody>
</table>

Estimates in Column 1 are logistic regression coefficients. Estimates in Column 2 are negative binomial coefficients. Robust standard errors clustered by district court judge are in parentheses. Fixed effects for circuit are included in the analysis but not presented.

^p < 0.10 * p < 0.05, ** p < 0.01, *** p < 0.001 for two-tailed tests.
effect on the respective models\textsuperscript{63}. The joint effect is clear: for both the decision to visit
($\chi^2 = 30.34; \text{df} = 3; p < 0.001$) and the frequency of visiting ($\chi^2 = 37.39; \text{df} = 3; p < 0.001$) models, working conditions at the court of appeals have an important effect. This suggests that chief judges consider the working conditions of the court of appeals when deciding to use a visiting judge.

Turning to the variables specific to each district court judge, the results appear mixed. The importance of working conditions in the district courts differs substantially from that of the court of appeals. In Column 1, only District Court Work-Rate achieves conventional levels of statistical significance. As the work-rate facing a district court judge increases the judge is significantly less likely to be asked to visit. Neither District Court Percent Vacant nor District Court Senior Ratio achieves statistical significance. In Column 2, the frequency of visiting, all three variables fail to achieve statistical significance. Assessing their joint contribution, the variables fail in both the decision to visit model ($\chi^2 = 5.53; \text{df} = 3; p < 0.137$) and the frequency of visiting model ($\chi^2 = 1.23; \text{df} = 3; p < 0.746$) to significantly impact the likelihood of a district court judge being used. The results indicate that chief judges do not consider the working conditions of the district court when deciding which district court judges will be designated for service in the court of appeals.

While the working conditions of the district court do not appear to affect the selection of district court judges, the Age of the district court judge may play a role in the

\textsuperscript{63} In this case, a Wald Test is preferable to the more conventional likelihood ratio test because the standard errors are clustered. Because clustering the standard errors prohibits the observations from being truly independent, the likelihood used for estimation is not a true likelihood, rendering the likelihood ratio test invalid. A Wald Test can be used in lieu of a likelihood-ratio test to assess the joint contribution of variables to a model (Korn and Graubard 1990, 273).
decision. Although correlated with Experience (r = .55), the results demonstrate that the age of a possible visitor exhibits an independent effect on the likelihood of being selected. Age is negatively signed and statistically significant in Column 1, indicating that as a judge ages, she is less likely to be asked to visit. However, Age does not appear to affect the frequency of visits. This result represents tentative evidence that chief judges consider the age of district court judges when selecting among possible visitors.

Experience is negatively signed and statistically significant in both models. A chief judge is more likely to select a relatively inexperienced district court judge to visit rather than more experienced colleagues. This result is consistent with claims made by proponents of the visiting judge process that the ability to designate a new district court judge creates a socialization tool available to a chief judge interested in creating harmony within a particular circuit.

Finally, the Strategic Chief Judge measure is negatively signed and statistically significant. As the ideological distance between a district court judge and the circuit chief judge increases, the district court judge is both less likely to be used and is used less frequently. This evidence suggests that chief judges do in fact consider policy implications when selecting among available district court judges.

To assess the substantive importance of this form of strategic behavior on the decision to visit, turn to Figure 3.1, which presents the change in predicted probability of a “typical” district court judge visiting in a calendar year based on her ideological distance from the chief judge. The predicted probability of visiting for a typical district court judge is

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64 The hypothetical judge used to assess the substantive magnitude is a district court judge of the 9th Circuit (modal category) with average age, years of experience, and respective circuit and district court workloads.
court judge who is an ideological clone of the chief judge (Ideological Distance = 0) is 0.42. Moving to the furthest extreme, the district judge–chief judge pairing who are least ideologically similar, the predicted probability of visiting is reduced to 0.26, a 16 percentage point reduction.

Figure 3.1:  The Probability of a District Court Judge Serving as a Visiting Judge in the Court of Appeals

While this change in predicted probability is informative, it is difficult to gauge the full consequences of this strategic behavior solely from the decision to visit or not.
Relying exclusively on this dichotomy obscures important variation in the number of cases a visiting district court judge actually hears. While some district court judges may serve on as few as a single court of appeals case during the year, one visiting district court judge in the sample served in 67. To fully examine this variation, refer to Figure 3.2. Figure 3.2 presents the expected number of visits for the typical district court judge discussed earlier, again contingent on her ideological compatibility with the chief judge.

The change, again, is substantively consequential. An ideological clone of the chief judge, holding all other considerations constant, is predicted to serve in just under 3 (2.93) cases per year. By comparison, the district court judge least compatible with the chief judge is predicted to serve in only 1.52 cases per year. While this difference may not appear dramatic, it is important to remember that it represents nearly twice the number of cases in which a judge is expected to serve. Additionally, district court judges served in 10 or fewer cases in approximately 90% of the observations, making the substantive change observed here even more impressive. Taken together, Figures 1 and 2 highlight not only the statistical significance, but also the substantive importance, of this form of strategic behavior.

The evidence presented here demonstrates that chief judges do in fact behave strategically when selecting which district court judge visitors. As noted above, the lack of formal constraints on chief judges when selecting among these judges creates the greatest opportunity for strategic behavior. However, this lack of constraint is the exception and not the rule for most types of visiting judges. In the case of active out-of-circuit visitors, chief judges are formally constrained by the Judicial Conference of the United States and the preferences of the chief judge of the lending circuit. Informally,
there is a strong expectation that out-of-circuit visitors agree to a visit before any reassignment is made. Does the strategic behavior of chief judges observed in the case of home-circuit district court judges generalize to other types of visiting judges, or do rules
and norms limiting the discretion of chief judges in their selection of visitors undermine their incentive or ability to behave strategically?

To test this proposition, I reproduce the analysis provided in Column 1 of Table 3.1 using data on the visits made by all active out-of-circuit appeals court judges. Like the case of home-circuit active district court judges, focusing on active out-of-circuit appeals judges helps reduce the universe of possible visitors to a more manageable number. Unlike the case of these district court judges, chief judges are not totally unconstrained in their selection of out-of-circuit appellate visitors. This intervening requirement has the possibility of mitigating both the motivation and the ability of a circuit chief to strategically among select these out-of-circuit visitors.

To create the necessary dataset of visits, I coded whether each active out-of-circuit appeals court judge heard a case in each regional circuit (other than their home-circuit) for each full calendar year that judge was active. The procedure yields a possible eleven annual judge-circuit dyads. To test the Strategic Chief Judge Hypothesis, I take the ideological distance (as measured by JCS scores) between each circuit chief judge and the possible visitor. To control for possible managerial motivations of chief judges, I again include measures of work-rate, vacancy percentage and senior judge ratio. For ease of interpretation, I have renamed these variables Receiving Circuit Work-Rate, Receiving Circuit Percent Vacant and Receiving Circuit Senior Judge Ratio. In lieu of including variables taping the working conditions of the lending district court, I instead include variables taping the working conditions of the lending circuit: Lending Circuit Work-Rate, Lending Circuit Percent Vacant and Lending Circuit Senior Judge Ratio. The Experience and Age included are identical to those of the previous model. I do include
one new variable, *Geographic Distance*, which measures the physical distance between the locations of the seats of each regional circuit. Chief judges could plausibly select visitors from circuits that are closer for the convenience of the chief and of the visitor. The *Geographic Distance* measure captures that possible effect, and is measured by taking the total number of miles between the official courthouses of the respective circuits. Receiving circuit fixed effects are included but not shown\(^65\).

Rather than reproducing both columns of Table 3.1, I reproduce only Column 1 - the logistic regression model. The dyadic setup of the data produces many more zeros than actual visits, meaning the data can be defined as being “rare events” (King and Zeng 2001, 138). Currently, rare events specifications are only available for logistic regression models. Because rare event specifications are not available for count models, I chose not to model the total number of visits\(^66\). Rather, I estimate a rare events logistic regression model of whether or not a judge visited a particular circuit in a particular year. To account for the possibility of heteroskedasticity, I employ robust standard errors, clustered on the visiting judge.

The results of the analysis are presented in Table 3.2. Most of the results are consistent with expectations. In terms of the working conditions of the lending circuit, while the percentage of vacant seats fails to exhibit a significant effect, both *Lending Circuit Work-Rate* and *Lending Circuit Senior Judge Ratio* are correctly signed and statistically significant. As the work-rate of the lending circuit increases, visitors are less

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\(^{65}\) I also estimated the models using lending circuit fixed effects. The results are substantively similar.  
\(^{66}\) If the count model is estimated without the rare events specification, the results are substantively similar to the rare events logistic regression model. The variable capturing the *Strategic Chief Judge Hypothesis* is signed negatively and is statistically insignificant.
likely to be selected from that circuit. However, as the ratio of available senior judges increases, the more likely a visitor from that circuit is likely to be selected. In terms of

<p>| | | |</p>
<table>
<thead>
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<tbody>
<tr>
<td><strong>Constant</strong></td>
<td>1.15</td>
<td>(4.16)</td>
</tr>
<tr>
<td><strong>Lending Circuit</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Work-Rate</td>
<td>-0.01***</td>
<td>(0.00)</td>
</tr>
<tr>
<td>Percent Vacant</td>
<td>-4.02</td>
<td>(2.70)</td>
</tr>
<tr>
<td>Senior Judge Ratio</td>
<td>3.67**</td>
<td>(1.30)</td>
</tr>
<tr>
<td><strong>Receiving Circuit</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Work-Rate</td>
<td>-0.004***</td>
<td>(0.001)</td>
</tr>
<tr>
<td>Percent Vacant</td>
<td>0.36</td>
<td>(2.27)</td>
</tr>
<tr>
<td>Senior Judge Ratio</td>
<td>-2.22**</td>
<td>(0.84)</td>
</tr>
<tr>
<td>Geographic Distance</td>
<td>-0.001^</td>
<td>(0.000)</td>
</tr>
<tr>
<td>Age</td>
<td>-0.06</td>
<td>(0.06)</td>
</tr>
<tr>
<td>Experience</td>
<td>0.11**</td>
<td>(0.04)</td>
</tr>
<tr>
<td>Strategic Chief Judge Hypothesis</td>
<td>-0.37</td>
<td>(0.99)</td>
</tr>
</tbody>
</table>

| Observations           | 8789             |
| Number of Clusters     | 226              |

Estimates are rare events logistic regression coefficients. Robust standard errors clustered by visiting judge are in parentheses. Fixed effects for receiving circuit are included in the analysis but not presented.  
^ p < 0.10 * p < 0.05, ** p < 0.01, *** p < 0.001 for two-tailed tests.

Table 3.2: Model of the Selection of an Active Out-of-Circuit Appeals Court Judge to Serve as a Visiting Judge
the receiving circuit, the results are less clear. *Receiving Circuit Senior Judge Ratio* is statistically significant and in the expected direction (negative). While the receiving circuit vacancy rate is insignificant, the work-rate is statistically significant but negatively signed, meaning that as the work-rate of the circuit increases, the less likely the circuit will be to employ an active out-of-circuit appeals court judges. This result runs counter to expectations and may be a function of the ability of circuit chief judges to select among different types of visitors. Further examination is necessary to clarify this seemingly aberrant finding.

Consistent with expectations, *Geographic Distance* is negative and approaching statistical significance (p=0.056) meaning that visitors are more likely to be selected from closer circuits. Although *Age* is not significantly related to visiting, the *Experience* measure is statistically distinguishable from zero. Interestingly, while *Experience* was negatively related to visiting for active home-circuit district court judges, it is positively related to visiting for active out-of-circuit appellate court judges. This result offers additional evidence that chief judges use the visiting judge process to socialize inexperienced home-circuit district court judges. Chief judges are more likely to select less experienced district court judges, presumably to help socialize those judges into the life of the circuit. This socialization motivation is lacking for out-of-circuit visitors. As a result, it is unsurprising that chief judges are more likely to select experienced active out-of-circuit appeals court judges, all other things being equal.

Most importantly, unlike Table 3.1, the *Strategic Chief Judge Hypothesis* fails to find support. The coefficient is signed in the correct direction (negative) but is not statistically distinguishable from zero. While the large standard error is likely in part a
function of the uncommon nature of visits by active out-of-circuit appeals court judges to other circuits, the coefficient fails to even approach conventional levels of statistical significance. The results provide no evidence that chief judges strategically select among these particular visitors.

Discussion

The choices of circuit chief judges examined here demonstrate that the use of visiting judges induces strategic behavior in the U.S. Courts of Appeals. The visiting judge process represents a deviation from the typical court of appeals institutional context. The theoretical perspective developed in Chapter 2 suggests that changes in group membership should affect the behavior of individual group members in a number of ways. One way that group membership should affect behavior is by generating opportunities to behave strategically. In this case, the change brought about by the presence of visiting judges allows circuit chief judges to use these temporary members to more effectively pursue their policy goals. Chief judges are largely responsible for the selection of visiting judges, who alter the distribution of ideological preferences in the court of appeals. By selecting visiting judges with shared ideological preferences, chief judges have the opportunity to tilt the ideological balance of the court in their favor, making it more likely that panels will be comprised of judges who share their preferences. In the selection of active home-circuit district court judges, chief judges engage in exactly this behavior. All things being equal, active home-circuit district court judges whose ideological preferences mirror those of the circuit chief judge are both more likely to visit (Table 3.1 Column 1) and visit more frequently (Table 3.1 Column 2).
than their colleagues whose ideological preferences differ from those of the chief judge. This offers confirmatory evidence that the visiting judge process does cause strategic group effects in the courts of appeals.

These strategic group effects are not present, however, when chief judges select among active out-of-circuit appeals court judges. Unlike the case of the district court judges, the ideological distance between a circuit chief judge and a possible visitor has no effect on the likelihood of that judge visiting. This result appears to undermine the validity of the Strategic Chief Judge Hypothesis. However, it is important to recall the different rules governing these two types of visiting judges. While chief judges are completely unconstrained in their selection of active home-circuit district court judges, all out-of-circuit visitors must be approved by the Judicial Conference of the United States. This institutional feature likely limits strategic behavior of chief judges. In order to behave strategically, judges must both be motivated and have the opportunity to engage in this form of costly behavior (see Chapter 2, pp. 39-40). Because many judges and commentators would likely view the strategic selection of visitors as illegitimate, the knowledge that all decisions regarding out-of-circuit visitors will be reviewed likely reduces the motivation for chief judges to select strategically. What is more, even if a chief judge attempts to behave strategically, the Conference has the power to refuse to consent to an out-of-circuit assignment. For these reasons, it should not be surprising that the Strategic Chief Judge Hypothesis fails to find support. In their selection of visiting judges, chief judges engage in strategic behavior, but only when the costs to doing so are comparatively few.
Of course, the visiting judge process is not dictated entirely by strategic behavior. Chief judges also appear to be motivated by managerial goals. For both types of visiting judges, working conditions affect how visitors are utilized. In the case of active home-circuit district court judges, the importance of court of appeals workload is clear in both model specifications. Chief judges turn to these district court judges, and turn to them often, when working conditions at the court of appeals are not favorable for the efficient disposal of cases. This is true regardless of a judge’s personal characteristics; all district court judges are objectively more likely to be used as visitors when working conditions at the court of appeals are poor. However, chief judges fail to consider the working conditions of the district courts when selecting specific judges to serve as visitors. None of the variables designed to capture the working conditions of the district court affect the likelihood that a judge will serve as a visitor.

Managerial goals are also apparent in the selection of active out-of-circuit appeals court judges, although their effects are less consistent. While variables tapping the working conditions of the lending circuit behave consistently with expectations, those tapping the conditions of the receiving circuit produce at least one anomalous result. While further research will be necessary to understand why receiving circuits would be less likely to use an active out-of-circuit appeals visitor when their work-rate is increasing, the results of both of the analyses generally support the notion that chief judges respond to working conditions when selecting visiting judges.

Perhaps the most compelling finding related to managerial concerns has nothing to do with workload but is observed in the role of a possible visitor’s previous experience as a judge. Experience significantly affects the likelihood of visiting for both types of
visitors examined here. However, the effects are in opposite directions: as experience increases a district court judge is less likely to visit, while an out-of-circuit judge is actually more likely to visit. One consistent claim among commentators is that the visiting judge process can be used as a socialization tool to help familiarize judges with the rules and norms governing a judicial circuit. The demonstrated effect of experience is consistent with such a hypothesis. While chiefs may be concerned that their own district court judges quickly become familiar with the rules and norms of the circuit, they are unlikely to be motivated to socialize out-of-circuit visitors. With the socialization motivation absent, chief judges would be likely to turn to experienced out-of-circuit visitors, who would (presumably) require less assistance when visiting an unfamiliar circuit. This unique finding offers the best evidence that chief judges, in addition to having policy and workload goals, may be motivated to maintain collegiality within their circuits. This motivation should not be terribly surprising – the role of the chief circuit judge has largely been viewed as an administrative one. The evidence presented here suggests that there is at least substantial truth behind this reputation.

**Conclusion**

This chapter has demonstrated that the visiting judge process has important implications for judicial behavior in the courts of appeals. Visitors provide policy-minded chief judges opportunities to engage in strategic behavior that otherwise would be unavailable. However, this is not the only manner in which visitors are expected to affect judicial behavior in the courts of appeals. In addition to strategic group effects, visiting

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judges can foster non-strategic group effects, which I have termed psychological group effects. While this chapter has demonstrated one important group effect, an entire second class remains unexplored. The next two chapters examine psychological group effects in detail. Rather than examining how court of appeals judges consciously use visitors, the next two chapters examine how the presence of visiting judges can affect judicial behavior in ways appellate judges may not even be aware. Only an investigation of both types of group effects can offer a complete understanding of the consequences of the visiting judge process.
CHAPTER 4: THE BEHAVIOR OF VISITING JUDGES IN THE U.S. COURTS OF APPEALS

The previous chapter demonstrated that the use of visiting judges in the U.S. Courts of Appeals fosters strategic group effects by inducing strategic behavior among circuit chief judges. In this and the following chapter, I examine the non-strategic group effects caused by the use of visitors. Characterized as psychological group effects, the use of visiting judges is theorized to affect judicial behavior through psychological processes and pressures unrelated to strategic behavior. In this chapter I examine how the perception that visiting judges are of lesser status than regular panel members affects the behavior of judges serving in the courts of appeals. Specifically, I test three hypotheses. First, I examine the Visitor Formal Deference Hypothesis, which suggests that visiting judges will be less likely than regular panel members to author a dissenting opinion. Second, I examine the Visitor Informal Deference Hypothesis, which argues that the ideological preferences of regular panel members will have greater influence on visiting judges than on other panel members. Lastly, I test the Visitor Influence Hypothesis, which suggests that, when compared to the preferences of a regular court of appeals judge, the preferences of a visiting judge will have less of an influence on the other panel members. Analyzing votes cast by judges serving in the courts of appeals, the results paint a mixed picture. Visitors, particularly district court visitors, are formally
deferential in the decision-making process. However, there is no evidence to suggest that any visitors are more likely to be influenced by the preferences of regular court of appeals judges, nor are the preferences of visiting judges less influential in the group decision-making process. While visiting judges are less active in the formal aspects of the decision-making process, the presence of a visiting judge does not allow court of appeals judges to dominate at their expense.

**Psychological Groups Effects and Visiting Judges in the U.S. Courts of Appeals**

Visiting judges are perceived by many appellate judges and legal commentators as being of lower status when serving in the courts of appeals. Although formally equal in the decision-making process, visitors differ from regular panel members in several important characteristics. District court visitors are formally nominated and confirmed to a different (lower) level of the federal judicial hierarchy. Out-of-circuit visitors, on the other hand, are confirmed to the same hierarchical level of the judiciary as regular panel members, but to an entirely distinct regional circuit. All visitors are temporarily reassigned to the court and are thus not fully socialized into the decision-making group. These characteristics create an inherent “otherness” to visitors that has led to perceptions of inferiority from commentators discussing the visiting judge process. Anecdotal evidence abounds (Chapter 2, pp. 47-49) in which both regular panel members and visiting judges themselves characterize visitors as being of lower status.

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68 The “otherness” of visiting judges demonstrates the importance of excluding home-circuit senior court of appeals judges from the analysis. Because these judges were in fact once a member of the decision-making group, it is difficult to assume they are perceived to be as different as any other type of visiting judge.
Theories of small group decision-making have demonstrated how status differences within groups can affect the decision-making process. Developed primarily in the field of social psychology, the consistent finding among these investigations has been the deferential role played by lower status group members (for a review of the literature, see Chapter 2 pp. 49). In the formal aspects of the decision-making process, low status group members are consistently less active, fail to make independent contributions to the group, and are less likely to complete their “fair share” of the group work when compared to higher status members. In the less formal aspects of the process, low status members tend to have less influence over the outcome of the decision-making process. High status members minimize or ignore the preferences and opinions of lower status group members. As a result, low status members are expected to make few contributions, either formally or informally, when working in groups with higher status members.

Studies examining how group member status differences affect decision-making in appellate courts arrive at similar conclusions. In one of the earliest examinations of group member status in appellate courts, Walker (1973) investigated how the behavior and role expectations of judges change when temporary members are part of the decision-making process. Studying the Washington State Supreme Court, a tribunal with 9 regular members which occasionally (due to sickness or recusal) makes use of nonmember judges, Walker found evidence that temporary members were largely deferential to regular panelists. Temporary members were not only willing to act in a compliant manner, but were used as “vehicle[s] for workload reduction of routine”, with regular members being unwilling to “use him [the visitor] for important tasks” (144-145).
The importance of group member status has also been examined in the use of visiting judges. Consistent with expectations, visiting judges are less likely to make contributions during opinion-crafting (Owens and Black 2009), are less likely to author concurring or dissenting opinions (Benesh 2006; Green and Atkins 1978; Saphire and Solimine 1995) and may be less likely to be assigned the majority opinion (Brudney and Ditslear 2001, but also see Benesh 2006 and Green and Atkins 1978). Although these examinations are suggestive of the fact that visiting judges are in fact deferential in the decision-making process, they tell only part of the story. All of these analyses have examined the extent to which visitors are deferential in the formal aspects of the decision-making process. None have analyzed the extent to which visiting judges are deferential in the informal aspects of the decision-making process. In this chapter I attempt to complete this picture. Testing hypotheses derived in Chapter 2, I examine the extent to which visiting judges are deferential, both in the formal and the informal aspects of the decision-making process. By examining both types of deference, this chapter offers the first complete analysis of how visiting judges affect decision-making in the U.S. Courts of Appeals.

### 4.2 Formal Deference

#### 4.2.1 Hypotheses

Visiting judges are formally equal to regular panel members when serving in the courts of appeals. Visitors are privy to all case materials, including briefs, histories, lower court decisions, etc. available to regular panel members. Visiting judges are required to be in attendance for all cases granted a hearing and are permitted to be an
active part of the hearing process. After arguments, their votes are weighted equally to those of regular panel members. Visitors are permitted to author majority, concurring and dissenting opinions. For the purposes of the formal aspects of the decision-making process, visiting judges and regular panel members should be indistinguishable.

In practice, however, visiting judges may not use their formal equality to behave similarly to regular panel members. If visiting judges are in fact deferential to regular panel members, it is unlikely that they will feel comfortable asserting themselves into the decision-making process any more than is necessary. Rather than fully embracing her role as a panel member, a deferential visitor will go along with the other two panel members, doing as little as possible to disrupt the decision-making process. As a result, I expect the following:

*Visitor Formal Deference Hypothesis:* Visiting judges will be less likely to author a dissenting opinion than their full status colleagues.

To assess the *Visitor Formal Deference Hypothesis*, I examine the decision to cast a dissenting vote and thus author a dissenting opinion. Obviously the decision to dissent represents just one aspect of the formal decision-making process. However, I focus on the decision to dissent for several reasons. First, casting a dissenting vote is an observable, easily measureable, aspect of the decision-making process. While it may be more informative to examine the extent to which judges participate in all aspects of the decision-making process (see Owens and Black 2009), systematic and reliable data on this type of participation is difficult to obtain.

Secondly, and perhaps more importantly, casting a dissenting vote is a form of truly discretionary behavior in the courts of appeals. In the case of majority opinion
writing, there may be an expectation at all judges, regardless of status, complete their fair share of the work. This expectation is likely amplified by the scheduling patterns for most panels; judges (including visiting judges) assigned to a panel will serve on that panel for a designated amount of time (typically two weeks) before being reassigned. As such, panelists hear and dispose of a series of cases together. This may cause judges to expect all panel members to contribute equally to the required output for each case – a majority opinion.

Such an expectation does not exist when dissenting from the majority opinion. If anything, there is an expectation, given the tremendous workload pressures facing the courts of appeals, for judges to avoid casting dissenting votes whenever possible. Because panels are comprised of three members, any judge willing to cast a dissenting vote must necessarily “go it alone”, meaning that all dissenters will be solely responsible for producing a dissenting opinion. Authoring a dissenting opinion is costly in terms of time and effort. For a court constantly perceived to be overburdened by caseload demands, expending the time and effort necessary to craft an opinion that does not ultimately contribute to the precedential value of a case is viewed as unnecessary. The expectation that judges serving in the courts of appeals avoid dissenting when possible is borne out in their behavior; dissenting opinions are much less common in the courts of appeals than in other appellate courts (Hettinger et al. 2004, 125). The discretionary nature of dissenting, coupled with a prior expectation that judges avoid the practice, makes the decision to dissent well-suited to examine deferential behavior. If visitors feel pressure to be deferential, they should be much less likely to dissent than regular panel members.
However, not all visitors may feel equal pressure to defer. As discussed in Chapter 2 (pp. 47) most of the anecdotal evidence concerning the deference of visiting judges has focused on district court judges sitting by designation in the courts of appeals. Status differences may be particularly salient for district court visitors. As judges typically serving on trial courts, district court judges are likely less familiar with the rules and tenets of appellate decision-making. Further, because district court judges are appointed to a “lower” level of the federal judicial hierarchy, the perception that they are of lower status may be even more pronounced. This is especially true in comparison to most out-of-circuit visitors, many of whom are appointed to a co-equal level of the federal judiciary and are thus familiar with appellate decision-making. To examine these possibilities, I offer a second test of the Formal Visitor Deference Hypothesis by examining the effects of district court and out-of-circuit visitors separately.

Previous research has demonstrated that a number of additional factors affect the likelihood of dissenting in the courts of appeals (Hettinger et al. 2003, 232). Primary among these is the ideological preferences of the members of the panel. On panels where the judges share similar policy preferences, the majority opinion is likely to effectively represent the views of all panel members. Even if their policy preferences slightly diverge, the norm of consensus and the costs associated with writing alone are typically strong enough to dissuade judges from authoring dissenting opinions. On the other hand, when a judge has dissimilar policy preferences to those of the other panel members, the content of the majority opinion is less likely to satisfy the outlying judge. This dissatisfaction may be strong enough to overcome the expectation against and costs of dissenting. As a result, I expect:
**Ideological Distance Hypothesis:** As the ideological distance between a judge and the other panel members increases, the likelihood of a judge dissenting increases.

A second ideological consideration related to the decision to dissent concerns the ideological preferences of the panel members and the ideological preferences of the circuit as a whole. One of the distinguishing features of the courts of appeals is the ability of the circuit as a whole to monitor the decisions of individual panels through the use of en banc review (Giles et al. 2006). If petitioned, the circuit court of appeals can chose to review any decision made by one of the circuit’s panels. If the decision of an individual panel strays too far from the collective preferences of the circuit, the circuit as a whole has the option of reviewing (and changing) the decision.

The threat of en banc review has led some scholars to theorize that judges may dissent to serve as “whistleblowers” (Cross and Tiller 1998). The logic of the whistleblower hypothesis is simple: if a panel majority strays too far from the preferences of the entire circuit, an unsatisfied panel member will write a dissenting opinion to signal (i.e. blow the whistle) the circuit that the panel has deviated from the circuit’s preferences. Empirical analyses are suggestive of “whistleblower” behavior in the courts of appeals (Cross and Tiller 1998; Kim 2009). To control for the possibility that casting a dissenting vote is actually this form of strategic behavior, I examine the:

**Whistleblower Hypothesis:** The effect of the ideological distance between a judge and other panel members on the likelihood of dissenting increases as the ideological distance between the preferences of the panel and the preferences of the circuit as a whole increases.

In addition to the distribution of ideological preferences, several other factors have been shown to affect the likelihood of casting a dissenting vote. One such factor is
whether the appellate court reverses or affirms the decision of the court below. Most appeals are affirmed by the appeals court. The decision to reverse a lower court demonstrates disagreement within the lower federal judiciary over the proper outcome of the case. Open disagreement may allow judges to feel more comfortable expressing their displeasure with the majority opinion, as no clear consensus has emerged within the lower federal judiciary over the proper outcome of the case. As a result, I expect:

Reversal Hypothesis: A judge is more likely to dissent when the court of appeals reverses a lower court decision.

An additional factor related to the decision to dissent is the involvement of third parties through the submission of amicus curiae briefs. Amicus participation is rare in the courts of appeals. As a result, scholars have theorized that amicus briefs raise the salience of cases when present (Hettinger et al. 2003, 224). Not all cases are equal in terms of their policy consequences, and the strength of a judge’s policy preferences may vary based on the potential policy impact of a case. If cases in which amicus briefs are filed are disproportionately consequential in terms of their effect on legal policy, judges may have stronger policy preferences over the disposition of these cases. The strength of a judge’s policy preferences may be enough to overcome the norm of consensus and motivate the judge to offer a true expression of her preferences. The presence of an amicus brief can signal to judges the policy importance of a particular case. As a result, I expect:

Amicus Participation Hypothesis: A judge is more likely to dissent when an amicus curiae brief is present.

A similar expectation exists for the types of cases heard in the courts of appeals. Amicus participation is not the only signal of a case’s salience. The very nature of the
case itself, whether a case concerning tax litigation, labor unions, or the First Amendment, can also serve as a signal of salience. Some issues are inherently more salient to judges than others. Rather than attempting to determine which issues are most salient, I include three controls, *Criminal, Civil Rights* and *Economic*, for the most common types of cases heard in the courts of appeal. The excluded category represents all additional issue types\textsuperscript{69}.

*Measurement and Methodology*

The data used for this analysis are drawn from the Update to the Appeals Courts Database (1997-2002)\textsuperscript{70}. The Original U.S. Appeals Courts Database (1925-1996) was designed to create an extensive dataset that would facilitate the empirical analysis of judicial behavior in the United States Courts of Appeals. The Update to the Appeals Courts Database extends this project, both in terms of time (including more calendar years) and scope (the inclusion of new variables, primarily related to amicus participation). This database provides a unique data source that allows scholars to examine many forms of judicial behavior in the courts of appeals in a common, systematic fashion (for more on the Courts of Appeals Databases, see Appendix 1, pp. 180-183).

To effectively examine the hypotheses related to formal deference, I use a “flipped” version of the Update to the Court of Appeals Database. The initial database is “case-centered”, meaning a single observation exists for each case used. However,

\textsuperscript{69} This includes issues related to labor relations as well as a “miscellaneous” category.  
\textsuperscript{70} The database is publicly available and is housed by the Judicial Research Initiative (JuRI) at the University of South Carolina. The database can be accessed at http://www.cas.sc.edu/poli/juri/appct.htm.
because I am interested in the behavior of individual judges, it is necessary that the database be “judge-centered”, meaning that there are three observations for each case: one for every judge serving on the panel. After flipping the database, the analysis includes 6186 judge-level observations, derived from 2062 distinct cases. From this dataset I derived the dependent variable Dissent, which takes the value of one if a judge authors a dissenting opinion, zero otherwise.

In terms of independent variables, a dummy variable, Visitor, is included in the primary analysis to test the Visitor Formal Deference Hypothesis. If visitors are in fact less likely to author a dissenting opinion than regular panel members, this variable should be negative signed. To test the Ideological Distance Hypothesis, I again rely on Judicial Common Space (JCS) scores (see Chapter 3, p. 71 and Appendix 1, p. 180 for discussion). To estimate ideological distance, I take the absolute value of the difference between the judge’s JCS score and the average JCS score of the other two panel members. I expect that as this value increases, the likelihood of authoring a dissenting opinion will also increase. To examine the Whistleblower Hypothesis I create a new variable designed to measure a panel’s ideological proximity to the circuit as a whole, Panel Distance. Panel Distance takes the absolute value of the difference between the JCS scores of the median panel member and the median circuit court of appeals member. I then interact Panel Distance with Ideological Distance to create the Whistleblower measure. My expectation is that Whistleblower is positively signed; the likelihood of an judge in the ideological minority writing a dissenting opinion will increase as the

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71 The database does include cases reviewed en banc. For the purposes of this analysis, I have excluded such cases.
preferences of the panel diverge from those of the circuit as a whole. To test the *Reversal* and *Amicus Participation* hypotheses, I include two dummy variables. *Reversal* takes the value of one if the appeals court reversed the lower court, zero otherwise. *Amicus Participation* takes the value of one if at least one amicus brief was filed, and zero otherwise. I also include dummy variables capturing whether a case pertained to *Criminal* matters, *Civil Rights* or *Economics*. Fixed effects for circuits are included but not presented. Because the dependent variable is dichotomous, I employ logistic regression. Robust standard errors, clustered by judge, are included.

**Results**

The results of the analysis are presented in the first column of Table 4.1. Turning first to the control variables, most behave in a manner consistent with expectations. *Ideological Distance* is positively signed and statistically significant, suggesting that judges who are ideologically distant from the other members of a panel are more likely to cast a dissenting vote. While *Ideological Distance* appears to affect the likelihood of dissenting, this effect does not appear to be conditioned on the relationship between the panel and the circuit as a whole. The *Whistleblower* variable, which acts as an interaction between *Ideological Distance* and *Panel Distance*, is not significantly distinguishable from zero. Judges who are ideologically distant from the other panel members are more likely to dissent, but are not any more likely to dissent when the other panel members are ideologically distant from the preferences of the collective circuit. This result appears to undermine the notion that judges serving in the court of appeals behave strategically when deciding to dissent from the majority opinion.
<table>
<thead>
<tr>
<th></th>
<th><strong>All Visitors</strong></th>
<th><strong>District Court Visitors</strong></th>
<th><strong>Out-of-Circuit Visitors</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Constant</strong></td>
<td>-6.10***</td>
<td>-6.11***</td>
<td>-6.10***</td>
</tr>
<tr>
<td></td>
<td>(0.68)</td>
<td>(0.68)</td>
<td>(0.68)</td>
</tr>
<tr>
<td><strong>Visitor</strong></td>
<td>-0.21</td>
<td>-0.35***</td>
<td>-0.26</td>
</tr>
<tr>
<td></td>
<td>(0.16)</td>
<td>(0.11)</td>
<td>(0.23)</td>
</tr>
<tr>
<td><strong>Ideological Distance</strong></td>
<td>0.67*</td>
<td>0.68*</td>
<td>0.66*</td>
</tr>
<tr>
<td></td>
<td>(0.26)</td>
<td>(0.26)</td>
<td>(0.26)</td>
</tr>
<tr>
<td><strong>Panel Distance</strong></td>
<td>0.86*</td>
<td>0.93*</td>
<td>0.84*</td>
</tr>
<tr>
<td></td>
<td>(0.40)</td>
<td>(0.40)</td>
<td>(0.40)</td>
</tr>
<tr>
<td><strong>Whistleblower</strong></td>
<td>-0.70</td>
<td>-0.75</td>
<td>-0.65</td>
</tr>
<tr>
<td></td>
<td>(0.76)</td>
<td>(0.75)</td>
<td>(0.76)</td>
</tr>
<tr>
<td><strong>Amicus Participation</strong></td>
<td>0.35^</td>
<td>0.34^</td>
<td>0.35^</td>
</tr>
<tr>
<td></td>
<td>(0.18)</td>
<td>(0.18)</td>
<td>(0.18)</td>
</tr>
<tr>
<td><strong>Reversal</strong></td>
<td>0.22^</td>
<td>0.22^</td>
<td>0.22^</td>
</tr>
<tr>
<td></td>
<td>(0.12)</td>
<td>(0.12)</td>
<td>(0.12)</td>
</tr>
<tr>
<td><strong>Criminal</strong></td>
<td>2.23***</td>
<td>2.21***</td>
<td>2.23***</td>
</tr>
<tr>
<td></td>
<td>(0.62)</td>
<td>(0.62)</td>
<td>(0.62)</td>
</tr>
<tr>
<td><strong>Civil Rights</strong></td>
<td>2.16***</td>
<td>2.15***</td>
<td>2.17***</td>
</tr>
<tr>
<td></td>
<td>(0.63)</td>
<td>(0.63)</td>
<td>(0.63)</td>
</tr>
<tr>
<td><strong>Economics</strong></td>
<td>2.00***</td>
<td>2.00***</td>
<td>2.00***</td>
</tr>
<tr>
<td></td>
<td>(0.61)</td>
<td>(0.62)</td>
<td>(0.62)</td>
</tr>
<tr>
<td><strong>Observations</strong></td>
<td>6251</td>
<td>6234</td>
<td>6251</td>
</tr>
<tr>
<td><strong>Number of Clusters</strong></td>
<td>492</td>
<td>492</td>
<td>492</td>
</tr>
<tr>
<td><strong>Log-Pseudolikelihood</strong></td>
<td>-1938.16</td>
<td>-1932.00</td>
<td>-1938.59</td>
</tr>
</tbody>
</table>

Estimates are logistic regression coefficients. Robust standard errors clustered by judge are in parentheses. Fixed effects for circuit are included in the analysis but not displayed.

^ p < 0.10 * p < 0.05, ** p < 0.01, *** p < 0.001 for two-tailed tests.

Table 4.1: Model of the Decision of a Visiting Judge to Dissent

Consistent with expectations, both *Amicus Participation* and *Reversal* are positively signed and statistically significant. Judges are more likely to cast dissenting opinions in salient cases, as measured by the presence of an amicus curiae brief. Judges also appear to be more willing to voice disagreement if the appellate court chooses to reverse the lower court in their decision. All three issue types, *Criminal, Civil Rights* and *Economics*, are more likely to produce dissenting opinions than the excluded categories.
Turning to the primary variable of interest, Visitor is correctly signed (-) but fails to reach conventional levels of statistical significance. Contrary to expectations, visitors are not any more or less likely to author a dissenting opinion than regular court of appeals members. This finding is surprising, given both strong theoretical expectations and previous research demonstrating the deferential nature of visiting judges (Benesh 2006; Owens and Black 2009., Brudney and Ditslear 2001; Green and Atkins 1978). However, most of these analyses have focused exclusively on district court judges serving by designation, not on all types of visiting judges. Perhaps, as discussed above, district court judges are more likely to be deferential because of the hierarchical nature of their status differences?

To examine the possibility, refer to Columns 2 and 3 of Table 4.1. Column 2 reproduces the analysis presented in Column 1. In Column 2 the variable Visitor only takes the value of one if the visiting judge is a district court judge sitting by designation. In Column 3 the same analysis is again reproduced, this time with the variable Visitor taking the value of one only if the visiting judge is an out-of-circuit visitor.

Turning first to Column 2, all of the control variables retain their sign and level of statistical significance. The only change can be found in the Visitor variable, which is again negatively signed, but is now statistically distinguishable from zero. Consistent with anecdotal accounts, district court judges are less likely to dissent when serving in the courts of appeals. The magnitude of this effect is also substantively significant.

Controlling for all other variables in the model\textsuperscript{72}, the predicted probability of any judge

\textsuperscript{72} Ordinal or continuous variables are held at their mean levels. All categorical variables are held at their modal values.
other than a district court visitor authoring a dissenting opinion is 2.56%. However, the probability of a visiting district court judge authoring a dissenting opinion is only 1.81%. While this difference may not appear large in terms of absolute magnitude\textsuperscript{73}, relatively speaking, the difference is substantial. A visiting district court judge is roughly 30% less likely to author a dissenting opinion than all other judges serving in the courts of appeals. The substantive importance of this finding is magnified when one considers that district court judges are overwhelmingly the most common type of visiting judge. In 2010 alone, visiting judges participated in 3,568 appeals. Although the finding may not appear substantively meaningful in the absolute, interpreted in its proper context, the deference demonstrated by district court visitors has a substantial effect on the decision-making process.

The fact that district court visitors are less likely to author dissenting opinions is particularly informative when interpreted in conjunction with the results presented in Column 3. Again, all control variables retain their sign and level of statistical significance. In Column 3 the \textit{Visitor} variable, which indicates if a judge is an out-of-circuit visitor, fails to reach statistical significance. Unlike district court judges, out-of-circuit visitors are just as likely to dissent as other regular panel members. The results of these analyses, taken together, suggest that while district court judges are formally deferential, there is little evidence to suggest out-of-circuit judges are any less likely to

\textsuperscript{73} The low predicted probabilities are largely a function of the strong norm of consensus operating in the courts of appeals. They are also a function of the controls; many variables significantly and positively related to dissenting (such as the presence of an amicus brief or the reversal of a lower court) are held at their modal category of zero.
dissent than regular court of appeals judges. Formal deference exists for visitors, but does so only for district court judges.

**Informal Deference**

*Hypotheses*

The results presented above demonstrate that district court judges are formally deferential in the decision-making process. All things being equal, district court judges are less likely to cast a dissenting vote than regular panel members. However, this is not the only way that visiting judges might be deferential to regular panel members. Visitors may also be deferential in some of the more subtle aspects of the decision-making process. One of the consistent criticisms of the visiting judge process is not only are visitors not completing their “fair share” of the work (formal deference) but visitors are essentially “rubber stamps” for regular panel members when it comes to decisions on the merits. Recognizing the status differences inherent to the visiting judge process, visitors may simply go along with the preferences of regular panel members.

Understanding informal deference is crucial for making a complete evaluation of the visiting judge process. However, this type of deference is much more difficult to capture empirically than the formal types of deference examined above. To determine whether visiting judges are informally deferential in the decision-making process, I examine the extent to which the presence of visitors changes the “panel effects” typically observed when examining voting behavior in the courts of appeals.

The importance of panel membership is a well established feature of the U.S. Courts of Appeals. Known as “panel effects”, scholars have demonstrated that, in a
variety of contexts, the ideological preferences of other panel members exert an
independent influence on the behavior of individual judges serving on court of appeals
panels (Boyd et al. 2011; Cross and Tiller 1998; Farhang and Wawro 2004; Kastellec
2004, 2006). In fact, the ideological preferences of other panel members have been
demonstrated to be better predictors of vote choice than the ideological preferences of the
judge actually making the choice (see Cross and Tiller 1998). One of the primary
conclusions scholars have drawn from this line of research is that court of appeals judges
are strongly influenced by the preferences of those members with whom they serve.

And while scholars have been successful in demonstrating panel effects in a
variety of contexts, little attention has been devoted to investigating the uniformity of
panel effects. Scholars have largely ignored the possibility that panel composition may
not consistently affect the behavior of appellate court judges. Both the characteristics of
the individual ( pressured) judge and the characteristics of the (pressuring) panel have the
potential to produce non-uniform panel effects. First, not all judges may be susceptible to
the preferences of their colleagues. Some judges may be sensitive to the preferences of
the other judges on the panel, while others may be largely indifferent to their colleagues.
As a result, each judge’s characteristics could either limit or heighten the effect of the
preferences of the other panel judges.

Second, characteristics of the panel itself might cause some panels to have greater
or less influence on the behavior of individual judges. For example, if a “freshman”
judge were to serve on a panel with two well-respected, experienced judges, the freshman
might be more likely to be influenced by the preferences of the other panel members than
if an experienced, well-respected judge was serving on a panel with two freshman judges. While this type of relationship has yet to be empirically demonstrated, it certainly appears plausible that panel effects may not be uniform for all types of judges and all types of panels.

It is from this framework that I test hypotheses related to the informal deference and influence (or lack thereof) of visiting judges. In terms of informal deference, I expect that visiting judges will be more sensitive to panel effects than regular panel members. In the language of panel effects, I expect the panel’s preferences to have a stronger effect on the vote choice of a visiting judge than on a regular panel member. I have termed this the Visitor Informal Deference Hypothesis.

A variety of other factors have been demonstrated to affect the vote choice of court of appeals judges. Primary among these are a judge’s ideological preferences (Hettinger et al 2004). Policy preferences are a consistent predictor of vote choice, and their effects have been established in a variety of judicial institutions. As such, any analysis of vote choice would not be complete without accounting for ideology. As a result, I expect the following:

*Ideology Hypothesis:* As a judge’s ideological preferences become more conservative (liberal), her likelihood of voting for a conservative (liberal) outcome increases.

As discussed above, the collective preferences of the panel have been demonstrated to substantially affect an individual judge’s vote choice in the courts of appeals. Independent of the presence of a visiting judge, research has established the
importance of accounting for the preferences of other panel members. As a result, I expect:

*Panel Ideology Hypothesis:* As the other panel members’ ideological preferences become more conservative (liberal), the likelihood of an individual judge voting for a conservative (liberal) outcome increases.

In addition to the preferences of the other panel members, two other sets of preferences need to be taken into account when modeling the vote choice of judges in the courts of appeals: the preferences of the collective circuit and the preferences of the Supreme Court. Both the circuit as a whole and the Supreme Court have the ability to review the decisions made by court of appeals panels. In the case of the entire circuit, judges may proactively change their vote to align more closely with the preferences of the circuit to prevent en banc review. In the case of the Supreme Court, judges may feel obliged to gauge how the Supreme Court would decide the case if it were to reach the court for final review (see Klein and Hume 2003, 580). As a result, both the preferences of the circuit and the preference of the Supreme Court have the potential to affect a judge’s decision-making calculus.

*Circuit Ideology Hypothesis:* As the preferences of the circuit become more conservative (liberal), the likelihood of an individual judge voting for a conservative (liberal) outcome increases.

*Supreme Court Ideology Hypothesis:* As the preferences of the Supreme Court become more conservative (liberal) the likelihood of an individual judge voting for a conservative (liberal) outcome increases.

Aside from ideological considerations, the types of cases typically heard by courts of appeals panels also have the potential to affect the vote choice of the judges. For
example, many of the cases brought before the court are appeals from persons convicted in the trial courts. Many of these appeals are groundless and lead to judges, regardless of ideological preferences, casting “conservative” votes by voting against the defendant. In order to control for the importance of case type, I include three dummy variables, *Criminal*, *Civil Rights*, and *Economic*.

*Measurement and Methodology*

The data used for this analysis are again derived from the judge-centered Update to the Courts of Appeals Database 1997-2002 (see above). The analysis includes 6251 judge-vote observations, derived from 2083 cases. The dependent variable for this analysis is the ideological direction of the judge’s vote choice. *Vote* takes the value of one if the judge casts a conservative vote (see Appendix 1 pp. 180-183 for a discussion of the database’s ideological coding) and zero if she casts a liberal vote. Cases in which the ideological direction of a judge’s vote could not be ascertained are excluded from the analysis. I estimate a logistic regression model with robust standard errors, clustered by judge.

To test the *Visitor Informal Deference Hypothesis*, I create an interaction of two variables. First, I include a dummy variable, *Visitor*, which takes the value of one if the judge is a visiting judge and zero otherwise. I then interact *Visitor* with *Panel Ideology*, which takes the value of the average JCS score of other two members of the panel. JCS scores are scaled so that more conservative scores take positive values and more liberal scores take negative values. I therefore expect *Visitor Informal Deference* to be positively signed; the effect of *Panel Ideology* should be stronger on visiting judges. JCS
scores are also used to measure Ideology, which is simply the judge’s JCS score. To capture the influence of Circuit Ideology, I assign the JCS score of the ideological median of the circuit for a given year. The same rule is applied to Supreme Court Ideology; the ideological score of the median court member for a given year is included in the analysis. I also include Criminal, Civil Rights and Economic to control for case type. Lastly, fixed effects for circuits are included in the analysis but not presented.

Results

The results of the analysis are presented in Table 4.2. Turning first to the additional independent variables, most behave in a manner consistent with theoretical expectations. Ideology is positively signed and statistically significant. Judges with higher JCS scores (more conservative) are more likely to cast conservative votes. This reaffirms a long line of research demonstrating the connection between policy preferences and vote choice in a variety of judicial settings. Panel Ideology is also positively signed and statistically significant. A judge is more likely to cast a conservative (liberal) vote when the other judges on the panel have conservative (liberal) policy preferences. This confirms the importance of considering the preferences of the other panel members when examining vote choice in the courts of appeals. In addition to their own ideology, judges are strongly and independently influenced by the ideology of the other panel members.

In terms of the preferences of the possible reviewing bodies, neither exhibits an
### Table 4.2: Model of the Vote Choice of a Visiting Judge

<table>
<thead>
<tr>
<th></th>
<th>Estimate</th>
<th>Std. Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>0.10</td>
<td>(0.34)</td>
</tr>
<tr>
<td>Ideology</td>
<td>0.52**</td>
<td>(0.10)</td>
</tr>
<tr>
<td>Panel Ideology</td>
<td>0.60***</td>
<td>(0.14)</td>
</tr>
<tr>
<td>Visitor</td>
<td>0.74</td>
<td>(0.11)</td>
</tr>
<tr>
<td>Panel Ideology x Visitor</td>
<td>0.36</td>
<td>(0.43)</td>
</tr>
<tr>
<td>Circuit Ideology</td>
<td>-0.04</td>
<td>(0.48)</td>
</tr>
<tr>
<td>Supreme Court Ideology</td>
<td>0.64</td>
<td>(0.67)</td>
</tr>
<tr>
<td>Criminal</td>
<td>0.67*</td>
<td>(0.27)</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>-0.01</td>
<td>(0.28)</td>
</tr>
<tr>
<td>Economics</td>
<td>-0.40</td>
<td>(0.27)</td>
</tr>
</tbody>
</table>

Observations: 5572  
Number of Clusters: 477  
Log Pseudolikelihood: -3312.03

| Estimates are logistic regression coefficients. Robust standard errors clustered by judge are in parentheses.  
Fixed effects for circuit are included in the analysis but not displayed.  
^ p < 0.10 * p < 0.05, ** p < 0.01, *** p < 0.001 for two-tailed tests.  

Independent influence on the vote choice of court of appeals judges. Both *Circuit Ideology* and *Supreme Court Ideology* are statistically insignificant. The preferences of these courts do not appear to influence the behavior of individual judges. For the case type control variables, only *Criminal* is statistically distinguishable from zero. All things being equal, judges are more likely to cast “conservative” votes in cases involving criminal disputes. Given the large number of criminal appeals, many of which are final
efforts to avoid punishment, it is not unsurprising that judges disproportionately tend to vote in favor of the state.

Most notably, *Visitor Informal Deference* is correctly signed (+) but fails to reach conventional levels of statistical significance. *Panel Ideology* does affect the vote choice of judges. However, this effect does not appear to be conditioned on whether or not the judge is a visitor. Visitors fail to demonstrate any measureable difference in their voting patterns to suggest they are uniquely susceptible to panel effects. This result calls into question the extent to which visitors are actually deferential in the decision-making process. I examine this point in greater detail in the Discussion section below.

**Visitor Influence**

**Hypotheses**

The previous section demonstrated that visiting judges are not any more or less susceptible to panel effects than regular panel members. While this analysis sheds important light onto the question of visitor deference, it only captures one possible way the presence of visiting judges can alter panel effects. In addition to the possibility that visitors would be more strongly influenced by panel effects, it may also be the case that panel effects are weaker when a visiting judge is part of the panel. In addition to deference, the status differences inherent to the visiting judge process may limit the influence visitors have over other judges. If visitors are less influential, I expect the following:

*Visitor Influence Hypothesis:* The preferences of a court of appeals panel will have less of an effect on the vote choice
In addition to the Visitor Influence Hypothesis, I expect a number of other factors to affect the vote choice of judges in the courts of appeals. I have outlined each of these hypotheses above when discussing the Visitor Informal Deference Hypothesis. Rather than rehashing the hypotheses here, I direct the reader to review the section above (see pp. 106-107). Each hypothesis (aside from the Visitor Informal Deference Hypothesis) is also included in this analysis.

**Measurement and Methodology**

Vote choice (Vote) again serves as the dependent variable for this analysis. To examine the Visitor Influence Hypothesis I rely on the interaction of two variables. First, I include a dummy variable, Visitor Panel, which takes the value of one if the panel contains a visiting judge, and zero otherwise. I then interact the Visitor Panel variable with Panel Ideology. I expect Visitor Influence to be negatively signed; the effect of Panel Ideology should be weaker when the panel includes a visiting judge. In terms of the additional independent variables, all remain unchanged. Measures of Ideology, Panel Ideology, Circuit Ideology, Supreme Court Ideology as well as controls for Criminal, Civil Rights and Economic are all identical to those presented in Table 4.2. Logistic regression modeling is employed with robust standard errors, clustered by judge. Fixed effects for circuits are once again included but now shown.

**Results**

The results of the analysis are presented in Table 4.3. In terms of the additional
<table>
<thead>
<tr>
<th>Variable</th>
<th>Estimate</th>
<th>Std. Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>0.10</td>
<td>(0.34)</td>
</tr>
<tr>
<td>Ideology</td>
<td>0.51***</td>
<td>(0.10)</td>
</tr>
<tr>
<td>Panel Ideology</td>
<td>0.54***</td>
<td>(0.15)</td>
</tr>
<tr>
<td>Panel Visitor</td>
<td>0.08</td>
<td>(0.08)</td>
</tr>
<tr>
<td>Panel Ideology x Panel Visitor</td>
<td>0.55</td>
<td>(0.31)</td>
</tr>
<tr>
<td>Circuit Ideology</td>
<td>-0.06</td>
<td>(0.49)</td>
</tr>
<tr>
<td>Supreme Court Ideology</td>
<td>0.70</td>
<td>(0.67)</td>
</tr>
<tr>
<td>Criminal</td>
<td>0.68*</td>
<td>(0.27)</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>0.01</td>
<td>(0.28)</td>
</tr>
<tr>
<td>Economics</td>
<td>-0.39</td>
<td>(0.27)</td>
</tr>
</tbody>
</table>

Observations                     5582
Number of Clusters           479
Log Pseudolikelihood    -3316.10

Estimates are logistic regression coefficients. Robust standard errors clustered by judge are in parentheses. Fixed effects for circuit are included in the analysis but not displayed.

^ p < 0.10 * p < 0.05, ** p < 0.01, *** p < 0.001 for two-tailed tests.

Table 4.3: Model of the Vote Choice of a Panel Member Serving with a Visiting Judge

independent variables, most are consistent with expectations. Ideology is positively signed and statistically significant; conservative (liberal) judges are more likely to cast conservative (liberal) votes. A similar pattern is observed for Panel Ideology. When the preferences of the other panel members are conservative (liberal), a judge is more likely
to cast a conservative (liberal) vote. This once again reaffirms the presence of panel effects in the courts of appeals and reiterates the importance of modeling group dynamics when examining appeals court decision-making. As was the case in Table 4.2, both Circuit Ideology and Supreme Court Ideology fail to exhibit an independent effect on vote choice. These results, taken with the results presented in Table 4.2, suggest there is reason to doubt that court of appeals judges attempt to anticipate the preferences of either reviewing bodies. Lastly, similar to the analysis presented in Table 4.2, Criminal is positively signed and statistically significant.

Turning to the primary variable of interest, the Visitor Influence Hypothesis finds little support. Contrary to expectations, the interaction between Panel Ideology and Visitor Panel (Visitor Influence) is statistically insignificant and is actually positively signed. There is no evidence from the results presented here to suggest that panel effects are weaker when the panel in question includes a visiting judge. If visiting judges do have less influence over other panel members, this limitation is not observed in any of the decision-making patterns. This result questions the criticisms allegedly that visiting judges fail to contribute to the decision-making process.

Discussion and Conclusion

To briefly review the results presented above, in terms of formal deference, there is evidence to support the criticism that visiting judges are less active in the decision-making process. District court judge visitors are less likely to dissent when serving in the courts of appeals. In terms of informal deference, there is no evidence to suggest that visitors are more likely to be influenced by the preferences of other panel members than
regular court of appeals judges. Finally, in terms of influence, visitors do not appear to lack influence. The preferences of visitors appear to affect the votes of other judges in a similar manner to the preferences of regular court of appeals judges. In total, while visitors appear to be less active in the formal aspects of the decision-making process, informally, they are undistinguishable from regular court of appeals judges.

These results have important implications for the study of judicial behavior in the courts of appeals as well as the litany of criticisms frequently leveled against the use of visiting judges. In terms of court of appeals behavior, the results presented here are largely consistent with previous analyses. Court of appeals judges are strongly influenced by their ideological preferences. However, the behavior of judges serving in the courts of appeals is also strongly influenced by the preferences of the other panel members. Although the presence of panel effects is well established in court of appeals scholarship, rarely are panel effects examined in the context of small group behavior. Despite the fact that court of appeals panel are small groups, scholars continue to ignore group effects unrelated to strategic behavior when examining the behavior of judges serving in these groups. While the results of this analysis suggest that visitors are neither deferential (in the informal sense) nor have any less influence in the decision-making process, this does not preclude the possibility that psychological group effects are important for understanding the behavior of court of appeals judges. Further theoretical development and empirical analysis is needed to explore this possibility more fully.

The results are also important for evaluating the visiting judge process itself. In terms of formal deference, visiting district court judges do behave differently than other judges in the courts of appeals. While this is an important finding, the normative
implications are non-obvious. Few question the normative value of the “norm of consensus” as a guideline for decision-making in the courts of appeals. If district court judges adhere to this norm more strongly than other types of judges, it is not clear that the refusal to dissent represents a limitation of district court visitors; it may in fact be a strength. While the value of dissent in appellate courts is outside of the context of this analysis, it is at least important to remember that consensus (or the lack thereof) may or may not be a negative quality of visiting judges.

Criticisms that visiting judges regularly defer to regular panel members or lack influence in the decision-making process appear unwarranted, at least as it relates to the decision on the merits. However, none of the results presented here preclude the possibility that visiting judges are deferential outside of the context of voting on the merits. Owens and Black (2009) demonstrate that in terms of the opinion-crafting process, visitors are less likely to demand or offer changes to the content of draft majority opinions. While this certainly represents a form of deference, this deference does not carry over to the final votes on the merits. Visitors may in fact be deferential for much of the decision-making process, but when it comes to casting actual votes, visitors behave in a manner indistinguishable from regular court of appeals judges.

In the next chapter, I continue my analysis of psychological group effects in the courts of appeals by directly examining if visiting judges undermine the quality of the decision-making process. While few normative concerns have arisen from the analysis presented here, it is possible that many of the alleged negative consequences stemming from the use of visiting judges could be manifested in ways not captured in votes on the
merits. To examine this possibility, I explore the visiting judge process by investigating how future panels respond to cases decided, at least in part, by visiting judges.
CHAPTER 5: VISITING JUDGES AND THE QUALITY OF DECISION-MAKING IN THE U.S. COURTS OF APPEALS

The previous chapter presented an examination of how visiting judges induce psychological group effects in the U.S. Courts of Appeals. In this chapter I continue the examination of psychological group effects by investigating the extent to which the use of visiting judges affects the quality of appellate decision-making. Judges and legal commentators alike stress the importance of group collegiality for successful decision-making in appellate courts. Visiting judges, as temporary group members who are not fully socialized into the group, are routinely alleged to undermine collegiality and thus harm the quality of judicial output. While many have been quick to levy criticisms, few have attempted to systematically examine what effect, if any, visiting judges have on the quality of judicial output. The analysis presented here attempts to answer these questions by examining the normative consequences of the use of visiting judges in the United States Courts of Appeals. To do so, I investigate the effectiveness of panels composed in part by visiting judges in persuading future courts to adopt the legal policies set forth by their decisions. The results demonstrate that critics’ fears may be warranted: the involvement of a visiting judge, specifically an out-of-circuit visitor, consistently undermines the quality of court of appeals decision-making. These results demonstrate
that visiting judges induce psychological group effects and have important implications for the continued use of visiting judges as a response to caseload concerns facing the U.S. Courts of Appeals.

Visiting Judges and Collegiality in the U.S. Courts of Appeals

One of the primary reasons the use of visiting judges in the courts of appeals has attracted criticism is because of the importance typically placed on collegiality in appellate decision-making. Decision-making in the courts of appeals takes place in three-judge panels, meaning that decisions are the product of “collegial” interaction between judges (Edwards 1998, 1335). In the context of appellate judging, collegiality is generally viewed as something more than comfortable, congenial working relationships between colleagues. Rather, collegiality is said to be a process, characterized by interaction among panel members where the work of the panel is ultimately completed by the collective members of the panel functioning as a group.

For many judges, collegiality is more than just a feature of the courts of appeals; it is a necessary condition for effective decision-making. Court of appeals judges regularly stress the importance of their collegial interactions, referring to collegiality as “the hallmark of an effective appellate court,” and noting that collegiality “promote[s] a cohesive court, with shared information, circulated experience, and maximized efficiency.” Judge Harry Edwards, perhaps the most vocal advocate of the importance of collegiality, stresses that “it is my explicit contention that the quality of judges’

74 Testimony of Judge Richard Tallman before the Senate Committee on the Judiciary, September 20, 2006.
decisions improves when collegiality filters their decision-making” (2003, 1684). The result, he argues, is “a better work product” (1650).

Commentators critical of the visiting judge process contend that the use of visiting judges limits the quality of the collegial interaction of panel members (Saphire and Solimine 1995). These critics contend that the use of visiting judges is “an awkward way to run a railroad” (quoted in Cohen 2002, 192) and argue that visitors lead to “… reduced collegiality within panels, restraint on the candid and robust exchange of views between all members of a panel…” (Saphire and Solimine 385, 1995). Preliminary evidence suggests these concerns may be valid. Owens and Black (2009), examining the private papers of Judge J. Shelly Wright, former member of the Court of Appeals for the District of Columbia, conclude “that visiting judges contribute little to the opinion crafting process” (31). The data presented by the authors may partially explain the decision of the D.C. circuit to discontinue the use of visiting judges altogether by 1991. The perspective of Judge Edwards, then a member of the D.C. circuit, bears repeating: “improved collegiality among the members of the court” contributed to the decision of to stop using visiting judges. While hardly conclusive, the steps taken by the D.C. circuit are at least suggestive of the possibility that visiting judges may undermine panel collegiality.

As detailed in Chapter 2 (pp. 53-54), research in social psychology has demonstrated that many characteristics, including time constraints and a lack of familiarity, consistently undermine the quality of the group decision-making process. Both of these concerns are particularly salient for panels employing visiting judges. Such panels face unique time constraints above and beyond those already facing typical court

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of appeals panels. Visiting judges are employed as a source of caseload relief for the receiving court. However, a judge’s visit does not excuse her from the work that goes on in her absence in the lending court. Many visiting judges attempt to complete both their work as a visitor and their work as a regular judge simultaneously. This divided attention is felt by panel members. One court of appeals judge noted “this kind of thing [visiting] is a real distraction for them [visiting judges]. They have a helluva time getting their share of the work done, so that slows us down some” (quoted in Cohen 2002, 197).

Panels slowed by external time constraints may be forced to forgo many aspects of the collegial interaction process, such as deliberation and discussion, and instead devote their resources primarily to disposing cases as quickly as possible rather than seeking the best possible outcome.

The most apparent difference between panels with visiting judges and those without is a lack of familiarity, both in terms of the familiarity of the panel members and the familiarity of visitors with circuit law and precedents. Permanent members of each court of appeals are regularly assigned to panels composed of other members of the circuit. This shuffling allows members to build reciprocal relationships which are continually reinforced over time by repeated interactions. Visiting judges are unable to build these types of relationships. Many court of appeals judges have reflected on how this lack of familiarity is harmful for group interaction. According to one such judge, “you have a judge you don’t know, you are not familiar with his habits…I think it is easier to work with two people whom you know well than with one that you do and one that you don’t” (quoted in Cohen 2002, 199). The recognition by court of appeals judges of the effect of membership changes on the quality of the decision-making process
conforms to the evidence presented by small group researchers. Visitors may also be less familiar with the legal precedents governing the circuit. Because one circuit’s rules and precedents are not formally binding on any other circuits, there is no reason for visitors to be intimately familiar with the law of the circuit in which they are visiting. This has the potential to further undermine the quality of their participation.

**Hypotheses**

Time constraints inherent to the use of visiting judges and the lack of familiarity for panels employing visitors leads to one consistent expectation: that visiting judges undermine the quality of the decision-making process. The primary purpose of this chapter is to test this proposition, which I have termed the *Visitor Quality Hypothesis*. All things being equal, I expect the case output generated by panels employing visiting judges to be of lesser quality than those panels employing three regular members.

However, not all visiting judges are created equal. Some visitors are district court judges serving by designation in the courts of appeals. Others are out-of-circuit visitors, serving in a regional circuit to which they were not appointed. The differences inherent to these types of visitors may have distinct effects on judicial quality. On the one hand, district court judges typically work alone as trial court judges and thus may be unaccustomed to collegial decision-making. On the other hand, the presence of a district

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76 Although the term “case output” is certainly not an elegant one, it is chosen purposefully to capture all aspects of the outcome of a case produced by the panel. This includes the disposition of the case, the majority opinion, concurring and dissenting opinions, etc. The term is meant to be inclusive – using terms like “decision” or “opinion” may artificially limit the breadth of what is intended to be captured.

77 These two categories are not mutually exclusive. The least common type of visitor (occurring on less than 5% of panels in the sample) is a district court judge serving in a court of appeals outside of her home circuit. For the purposes of this analysis, any panel including such a judge is considered to have both a District Court Judge and an Out-of-Circuit Judge.
court judge may have less of an effect on regular panel members than out-of-circuit visitors. District court judges are much more common; while 20% of panels contain a district court judge, only 12% contain an out-of-circuit visitor. Regular panel members may therefore be more accustomed to working with district court judges than out-of-circuit visitors. In comparison, out-of-circuit visitors (specifically active or senior appeals court visitors) may be well versed in the process of appellate decision-making but may be largely unfamiliar with the legal precedents governing circuits in which they do not typically serve.

To investigate the possibility that not all types of visiting judges affect judicial quality in similar ways, I examine the Visitor Quality Hypothesis for two different classes of visitors: district court judges and out-of-circuit visitors. The results should clarify what specific characteristics common to visiting judges lead to lower quality case output.

In addition to the presence of a visiting judge, several other factors are theorized to affect the overall quality of a case output. Most cases heard in the court of appeals arrive in the form of an appeal from a trial court. In most circumstances the court of appeals will either affirm or reverse the decision of the trial court. The decision to reverse the trial court is noteworthy because it demonstrates some disagreement over the proper legal resolution of the case. Disagreement between the trial and appellate courts may suggest something about the quality of the case output. If another federal judge disagreed with the decision of the appellate court, this may reflect a lower quality output than if all judges reviewing the case arrived at a similar conclusion. I therefore expect:

*Reversal Hypothesis:* A decision that reverses a lower court will be of lower quality than a decision that does not reverse a lower court.
Separate opinion writing is similarly related to output quality. Separate opinion writing, either in the form of a dissent or concurrence, is rare in the courts of appeals (Hettinger et al. 2004, 125). The decision of a court of appeals judge to break the norm of unanimity and author a separate opinion suggests potential weaknesses in the logic of the case output, undermining its quality. More importantly, the decision to write separately represents a breakdown in collegiality – an important determinate of output quality.

*Dissent Hypothesis:* A decision that includes a dissenting opinion will be of lower quality than a unanimous decision.

*Concurrence Hypothesis:* A decision that includes a concurring opinion will be of lower quality than a decision with a unanimous majority opinion.

Most analyses devoted to the subject of judicial quality have been designed explicitly to measure the quality of individual judges, not the quality of individual case outputs (Choi and Gulati 2004a, 2004b, 2005, 2006; Choi, Gulati and Posner 2009). I deviate from this pattern by primarily examining the attributes of decisions, rather than the characteristics of judges (except for status as visitors), when assessing quality. As I discuss below, measures of individual judge “quality” are limited in several important respects. Such measures typically use only the total quantity of citation counts rather than citation treatments to measure quality (for an exception, see Anderson 2009), assign all citation “credit” to the majority opinion author, and fail to incorporate both in- and out-of-circuit citations. As a result, I do not believe a sufficient measure of judge quality exists for the purposes of this analysis. Theoretically, the case output, not the individual

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78 For the data used in this analysis, a case output included a dissenting opinion or a concurring opinion 14.4% of the time.
judge, serves as the unit of analysis. My preference is that as many of the control variables as possible are derived from case-level factors.

**Measuring Judicial Quality**

Central to testing the *Visitor Quality Hypothesis* is the notion of judicial quality. In order to effectively test the hypothesis, a measure of quality is needed. In this section I discuss how to best conceptualize judicial quality and review two measurement strategies: review-based measures (see Cross and Lindquist 2009) and citation-based measures (see Anderson 2009; Choi and Gulati 2004a, 2004b, 2005, 2006; Choi, Gulati and Posner 2009; Landes and Posner 1993; Landes et al. 1998; Posner 2000). I demonstrate that citation analysis is a preferable measurement strategy and discuss improvements made to prior analysis, producing a measure best served to capture the quality of a case output.

**Defining Judicial Quality**

Scholars who have written about quality have done so primarily with the goal of evaluating individual judges (see Anderson 2009.; Choi and Gulati 2004a, 2004b, 2005, 2006). Typically quality has been defined by association, with commentators pairing the term with a variety of normatively-laden synonyms, including excellence, integrity, merit, intelligence, etc. (see Solum 2005 for a full treatment). I differ from prior discussions of quality by stressing the importance of the *persuasiveness*, rather than normative value, for understanding the quality of case outputs.
In order to most effectively define the notion of judicial quality, I frame my analysis in terms of judicial motivation. Most scholars agree that judges are primarily motivated by preferences over the development legal policy in their decision-making (Baum 1997, 23). Judges motivated by legal policy goals are typically thought to have both short and long term preferences about the effects of legal policy change. Not only are judges concerned with how the legal policy created by their decision will affect the immediate dispute in question, but they are also concerned with how legal policy affects the decisions of other judges in future disputes (see Maltzman et al. 2000, 15-16 for the importance judges place on affecting future cases). I refer to this as the persuasiveness of a case’s output. In terms of conceptualizing quality, persuasiveness is a critical criterion. All case outputs are likely to achieve a panel’s short term legal policy goals. Rarely does a case output fail to reflect the legal policy preferences of the panel judges in the disposition of the dispute. However, the extent to which a case output is able to achieve the panel’s long term legal policy goals varies substantially. It is the ability to do so that differentiates the quality of case outputs. For the purposes of this analysis, higher quality case outputs are those that both resolve the legal dispute in a manner consistent with the judges’ collective legal policy preferences and persuade future judges to adopt and implement the output.

Existing Measures of Judicial Quality

Any measure of judicial quality should therefore capture the persuasiveness of a case’s output on future judges. Judicial quality has traditionally been operationalized using two types of measures: review-based measures, which examine decisions of
reviewing courts (Cross and Lindquist 2009, 1403-1404) and citation-based measures, which examine how other courts make reference to case outputs. Conceptually, review-based measures are centered upon the notion of a “legal correctness” which is available to be reached. Proponents of review-based measures argue that the vertical structure of most judicial systems is crucial for understanding judicial quality; courts higher up the hierarchical ladder are more likely to arrive at the legally correct answer. The alternative, citation-based measures, examines how case outputs are cited after they have been published. This type of measure assumes that the utility of an opinion is the best proxy for the quality of the product (see Choi and Gulati 2004a, 305-309) and that other court of appeals judges evaluate case outputs in a way consistent with market forces. Based on this logic, the “best” outputs will be those that are in highest demand (i.e. cited most often).

While neither perfectly captures the persuasiveness of a case’s output, the logic inherent to citation-based measures more directly reflects the concept I intend to measure. Citation analysis gauges persuasiveness, albeit imperfectly, by examining the decision of future judges to self-report being persuaded by a case output in the form of a legal citation. The decision to cite a case offers a strong indication that a judge was influenced by the legal policy developed in the cited case. This type of analysis is attractive not only because it more closely captures the persuasiveness of a case’s output but because it requires no assumptions about the “correctness” of that output— a central tenet of review based measures. The concept of “legal correctness” has been met with profound skepticism. Scholars have questioned the existence of legally correct answers and argue that even if they do exist, they may not be determinable by judges (Vladeck 2005, 1435).
Focusing on the behavior of reviewing courts is also limited as a practical measurement strategy. Not all decisions are reviewed, which creates the possibility of a selection bias in the measure. Litigants must actively seek review for a case to move up the judicial hierarchy; courts cannot proactively seek out a case. Because not all litigants will seek review, no evaluation of quality can be made for all decisions in which review was not sought. This problem is exacerbated when attempting to measure quality at the court of appeals level where only a small number of cases are actually granted review. Relying exclusively on reviewing bodies also ignores many possible ways in which a decision can impact the development of legal policy. Decisions from the lower federal judiciary are evaluated not only vertically but also have the opportunity to be evaluated horizontally by co-equal courts. While courts are not obligated to evaluate decisions made by another court at a common level, they frequently do so (Klein 2002). Developing a measure of quality based solely on vertical review ignores these important contributions.

The limitations of review-based measures are perhaps clearest in previous analyses of visiting judges. For example, Saphire and Solimine (1995) find that the performance of a panel, in terms of reversal rates and en banc review, does not vary due to the presence of a district court judge sitting by designation. What is unclear is what this non-finding actually implies about the visiting judge process. Despite a lack of evidence that the presence of a district court judge actually leads to more reversals, the authors remain skeptical of visitors, noting “this [the lack of finding] does not necessarily suggest that the participation of a district judge is a neutral phenomenon…with respect to
the decision-making dynamics – the quality and character of deliberation – of appellate panels” (371).

I agree. To better evaluate the Visitor Quality Hypothesis, I turn to citation analysis. Below I briefly review the measurement decisions made in many citation analyses and the primary criticisms levied against them. I then discuss how to make the most effective use of citation analysis to examine the visiting judge process.

Improving Upon Measures of Judicial Quality

Citation analysis has gained great notoriety within the legal academy (Choi and Gulati 2004a, 2004b, 2005, 2006; Choi, Gulati and Posner 2009; Landes et al. 1998), with the measurement strategy used to assess judicial quality (Chou and Gulati 2004a, 48-61) receiving the bulk of scholarly attention. To measure the quality of a particular judge, citation analyses typically examine all out-of-circuit citations to an opinion written by the judge over a specified period of time. While still relying on the logic citation analysis, I deviate from this measurement strategy in several important respects (for the basis of this framework, see Anderson 2009, 8-13). These deviations, I argue, create the most appropriate measure of judicial quality for testing the Visitor Quality Hypothesis.

Individual Judge v. Individual Opinion

Previous citation analyses have operated at the judge, rather than the case, level. Although useful for the authors’ purposes, there is no apparent reason why citation analyses would fail to generalize to the case output level. In the analysis below, all
citations are assigned to each case output, not to any individual judge. This decision has important implications for the distinction between panel members and opinion authors.

**Author v. Panel Member**

Previous citation analyses have consistently assigned credit (blame) for a case output solely to the majority opinion author. The nature of court of appeals decision-making (three-member rotating panels, high caseloads, etc.) allows judges assigned the majority opinion to have disproportionate control over its content. Much more so than at the Supreme Court, the resulting opinion of the panel is assumed to belong to the author. If the author is largely responsible for the content of the majority opinion, it follows that she should be given credit (blame) for how the opinion is cited.

Although the importance of the majority opinion author may be heightened in the courts of appeals, ignoring the contributions of other panel members is both unnecessary and theoretically troubling, particularly for the study of visiting judges. The primary benefit of focusing on majority authors rather than collective panels is that doing so escapes the difficult question of “how much credit does each judge get?” for an opinion. Because I am not interested in assigning credit for an opinion to any individual judge and am only testing how panel composition affects judicial quality, I only need to assume that each judge makes *some* contribution to the quality of the end product. Given extensive discussions of the importance of deliberation for decision-making by court of appeals judges, this appears to be a plausible assumption.

Second, and more importantly, relying exclusively on opinion authorship ignores the collegial factors visiting judges are said to negatively affect. Judges who serve on
panels make (or chose not to make) contributions to the final product, even if they are not
the authors (see Owens and Black 2009.). To capture these collegial factors, each
analysis includes all panel members, not just opinion authors, when examining citation
patterns. If any member of a panel, not just the majority opinion author, is a visiting
judge, the case output will be treated as being created by a panel with a visitor.

Out-of-Circuit v. In-Circuit

Most citation studies ignore in-circuit citations and examine how case outputs are
cited by courts outside the cited case’s home circuit. The reason for this unequal
treatment stems from the precedential value created by each case. There is a strong
expectation that future panels will follow precedents set by other panels within the same
circuit, regardless of the quality of the decision. Panels in other circuits, however, face
no such pressure and thus have the option of ignoring any out-of-circuit decision.
Because out-of-circuit citations are not driven by precedent, these citations are thought to
be a truer indication of judicial quality (see Landes et al. 1998, 285-86).

The decision to rely exclusively on out-of-circuit citations is particularly ill-fitting
for the study of visiting judges. Out-of-circuit visitors represent a substantial portion of
all types of visiting judges (see Chapter 1 pp. 17-23). The use of out-of-circuit visitors
may have important effects on citation patterns not foreseen by previous citation
analyses. For example, the presence of an out-of-circuit visitor, who is likely to be less
familiar with circuit precedent and case-law, may affect how the quality of the opinion is
evaluated by future in-circuit panels but not out-of-circuit panels. Relying exclusively on
out-of-circuit precedents precludes a test of such a claim. To alleviate these concerns, I
use both in-circuit and out-of-circuit citations, both together and separately (where appropriate), when measuring judicial quality. By erring on the side of inclusivity rather than exclusivity, this measurement strategy allows for the greatest diversity of empirical tests.

_Citations v. Treatments_

I deviate most dramatically from previous citation analyses by examining case “treatments” rather than “citations”. Prior analyses, rather than differentiating between positive, neutral and negative citations, have simply counted the total number of citations made to a case’s output as a measure of its quality. Proponents of this approach argue that differentiating between citation types is unnecessary because positive, neutral and negative citations all reflect some level of influence (Landes et al. 1998, 273). This measurement strategy assumes that non-influential case outputs (particularly for out-of-circuit courts) will be ignored, meaning that the most important decision made by future courts with regards to citations is whether to cite or to ignore, not whether to cite positively, negatively or neutrally.

The decision to count all citations to measure the _influence_ of a decision may be a reasonable one. But influence is not equivalent to, or even necessarily correlated with, quality (Landes and Posner 1993, 389-390). Focusing exclusively on citation counts fails to capture the persuasiveness of a case’s output. A poor quality case output could steer future courts to create legal policy in a manner inconsistent with the creating panel’s preferences. Few would view this type of “persuasion” as equivalent to the persuasion defined above. Although not as common as positive citations, negative citations do
happen\textsuperscript{79}. The failure to distinguish between these types of treatments assumes each have similar implications for the development of legal policy. This is a difficult assumption to make.

To overcome these concerns, this analysis differentiates between positive and negative treatments. Again, by erring on the side of inclusivity rather than exclusivity, I am able to offer a more robust set of tests for the hypothesized relationship between visiting judges and judicial quality. The consequences of all measurement decisions, when consequential, are discussed further in the results section.

\textit{The Dependent Variables}

Two dependent variables, the total number of positive (\textit{Positive}) and negative (\textit{Negative}) treatments made by future court of appeals panels to a case output, are examined in the primary analyses. Treatments were collected using \textit{Shepard's Citations} (henceforth \textit{“Shepard’s”}) from the LexisNexis database in the fall of 2010. \textit{Shepard's} is a citation index that links all U.S. court opinions to any court case decided at the state or federal level since the founding of the United States. Important for evaluating quality, \textit{Shepard's} also indicates how a case output is treated by cases that subsequently cite it. The majority of citations are not “treatments” in any real sense; such citations do not indicate any positive or negative relationship between the cited case and the citing case. However, a substantial number of future cases do “treat” the opinion. These treatments generally fall into two broad classes of categories, either \textit{Positive} or \textit{Negative}. Six non-

\textsuperscript{79} There were a total of 1135 negative citations for the 2160 cases used in this analysis. See Table 5.1 below for further details.
neutral treatment codes exist. Cases coded as “Following” the cited opinion are Positive, while cases either “Distinguishing,” “Criticizing,” “Limiting,” “Questioning,” or “Overruling” the cited opinion are Negative. For a more substantial discussion of Shepard’s Citations, see Appendix 1 (pp. 183-184).

Positive and negative treatments are examined separately (see Black and Spriggs 2008, 671-673). Prior analyses using Shepard’s typically create a single aggregate measure by taking the difference between the total number of positive treatments and the total number of negative treatments (Hansford and Spriggs 2006, 60). I deviate from this strategy for two reasons. First, taking the difference between the total number of positive and negative treatments makes interpreting the score of zero difficult. Such an operationalization assumes that a case output that has not been treated at all is equivalent to a case output that has been treated positively and negatively in equal proportion. The validity of this assumption is unclear. This problem is particularly salient for this sample of cases - 38% would receive a score of zero.

A second question concerns how positive and negative treatments are weighted in relation to each other. Aggregate measures that take the difference between the number of Positive and Negative treatments assume that each positive treatment of a case is equivalent to each negative treatment. The data collected from Shepard’s demonstrate clear inequality in the use of positive and negative treatments. Table 5.1 presents the number of total treatments, broken down by type (Positive and Negative, In-Circuit and Out-of-Circuit). Of the 5689 treatments made to the 2160 cases, 80% (4554) were categorized as Positive. This distribution demonstrates that, all things being equal, a case is more likely to be treated positively than negatively.
<table>
<thead>
<tr>
<th>Type of Treatment</th>
<th>In-Circuit Treatments</th>
<th>Out-of-Circuit Treatments</th>
<th>Total Treatments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Followed</td>
<td>3413</td>
<td>1141</td>
<td>4554</td>
</tr>
<tr>
<td>Negative</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Distinguished</td>
<td>525</td>
<td>279</td>
<td>804</td>
</tr>
<tr>
<td>Criticized</td>
<td>37</td>
<td>236</td>
<td>273</td>
</tr>
<tr>
<td>Limited</td>
<td>2</td>
<td>6</td>
<td>8</td>
</tr>
<tr>
<td>Questioned</td>
<td>27</td>
<td>20</td>
<td>47</td>
</tr>
<tr>
<td>Overruled</td>
<td>22</td>
<td>2</td>
<td>24</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>4015</strong></td>
<td><strong>1674</strong></td>
<td><strong>5689</strong></td>
</tr>
</tbody>
</table>

Each cell represents the number of case treatments. Data were collected in the fall of 2010 from Shepard’s Citations through LexisNexis.

Table 5.1: Summary of Court of Appeals Case Treatments, 1997-2002

This discrepancy likely stems from professional norms governing the role of precedent, particularly for treatments by panels in the same circuit as the cited case. As Anderson (2009) notes, “even the citation studies recognize that in judicial decisions the doctrine of binding precedent might compel a citation – even a positive citation – to an unpersuasive or poorly-reasoned opinion” (9). Unlike negative treatments, precedent can compel an author to treat a case positively. If positive treatments are (at least partially) driven by demands of precedent, In-Circuit treatments, where strong norms concerning the role of precedent exist, should be more likely to be positive than Out-of-Circuit treatments, where precedent plays no role. Table 5.1 confirms this intuition. While 68%
of *Out-of-Circuit* treatments are positive, 85% of *In-Circuit* treatments are categorized as positive \( (p < 0.01) \). The impact of precedent can also be seen by comparing the distribution of treatments across circuits. While negative treatments (presumably not subject to the dictates of precedent) are nearly equally distributed in (52.8%) and out (47.1%) of circuit, positive treatments are disproportionately found in (74.9%) rather than out (25.1%) of circuit.

The unequal likelihood of observing positive and negative treatments raises serious questions about the validity of aggregate measures. To avoid these difficulties, positive and negative treatments are examined separately. This strategy allows for the most effective, transparent test of the relationship between visiting judges and judicial quality.

**Additional Variable Measures and Methodology**

The primary independent variable is the presence of a visiting judge on a panel. *Visitor* is included in the analysis, which takes the value of one if a panel included a visiting judge and zero if the panel includes three regular court of appeals members. To capture the possible effects of reversals, the variable *Reverse* is included, which takes the value of one if the appellate court reversed the decision of the lower court, and zero otherwise. To control for the influence of writing separately, two dummy variables are included, *Dissent* and *Concurrence*, which take the value of one if the case output includes a dissenting (concurring) opinion, and zero otherwise.

The preceding variables are included to help control for alternative explanations of case quality. However, because judges are not exclusively considering quality when...
deciding to cite, several characteristics unrelated to quality may affect how future panels treat a case’s output. One of the primary criticisms of citation analyses is that citation counts fail to recognize that frequent citation to a case output may result from its innovativeness rather than its quality (Cross and Lindquist 2009, 1415), artificially conflating unconventional judges (or legal policies) with higher quality ones. Most case outputs produced in the lower federal judiciary do not stake out new or provocative legal policies. For those cases that do, this deviation from the norm may be more likely to draw the attention of future citers, even if the output of the case is of no better quality than a typical decision. As a consequence, cases in which new or innovative policies are articulated may be more likely to be treated.

To account for this possibility, I examine the ideological composition of each panel. Research into the effects of panel composition demonstrates that panels composed of ideologically like-minded members tend to “go to extremes” when determining case outputs (Sunstein et al. 2006, 75). This propensity to go to extremes may make panels with like-minded members more likely to develop new and innovative legal policies. To account for this possibility, a measure, Panel Extremity, is included in the analysis. Using JCS scores, Panel Extremity takes the absolute value of the panel’s mean ideology score. Panels consisting of strongly conservative and strongly liberal members will each receive high scores, while panels composed largely of ideologically moderate members or members from diverse ideological viewpoints will receive lower scores.

The age of a case output has an important effect on treatment patterns. All else being equal, older cases have the greatest opportunities for treatment than newer cases.
To account for this possibility the Age of a case output, the number of years since the case was decided, is included.

Several characteristics of the majority opinion, an important part of the case output, also have the possibility of affecting future treatments. The length of a case’s majority opinion may lead future judges to cite the case more frequently. Verbiage above and beyond what is typical for a court of appeals’ opinion may suggest to future judges that the opinion author has devoted extra time and care to a particular opinion, making it attractive for a treating judge. Additional language may also widen the relevancy of the opinion to a more varied range of legal disputes. The importance of opinion length has been demonstrated empirically at the Supreme Court level; lower federal courts are more likely to cite longer Supreme Court opinions (Black and Spriggs 2008, 676). To control for the effect of opinion length, Length is included, which is measured as the number of pages in the Federal Reporter devoted to the majority opinion.

Similarly to length, the presence of an appendix to a majority opinion may lead to more positive treatments and fewer negative treatments. Appendices play an informational role for future courts, providing unique, frequently technical, information that otherwise may not be included in the opinion. Future judges wishing to refer to this additional information may be more likely to treat a case positively where an appendix is present. A dummy variable, Appendix, is included, which takes the value of one if the majority opinion was accompanied by an appendix and zero otherwise.

Factors exogenous to the behavior of the panel may also have important effects on the likelihood of future treatment. One notable factor is the presence of third-party interest in the form of an amicus curiae brief. Amicus participation can provide unique
information otherwise unavailable to the court in the decision-making or treatment processes. More importantly, amicus participation is quite rare in the courts of appeals (see Collins and Martinek 2011, 401). Because organized interests rarely chose to participate in the courts of appeals, the decision to do so has the possibility of substantially raising the salience of case output, making it more likely to be treated in the future. A variable, Amicus, is included, which takes the value of one if an amicus brief was filed in the case and zero otherwise.

The issue with which the case deals can affect future treatments. Some issues are quite common in the court of appeals, while others are quite rare. Cases dealing with issues common to the court of appeals are more likely to be treated than those dealing with uncommon issues. Several issue area control dummies (Criminal, Civil Rights, Economic) are included. Lastly, I include the number of opposing treatments made to each case output. For models estimating the number of positive treatments, the total number of negative treatments made to the case output is included, and vice versa. This variable should help control for any innate qualities that make a particular case output more likely to be treated that the variables described above fail to capture.

The cases used to test the Visitor Quality Hypothesis are derived from an update to The Original U.S. Appeals Court Database (1997-2002; for more discussion see Chapter 4 pp. 98-99 and Appendix 1 pp. 180-183). To test these hypotheses, I estimate a count model, the appropriate modeling technique when the observed dependent variable takes only nonnegative integer values. Negative binomial regression is preferable to poisson regression when the dependent variable is likely to be over- or underdispersed
To account for variation among the circuits in their treatment patterns, fixed effects for each circuit (save one) are included in the analysis but not presented.

**Results**

The preliminary results are presented in Columns 1 and 2 ("All Visitors") of Table 5.2. Many of the control variables hypothesized to affect the quality of a case’s output behave as expected, with the pattern emerging most clearly in the negative treatment model. In the positive treatment model, while the presence of a Concurrence negatively affects the number of positive treatments, neither Dissent nor Reverse has a significant effect. In the negative treatment model, the effect of a dispute over the correct legal policy is clear. Both Dissent and Reverse are positively signed and statistically significant. The Concurrence variable is correctly signed (+) and approaches conventional levels (p=0.11) of statistical significance. The presence of a dispute over the correct legal policy appears to adversely affect the quality of a case’s output.

Turning to the controls affecting treatment patterns independent of output quality, Panel Extremity fails to achieve statistical significance in either model. Case outputs created by ideologically extreme panels are no more likely to be treated positively or negatively than outputs with more moderate or ideologically diverse members. The failure of Panel Extremity to exhibit any effect suggests that claims that treatment patterns are driven exclusively by policy innovativeness or extreme ideological decision-making may be overstating the relative importance of these factors.

As expected, Age affects treatment patterns, but like the behavioral variables discussed above, its hypothesized effect is only observed in the negative treatment model.
<table>
<thead>
<tr>
<th></th>
<th>All Visitors</th>
<th>District Court Visitors</th>
<th>Out-of-Circuit Visitors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Positive</td>
<td>Negative</td>
<td>Positive</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.60</td>
<td>-2.94***</td>
<td>-0.59</td>
</tr>
<tr>
<td></td>
<td>(0.38)</td>
<td>(0.50)</td>
<td>(0.38)</td>
</tr>
<tr>
<td>Visitor</td>
<td>0.02</td>
<td>0.10</td>
<td>0.02</td>
</tr>
<tr>
<td></td>
<td>(0.09)</td>
<td>(0.11)</td>
<td>(0.11)</td>
</tr>
<tr>
<td>Reverse</td>
<td>-0.09</td>
<td>0.40***</td>
<td>-0.08</td>
</tr>
<tr>
<td></td>
<td>(0.09)</td>
<td>(0.11)</td>
<td>(0.09)</td>
</tr>
<tr>
<td>Dissent</td>
<td>-0.14</td>
<td>0.79***</td>
<td>-0.14</td>
</tr>
<tr>
<td></td>
<td>(0.17)</td>
<td>(0.15)</td>
<td>(0.15)</td>
</tr>
<tr>
<td>Concurrence</td>
<td>-0.42*</td>
<td>0.35</td>
<td>-0.42*</td>
</tr>
<tr>
<td></td>
<td>(0.17)</td>
<td>(0.22)</td>
<td>(0.17)</td>
</tr>
<tr>
<td>Panel Extremity</td>
<td>0.14</td>
<td>0.24</td>
<td>0.14</td>
</tr>
<tr>
<td></td>
<td>(0.29)</td>
<td>(0.40)</td>
<td>(0.30)</td>
</tr>
<tr>
<td>Age</td>
<td>-0.01</td>
<td>0.11***</td>
<td>-0.01</td>
</tr>
<tr>
<td></td>
<td>(0.02)</td>
<td>(0.03)</td>
<td>(0.02)</td>
</tr>
<tr>
<td>Length</td>
<td>0.06***</td>
<td>0.03***</td>
<td>0.06***</td>
</tr>
<tr>
<td></td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
</tr>
<tr>
<td>Appendix</td>
<td>-0.01</td>
<td>-0.09**</td>
<td>-0.01</td>
</tr>
<tr>
<td></td>
<td>(0.04)</td>
<td>(0.03)</td>
<td>(0.04)</td>
</tr>
<tr>
<td>Amicus</td>
<td>-0.09</td>
<td>0.18</td>
<td>-0.09</td>
</tr>
<tr>
<td></td>
<td>(0.13)</td>
<td>(0.15)</td>
<td>(0.13)</td>
</tr>
<tr>
<td>Criminal</td>
<td>0.73**</td>
<td>0.23</td>
<td>0.73**</td>
</tr>
<tr>
<td></td>
<td>(0.26)</td>
<td>(0.32)</td>
<td>(0.26)</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>0.69**</td>
<td>0.19</td>
<td>0.69**</td>
</tr>
<tr>
<td></td>
<td>(0.26)</td>
<td>(0.33)</td>
<td>(0.26)</td>
</tr>
<tr>
<td>Economic</td>
<td>-0.06</td>
<td>-0.19</td>
<td>-0.06</td>
</tr>
<tr>
<td></td>
<td>(0.25)</td>
<td>(0.32)</td>
<td>(0.25)</td>
</tr>
<tr>
<td>Treatments (-)</td>
<td>0.27***</td>
<td>-</td>
<td>0.27***</td>
</tr>
<tr>
<td></td>
<td>(0.03)</td>
<td>(0.03)</td>
<td>(0.03)</td>
</tr>
<tr>
<td>Treatments (+)</td>
<td>-</td>
<td>0.11***</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>(0.02)</td>
<td>(0.02)</td>
<td>(0.02)</td>
</tr>
<tr>
<td>Observations</td>
<td>2087</td>
<td>2087</td>
<td>2076</td>
</tr>
<tr>
<td>Log-Pseudolikelihood</td>
<td>-3626.98</td>
<td>-1848.92</td>
<td>-3601.30</td>
</tr>
<tr>
<td>Ln(α)</td>
<td>0.12</td>
<td>0.35</td>
<td>0.13</td>
</tr>
<tr>
<td></td>
<td>(0.09)</td>
<td>(0.11)</td>
<td>(0.09)</td>
</tr>
<tr>
<td>α</td>
<td>1.12</td>
<td>1.43</td>
<td>1.14</td>
</tr>
<tr>
<td></td>
<td>(0.10)</td>
<td>(0.15)</td>
<td>(0.10)</td>
</tr>
</tbody>
</table>

Standard errors are in parentheses. Estimates are negative binomial regression coefficients. Fixed effects for circuits are included in the analysis but not displayed.

*p < 0.10   **p < 0.01   ***p < 0.001 for two-tailed tests.

Table 5.2: Model of the Treatment of Visiting Judge Panel Case Outputs by All Panels
Length, consistent with prior analyses (Black and Spriggs 2008), is positive and statistically significant in both models, suggesting that longer opinions are more likely to be treated than shorter opinions. The presence of an Appendix affects treatment patterns but again, only in the negative treatment model. Cases with an appendix are less likely to be treated negatively than cases without, suggesting that appendices do provide valuable information to future judges. In neither model does the presence of an amicus brief have a statistically significant effect on the number of treatments. The issue area of the case, particularly cases dealing criminal matters (Criminal) and civil rights claims (Civil Rights), affects the number of positive treatments. Finally, the number of opposing treatments is significant in both models, suggesting that the model may fail to capture all of the factors affecting treatment patterns.

The results of the control variables are significant for several reasons. Variables designed to capture the presence of disagreement demonstrate its negative effect on quality. The results also support the decision to treat positive and negative citations separately. The effects of the control variables differ substantially across models. In fact, most of the hypothesized effects are observed only in the negative treatment model. The non-equal distribution of positive treatments within and between each circuit (see Table 5.1) demonstrates that positive treatments are driven at least partially by norms governing precedent within each circuit. As a consequence, examining negative treatments, not positive treatments, may be the best way to gauge judicial quality – an important finding in its own right.

Turning to visiting judges, the Visitor Quality Hypothesis finds little support. The Visitor variable, which indicates the presence of a visiting judge, is statistically
insignificant in both models. Case outputs generated by panels with a visiting judge are no more likely to be treated positively or negatively than panels with three regular court of appeals members. Despite the many criticisms levied against the process, visiting judges do not appear to undermine the quality of judicial work in the U.S. Courts of Appeals.

However, as discussed above, all visiting judges may not be created equal. District court judges may negatively affect quality because they are less familiar with the rules and norms guiding appellate decision-making. Out-of-circuit visitors may undermine quality because they are less familiar with the legal precedents governing the circuit in which they are serving. To examine these possibilities, refer to Columns 3-6 in Table 5.2. The models presented in Columns 3-6 are identical to those in Columns 1-2, expect that the Visitor is changed from “All Visitors” (Columns 1 and 2) to “District Court Visitors” (Columns 3 and 4) and “Out-of-Circuit Visitors” (Columns 5 and 6)\(^\text{80}\).

Turning first to District Court Judges (Columns 3 and 4), the results bear a striking resemblance to the All Visitors models (Columns 1 and 2). All of the control variables retain their sign and level of statistical significance (although Concurrence moves from being insignificant to marginally significant in the negative treatment model). Most importantly, much like in the All Visitors models, the variable indicating the Visitor remains statistically indistinguishable from zero. The presence of a district court judge on a panel does not appear to affect the quality of the case output.

\(^\text{80}\) In the rare case (under 2% of cases in the sample) of having both an out-of-circuit visitor and a home-circuit district court judge serving on the same panel, the case is included in both the District Court Judges (Columns 3 and 4) and the Out-of-Circuit Visitors (Columns 5 and 6). To ensure that these cases are not systematically biasing the results, I have also estimated the models excluding these cases. The results are substantively identical.
Turning now to *Out-of-Circuit Visitors* (Columns 5 and 6), a different pattern begins to emerge. Although the control variables retain their sign and level of significance, the *Visitor* variable now demonstrates a significant effect. While still indistinguishable from zero in the positive treatment model, the variable is positively signed and statistically significant in the negative treatment model. When an out-of-circuit judge serves as a member of a panel, the case output generated is more likely to be treated negatively by future panels. The magnitude of this effect is substantively meaningful. The presence of an out-of-circuit visitor on a panel corresponds to a roughly 33% increase in the number of negative treatments a case output is expected to receive\(^\text{81}\). The model predicts a total of approximately 146 negative treatments for the 263 cases examined in this analysis decided in part by an out-of-circuit visitor. If each of those case outputs had been created by a panel of three regular court of appeals members, the model predicts approximately 108 negative treatments, a difference of 38 negative treatments.

The effect of out-of-circuit visitors and the lack thereof for designated district court judges help clarify the mechanism through which visitors affect quality. Most of the complaints levied against visitors by regular appeals court judges are directed at district court judges. As a result, nearly all empirical analyses of visiting judges focus exclusively on the question of how district court judges affect the decision-making process (Collins and Martinek 2011; Brudney and Ditslear 2001; Saphire and Solimine

\(^{81}\) This is true holding all other variables at their mean (in the case of ordinal or continuous variables) or modal (in the case of dichotomous variables) categories. I discuss the substantive effect in terms of percentage increases rather than expected counts because the baseline expected number of negative treatments is low. As a result, the predicted substantive effect generates partial treatments – a difficult notion to conceptualize. In terms of expected counts, the expected number of negative treatments increases from 0.41 negative treatments to 0.55 negative treatments when an out-of-circuit visitor is present.
The above results demonstrate that this decision has left scholars with an incomplete picture of the visiting judge process. Judges moving horizontally across geographic boundaries, not vertically across jurisdictional boundaries, appear to have the greatest impact on the quality of case outputs. This is the first analysis to recognize this important distinction.

The results of Table 5.2 show that the presence of an out-of-circuit visitor on a panel leads all future panels to treat a case output more negatively. Examining treatments in this manner assumes that all future panels are equally able to evaluate quality. Is it possible that some panels are simply better at evaluating quality than others? Out-of-circuit visitors may negatively affect case output quality because they are (presumably) less familiar with the body of law governing decision-making in the circuit they are visiting. If out-of-circuit visitors are unfamiliar with the case law of a particular circuit, might future out-of-circuit panels be less likely to recognize these shortcomings? A similar concern is plausible for district court visitors. Perhaps future in-circuit panels, undoubtedly more knowledgeable about the state of the law in their own circuit, are better able to recognize poor quality case outputs.

To investigate these possibilities, Tables 5.3 and 5.4 examine how in- and out-of-circuit panels differ in their treatments of case outputs. Tables 5.3 and 5.4 are identical in all respects to Table 5.2 with one important difference: the dependent variable has been disaggregated from all positive and negative treatments to all positive and negative In-Circuit treatments (Table 5.3) and all positive and negative Out-of-Circuit treatments (Table 5.4).
<table>
<thead>
<tr>
<th>All Visitors</th>
<th>District Court Visitors</th>
<th>Out-of-Circuit Visitors</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Positive</strong></td>
<td><strong>Negative</strong></td>
<td><strong>Positive</strong></td>
</tr>
<tr>
<td>Constant</td>
<td>-0.96***</td>
<td>-3.43***</td>
</tr>
<tr>
<td></td>
<td>(0.47)</td>
<td>(0.60)</td>
</tr>
<tr>
<td>Visitor</td>
<td>0.02</td>
<td>0.126</td>
</tr>
<tr>
<td></td>
<td>(0.10)</td>
<td>(0.127)</td>
</tr>
<tr>
<td>Reverse</td>
<td>-0.17</td>
<td>0.454***</td>
</tr>
<tr>
<td></td>
<td>(0.11)</td>
<td>(0.143)</td>
</tr>
<tr>
<td>Dissent</td>
<td>-0.01</td>
<td>0.802***</td>
</tr>
<tr>
<td></td>
<td>(0.17)</td>
<td>(0.181)</td>
</tr>
<tr>
<td>Concurrence</td>
<td>-0.41*</td>
<td>0.286</td>
</tr>
<tr>
<td></td>
<td>(0.19)</td>
<td>(0.230)</td>
</tr>
<tr>
<td>Panel Extremity</td>
<td>0.21</td>
<td>-0.11</td>
</tr>
<tr>
<td></td>
<td>(0.34)</td>
<td>(0.43)</td>
</tr>
<tr>
<td>Age</td>
<td>-0.02</td>
<td>0.07*</td>
</tr>
<tr>
<td></td>
<td>(0.03)</td>
<td>(0.03)</td>
</tr>
<tr>
<td>Length</td>
<td>0.06***</td>
<td>0.02*</td>
</tr>
<tr>
<td></td>
<td>(0.01)</td>
<td>(0.01)</td>
</tr>
<tr>
<td>Appendix</td>
<td>-0.05^</td>
<td>-0.11***</td>
</tr>
<tr>
<td></td>
<td>(0.03)</td>
<td>(0.04)</td>
</tr>
<tr>
<td>Amicus</td>
<td>-0.14</td>
<td>-0.33</td>
</tr>
<tr>
<td></td>
<td>(0.15)</td>
<td>(0.21)</td>
</tr>
<tr>
<td>Criminal</td>
<td>0.84**</td>
<td>0.86*</td>
</tr>
<tr>
<td></td>
<td>(0.32)</td>
<td>(0.41)</td>
</tr>
<tr>
<td>Civil Rights</td>
<td>0.83**</td>
<td>0.76^</td>
</tr>
<tr>
<td></td>
<td>(0.32)</td>
<td>(0.41)</td>
</tr>
<tr>
<td>Economic</td>
<td>0.04</td>
<td>0.31</td>
</tr>
<tr>
<td></td>
<td>(0.32)</td>
<td>(0.41)</td>
</tr>
<tr>
<td>Treatments (-)</td>
<td>0.23***</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>(0.03)</td>
<td>(0.03)</td>
</tr>
<tr>
<td>Treatments (+)</td>
<td>0.10***</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>(0.02)</td>
<td>(0.02)</td>
</tr>
<tr>
<td>Observations</td>
<td>2087</td>
<td>2087</td>
</tr>
<tr>
<td>Log-</td>
<td>-3118.79</td>
<td>-1277.75</td>
</tr>
<tr>
<td>Pseudolikelihood</td>
<td>-1275.97</td>
<td>-1275.97</td>
</tr>
<tr>
<td>Ln(α)</td>
<td>0.37</td>
<td>0.29</td>
</tr>
<tr>
<td></td>
<td>(0.10)</td>
<td>(0.17)</td>
</tr>
<tr>
<td>α</td>
<td>1.45</td>
<td>1.33</td>
</tr>
<tr>
<td></td>
<td>(0.14)</td>
<td>(0.22)</td>
</tr>
</tbody>
</table>

Standard errors are in parentheses. Estimates are negative binomial regression coefficients. Fixed effects for circuits are included in the analysis but not displayed.

^p < 0.10    *p < 0.05    **p <0.01    ***p < 0.001 for two-tailed tests.

Table 5.3: Model of the Treatment of Visiting Judge Panel Case Outputs by All In-Circuit Panels
Turning first to Table 5.3, the results are quite similar to Table 5.2. Again, of all the visiting judge types, only out-of-circuit visitor has a relationship with the dependent variable that is statistically distinguishable from zero. And again, this relationship is only apparent in the negative treatments model. Like the total treatment models, future home-circuit panels are more likely to treat case outputs generated by panels including out-of-circuit visitors more negatively than those created by a panel of three regular court of appeals judges. Again, this effect is substantively meaningful. In terms of home-circuit treatments, the presence of an out-of-circuit visitor yields approximately 40% more negative treatments than if the case output had been generated by three regular court of appeals members. Further, there is no evidence that the presence of district court judges affects the quality of the case output. Home-circuit panels do not treat outputs generated by a designated district judge panel any differently than those generated by regular judge panels. The consistent lack of effect of district court judges suggests that the extensive criticisms directed at their participation, and the analyses they have motivated, appear to be misplaced.

To examine how case outputs are treated by future panels originating outside of the cited case’s original circuit, refer to Table 5.4. Here, once again, most of the variables retain their substantive sign and level of statistical significance. The most notable difference in Table 5.4 is that the relationship between out-of-circuit visitors and negative treatments has gone from one that is statistically significant at conventional levels to one that is not, albeit marginally so (p = .146). The failure to observe a

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82 Again, all control variables are held at their mean or modal category. In terms of expected counts, the presence of an out-of-circuit visitor changes the number of expected negative treatments from 0.15 to 0.21 negative treatments.
<table>
<thead>
<tr>
<th></th>
<th>All Visitors</th>
<th>District Court Visitors</th>
<th>Out-of-Circuit Visitors</th>
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<tr>
<td></td>
<td>Positive</td>
<td>Negative</td>
<td>Positive</td>
</tr>
<tr>
<td><strong>Constant</strong></td>
<td>-1.90***</td>
<td>-4.09***</td>
<td>-1.92***</td>
</tr>
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<td></td>
<td>(0.52)</td>
<td>(0.69)</td>
<td>(0.52)</td>
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<td>-0.03</td>
</tr>
<tr>
<td></td>
<td>(0.12)</td>
<td>(0.14)</td>
<td>(0.13)</td>
</tr>
<tr>
<td><strong>Reverse</strong></td>
<td>0.13</td>
<td>0.31*</td>
<td>0.13</td>
</tr>
<tr>
<td></td>
<td>(0.12)</td>
<td>(0.15)</td>
<td>(0.12)</td>
</tr>
<tr>
<td><strong>Dissent</strong></td>
<td>-0.40</td>
<td>0.78****</td>
<td>-0.40</td>
</tr>
<tr>
<td></td>
<td>(0.28)</td>
<td>(0.21)</td>
<td>(0.28)</td>
</tr>
<tr>
<td><strong>Concurrence</strong></td>
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<td>0.46</td>
<td>-0.46*</td>
</tr>
<tr>
<td></td>
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<td>(0.20)</td>
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<tr>
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<td>(0.54)</td>
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<td></td>
<td>(0.03)</td>
<td>(0.04)</td>
<td>(0.03)</td>
</tr>
<tr>
<td><strong>Length</strong></td>
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<td>0.04****</td>
<td>0.04***</td>
</tr>
<tr>
<td></td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>(0.01)</td>
</tr>
<tr>
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</tr>
<tr>
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<td>(0.05)</td>
<td>(0.07)</td>
</tr>
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<td><strong>Amicus</strong></td>
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<td><strong>Criminal</strong></td>
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<td>(0.43)</td>
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<td></td>
<td>(0.31)</td>
<td>(0.43)</td>
<td>(0.31)</td>
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<td></td>
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<td>(0.43)</td>
<td>(0.31)</td>
</tr>
<tr>
<td><strong>Treatments (-)</strong></td>
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<td>-</td>
<td>0.35***</td>
</tr>
<tr>
<td></td>
<td>(0.03)</td>
<td>(0.03)</td>
<td>(0.03)</td>
</tr>
<tr>
<td><strong>Treatments (+)</strong></td>
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<td>-</td>
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<tr>
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<td>(0.03)</td>
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<td><strong>Ln(α)</strong></td>
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<td>0.66</td>
</tr>
<tr>
<td></td>
<td>(0.11)</td>
<td>(0.14)</td>
<td>(0.11)</td>
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<tr>
<td><strong>A</strong></td>
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<td>1.94</td>
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<td>(0.22)</td>
</tr>
</tbody>
</table>

Standard errors are in parentheses. Estimates are negative binomial regression coefficients. Fixed effects for circuits are included in the analysis but not displayed.

*p < 0.10   *p < 0.05   **p < 0.01   ***p < 0.001 for two-tailed tests.

Table 5.4: Model of the Treatment of Visiting Judge Panel Case Outputs by Out-of-Circuit Panels
relationship between out-of-circuit visitors and output quality in out-of-circuit citations patterns could be the result of several factors. Methodologically, the majority of treatments (see Table 5.1) are in-circuit treatments, which may limit the statistical power of the out-of-circuit model. Substantively, out-of-circuit panels may have greater difficulty evaluating the quality of a case’s output than panels operating within the original circuit. If the effective use of precedent and fidelity to circuit law is a component of output quality, it should be unsurprising that out-of-circuit panels would have a more difficult time differentiating between higher and lower quality outputs than panels well immersed in the law of the circuit. The results demonstrate the importance of distinguishing between in-circuit and out-of-circuit treatments. Most citations analyses prioritize out-of-circuit treatments as the best proxies for judicial quality; the patterns displayed in Tables 5.3 and 5.4 suggest that in-circuit citations may be a useful tool for comparing different hypotheses related to quality.

The results presented in Tables 5.2-5.4 paint a consistent picture: while visitors as a whole do not undermine the quality of case outputs in the courts of appeals, the presence of out-of-circuit visiting judges leads to more negative treatments by future panels. This effect is particularly robust for future panels of the circuit in which the case output was generated.

**Discussion and Conclusion**

Critics have been skeptical of the normative implications of the visiting judge process. However, a consistent explanation as to why visitors are harmful for the decision-making in the U.S. Courts of Appeals has failed to emerge. This has led
attempts to verify the limitations of the visiting judge process to frequently arrive at differing conclusions. This examination helps to fill both of these voids. The analysis presented here is the first to empirically demonstrate that the visiting judge process (at least one part of that process) does indeed have normatively undesirable consequences for the creation of legal policy in the courts of appeals.

The finding that out-of-circuit visiting judges specifically, rather than all types of visitors, lead to lower quality case outputs demonstrates how collegiality is inhibited for appellate court decision-making. Out-of-circuit visitors are unlikely to be familiar with the rules and precedents guiding decision making in a circuit with which they are largely unfamiliar. These visitors also lack the opportunity to engage in reciprocal relationship building that is available to all regular court of appeals members and is at least more commonly available to home-circuit district court judges. The inability of some panel members to build these types of relationships and to become immersed in the rules and norms dictating the decision-making process severely limits the ability of the group members to interact effectively and produce a quality product.

The effect of out-of-circuit visitors and the lack of an effect for district court judges demonstrate that the quality of judicial output is affected by collegial factors and not status differences among the judges themselves. The criticism that district court visitors, because they are trial court judges, are simply inferior appellate decision-makers is unfounded. As a result, prior examinations of the visiting judge process which have focused exclusively on district court judges in the courts of appeals (Collins and Martinek 2011; Brudney and Ditslear 2001; Saphire and Solimine 1995) appear needlessly restrictive. Future analyses of the visiting judge process should focus their attention on
the effect of visitors on the dynamics of group interaction and not on the status differences of the panel members.

Perhaps the most contribution of this analysis is the implications for the study of group decision-making on appellate courts. The results of this analysis and the analysis presented in Chapter 4 demonstrate the importance of psychological group effects in the courts of appeals. While most scholars recognize the importance of the group structure of the decision-making process, most do so only to acknowledge the possibility of rational, or strategic, behavior among judges. Rarely have scholars chosen to examine how group membership can affect the psychological aspects of the decision-making process. The use of visiting judges in the courts of appeals provides an excellent opportunity to examine these possibilities in greater depth.

This analysis makes several additional contributions. Methodologically, the empirical results suggest that a more thorough dialogue examining how *Shepard’s Citations* are used to evaluate the development of legal policy in the federal judiciary is needed. While *Shepard’s* has been demonstrated to be both reliable and valid (Hansford and Spriggs 2006, 43-54; Spriggs and Hansford 2000), to effectively use this unique data source, scholars require a clearer understanding of how different types of treatments relate to one another. Previous citation analyses either (a) take only a total count of all citations, not treatments, or (b) examine the aggregate difference between the number of positive and negative treatments to gauge the overall treatment of a particular case output. Neither is an advisable measurement strategy. While positive treatments are made disproportionately within home circuits, negative treatments are equally likely to be made by in- and out-of-circuit panels. In addition, the expected effect of many
noncontroversial variables (e.g. Age of a case predicting the total number of citations) is observed only in models predicting the number of negative citations to a case. Unique information about the treatment of a case appears to be found almost exclusively in the decision to treat a case negatively and not in the decision to treat a case positively. Additional research is needed to help illuminate this question more fully.

Lastly, the results have important implications for the study of legal development in the U.S. Courts of Appeals. The overwhelming majority of empirical research devoted to the study of the courts of appeals centers on the determinants of judicial decision-making. And while this is undeniably crucial for understanding the lower federal judiciary, ignoring the complex network of “the law” and the development of legal policy leaves an incomplete picture of how these courts actually operate. Only by understanding how judges respond to changes in legal policy can we truly understand why judges behave as they do.
CHAPTER 6: CONCLUSION

The primary purpose of this dissertation was to examine the consequences of the use of visiting judges in the United States Courts of Appeals. Although scholars and legal commentators have written extensively about the utilization of visiting judges, no existing scholarship offers a complete analysis of the use of visitors, their effects on judicial behavior, and normative implications of their use for the development of legal policy. This dissertation rectifies these limitations.

I have also extended previous analyses by evaluating not only the practical consequences of the use of visiting judges, but the implications for the study of judicial behavior in the courts of appeals. Scholars who have examined the visiting judge process have done so primarily as a question of judicial administration. This is a sensible question to address. After all, the visiting judge process was created explicitly (Chapter 1, pp. 11-14) to help resolve administrative challenges facing the lower federal judiciary. Whether or not visiting judges help to solve the administrative problems they were created to address is an interesting and appropriate question in its own right.

However, examining the use of visiting judges solely as a response to administrative concerns fails to consider the important implications of the process for judicial behavior in the courts of appeals. The defining feature of the U.S. Courts of Appeals is the use of rotating three-judge panels to dispose of cases. This feature
demonstrates the need for scholars interested in the study of judicial behavior to consider how institutional structures, aside from those found at the United States Supreme Court, affect the behavior of judges operating within courts. For the United States Courts of Appeals, I argue that the use of three-judge panels requires scholars to more seriously consider the effect of the small group context on the behavior of individual judges. The continued use of visiting judges provides a unique opportunity to examine the importance of this context. The presence of a visiting judge is expected to affect the behavior of judges in theoretically predictable and empirically verifiable ways. In the preceding chapters I have derived these theoretical expectations and have subjected them to empirical analysis. In this chapter I conclude by reviewing the empirical results, discussing their theoretical implications and previewing avenues for future research. I begin with a brief review of the results.

**Review of the Results**

The empirical analyses presented in Chapters 3-5 were designed to test 5 primary hypotheses. Rather than review each hypothesis in detail, Table 6.1 presents a brief summary of each hypothesis and the results of the relevant analyses.

Turning first to the *Strategic Chief Judge Hypothesis*, Chapter 3 tests the hypothesis using data on all active home-circuit district court judge visits and all active out-of-circuit appeals court judge visits from 1997-2009. The results demonstrate that, consistent with expectations, visiting judges do induce strategic group effects in the courts of appeals. As the ideological distance between a circuit chief judge and a possible visitor increases, the likelihood of that judge being employed as a visitor
significantly decreases. This suggests that circuit chief judges do consider the ideology of visitors when managing the visiting judge process. However, the effect is only present in the case of active home-circuit district court judges and not for active out-of-circuit appeals court judges. There are several possible reasons for this pattern. Active home-circuit district court judges are the most frequently utilized type of visiting judge, while active out-of-circuit appeals court judges are the least frequently utilized type (see Figure 1.2, pp. 22). The relative rarity of active out-of-circuit appeals court visitors may diminish the motivation for chief judges to behave strategically when selecting this type.
of visitor. Because they are employed so infrequently, the effect of active out-of-circuit
appeals judges on policy is likely to be minimal, especially in comparison to other types
of visitors. Circuit chief judges are also more likely to be familiar with the active district
court judges from their home circuit than appeals court judges from other circuits. As a
result, chief judges may be more successful at making strategic selections when choosing
among active home-circuit district court judges.

Most important, however, are the different rules governing the use of these types
of visiting judges. Circuit chief judges are completely unconstrained when designating
an active home-circuit district court judge to serve in their home-circuit courts of appeals.
For all out-of-circuit visitors, a circuit chief judge requires formal approval of the Chief
Justice of the United States, who typically follows the recommendation of the Committee
for Intercircuit Assignments of the Judicial Conference of the United States (see Chapter
1, pp. 15-17). The presence of this intervening body may cause circuit chief judges to be
wary of behaving strategically when selecting out-of-circuit visitors.

Chapter 4 examines the Visitor Formal Deference Hypothesis, the Visitor Informal
Deference Hypothesis and the Visitor Influence Hypothesis by examining the
voting behavior of judges serving in the courts of appeals from 1997-2002. In terms of
formal deference, district court visitors are less likely to author dissenting opinions than
other types of panel members. However, other types of visiting judges (including both
senior and active out-of-circuit visitors) are not any less likely to dissent than regular
court of appeals judges. In terms of informal deference and influence, there is no
evidence to suggest that visiting judges are more strongly influenced by the preferences
of regular panel members when voting on the merits, nor are the preferences of visiting
judges any less influential on other panel members than the preferences of regular court of appeals judges. Using a panel effects framework, the effect of the panel’s ideological preferences is not conditioned by the presence of a visiting judge. Taken together, these results demonstrate that the use of visiting judges does not appear to substantially affect decision-making patterns in the courts of appeals. Visitors may be deferential in other parts of the decision-making process (see Owens and Black 2009), but this deference and lack of influence is not reflected in their votes on the merits.

Chapter 5 offers a test of the Visitor Quality Hypothesis. Underlying most of the criticisms directed at the visiting judge process is the notion that the use of visitors somehow undermines the quality of appellate decision-making. Relying on citation analysis to help measure judicial quality, the results show that visiting judges do negatively affect quality. However, this effect is present only for out-of-circuit visitors. Cases decided by panels employing an out-of-circuit visitor are treated negatively more frequently than cases decided by panels without this type of judge as a panel member. This treatment pattern is observed only for in-circuit panels; future out-of-circuit panels do not treat cases employing out-of-circuit visitors any differently than cases decided using three regular panel members. These findings are particularly informative as most of the criticism of the visiting judge process has been directed at district court visitors. The importance of out-of-circuit visitors, rather than district court judges, may stem from the fact that out-of-circuit visitors are less familiar with circuit law and precedent governing the decision-making process. The results suggest that there is reason to be skeptical of the consequences of the visiting judge process, but not for reasons typically asserted by critics.
The collective results offer only conditional support for many of the criticisms directed toward visiting judges. The strategic behavior of circuit chief judges, the unwillingness of district court visitors to dissent, and the reduced quality of opinions generated by panels employing out-of-circuit visitors clearly demonstrate that visiting judges should not be considered fungible with regular court of appeals judges. The use of visiting judges does have real, tangible consequences for judicial behavior in the United States Courts of Appeals. Any normative evaluation of the visiting judge process needs to take these results into consideration.

The results presented here also have important implications for the study of judicial behavior in the U.S. Courts of Appeals. In the next section I discuss the theoretical implications of these results. Specifically, I discuss the utility of more directly incorporating insights gained from theories of small group behavior in theories of judicial behavior in appellate courts.

**Theoretical Implications**

This project was designed to address both the practical concerns inherent to the visiting judge process and the importance of visiting judges for understanding judicial behavior in the courts of appeals. The unique decision-making environment of the courts of appeals and the inclusion of visiting judges in that decision-making environment highlight the need for scholars to think carefully about the role of institutional context in shaping judicial behavior. In the courts of appeals judges hear cases as a small group, frequently including a temporary member. Current theories of judicial behavior fail to incorporate this context. Rather, these theories assume that judges serving in the courts...
of appeals will behave in a manner similar to that of Supreme Court justices. While commonalities undoubtedly exist between the two levels, by failing to acknowledge the differences, current theories of judicial behavior provide only a partial picture of judicial behavior in the court of appeals.

In Chapter 2, I developed a perspective that more directly incorporates group membership into existing theories of judicial behavior. Group membership is theorized to affect judicial behavior by inducing both strategic and psychological group effects. The results presented in Chapter 3 offer a confirmation of the importance of incorporating strategic considerations when examining judicial behavior in the courts of appeals. While there may be good reason to be skeptical of the utility of strategy as an explanation of judicial behavior in the courts of appeals (see Chapter 2, pp. 39-40), the confirmation of the Strategic Chief Judge Hypothesis suggests that when given the opportunity to pursue policy goals, court of appeals judges\(^3\) will behave strategically. However, strategic behavior is not unconditional. When barriers exist that limit judges’ discretion (in this case of the requirement that out-of-circuit visitors be approved functionally by the Judicial Conference), evidence of strategic behavior is largely absent. The conditional nature of strategic behavior suggests that theories attempting to explain judicial behavior in the courts of appeals do need to incorporate the possibility of strategy. However, any theory incorporating strategic behavior needs to recognize the limitations of strategy in the courts of appeals. Appeals court judges behave strategically,

\(^3\) One may be concerned that strategic behavior has only been demonstrated by chief judges and not by all court of appeals judges. However, because circuit chief judges are chosen exclusively based on seniority and age (see Chapter 3, pp. 60), there is little reason to think that these judges are systematically different than the universe of court of appeals judges. The selection mechanism prohibits the possibility that particularly strategic judges are self-selecting into the role of chief judge.
but do so only when the costs are low. As discussed earlier, the costs of strategic behavior can vary widely. Scholars would be well served to recognize the non-uniform costs of strategic behavior when developing expectations concerning the behavior of court of appeals judges. These judges will behave strategically, but only under certain conditions.

Group membership is also theorized to affect judicial behavior in many non-strategic ways, which I have termed psychological group effects. Drawing on research from the fields of sociology and social psychology, I theorized that several group characteristics, such as status differences, socialization patterns, and familiarity, should affect judicial behavior in the courts of appeals. Visiting judges provide a particularly unique opportunity to examine psychological group effects. Visiting judges are typically perceived to be of lower status than regular court of appeals judges, are never fully socialized into the court in which they are visiting, are unlikely to be familiar with many of the group members with whom they will work or the rules governing the decision-making process, and face unique time pressures associated with serving on two different courts simultaneously. These characteristics allow for a robust test of the importance of psychological group effects in the courts of appeals.

The results of the analyses presented in Chapters 4 and 5 offer some, albeit mixed, confirmation for the importance of psychological group effects. District court visitors are deferential when deciding to cast dissenting votes. Cases decided by panels employing out-of-circuit visitors are cited more negatively than cases decided using other panel compositions. However, there is no evidence to suggest that the presence of visiting judges substantially alters the final votes on the merits. Neither visitors nor court of
appeals judges serving with visitors appear to be influenced by their presence when casting votes. These results suggest that some factors included under the term “psychological group effects” are more important for understanding court of appeals decision-making than others. For example, the results of the Visitor Formal Deference Hypothesis help to illuminate the role of status differences in the courts of appeals. Only visiting district court judges are hesitant to dissent. If differences in status are in part driving this behavior, this suggests that status is in fact defined hierarchically within the lower federal judiciary. The results of the Visitor Quality Hypothesis confirm the importance of familiarity for effective decision-making. Panels including out-of-circuit visitors, presumably less familiar with the legal rules and precedents governing the visited circuit, produce lower quality opinions than panels with different member compositions. The presence of visiting judges does appear to induce psychological group effects in the courts of appeals.

The failure to more clearly differentiate between the types of visiting judges conceptually represents one of the primary limitations of this project. The presence of any type of visitor is theorized to induce similar types of psychological group effects. While the empirical analyses do differentiate between the different types of visiting judges, the theoretical perspective outlined in Chapter 2 stresses the commonality of the “otherness” of all visiting judges. The results of Chapters 4 and 5 suggest that a more nuanced approach to understanding psychological group effects may be necessary. This represents one possible avenue for future research, a topic to which I now turn.
Future Research

Several attractive avenues are available for future research. In terms of the study of visiting judges, I have primarily examined how the presence of visiting judges affects judicial behavior in the courts of appeals. Only Chapter 5 offers any analysis of the consequences of visiting judges for the development of legal policy. There is good reason to believe that visiting judges may play a greater role in the development of legal policy than is recognized here. The hierarchical nature of the lower federal judiciary is structured in such a way that legal policy is typically developed along “vertical” lines. Courts further up the judicial hierarchy are primarily responsible for developing new policies. These policies then percolate down throughout the lower levels of the judiciary. But research has demonstrated that legal policy is also developed “horizontally” in the courts of appeals, meaning different regional circuits can, and do, learn from each other (see Klein 2002). However, how different circuits learn from each other is not entirely clear. The visiting judge process represents one of the only institutionalized characteristics of the lower federal judiciary that transcends circuit borders. While visitors may be deferential or undermine collegiality, they also have the potential to act as mechanisms for horizontal learning. The Third Branch, the official newsletter of the federal judiciary, once noted that “Visiting Judges Take their Work on the Road.”84 Perhaps they also take their experience, their skills and their knowledge of legal policy as well. Visiting judges have the unique opportunity to help unify the policies created by an otherwise structurally-divided level of the federal judiciary. Understanding how the

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84 Story can be accessed at http://www.uscourts.gov/news/TheThirdBranch/06-02-01/Visiting_Judges_Take_Their_Work_on_the_Road.aspx.
movement of judges across institutional borders affects legal policy is an important question that is currently unanswered.

The theoretical perspective and empirical results presented here demonstrate the need for theory building on the subject of judicial behavior in the courts of appeals. Most work on judicial behavior has been developed to explain the decisions of Supreme Court justices. Only after these models have been developed are they then transported to the courts of appeals. This type of theory borrowing ignores many of the important differences of institutional context between the two levels. While Supreme Court models have done an adequate job explaining judicial behavior in the courts of appeals, these models are necessarily incomplete. The perspective outlined here lays the groundwork for the development of models of judicial behavior explicitly designed for judges serving in the courts of appeals. Research in the study of small group behavior may generate unique predictions about judges currently unrecognized by existing theories. Incorporating this line of research will provide scholars with a wide array of new research possibilities that currently receive little attention. Expanding on the possible explanations of judicial behavior and challenging many of the simplifying assumptions inherent to existing models will lead to a more complete understanding of the choices judges make when serving in the United States Courts of Appeals.
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APPENDIX 1

This appendix is designed to provide additional information concerning many of the methodological decisions made throughout the dissertation, including sources of data and measurement strategies. The appendix is divided into several sections, each of which corresponds to methodological decisions made in various portions of the dissertation. Because many of the methodological choices and measurements transcend the empirical chapters, the appendix is arranged by subject, rather than by chapter.

Visits Made by District Court and Appeals Court Judges

In order to perform the analysis presented in Chapter 3, I required data on the number of visits made by all home-circuit district court judges and all active out-of-circuit appeals court judges in each regional circuit court of appeals. To collect these data I relied on the LexisNexis Database, specifically the LexisNexis U.S. Federal and State Case search engine85 (“Lexis”). Lexis contains all published case opinions from the 1770s forward and all publicly-available unpublished case opinions from 1980 to the present. Lexis is one of the most inclusive, widely utilized legal research tools available today. To conduct my search, I generated a list of all active district court judges and all active court of appeals judges from 1997-2009. Judges were included in a given year

85 http://www.lexisnexis.com/productsandservices/solutionguide.asp

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only if the judge was active for the entire calendar year. For example, if a judge received her official commission on June 1, 1997 and officially resigned (or took senior status) on June 1, 2009, she would only be included for the years 1998-2008. Because the variable of interest is the number of visits made by a particular judge in a given year, by including only full years I ensure that valid comparisons can be made between judges.

After restricting the number of active judges to those serving a complete calendar year, I then began to search each judge by last name using the Lexis search feature. Lexis allows opinions to be searched by the name of the judge(s) serving on the panel, by date of decision and by circuit. For home-circuit district court judges, I searched all cases in which a judge’s last name was listed as a judge on the panel for a particular calendar year in which the case was decided (e.g. 1/1/1997 through 12/31/1997) in that judge’s home circuit. I then counted the number of unique opinions for which the judge was listed as a panel member. In the event of multiple judges with the same last name, I searched the judge again, this time including his or her first as well as last name. If I was still unsure as to the validity of the measure, I also included the word “designated” in the search. Lexis notes when a district court judge is “designated” to serve in the courts of appeals under the “Judges” section.

86 Hearing date, rather than decision date, would actually serve as the best search criterion to measure the number of visits made by a particular judge in a given year. Decision dates occur after a judge actually visits, and for cases that are heard late in the calendar year, the decision date may actually carry over into the next year. While hearing date would be ideal, Lexis does not include a filter which makes cases searchable by hearing date. Further, not all cases are granted a full hearing in the courts of appeals. Although using decision date is not ideal, I believe any error associated with using the decision date rather than the hearing date should be minimal. In the event that some error exists, presumably the error is randomly distributed, effectively cancelling out any possible bias. So, for each case heard in 1997 but decided in 1998, there should be a case heard in 1998 but decided in 1999, and so on.
A similar procedure was used for all active out-of-circuit appeals court judges. Rather than searching within the judge’s home circuit, the search was conducted in each circuit other than the judge’s home circuit. Again, in the case of multiple judges with the same last name, the first name was included as an additional filter. If this search did not yield adequate results, I included the word “visiting”. Much like the “designated” label for district court judges serving in the courts of appeals, Lexis includes the word “visiting” to describe any panel members reassigned from a different regional circuit.

One of the primary benefits of using Lexis during this time period is the ability to include both published and unpublished opinions. Published opinions are those opinions that judges (typically the majority opinion author) submit to the *Federal Reporter*. Although the *Federal Reporter* is a private enterprise (published by WestLaw), it is generally viewed as the authoritative source of case law for the lower federal judiciary, including the courts of appeals. Most cases decided in the courts of appeals are not published in the *Federal Reporter*, and are thus considered “unpublished” cases. The most important difference between published and unpublished decisions is their precedential value; unpublished decisions are not binding on future panels.

The search procedure detailed above makes no distinction between published opinions and unpublished opinions. I include both published and unpublished opinions because the goal of this particular analysis has little to do with the effect of precedent or the development of legal policy (areas where the difference between published and unpublished cases might be salient); I am simply interested in gauging how often a judge served in a particular court of appeals. Including both published and unpublished cases should generate the most accurate measure of visitor participation.
Judicial Common Space Scores

To measure the ideological preferences of judges serving in the federal judiciary, I rely on Judicial Common Space (JCS) scores. JCS scores are based on Poole and Rosenthal (1997) NOMINATE Common Space scores. NOMINATE scores are the product of a scaling analysis of congressional and presidential votes which allows these policymakers to be placed into a single, “common”, ideological space. In order to create JCS scores, the NOMINATE Common Space score of the appropriate congressperson or president is assigned to each federal judge, based on the norm of senatorial courtesy. Senatorial courtesy is the unwritten custom whereby the President consults the senators of his political party of a given state before nominating any person to a federal vacancy within that senator's state. All federal judges are assigned the NOMINATE Common Space score of the senator of the state in which the judicial vacancy exists if that Senator and the President are of the same political party. If neither senator shares the political affiliation of the President, the judge is assigned the president’s NOMINATE Common Space score. If both senators share the party affiliation of the President, the senators’ NOMINATE Common Space scores are averaged (see Giles et al. 2001, 631). JCS scores have been demonstrated to be both externally valid and highly reliable (see Epstein et al. 2007). Because of their utility for placing all judges serving in the federal judiciary into a common ideological space, JCS scores have become the standard measure for judicial ideology, particularly in research focused on the courts of appeals.
The United States Courts of Appeals Database

The data used for the analyses in Chapters 4 and 5 are drawn from the Update to the Appeals Courts Database (1997-2002). The Original U.S. Appeals Courts Database (“the Original Database”, 1925-1996) was designed to create an extensive dataset that would facilitate the empirical analysis of judicial behavior in the United States Courts of Appeals. In an effort to make comparisons of judicial behavior over a wide range of issues covering a long expanse of time, the Original Database includes a broad range of variables of theoretical importance to political scientists and legal scholars ranging from 1925 to 1996. The variables capture a wealth of information related to case characteristics, the participants, the issues involved, and most importantly, judges and their votes. Judges are identifiable through a common system of identification numbers. Judges’ votes are coded in a variety of ways, including for the appellant/respondent, majority/dissenting, and liberal/conservative. Generally the coding for the liberal/conservative distinction follows the “upperdog” and “underdog” coding procedure used in many other judicial datasets (see “Documentation” cited below for more information). While the Original Database is “case-centered”, meaning that one observation exists for each case in the analysis, it can easily be converted to a “judge-centered” format (used in Chapter 4) where the unit of analysis is the judge-case level, meaning that for the typical court of appeals case, three observations exist.

The Update to the Appeals Courts Database (“The Update”, 1997-2002) extends this project, both in terms of time (including more calendar years) and scope (the

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87 The database is publicly available and is housed by the Judicial Research Initiative (JuRI) at the University of South Carolina. For more information about the coding procedures of the database, as well as a copy of the database itself, see http://www.cas.sc.edu/poli/juri/appct.htm.
inclusion of new variables, primarily related to third party participation in the courts of appeals). Much like the Original Database, the Update provides a unique data source that allows scholars to examine many forms of judicial behavior in the courts of appeals in a common, systematic fashion. The Update is simply an extension of the Original Database.

Unlike many other judicial datasets, neither the Original Database nor the Update includes the universe of cases theoretically available for analysis. The courts of appeals dispose of literally tens of thousands of cases per year; attempting to collect systematic and reliable data on this many cases is unfeasible. Instead, both databases use a form of stratified sampling to produce a sample of court of appeals cases. To generate a useful sample, circuit-year serves as the sampling unit. For the Update, this produces 72 circuit-years. The universe of possible cases was defined as all decisions with opinions published in the *Federal Reporter* for each circuit in each calendar year. For the Update, a random sample of 30 cases was generated for each circuit-year for a total of 2160 cases. However, because the number of cases that occurs in each of the 72 circuit-years varies widely, the Update is not a proper random sample of all court of appeals decisions. To produce such a sample, each case is weighted based on the number of circuits (12 geographically defined circuits for the years included in the Update) and the universe of cases in that circuit-year. This weighting system appropriately approximates a random sample and allows for proper statistical inferences to be made from data. For all analyses completed using data from the Update, I have included weights to account for the sample
structure. For further discussion concerning the reliability and validity of the data, see “The United States Courts of Appeals Data Base: Documentation for Phase 1” (p. 10)\textsuperscript{88}.

\textit{Shepard's Citations}

To collect data on the treatment of cases included in the Update, I rely on \textit{Shepard’s Citations} (“Shepard’s”), available through Lexis. \textit{Shepard’s} is a citation index that links all U.S. court opinions to any court case decided at the state or federal level and available in any reporter (i.e. published) since the founding of the United States. Using \textit{Shepard’s} to examine citations patterns for a particular case (or “shepardizing” a case) provides an exhaustive list of citations that is both retrospective and prospective in nature. Sheparding a case will provide a complete list of inward citations, meaning all cases that cite the case being shepardized, as well as a complete list of outward citations, meaning all cases the case being shepardized cites. Using \textit{Shepard’s}, all cases published in the United States can be linked through citations.

Important for the analysis presented in Chapter 5, \textit{Shepard’s} also indicates how a case is treated by cases that subsequently cite it. The majority of citations are not “treatments” in any real sense; such citations do not indicate any positive or negative relationship between the cited case and the citing case. However, a substantial number of future cases do “treat” the opinion. To determine how a case is treated (if at all), \textit{Shepard’s} asks “What effect, if any, does the citing case have on the cited case?” (see Spriggs and Hansford 2000, 329). These treatments generally fall into two broad classes of categories, either positive or negative. Six non-neutral treatment codes exist. Cases

\footnote{\textsuperscript{88} http://www.cas.sc.edu/poli/juri/cta96_codebook.pdf}
coded as “Following” the cited opinion are considered Positive, while cases either “Distinguishing,” “Criticizing,” “Limiting,” “Questioning,” or “Overruling” the cited opinion are considered Negative. Shepard’s hires attorneys to code these treatments, subjecting them to extensive training based on an in-house unpublished manual. These trained coders are then assigned to perform content analysis on court opinions, assigning treatments to all citations available in the opinion.

Scholars have conducted extensive tests on Shepard’s data and found that the treatment coding is both reliable and valid (Hansford and Spriggs 2006, 43-54; Spriggs and Hansford 2000). While Shepard’s is undoubtedly not perfect and likely subject to some random coding error, the crux of the analysis presented in Chapter 5 hinges only on the distinction between positive and negative citations and not on the more difficult differentiation between the various types of negative citations. As additional reliability and validity analyses are conducted, scholars are beginning to make increased use of Shepard’s Citations to study the development of legal policy. As Hansford and Spriggs (2000) conclude after their extensive evaluation of Shepard’s, “Shepard’s can provide a valuable data source for developing indicators of legal change, the treatment of precedent, and the like” (339).