

**THE BEHAVIOR OF
FEDERAL JUDGES**

**A THEORETICAL AND
EMPIRICAL STUDY OF
RATIONAL CHOICE**

**LEE EPSTEIN, WILLIAM M. LANDES, AND
RICHARD A. POSNER**

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CHAPTER 8

THE AUDITIONERS

Desire for promotion is a significant motivating factor in many workplaces, and we expect it to operate in the federal judiciary as well¹, though the age of appointment of federal judges limits the opportunities for promotion. Almost 50 percent of American lawyers are under the age of 45, and more than 75 percent are under 55.² In contrast, the median age of the 163 active (that is, not senior-status) judges serving on the federal courts of appeals in 2010 was 62 and the average age 62.2, and none of the judges was younger than 40. The median age of the 632 active district judges was 60 (and the mean 59.9), and of the nine Supreme Court Justices 62 (with a mean of 64). These high ages, especially of the district judges (since court of appeals and Supreme Court Justices have often been promoted from lower ranks of the federal judiciary), reflect

¹ For some evidence that it does, see Chris Guthrie and Tracey E. George, "The Futility of Appeal," 32 *Florida State University Law Review* 357 (2005); Mark A. Cohen, "Explaining Judicial Behavior or What's 'Unconstitutional' about the Sentencing Commission," 7 *Journal of Law, Economics, and Organization* 183 (1991).

² The median age is 45. The age distribution of practicing lawyers in the United States in 2000, as shown in http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf (visited June 20, 2011), is as follows:

| | |
|------------------|----|
| 29 years or less | 7% |
| 30-34 | 12 |
| 35-39 | 14 |
| 40-44 | 15 |
| 45-54 | 28 |
| 55-64 | 13 |
| 65+ | 12 |
| Median | 45 |

the later entry of lawyers into judging (Article III judging at any rate) than into other legal careers.

We are interested in how the desire for promotion affects judicial behavior. There is a debate over whether promotion *should* be a feature of a judicial system. It is argued both that a norm against promotion encourages judicial independence and that it diminishes incentives to excel.³ We do not take sides; as throughout this book our analysis is strictly positive.

Our focus is on court of appeals judges who have a realistic prospect of promotion to the Supreme Court; we are curious whether any of these “auditioners” alter their behavior in order to improve their promotion prospects.⁴ This would be consistent with our realistic model of judges.

Table 8–1 presents historical data on age and some other characteristics of federal judges at appointment to any of the three principal ranks of Article III judges (district court, court of appeals, Supreme Court).⁵ The span covered by the table is 1789 to 2010 for Supreme Court Justices and district judges, and 1868 to 2010 for circuit judges (since 1893, judges of the federal courts of appeals).

[Insert Table 8–1]

For most district judges, appointment to the district court was their first judicial appointment, though about 6 percent had held another federal judicial appointment (usually as a magistrate judge or bankruptcy judge, occasionally as an administrative law judge)

³ See, for example, Eli Salzberger and Paul Fenn, “Judicial Independence: Some Evidence from the English Court of Appeal,” 42 *Journal of Law and Economics* 831 (1999); Daniel Klerman, “Nonpromotion and Judicial Independence,” 72 *Southern California Law Review* 455 (1999).

⁴ As throughout the book we disregard judges of the U.S. Court of Appeals for the Federal Circuit because of its specialized jurisdiction.

⁵ For information on judges, we rely on biographical sources, including a *Database on the Federal Judiciary* created by us, described in the final chapter of this book..

and another 28 percent had been state court judges. Surprisingly, the median age of appointment to the district court of lawyers who had prior judicial experience was only slightly higher than those who did not—51, compared to 50.8 for former state judges and 49 for former magistrates—even though the former state court judges had already served, on average, 9.5 years in the state courts before being appointed federal district judges.

Judges of the courts of appeals were older at the time of their appointment than district court judges: 53 (that is both their median and their mean age). A majority were appointed from other judicial positions: 41 percent had been district judges, 1 percent other federal judicial officers, and 14 percent state court judges. On average, district judges were appointed to courts of appeals at an older age than nonjudicial appointees to the courts of appeals (55 versus 51), as were former state court judges (52 versus 51), though only the former difference is statistically significant. The judges appointed to courts of appeals from other judgeships had on average spent a considerable amount of time in those judgeships: 9 years for former district judges and 12 for former state court judges.

The mean age of appointment of Supreme Court Justices is roughly the same as that of court of appeals judges—53.4—though the median is slightly higher (54.5). Almost half came directly from federal or state judgeships, and for those promoted from another federal court the mean was slightly higher (55). On average they had served 7 years in a federal court of appeals if promoted from that court and 9 years in a federal district court if promoted from that court.

Age at time of appointment has not varied dramatically over time at any of the three levels of the Article III judiciary (see Figures 8–1 and 8–2). The mean age of appointment of Supreme Court Justices and court of appeals judges peaked in the 1920s at 58 in the Supreme Court and 56 in the court of appeals, then declined to its present level. In the district courts the mean increased steadily from about 44 in the 1790s to 52 in the 1950s and then declined to its pre-

sent level. In the case of Supreme Court Justices a regression of year on age reveals a positive and statistically significant coefficient of .04, meaning that the average age of appointment increased by about 4 years every 100 years. But if we limit the analysis to 1900–2010, the coefficient (.03) is negative; that is, we would predict a median of 55.6 in 1900, 54.2 in 1950, and 52.7 in 2000.

[Insert Figures 8–1 and 8–2]

There is little systematic correlation between age of appointment and party of the appointing President (see Table 8–2). The average age at the time of appointment of court of appeals judges appointed by Republican Presidents is 52.8 and by Democratic Presidents an insignificantly higher 53.2. If we go back to 1857, the usual date for the onset of the modern two-party system, the mean age of Justices appointed by Republican Presidents is higher (55.5) than that of Justices appointed by Democratic Presidents (54.7), but the difference is not statistically significant. In the twentieth century Republican Presidents continued to appoint slightly older Justices (55.7 versus 54.5) but again the difference is not statistically significant. Since 1950, the appointees of Democratic Presidents have been older, but again not significantly (54.1 versus 53.9). However, as noted in chapter 3, beginning with Reagan the average age of court of appeals judges appointed by Republican Presidents (50.4) has been significantly lower than that of the Democratic Presidents' appointees (52.8)—and 23.4 percent of Republican President's appointees to the courts of appeals have been 45 or younger, compared to 13.2 percent of Democratic Presidents' appointees.

[Insert Table 8–2]

We noted in chapter 3 the tradeoff between the legacy effect of an appointment, which is greater the younger the appointee, and the ideological-drift effect, which is smaller the older the appointee.

Both are particular concerns in the case of the Supreme Court. Although the youngest Justice ever appointed, Joseph Story, was only 32 at the time of the appointment and the oldest, Harlan Fiske Stone when made Chief Justice, was 68, such extremes have become rare. None of the last ten Justices (since Scalia in 1986) has been younger than 40 (Thomas was 43) or older than 60 (Ginsburg was 60). For these Justices the standard deviation in their ages has been a relatively low 4.5, and the mean (52) has remained close to the overall mean for Supreme Court Justices of 53.

The lesson for judges seeking promotion to the Supreme Court from the lower federal courts is clear: the likelihood of such a promotion will drop to near zero at age 60. The lesson for district judges aspiring to promotion to the court of appeals is similar, though not quite so extreme. District judges are sometimes promoted to the court of appeals when they are over 60, but this is rare and only one court of appeals judge promoted from the district court, Horace Lurton in 1909, was 65 and none has been older. Occasionally though again infrequently a person with no prior judicial experience who is older than 60 is appointed to the court of appeals; an example is Guido Calabresi, appointed to the Second Circuit in 1994 at the age of 61.

The remainder of this chapter focuses directly on the auditioning phenomenon. We begin by noting that although the federal judiciary is a hierarchy, internal promotions are not a matter of course. Although we know from Table 8–1 that former judges are the largest single group of judges of the federal courts of appeals and Justices of the Supreme Court, most federal judges are not promoted. As shown in Table 8–3, only 4.1 percent of court of appeals judges have ever been appointed to the Supreme Court—of whom several were no longer on the court of appeals at the time of their appointment to the Supreme Court and so were not actually promoted; if they are eliminated, the percentage falls to 3.5 percent. And as shown in Table 8–4, only 11 percent of district judges have ever been promoted to a court of appeals or to the Supreme Court.

[Insert Tables 8–3 and 8–4]

If only because the number of district judges has risen relative to the number of court of appeals judges, and the number of court of appeals judges relative to the number of Supreme Court Justices, the rate of promotion has declined. Of court of appeals judges confirmed before 1960, 6.6 percent were promoted to the Supreme Court, compared to 2.6 percent since 1960. The comparable percentages for district judges promoted to the courts of appeals are 17 and 8.5, though in both cases some of the judges appointed since 1960 will yet be promoted, so that these numbers overstate the decline.

The promotion pools normally are limited to judges appointed by a President of the same party as the current President (the one who would be making the promotion). For example, of the 33 district judges whom Reagan promoted to the courts of appeals, 32 (97 percent) had been appointed to the district court by a Republican President.⁶ All 8 of Obama's promotions to courts of appeals at this

⁶ The statistics in this paragraph are based on the following table:

| | <i>Appointment of District Court Judges to the Court of Appeals</i> | | |
|------------------------------|---|-------------------|---------------------------|
| | <i>Total Number</i> | <i>Same party</i> | <i>Percent Same Party</i> |
| Roosevelt/Truman (1933–1952) | 23 | 17 | 74 % |
| Eisenhower (1953–1960) | 18 | 14 | 78 |
| Kennedy/Johnson (1961–1968) | 27 | 24 | 89 |
| Nixon/Ford (1969–1976) | 31 | 28 | 90 |
| Carter (1977–1980) | 15 | 10 | 67 |
| Reagan (1981–1988) | 33 | 32 | 97 |
| Bush I (1989–1992) | 23 | 22 | 96 |
| Clinton (1993–2000) | 19 | 14 | 74 |
| Bush II (2001–2008) | 13 | 12 | 92 |
| Obama (2009–2010) | 8 | 8 | 100 |

writing had been appointed to the district court by Democratic Presidents, though Democratic Presidents usually promote a smaller percentage of district judges of their own party than Republican Presidents do (79 percent versus 92 percent since 1933). The overall percentage of same-party promotions to courts of appeals since 1933 is 86 percent.

The probability of a same-party district judge being promoted depends not only on how strongly the President favors same-party appointments but also on the number of vacancies and the number of eligible district judges to fill those vacancies. Since roughly 57 percent (see Table 8–1) of the active district judges (that is, excluding district judges in senior status) during Reagan’s Presidency had been appointed by a Republican President, the probability of promotion was about 7 percent for district judges who had been appointed by a Republican President (32/440) and close to zero for district judges who had been appointed by a Democratic President (1/332). Clinton appointed 61 judges to the courts of appeals of whom 19 had been district judges, 14 of whom had been appointed by Democratic Presidents. Since there were roughly 368 appointees of Democratic Presidents on the district courts, the probability of promotion was about 4 percent for district judges appointed by Democratic Presidents (14/368) and 1 percent for appointees of Republican Presidents (5/489).

But the limitations that we have imposed on the promotion of district judges who had been appointed by a President of the opposite party of the President who had appointed them to the district court is too severe, since such judges would have a realistic possibility of being appointed to the court of appeals by a future Presi-

The source for these data are the “Biographical Directory of Federal Judges,” *United States Courts*, www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx (visited on June 14, 2011). We include independents in the denominator but not in the numerator; since the Nixon administration the percentage of independents has varied from 2 to 6 percent.

dent of the same party as the President who had appointed them to the district court.

Whether any district judges desirous of appointment to the court of appeals (not all are, by any means) shade their decisions or take other steps to increase the probability of such an appointment would be a formidable research project, which we have not attempted. We have, however, studied promotion-seeking behavior by court of appeals judges desirous of a Supreme Court appointment (as most are), and report our results in the next section.

Auditioning for the Supreme Court

Given the very small probability that a court of appeals judge will be appointed to the Supreme Court, we might expect promotion-seeking behavior by court of appeals judges to be almost nonexistent. Why would a judge alter his behavior to advance his career ambitions when the chance of success was so small?

One possibility is that just being considered for an appointment to the Supreme Court, or indeed just being thought by the media, other judges, etc., to be under consideration, is a source of utility because it increases the judge's visibility and prestige. If the appointment, or just being known to be under consideration (or to have been under consideration though the appointment went to someone else), would confer great utility on the judge, it would be rational for him to expend resources on increasing the probability of that happy event, even if the maximum feasible expenditure would increase the probability only slightly. That is an implication of simple cost-benefit analysis: if an increase in c will produce a greater increase in pb , where c is cost, b benefit, and p the probability of obtaining the benefit, then an expenditure of c is worthwhile. Expending resources on improving the probability of obtaining a judicial promotion might include incurring the disutility of voting against one's convictions in order to be a more attractive candidate for promotion, or taking time to ingratiate oneself with officials or

other opinion makers likely to have influence on a future Supreme Court appointment.

Still another reason to expect auditioning despite a low probability of success might be optimism bias.⁷ Court of appeals judges may underestimate the odds against promotion, especially since almost 30 percent of all Supreme Court Justices were promoted from the courts of appeals, thus making such promotions a salient feature of the federal judiciary—and in today's Court the figure is 88.9 percent. However, we have no evidence that court of appeals judges who audition for the Supreme Court do have optimism bias.

Finally, and of great importance, the odds of appointment to the Supreme Court are not uniform across court of appeals judges. The actual promotion pool is much smaller and the probabilities of promotion for members of the pool are therefore much higher.⁸ Those are the judges who have a substantial incentive to take steps to improve further their chances of appointment to the Supreme Court. They are the rational auditioners.

To identify the auditioners (more precisely, persons who have an incentive to audition because they have a real chance to be appointed—not all who have such a chance would lift a finger to increase the likelihood of such an appointment, either because they're not interested or because they think it undignified or improper to audition for a judicial appointment) we have examined presidential short lists, which are available for Supreme Court Justices since 1930,⁹ plus newspaper and scholarly accounts that provide infor-

⁷ See, for example, David Dunning, Chip Heath, and Jerry M. Suls, "Flawed Self-Assessment. Implications for Health, Education, and the Workplace," 5 *Psychological Science in the Public Interest* 69 (2004); Arnold C. Cooper, Carolyn Y. Woo, and William C. Dunkelberg, "Entrepreneurs' Perceived Chances for Success," 3 *Journal of Business Venturing* 97 (1988); Neil D. Weinstein, "Unrealistic Optimism about Future Life Events," 39 *Journal of Personality and Social Psychology* 806 (1980).

⁸ See Klerman, note 3 above.

⁹ Christine L. Nemacheck, *Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover through George W. Bush* (2007).

mation from then to the present.¹⁰ These sources, which enable us to compile a promotion pool (the scarcity of comparable sources for appointments to the courts of appeals prevented our conducting a parallel study of auditioner behavior by district judges who seek promotion to the court of appeals), reveal that more than 20 percent of active court of appeals judges since 1930 have been considered for appointment to the Supreme Court. We exclude judges appointed after 2009 because they are too recent to have been considered for the Court.

Table 8–5 provides summary statistics for these 122 auditioners and for the 475 other active court of appeals judges in service at some time between 1930 and 2009. (The names of the auditioners are listed in the appendix at the end of this chapter.) A word of caution is necessary. Some judges may have been placed in the promotion pool to appeal to interest groups and were never serious contenders. Such *faux* auditioners are likely to be similar to non-auditioners; so the differences we find between auditioners (using a list that doubtless includes some of the *faux* auditioners) and non-auditioners probably understate the actual differences between judges who do and do not have an incentive to audition. But the understatement is probably slight, because being reported as under consideration for appointment to the Supreme Court is considered an honor and therefore enhances the person’s utility.

[Insert Table 8–5]

The table reveals a number of differences between auditioners and non-auditioners:

1. Auditioners are concentrated in the Second, Fifth, and D.C. Circuits, even though those are not the largest circuits (a larger cir-

¹⁰ These include three newspapers (the *New York Times*, the *Washington Post*, and the *Wall Street Journal*); David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (1999); and Henry J. Abraham, *Justices, Presidents, and Senators* (5th ed. 2007).

cuit might be expected to contain more auditioners). Auditioners constituted 31 percent of the judges of those circuits compared to 16 percent for the other circuits. The D.C. Circuit is especially overrepresented—45.1 percent of its members were auditioners at some point during the period of our study. This is not surprising. That circuit has a disproportionate percentage of major cases; the judges, being located in Washington, are in a better position to “network” with high government officials likely to be influential in choosing a Supreme Court nominee; and, perhaps most important, because the District of Columbia has no Senators, a President has greater latitude in picking judges for the D.C. Circuit, and it is natural for him to pick potential auditioners in order to increase the promotion pool from which he will pick Supreme Court nominees if there are vacancies on the Court during his Presidency.

2. Younger appointees to the courts of appeals are significantly more likely to be in the promotion pool than those appointed at older ages; the average age of an auditioner is 48.6, compared to 53.8 for non-auditioners. Assuming some seasoning on a court of appeals—the average period that a Justice appointed from a court of appeals had served on that court is about 7 years—younger judges are more attractive to Presidents seeking to establish judicial legacies. The Reagan administration, as we noted in chapter 3, was explicit about this, deeming age “a very important” factor in the selection process, in order to ensure Justices’ and judges’ “lasting impact” on the law.¹¹

3. Judges appointed by Republican Presidents are proportionately more likely to be in the promotion pool; 23.3 percent of the members of the pool were such appointees, and only 17.9 percent were appointees of Democratic Presidents—a ratio of 1.3 to 1—though the ratio of Supreme Court Justices appointed by Republi-

¹¹ Statement of Edward C. Schmults, Deputy Attorney General, in Arnold H. Lubasch, “3 Reported Picked For Appeals Court,” *New York Times*, July 26, 1981, § 1, p. 1. See also Sheldon Goldman, *Picking Federal Judges* 337 (1997).

can Presidents to those appointed by Democratic Presidents between 1930 and 2009 was only 1.05 to 1.

3. Members of the promotion pool are disproportionately nonwhite and female. Of the 50 Hispanic, black, and Asian court of appeals judges in the relevant period (that is, since 1930), 36 percent were in the promotion pool, compared to only 19.4 percent of white judges. The corresponding percentages for female and male judges is 40.0 percent and 18.8 percent.

4. The American Bar Association evaluates the qualifications of candidates for court of appeals judgeships. No members of the promotion pool had received a “not qualified” rating, but only 1 percent of the non-auditioners had received it. Despite the growing emphasis on perceived qualifications in the confirmation process, we find no significant difference between the percentages of judges in and outside the promotion pool who received “qualified” versus “well qualified” ABA ratings.¹²

5. The quality (or reputed quality) of the law school attended by the auditioner—another possible proxy for competence—seems to make a difference. Of judges who had graduated from either Harvard Law School or Yale Law School, 30.4 percent were in the auditioner pool compared to 18 percent who had gone elsewhere. We single out these two law schools (with a reservation noted later) because all the current Justices of the Supreme Court attended one of them, although Ginsburg for only one year (Harvard, before transferring to Columbia Law School). There are more refined tests for determining which court of appeals judges would be the best candidates for the Supreme Court on pure competence grounds,

¹² We have data of ABA ratings for 485 court of appeals judges (97 auditioners and 388 non-auditioners). The ABA rated 36 percent of the auditioners as qualified and 64 percent as well qualified, and thus none unqualified. For non-auditioners the percentages were 31 percent qualified, 68 percent well qualified, and 1 percent unqualified.

regardless of political or diversity considerations,¹³ but they have no influence on appointments.

6. Auditioners are slightly more ideological as measured by their senatorial-courtesy score of .39, compared to .35 for non-auditioners. The less ideological the judge, the less opposition he or she is likely to encounter in the Senate confirmation process, but also the smaller the legacy effect of appointing him.

7. In terms of careers immediately prior to their appointment to the court of appeals, auditioners were more likely to be former federal lawyers or members of Congress than non-auditioners, although the numbers are small. Of the 31 court of appeals judges who had served as a U.S. Attorney (or Assistant U.S. Attorney) or as Solicitor General or Assistant to the Solicitor General prior to their appointment, 12 (39 percent) were in the promotion pool, as were 4 of the 6 former members of Congress. These figures may seem to belie claims that the United States is moving toward a European-style professional judiciary.¹⁴ But this ignores trend; eight of the nine Supreme Court Justices today are former federal court of appeals judges, and 40 percent of court of appeals judges are former district judges and a number of others are former state court judges, as are a number of district judges.

¹³ See, for example, Stephen Choi and Mitu Gulati, "Choosing the Next Supreme Court Justice: An Empirical Ranking of Judicial Performance," 78 *Southern California Law Review* 23 (2004), and the comprehensive literature review by Frank B. Cross and Stefanie Lindquist, "Judging the Judges," 58 *Duke Law Journal* 1383 (2009).

¹⁴ See William H. Rehnquist, "2001 Year-End Report on the Federal Judiciary," www.supremecourt.gov/publicinfo/year-end/2001year-endreport.aspx (visited June 15, 2011); Teddy Davis, "Justice Scalia Praises Elena Kagan's Lack of Judicial Experience," *ABC News*, May 26, 2010. <http://blogs.abcnews.com/politicalpunch/2010/05/justice-scalia-praises-elena-kagans-lack-of-judicial-experience.html> (visited June 15, 2011); Stephen Breyer, "Federal Judicial Compensation," Testimony before the House Committee on the Judiciary, Apr. 19, 2007. <http://judiciary.house.gov/hearings/printers/110th/34757.PDF> (visited June 14, 2011).

What is true is that court of appeals judges who had been appointed to a court of appeals from another court are rarely found in the Supreme Court promotion pool. Of the 19 court of appeals judges appointed to the Supreme Court between 1930 and 2009, only Sotomayor and Whittaker had moved from the district court to the court of appeals before being appointed to the Supreme Court. One of the 19 (Souter) had started his judicial career in a state court. But of course a judge who has served in two courts is likely to be too old to be considered seriously for appointment to a third (the Supreme Court).

We use regression analysis to explore further the relation between the probability of being an auditioner and the variables in Table 8–5. Table 8–6 presents our regression results. The only difference between the two regression equations is that the second has dummy variables for the Second, Fifth, and D.C. Circuits.

[Insert Table 8–6]

As expected, we find a significant negative coefficient on the *Age* variable. Each additional year reduces by .015 the probability of being an auditioner. So a judge appointed to the court of appeals at age 53 (the average age of appointment of the judges in our sample) has a 16 percent probability of being in the promotion pool, all else being equal (that is, setting all other variables at their mean). But for a judge appointed at age 46 (one standard deviation below the mean), the probability increases to 28 percent, while it declines to 8 percent for a 60-year-old appointee (one standard deviation above the mean). We also find a negative and significant coefficient on the *Year Confirm* variable: a judge appointed earlier tends to have more years of service and hence a greater opportunity to be in the promotion pool (and remaining there for a longer period). Thus, a judge confirmed in 1971 (the mean confirmation year for judges in our sample) has a 16 percent probability of being in the pool, and this increases to 22 percent for a judge confirmed in 1947 (one standard

deviation below the mean) and falls to 11 percent for a judge confirmed in 1995 (one standard deviation above). We also find that judges appointed by Republican Presidents have a significantly higher probability of being in the pool: 21 percent, compared to 12 percent for judges appointed by Democratic Presidents.

Diversity concerns have a significant effect on both appointments and inclusion in the promotion pool. In 1980, only 8 percent of active court of appeals judges were female and 11 percent nonwhite. By 2010 these figures had grown to 30 percent and 20.5 percent. Other things held constant, a white male has a 13 percent chance, a nonwhite male a 34 percent chance, and a white female a 33 percent chance of being in the promotion pool.

Diversity concerns are relatively new, and as a result the criteria for entering the promotion pool have changed. Of the 12 appointments to the Supreme Court since 1980, 5 (42 percent) were of women or nonwhites. In an attempt to take account of the newness of diversity concerns, we re-estimated the regressions in Table 8–6 for court of appeals judges active since 1970 rather than 1930 (429 versus 582 judges). But the results were very similar because so few women and nonwhites were judges before 1970.

The table shows that graduates of Harvard or Yale law schools have a significantly higher probability of being in the promotion pool than graduates of other law schools (22 versus 14 percent at the mean values of the other variables). This is a poor test of the effect of elite education, because there are other elite law schools, but a good test of the effect of attending Harvard or Yale. We suspect that because of the historical primacy of those schools in American legal education, the lay public (and perhaps many members of Congress) regards a degree from either of them as a qualification for the Supreme Court, though of course not the only qualification. In addition, the large pool of influential alumni (inside and outside the Beltway) of these schools offers superior networking opportunities for auditioners.

The four previous-employment variables (the omitted category is the private sector) are insignificant predictors of getting into the promotion pool, with the exception that a court of appeals judge who had worked for the federal government in a nonjudicial position is significantly more likely to be an auditioner in equation (1) but not in equation (2). This effect disappears in equation (2) because the dummy variable for the D.C. Circuit captures the previous-employment effect. Judges of the court of appeals of that circuit are significantly more likely to be auditioners than judges in other circuits (31 percent versus 15 percent); and 31 percent of the judges of that court but only 6 percent of judges of other courts of appeals had worked for the federal government in nonjudicial positions. Fifth Circuit judges also have a significantly higher probability of being in the auditioner pool, perhaps because it is the second largest circuit, with 17 judgeships; the Ninth Circuit, which is the largest federal court of appeals, is also the most controversial and the most heavily criticized.

We find no significant difference in probability of being an auditioner between court of appeals judges without prior judicial experience and state court and district court judges appointed to the court of appeals. The senatorial-courtesy score also has no significant effect on the probability of making the auditioner list. (The mean senatorial-courtesy score is .41 for the 19 appellate judges in our sample elevated to the Supreme Court compared to .36 for those not elevated, and the difference is not statistically significant.) Nor has the appointing President's ideological score have a significant effect. Probably what drives these results is that the promotion pool contains both liberals and conservatives, because Democratic and Republican Presidents alternate pretty frequently.

The regression analysis does a good job of distinguishing between auditioners and non-auditioners. As estimated from equation (2) in Table 8-6, the mean predicted probability of being an auditioner is .36 for the 122 auditioners in the sample but only .17 for the 460 non-auditioners—a difference of more than 100 percent.

Only 10 percent of the non-auditioners had a predicted probability of being an auditioner that was as high as the mean predicted probability of judges in the auditioner category.

We can also ask how well our model does in predicting which judges are actually promoted to the Supreme Court. Nineteen judges in our sample were promoted to the Court (17 directly from courts of appeals and two others—Vinson and Marshall—after they had resigned from courts of appeals). The mean predicted probability that one of the 19 was an auditioner was .47, compared to .34 for auditioners who were not appointed to the Supreme Court. In a logit regression of the probability of being appointed on the predicted probability of being an auditioner (for the 122 judges who were auditioners), a 10 percent increase in the predicted probability of being an auditioner increases the probability of appointment to the Supreme Court by 3.8 percent.

Of the 12 court of appeals judges who were appointed to courts of appeals after 1950 and had the highest predicted probability (ranging from 71 to 91 percent, with a mean of 77 percent) of making the Supreme Court promotion list, three became Justices (Scalia, Sotomayor, and Thomas). One was nominated but forced to withdraw (Douglas Ginsburg); another (Kenneth Starr) resigned from the court of appeals in 1989 when he passed over for appointment to the Court, but until then he had been widely considered a leading candidate. Two others (Amalya Kearse and Edith Jones) were auditioners at one time but are now too old to be considered for the Court. None of the remaining five judges of the 12 (Harry Edwards, Deanell Tacha, Brett Kavanaugh, Jennifer Elrod, and Debra Livingston) were ever in the auditioner pool, but three of them (Kavanaugh, Elrod, and Livingston) are young enough to remain in the running should a Republican become President in 2012 or even 2016.

Six of the 19 court of appeals judges who were appointed to the Supreme Court during the period covered by our study had predicted probabilities of being in the auditioner pool that ranged only

from 11.4 percent (Whittaker) to 24.7 percent (Minton), with a mean of 17.7 percent. (The others in this range were Harlan, Blackmun, Stevens, and Souter.) How to explain their appointment? We know in the case of Minton, Blackmun, Stevens, and Souter that personal connections played a critical role: Minton had served in the Senate with Truman (who appointed him) and was a close friend—and Truman was notorious for appointing cronies to high office. Blackmun was a friend of Warren Burger, the Chief Justice; Stevens of Senator Percy, at the time a very influential Republican Senator (Stevens was appointed to the Supreme Court by President Ford); and Souter of Senator Rudman, who was close to the first President Bush, who appointed Souter.

All this is well known; less well-known are the connections that played a significant role in the appointments of Harlan and Whittaker. Harlan was close to Eisenhower's attorney general, Herbert Brownell, Jr., and his appointment to the Supreme Court has been called "an abdication [by Eisenhower] to the personal preference of [Eisenhower's] attorney general."¹⁵ Whittaker had "a sponsor, someone with enough influence and connections to the right people in power to get him appointed"¹⁶—Roy Roberts, who, having been close to Eisenhower before, during, and after his election, was one of his trusted political advisors. Notice too that the pool from which Eisenhower picked Supreme Court Justices (after his first appointment, that of Warren as Chief Justice) was smaller than usual because he limited it to sitting judges, which Harlan and Whittaker happened to be. Harlan turned out to be an outstanding Supreme Court Justice, Whittaker a dreadful one who resigned after five years in the wake of a nervous breakdown brought about by inability, apparently of psychiatric origin, to cope with the Court's workload.

¹⁵ Craig Alan Smith, *Failing Justice: Charles Evans Whittaker on the Supreme Court* 86 (2005). See also *id.* at 78.

¹⁶ *Id.* at 44–45

Voting Behavior and Auditioners

If we assume, plausibly, that most judges in the promotion pool desire elevation to the Supreme Court, do they audition—that is, do they do things intended to increase the probability of being appointed to the Court? Several studies have addressed the question but have produced mixed or inconsistent answers.¹⁷

One of the things an auditioner might try to do would be to vote in cases in a way designed to ingratiate himself or herself with the present or a future President, or with other present or future officials or opinion makers who might influence a future Supreme Court appointment. It is difficult for judges to assess the impact of any particular decision on their promotion chances, especially when they are uncertain what political party the next President will belong to. But since at least the 1960s, a period that saw a sharp rise in crime rates, the rights of criminals have been widely unpopular. Efforts by the courts and Congress to cut back on criminal defendants' rights created by the Warren Court have had the support of Republicans and Democrats (notably President Clinton) alike. No president since Carter has called for the abolition of capital punishment. And though support for capital punishment has declined in recent years, 64 percent of Americans continue to support it,¹⁸ while 82 percent believe that judges are “not harsh enough” on criminals.¹⁹

So being tagged as “soft on crime” could lengthen the odds of a judge being promoted to the Supreme Court, and, knowing this,

¹⁷ See Cohen, note 1 above; Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, “Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning,” 73 *New York University Law Review* 1377 (1998). But in the Sisk, et al., study this finding is statistically significant only in the case of district judges appointed by Democratic Presidents.

¹⁸ See www.gallup.com/poll/144284/Support-Death-Penalty-Cases-Murder.aspx.

¹⁹ James A. Davis, Tom W. Smith, and Peter V. Marsden, *General Social Surveys, 1972–2010*, /www.norc.uchicago.edu/GSS+Website/ (visited June 24, 2011). The relevant variable is “COURTS” in the mnemonic index.

some judges in the promotion pool might be expected to adjust their behavior. Of possible relevance to this conjecture, two studies find that district judges who upheld the constitutionality of the Sentencing Reform Act of 1987 (which curtailed sentencing discretion) were more likely to be promoted to the courts of appeals than district judges who did not.²⁰

To test whether auditioners are less likely to rule for defendants in criminal cases than non-auditioners, we use the updated Sunstein database (see chapter 4), which contains two categories of criminal cases decided with a published opinion in the courts of appeals between 1995–2008—death penalty appeals and other criminal appeals, but the other appeals are limited to cases the Third, Fourth, and D.C. Circuits. We have divided the other criminal appeals into ordinary (“street crime”) appeals and white-collar appeals.²¹ Thus we have a threefold division:

Death penalty appeals. This subset covers 11 of the 12 circuits (there were no capital cases in the D.C. Circuit) and includes 314 cases, or 942 votes. After eliminating votes cast by district court judges and others sitting by designation, we were left with 926 votes.

Ordinary (“street crime”) criminal appeals. This subset includes 1274 criminal appeals in “ordinary” criminal cases (predominately drug possession and distribution, robbery, and illegal possession of guns) but is limited to judges in the Third, Fourth, and D.C. Circuits. Excluding votes cast by judges sitting by designation in these circuits, the number of votes is 3542.

“White-collar” criminal appeals. This subset is also limited to the Third, Fourth, and D.C. Circuits. It includes 468 cases of white-collar crime (fraud, bribery, money laundering, tax eva-

²⁰ Cohen, note 1 above;

²¹ Because our interest is in court of appeals judges, we exclude votes cast by district court judges sitting in a court of appeals by designation.

sion, embezzlement, etc.),²² which yield a total 1298 votes cast by court of appeals judges.

Because Americans believe “that street crime is our worse social problem and that corporate crime is not as dangerous or costly,”²³ we suspect that auditioner effects, if they exist, will be smaller in category (3) cases than in (1) and (2) cases. The public’s views may have changed in the wake of the Enron and other corporate scandals, but survey data suggest that this is not the case.²⁴

Before testing our hypothesis, we trimmed the auditioner list by excluding votes by judges when they were over 60 unless they had been appointed by a President of the same party as the current President; in that event we extend the eligibility age to 62. Only one of the 29 Justices appointed since 1945 was older than 62—Powell, who was 64 (and not a judge, so he wouldn’t be on our list of auditioners regardless of his age)—but four others—Warren, Burger, Blackmun, and Ginsburg—were between 60 and 62. This trimming gives us a set of ex-auditioners—judges who were once auditioners but were too old when they cast judicial votes included in the database to be included in the auditioner pool. For example, Judge Wilkinson of the Fourth Circuit cast 113 votes in the Sunstein database as an auditioner and 24 as an ex-auditioner, and Judge Wilkins (also of the Fourth Circuit) cast 98 judicial votes as an auditioner and 26 as an ex-auditioner.

We expect ex-auditioners to favor criminal defendants more frequently than when they were part of the auditioner pool. This is

²² For the full list of white-collar crimes see http://topics.law.cornell.edu/wex/White-collar_crime (visited June 24, 2011).

²³ David M. Newman, *Sociology: Exploring the Architecture of Everyday Life* 113 (2010).

²⁴ Kristy Holtfreter, et al., “Public Perceptions of White-Collar Crime and Punishment,” 36 *Journal of Criminal Justice* 50 (2008), reports the results of a national public opinion poll showing that the majority of respondents believed that “violent criminals should be punished more severely than white collar-criminals.” The study is based on a 2005 survey and thus predates the Madoff and other more recent corporate scandals—but so do our data.

an important test of our hypothesis that auditioners change their voting behavior to increase their chances of promotion because it allows us to test the alternative hypothesis that judges who are less likely to favor criminal defendants are more likely to be selected as auditioners in the first place; for if that hypothesis is correct we would find no difference in voting behavior between auditioners and ex-auditioners.

Table 8–7 reveals that auditioners are significantly less likely to vote for defendants in capital cases than either non- or ex-auditioners. There are no significant differences in the other two categories, where the emotions of the public are less likely to be aroused by the reversal of a conviction or sentence.

[Insert Table 8–7]

Regression analysis allows us to test whether these results hold up when we control for other variables. We expect the judge's ideology (proxied by the party of the appointing President), and the ideology of the panel (proxied by whether a majority of the judges on the panel were appointed by Democratic or Republican Presidents) and of his circuit (the fraction of active judges appointed by Republican Presidents), to influence the judge's vote, and in the capital-punishment regression we need to consider whether the lower-court decision was for or against the defendant, in order to control for the appellate courts' propensity to affirm. (This adjustment is not necessary for the other categories, in which almost all appeals are by defendants.) Since the street-crime and white-collar categories include only votes of judges in the Third, Fourth, and D.C. circuits, our regressions control for circuit ideology by including dummy circuit variables (with the D.C. circuit as usual the omitted category). We include sex and race variables and a variable for whether the judge had worked as a government lawyer before being appointed to the court of appeals. Tables 8–8 presents our results.

[Insert Table 8–8]

In the death-penalty and street-crime regressions, auditioners are significantly more likely to vote against defendants than either non-auditioners or ex-auditioners (who vote almost identically). The regression coefficients imply that, other things being equal, the probability of voting against the defendant in death penalty cases is 81 percent for auditioners and 71 percent for non-auditioners and ex-auditioners when the defendant is appealing his conviction. If the government is appealing in a death-penalty case the probability of reversal (and thus a decision in the government's favor) is 65 percent for auditioners, compared to 51 percent for ex-auditioners and 52 percent for non-auditioners. Auditioners are also more likely to vote to affirm convictions of street crimes—the probability is 64 percent, compared to 51 percent for ex-auditioners and 50 percent for non-auditioners. We find no statistically significant differences among auditioners, non-auditioners, and ex-auditioners in the white-collar regression—the class of crimes in which the emotions of the public and politicians are least engaged, though that may be changing since the financial crisis of 2008. The only significant circuit-effect variable is the Fourth Circuit variable in the street-crime regression. Fourth Circuit judges are more likely to favor the government in criminal appeals than judges in the Third and D.C. circuits (the respective predicted probabilities of voting for the government is .69, .62 and .64). These results are consistent with the widely held belief that the Fourth Circuit was one of the most conservative courts of appeals until recent appointments by President Obama, not reflected in our data.

Our results suggest that court of appeals judges who have a good shot at the Supreme Court tend to alter their judicial behavior in order to increase their chances, though this is just an average tendency—we do not suggest that all court of appeals judges in

what we are calling the promotion pool audition for the Supreme Court.

APPENDIX

**COURT OF APPEALS JUDGES IN THE SUPREME COURT
PROMOTION POOL, 1930–2010**

| <i>Name of Judge</i> | <i>Position at Time of Appointment to the Court of Appeals</i> | <i>Appointing President (Court of Appeals)</i> | <i>Year Confirmed to the Court of Appeals</i> |
|---|--|--|---|
| <i>First Circuit (3/23 = 13.0%)</i> (number of judges in the promotion pool in the circuit/ number of active judges in the circuit, and former as percentage of latter) | | | |
| <i>Breyer, Stephen G.</i> | Professor | Carter | 1980 |
| <i>Souter, David H.</i> | State Judge | Bush, 41 | 1990 |
| <i>Woodbury, Peter</i> | State Judge | FDR | 1941 |
| <i>Second Circuit (15/56 = 26.8%)</i> | | | |
| <i>Cabranes, Jose Alberto</i> | US District Ct J | Clinton | 1994 |
| <i>Chase, Harrie Brigham</i> | State Judge | Coolidge | 1929 |
| <i>Friendly, Henry</i> | Private Practice | Eisenhower | 1959 |
| <i>Hand, Learned</i> | US District Ct J | Coolidge | 1924 |
| <i>Harlan, John Marshall</i> | Private Practice | Eisenhower | 1954 |
| <i>Kaufman, Irving R.</i> | US District Ct J | Kennedy | 1961 |
| <i>Kearse, Amalya Lyle</i> | Private Practice | Carter | 1979 |
| <i>Marshall, Thurgood</i> | NAACP | Kennedy | 1962 |
| <i>Miner, Roger J.</i> | US District Ct J | Reagan | 1985 |
| <i>Mulligan, William H.</i> | Professor | Nixon | 1971 |
| <i>Newman, Jon O.</i> | US District Ct J | Carter | 1979 |
| <i>Oakes, James L.</i> | US District Ct J | Nixon | 1971 |
| <i>Patterson, Robert Sr.</i> | US District Ct J | F. Roosevelt | 1939 |
| <i>Sotomayor, Sonia</i> | US District Ct J | Clinton | 1998 |
| <i>Winter, Ralph K.</i> | Professor | Reagan | 1981 |
| <i>Third Circuit (10/56 = 17.9%)</i> | | | |
| <i>Adams, Arlin M.</i> | Private Practice | Nixon | 1969 |
| <i>Alito, Samuel A., Jr.</i> | US Attorney | Bush, 41 | 1990 |
| <i>Biddle, Francis</i> | Private Practice | F. Roosevelt | 1939 |

| | | | |
|---|------------------|--------------|------|
| Chertoff, Michael | US Attorney | Bush, 43 | 2003 |
| Davis, John Warren | US District Ct J | Wilson | 1920 |
| Goodrich, Herbert | Professor | F. Roosevelt | 1940 |
| Hastie, William H. | State Governor | Truman | 1950 |
| Higginbotham, A. Leon | US District Ct J | Carter | 1977 |
| Jones, Charles Alvin | Private Practice | F. Roosevelt | 1939 |
| Lewis, Timothy K. | US District Ct J | Bush, 41 | 1992 |
| <i>Fourth Circuit (8/38 = 21.1%)</i> | | | |
| Chapman, Robert F. | US District Ct J | Reagan | 1981 |
| <i>Haynsworth, Clement</i> | Private Practice | Eisenhower | 1957 |
| Luttig, J. Michael | US Attorney | Bush, 41 | 1991 |
| Parker, John Johnston | Private Practice | Coolidge | 1925 |
| Widener, Hiram | US District Ct J | Nixon | 1972 |
| Wilkins, William W. | US District Ct J | Reagan | 1986 |
| Wilkinson, J. Harvie, III | Professor | Reagan | 1984 |
| Williams, Karen J. | Private Practice | Bush, 41 | 1992 |
| <i>Fifth Circuit (18/74 = 23%)</i> | | | |
| Bell, Griffin | Other State Job | Kennedy | 1962 |
| Benavides, Fortunato | Private Practice | Clinton | 1994 |
| <i>Carswell, George H.</i> | US District Ct J | Nixon | 1969 |
| Clark, Charles | Private Practice | Nixon | 1969 |
| Clement, Edith Brown | US District Ct J | Bush, 43 | 2001 |
| Garza, Emilio M. | US District Ct J | Bush, 41 | 1991 |
| Higginbotham, Patrick | US District Ct J | Reagan | 1982 |
| Hutcheson, Joseph | US District Ct J | Hoover | 1931 |
| Johnson, Frank M. | US District Ct J | Carter | 1979 |
| Jones, Edith H. | Private Practice | Reagan | 1985 |
| Owen, Priscilla | State Judge | Bush, 43 | 2005 |
| Prado, Edward | US District Ct J | Bush, 43 | 2003 |
| Roney, Paul H. | Private Practice | Nixon | 1970 |
| Sibley, Samuel Hale | US District Ct J | Hoover | 1931 |
| Smith, Jerry | State Attorney | Reagan | 1987 |
| <i>Thornberry, William</i> | US District Ct J | L.B. Johnson | 1965 |
| Tjoflat, Gerald B. | US District Ct J | Ford | 1975 |
| Tuttle, Elbert P. | Other Fed Job | Eisenhower | 1954 |

| <i>Sixth Circuit (10/58 = 17.2%)</i> | | | |
|--|------------------|--------------|------|
| Allen, Florence | State Judge | F. Roosevelt | 1934 |
| Batchelder, Alice M. | US District Ct J | Bush, 41 | 1991 |
| Combs, Bert T. | Private Practice | L.B. Johnson | 1967 |
| Daughtrey, Martha | State Judge | Clinton | 1993 |
| Hickenlooper, Smith | US District Ct J | Coolidge | 1928 |
| Kennedy, Cornelia | US District Ct J | Carter | 1979 |
| McCree, Wade H. | US District Ct J | L.B. Johnson | 1966 |
| Merritt, Gilbert S. | Private Practice | Carter | 1977 |
| Ryan, James L. | State Judge | Reagan | 1985 |
| <i>Stewart, Potter</i> | Private Practice | Eisenhower | 1954 |
| <i>Seventh Circuit (8/45 = 17.8%)</i> | | | |
| Easterbrook, Frank H. | Professor | Reagan | 1985 |
| Lindley, Walter | US District Ct J | Truman | 1949 |
| <i>Minton, Sherman</i> | Other FedJob | F. Roosevelt | 1941 |
| Posner, Richard A. | Professor | Reagan | 1981 |
| <i>Stevens, John Paul</i> | Private Practice | Nixon | 1970 |
| Tone, Philip W. | US District Ct J | Nixon | 1974 |
| Williams, Ann | US District Ct J | Clinton | 1999 |
| Wood, Diane P. | Professor | Clinton | 1995 |
| <i>Eighth Circuit (7/48 = 14.6%)</i> | | | |
| Arnold, Richard S. | US District Ct J | Carter | 1980 |
| <i>Blackmun, Harry</i> | Private Practice | Eisenhower | 1959 |
| Bowman, Pasco M. | Professor | Reagan | 1983 |
| Kenyon, William Squire | US Congress | Harding | 1922 |
| Stone, Kimbrough | State Judge | Wilson | 1916 |
| Webster, William H. | US District Ct J | Nixon | 1973 |
| <i>Whittaker, Charles</i> | US District Ct J | Eisenhower | 1956 |
| <i>Ninth Circuit (15/87 = 17.2%)</i> | | | |
| Callahan, Consuelo | State Judge | Bush, 43 | 2003 |
| Denman, William | Private Practice | F. Roosevelt | 1935 |
| Fernandez, Ferdinand | US District Ct J | Bush, 41 | 1989 |
| Goodwin, Alfred T. | US District Ct J | Nixon | 1971 |
| Hall, Cynthia H. | US District Ct J | Reagan | 1984 |
| Hufstedler, Shirley | State Judge | L.B. Johnson | 1968 |

| | | | |
|--|------------------|--------------|------|
| <i>Kennedy, Anthony</i> | Professor | Ford | 1975 |
| Kozinski, Alex | Other Fed J | Reagan | 1985 |
| McKeown, M. Margaret | Private Practice | Clinton | 1998 |
| Rawlinson, Johnnie B. | US District Ct J | Clinton | 2000 |
| Rymer, Pamela A. | US District Ct J | Bush, 41 | 1989 |
| Sneed, Joseph T. | US Attorney | Nixon | 1973 |
| Wallace, J. Clifford | US District Ct J | Nixon | 1972 |
| Wardlaw, Kim | US District Ct J | Clinton | 1998 |
| Wiggins, Charles E. | Private Practice | Reagan | 1984 |
| <i>Tenth Circuit (5/38 = 13.2%)</i> | | | |
| Bratton, Sam Gilbert | US Congress | F. Roosevelt | 1933 |
| McConnell, Michael W. | Professor | Bush, 43 | 2002 |
| McWilliams, Robert H. | State Judge | Nixon | 1970 |
| Phillips, Orié Leon | US District Ct J | Hoover | 1929 |
| Seymour, Stephanie | Private Practice | Carter | 1979 |
| <i>Eleventh Circuit (3/24 = 12.5%)</i> | | | |
| Johnson, Frank M. | US District Ct J | Carter | 1979 |
| Roney, Paul H. | Private Practice | Nixon | 1970 |
| Tjoflat, Gerald B. | US District Ct J | Ford | 1975 |
| <i>District of Columbia 23/51 = 45.1%</i> | | | |
| Arnold, Thurman | US Attorney | F. Roosevelt | 1943 |
| <i>Bork, Robert</i> | Private Practice | Reagan | 1982 |
| Brown, Janice Rogers | State Judge | Bush 43 | 2005 |
| Buckley, James L. | Private Sector | Reagan | 1985 |
| <i>Burger, Warren Earl</i> | US Attorney | Eisenhower | 1956 |
| Danaher, John A. | Private Practice | Eisenhower | 1954 |
| Fahy, Charles | Private Practice | Truman | 1950 |
| Garland, Merrick | US Attorney | Clinton | 1997 |
| <i>Ginsburg, Douglas, H.</i> | US Attorney | Reagan | 1986 |
| <i>Ginsburg, Ruth Bader</i> | Professor | Carter | 1980 |
| Groner, Duncan | US District Ct J | Hoover | 1931 |
| Mikva, Abner J. | US Congress | Carter | 1979 |
| <i>Roberts, John G. Jr</i> | Private Practice | Bush, 43 | 2003 |
| <i>Rutledge, Wiley Blount</i> | Professor | F. Roosevelt | 1939 |
| <i>Scalia, Antonin</i> | Professor | Reagan | 1982 |

| | | | |
|--------------------------|------------------|--------------|------|
| Silberman, Laurence H. | Private Practice | Reagan | 1985 |
| Starr, Kenneth W. | US Attorney | Reagan | 1983 |
| Stephens, Harold | US Attorney | F. Roosevelt | 1935 |
| Tatel, David Stephen | Private Practice | Clinton | 1994 |
| <i>Thomas, Clarence</i> | US Dept Head | Bush 41 | 1990 |
| <i>Vinson, Frederick</i> | US Congress | F. Roosevelt | 1937 |
| Wald, Patricia M. | US Attorney | Carter | 1979 |
| Wilkey, Malcolm R. | Private Practice | Nixon | 1970 |

Notes:

- (1) Fifth and Eleventh Circuits: Three judges (Johnson, Roney, and Tjoflat) who were appointed to the Fifth Circuit and reassigned to the Eleventh Circuit are listed twice, under both circuits. We do not include Judge Tuttle in the Eleventh Circuit list because he was a senior judge at the time of his reassignment.
- (2) Counts of Active Judges in the Circuit: Two judges (John Cotteral and Robert Lewis) were appointed to the Eighth Circuit but reassigned to the Tenth. Because their reassignments came before 1930, we include them in the count of active judges on the Tenth, not Eighth, Circuit. One judge (Julian Mack) served on the Sixth and Seventh Circuits prior to 1930, and after 1930 he served on the Second circuit. We include him in the count of Second Circuit Judges. Eighteen judges were transferred from the Fifth to the Eleventh Circuit but five (Jones, Morgan, Rives, Simpson, and Tuttle) had assumed senior status before their reassignment, so we don't count them.
- (3) A few judges were in other positions when they were initially shortlisted. For example, Pamela Rymer was a district court (not court of appeals) judge when Reagan considered her for Powell's seat. After she was elevated to the court of appeals, she remained under consideration as a possible Republican appointment.
- (4) Names in Italics: Nominated to the Supreme Court.

TABLES AND FIGURES

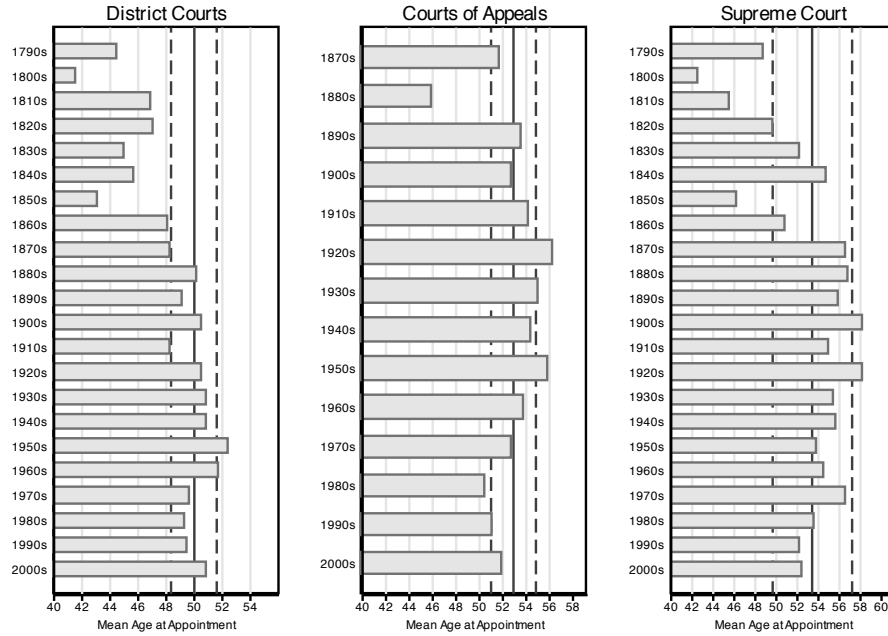
Table 8-1
Appointments to Federal Courts

| | <i>Supreme Court</i> (N=116) | <i>Courts of Appeals</i> (N=682) | <i>District Courts</i> (N=2671) |
|---|---------------------------------|-------------------------------------|------------------------------------|
| <i>Mean Age at Appointment</i> | 53.4 | 52.9 | 50.0 |
| <i>Mean Age at Departure (N)</i> | 69.3 (107) | 68.2 (504) | 66.4 (1782) |
| <i>Job at Time of Nomination</i> | | | |
| <i>Judge (All)</i> | .47 (55/116) | .56 (379/682) | .34 (898/2668) |
| <i>Federal Judge</i> | .62 (34/55) | .75 (284/379) | .17 (157/898) |
| <i>State Judge</i> | .38 (21/55) | .25 (95/379) | .83 (741/898) |
| <i>Private Practice</i> | .21 (24/116) | .26 (175/682) | .45 (1190/2668) |
| <i>Government Attorney</i> | .10 (12/116) | .07 (48/682) | .12 (313/2668) |
| <i>Elected Office</i> | .11 (13/116) | .03 (18/682) | .05 (142/2668) |
| <i>Other Government Position</i> | .09 (10/116) | .03 (22/682) | .03 (87/2668) |
| <i>Professor</i> | .02 (2/116) | .06 (40/682) | .01 (38/2668) |
| <i>Fraction Promoted</i> | — | .04 (28/682) | .11 (292/2671) |
| <i>Fraction Appointed by a Republican President</i> | .65 (54/83) | .56 (382/682) | .57 (1435/2536) |
| <i>Fraction of Cross-Party Appointments</i> | .16 (13/83) | .08 (57/682) | .09 (230/2541) |
| <i>Fraction Nonwhite (1980–2010)</i> | .17 (2/12) | .16 (41/260) | .18 (199/1101) |
| <i>Fraction Female (1980–2010)</i> | .33 (4/12) | .20 (52/260) | .21 (229/1101) |

Notes:

- (1) The Supreme Court column includes all Justices appointed between 1789 and 2010. Of the 160 nominations transmitted to the Senate (not double counting recess appointees—for example, we count Stewart once, not twice), some failed of confirmation and some failed initially but ultimately succeeded. A total of 116 were confirmed of whom four served both as an Associate Justice and as a Chief Justice—White, Hughes, Stone, and Rehnquist—and so appear twice in the data.
- (2) The courts of appeals column includes all circuit judges appointed between 1868–1891 and all judges appointed to one of the regional court of appeals since 1891 (also called circuit judges). We exclude judges of the U.S. Court of Appeals for the Federal Circuit and two recess appointees who were not confirmed: Wallace McCamant and Charles Pickering.
- (3) The district courts column includes all district judges appointed between 1789 and 2010 with the exception of the 21 recess appointments that were never confirmed.
- (4) Age at Time of Appointment: We are missing the year of birth for one judge (Philip Kissick Lawrence).
- (5) Age at Departure: For district and court of appeals judges, departure is the age at which the judge took senior status or died or resigned. The court of appeals column excludes judges elevated to the Supreme Court; and the district court column excludes judges elevated to the Supreme Court or to a court of appeals.
- (6) Job at Time of Appointment: “Elected position” includes members of Congress, state legislators, governors, and mayors. We are missing the pre-appointment job of three district court judges.
- (7) Promotion to the Supreme Court from the Court of Appeals: Includes four former court of appeals judges who had left the bench for other jobs before being appointed to the Supreme Court: McKenna (U.S. Attorney General), Taft (professor), Vinson (U.S. Treasury Secretary), and Marshall (U.S. Solicitor General).
- (8) Promotion from the District Court: We include one failed promotion attempt (Pickering to the court of appeals) and six promotions to the Supreme Court. We include two former district judges who had left the bench for other judges prior to their appointment to the court of appeals: Walter Gresham (Postmaster General) and Louis McComas (U.S. Senator).
- (9) Party and Cross-Party Appointments: 1857–2010 for the Supreme Court and district courts and 1868–2010 for the courts of appeals. We begin in 1857 because this was when the current two-party system became entrenched. Cross-party appointments mean (1) a Republican President appoints a Democrat or an independent or (2) a Democratic President appoints a Republican or an independent.

Figure 8-1
Mean Age at Appointment, by Decade



Notes:

- (1) The solid vertical line is the mean of the means, weighted by the number of confirmations in each decade; the dashed lines are one standard deviation from the mean of the means.
- (2) The decade of the 1790s includes 1789; the 2000s include 2010. For the courts of appeal, the decade of the 1870s includes 1869.

Table 8–2
Average Age of Appointments to the Court of Appeals, by
Appointing President

| <i>President</i> | <i>Number of Appointees</i> | <i>Mean Age of Appointees</i> | <i>Median Age</i> |
|-------------------------|-----------------------------|-------------------------------|-------------------|
| Harrison | 11 | 52.5 | 53 |
| Cleveland (2) | 9 | 53.3 | 53 |
| McKinley | 6 | 54.5 | 53 |
| T. Roosevelt | 18 | 51.1 | 51 |
| Taft | 13 | 57.8 | 58 |
| Wilson | 20 | 52.7 | 56 |
| Harding | 6 | 59.8 | 60 |
| Coolidge | 16 | 55.9 | 57 |
| Hoover | 16 | 57.1 | 59 |
| F. Roosevelt | 50 | 53.4 | 52 |
| Truman | 26 | 55.6 | 56 |
| Eisenhower | 45 | 56.6 | 56 |
| Kennedy | 20 | 54.7 | 55 |
| Johnson | 41 | 52.4 | 52 |
| Nixon | 45 | 54 | 53 |
| Ford | 12 | 52.6 | 53 |
| Carter | 56 | 52.3 | 53 |
| Reagan | 78 | 50.5 | 51 |
| Bush 41 | 37 | 49.5 | 49 |
| Clinton | 61 | 52.3 | 51 |
| Bush 43 | 59 | 51.0 | 51 |
| Obama (through 2010) | 15 | 55.0 | 56 |
| | | | |
| Democrats | 293 | 53.2 | 53 |
| Republicans | 362 | 52.8 | 53 |
| Total | 655 | 53.0 | 53 |

Figure 8-2
Mean Age of Supreme Court Justices at Appointment, 1788-2010

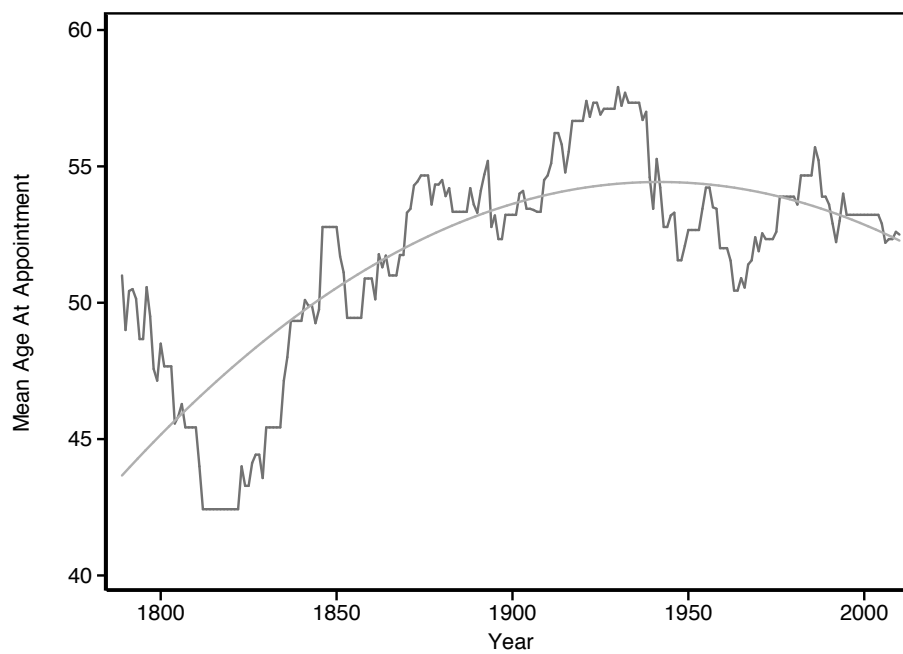


Table 8–3
Promotions from the Courts of Appeals to the Supreme Court, by President

| <i>President (Years)</i> | <i>(1) Number of Active Court of Appeals Judges</i> | <i>(2) Number of Appointments to the Supreme Court</i> | <i>(3) Fraction of Supreme Court Appointments of Court of Appeals Judges</i> | <i>(4) Fraction of Court of Appeals Judges Appointed to Supreme Court</i> |
|-------------------------------|---|--|--|---|
| Roosevelt/ Truman (1933–1952) | 119 | 13 | .15 (2/13) | .02 (2/119) |
| Eisenhower (1953–1960) | 108 | 5 | .60 (3/5) | .03 (3/108) |
| Kennedy/ Johnson (1961–1968) | 127 | 4 | .0 (0/4) | .0 (0/127) |
| Nixon/ Ford (1968–1976) | 144 | 5 | .60 (3/5) | .02 (3/144) |
| Carter (1977–1980) | 148 | 0 | – | – |
| Reagan (1981–1988) | 205 | 4 | .5 (2/4) | .01 (2/205) |
| Bush I (1988–1992) | 186 | 2 | 1.0 (2/2) | .01 (2/186) |
| Clinton (1993–2000) | 211 | 2 | 1.0 (2/2) | .01 (2/211) |
| Bush II (2001–2008) | 201 | 2 | 1.0 (2/2) | .01 (2/201) |
| Obama (2008–2010) | 169 | 2 | .5 (1/2) | .01 (1/169) |
| All Years (1933–2010) | 588 | 39 | .44 (17/39) | .03 (17/588) |

Notes:

- (1) Number of active judges: Judges who were confirmed before the last year in the President's term and who did not take senior status or otherwise depart before the President's first year. For example, for the Truman and Roosevelt years the number of active district court judges equals those confirmed before or in 1952 who departed after 1932.
- (2) The number of promoted judges excludes appointments of former judges.

Table 8-4
Promotions from the District Courts to the Courts of Appeals,
by President

| <i>President (Years)</i> | <i>(1) Number of Active Dis- trict Judges</i> | <i>(2) Number of Appoint- ments to the Courts of Appeals</i> | <i>(3) Fraction of Court of Ap- pointments of District Judg- es</i> | <i>(4) Fraction of Dis- trict Judges Ele- vated to Courts of Appeals</i> |
|-------------------------------------|---|--|---|--|
| Roosevelt/ Truman (1933-1952) | 380 | 76 | .36 (27/76) | .07 (27/380) |
| Eisenhower (1953-1960) | 331 | 45 | .40 (18/45) | .05 (18/331) |
| Kennedy/ Johnson (1961-1968) | 458 | 61 | .44 (27/61) | .06 (27/458) |
| Nixon/ Ford (1968-1976) | 559 | 57 | .54 (31/57) | .05 (31/559) |
| Carter (1977-1980) | 576 | 56 | .27 (15/56) | .03 (15/576) |
| Reagan (1981-1988) | 772 | 78 | .42 (33/78) | .04 (33/772) |
| Bush I (1988-1992) | 696 | 37 | .59 (22/37) | .03 (22/696) |
| Clinton (1993-2000) | 857 | 61 | .31 (19/61) | .02 (19/857) |
| Bush II (2001-2008) | 867 | 60 | .23 (14/60) | .02 (14/867) |
| Obama (2008-2010) | 681 | 15 | .53 (8/15) | .01 (8/681) |
| All Years (1933-2010) | 2216 | 546 | .39 (214/546) | .10 (214/2216) |

Note: See notes to Table 8-3.

Table 8-5
Auditioners and Non-Auditioners among Active Judges of
the Courts of Appeals, 1930-2010

| | <i>Number</i> | | <i>Percent</i> |
|--|--------------------|-----------------------------|---|
| | <i>Auditioners</i> | <i>Non- Auditioners</i> | <i>Auditioners plus Non-Auditioners</i> |
| All Judges | 122 | 463 | 20.9 |
| Circuits | | | |
| <i>Second</i> | 15 | 40 | 27.3% |
| <i>Fifth</i> | 18 | 56 | 24.3 |
| <i>D.C.</i> | 23 | 28 | 45.1 |
| <i>Other Circuits</i> | 66 | 339 | 16.3 |
| | | | |
| Attributes | | | |
| <i>Age at Appointment</i> | 48.6 | 53.8 | |
| <i>Year Confirmed</i> | 1970 | 1971 | |
| <i>Republican President</i> | 74 | 243 | 23.3 |
| <i>Democratic President</i> | 48 | 220 | 17.9 |
| <i>Female</i> | 23 | 36 | 39.0 |
| <i>Male</i> | 99 | 427 | 18.8 |
| <i>White</i> | 104 | 431 | 19.44 |
| <i>Nonwhite</i> | 18 | 32 | 36.0 |
| <i>Harvard or Yale Law Schools</i> | 41 | 94 | 30.3 |
| <i>All Other Law Schools</i> | 81 | 369 | 18.0 |
| <i>Senatorial-Courtesy</i> | .394 | .349 | |
| Score | | | |
| <i>Prior Employment:</i> | | | |
| <i>Federal or State Judge</i> | 56 | 264 | 17.5 |
| <i>Federal Government</i> | 19 | 31 | 38.0 |
| <i>State Government</i> | 3 | 16 | 15.8 |
| <i>Law Professor</i> | 14 | 24 | 36.8 |
| <i>Private Sector</i> | 30 | 128 | 19.0 |

Note: See notes to Table 8-3.

Table 8–6
Logit Regressions on Auditor Probability
1930–2010

| <i>Independent Variables</i> | <i>Equation 1</i> | <i>Equation 2</i> |
|---|-------------------|-------------------|
| <i>Age</i> | -.015** (4.54) | -.015** (6.10) |
| <i>Year Confirmed</i> | -.002** (4.77) | -.002** (3.13) |
| <i>Pres (1=Republican)</i> | .092** (3.00) | .092* (2.59) |
| <i>Law School</i> (1 = Harvard or Yale) | .077** (2.82) | .070* (1.97) |
| <i>Senatorial-courtesy score</i> | .120 (0.99) | .089 (0.97) |
| <i>Sex (1 = Female)</i> | .160* (3.84) | .157** (3.05) |
| <i>Nonwhite (1 = Black, Hispanic, or Asian)</i> | .177** (3.38) | .166** (3.43) |
| <i>District Judge or State Judge</i> | -.003 (0.05) | .012 (0.30) |
| <i>Federal Government</i> | .097* (2.10) | .080 (1.36) |
| <i>State Government</i> | -.067 (0.56) | -.043 (0.51) |
| <i>Law Professor</i> | .093 (1.55) | .094 (1.43) |
| <i>D.C. Circuit</i> | – | .148* (2.58) |
| <i>Second Circuit</i> | – | .085 (1.59) |
| <i>Fifth Circuit</i> | – | .110* (2.37) |
| <i>No. of Observations</i> | 582 | 582 |

Notes:

- (1) All regression coefficients have been converted to marginal effects.
- (2) The number of observations is 582 rather than 585 because we do not have ideology scores for three judges.
- (3) In equation (1) the standard errors are clustered by circuit, and in equation (2) we use robust standard errors.

Table 8-7
Fraction of Votes against Defendant in Criminal Appeals,
1995-2008
(number of votes in parentheses)

| <i>Judge Type</i> | <i>Capital Punishment</i> | <i>Street Crime</i> | <i>White Collar Crime</i> |
|------------------------|-------------------------------|---------------------|-------------------------------|
| <i>Non-Auditioners</i> | .662** (678) | .634** (2562) | .605 (979) |
| <i>Auditioners</i> | .796 (157) | .714 (685) | .592 (223) |
| <i>Ex-Auditioners</i> | .659* (91) | .667 (295) | .573 (96) |

Table 8–8
Regression Analysis of Votes for the Government in
Criminal Appeals, 1995–2008

| <i>Independent Variables</i> | <i>Equation 1 Death Penalty</i> | <i>Equation 2 Street Crime</i> | <i>Equation 3 White Collar Crime</i> |
|---|---|------------------------------------|--|
| <i>Auditioner</i> | .122* (2.06) | .054** (2.40) | -.058 (1.48) |
| <i>Ex-Auditioner</i> | .004 (0.05) | .009 (0.27) | -.078 (1.38) |
| <i>Lower-Court Decision (1 = for defendant)</i> | .185** (4.01) | – | – |
| <i>Appointing President (1 = Republican)</i> | .108* (2.23) | .021 (1.01) | .068 (1.89) |
| <i>Panel Majority (1 = Democratic)</i> | -.055 (0.82) | -.078** (3.89) | -.023 (0.67) |
| <i>Former Government Attorney</i> | -.019 (0.65) | -.007 (0.38) | .032 (1.11) |
| <i>Nonwhite</i> | -.013 (0.23) | -.035 (1.31) | -.051 (1.09) |
| <i>Sex (1 = female)</i> | -.081 (1.39) | .029 (1.43) | .078* (2.25) |
| <i>Fraction Republican</i> | .457* (1.52) | – | – |
| <i>Third Circuit</i> | | -.024 (1.08) | -.036 (0.93) |
| <i>Fourth Circuit</i> | | .048* (2.25) | .070 (1.77) |
| <i>No. of Observations</i> | 926 | 3542 | 1298 |

Notes:

(1) The dependent variable is whether the judge voted against the defendant (against = 1 and for=0).

(2) All regression coefficients are converted to marginal effects.

(3) Standard errors are clustered by circuit in the death penalty regression, which includes data for all circuits except the D.C. Circuit.

(4) We use robust standard errors in equations (3) and (3), which are equations limited to the Third, Fourth, and D.C. Circuits.