Elevation Adaptation: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court*

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Abstract

We examine whether federal circuit court judges alter their behavior when vacancies open up on the United States Supreme Court so that they might get noticed by the president and nominated to the high court. Using matching methods, we compare the behavior of these contending judges during vacancy periods with the behavior of contending judges outside vacancy periods. The data show that judges who are contending for elevation are much more likely to vote consistent with the president’s preferences during vacancy periods, to write concurring opinions, to write majority opinions, and to engage in strategic publishing and per curiam decisions.

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In 2000, sensing the possibility of promotion to the United States Supreme Court, Judge Michael Luttig of the Fourth Circuit Court of Appeals penned a number of biting opinions in which he railed against liberal rulings by his circuit—especially liberal rulings by other conservative judges who might also be Supreme Court contenders (Baum 2006, 1-2). Indeed, Luttig spared few words attacking his unfaithful conservative colleagues, arguing the Judge Harvey Wilkinson in particular “over-rhetorically” made predictions based on “speculation” that sounded more “like the dissents in both Lopez and Morrison” than the majority that rendered those decisions. Judge Wilkinson, himself a contender for the Court, shot back that Luttig’s approach was “a truncated legal universe” that was a “mystery” and smacked of judicial activism. What led Luttig and Wilkinson to behave so aggressively? Ideology, to be sure, had much to do with Luttig’s motivation, as he was a strong conservative who chafed against liberal decisions. Yet, both judges went out of their ways to support their positions and attack the other’s. Something other than ideology seems to have been at work, something more personal. Did their desire for elevation to the highest court motivate their behavior?

The central question we examine is whether, when there are vacancies on the United States Supreme Court, federal circuit court judges change their behavior to signal their viability for elevation. Today, Supreme Court nominees nearly always come from the federal circuit courts of appeals (Epstein, Knight and Martin 2003). Indeed, when it comes to nominations to the Supreme Court, Yalof (2005) argues that federal court of appeals judges “have all but stolen the show” (696). Circuit judges, of course, know this and, therefore, many of them have reason to believe that they are strong contenders for elevation. The question is whether they engage in behavior likely to generate or solidify presidential interest in them that might lead to elevation to the high court.

Our results show that circuit court judges who are strong contenders for nomination to the Supreme Court significantly change their behavior during high court vacancies. They are much more likely to cast their votes in the ideological direction of the president, to write
concurring opinions, to write majority opinions, to write strategic per curiam opinions, and to engage in strategic publishing of their opinions. In short, these judges alter their behavior for promotion to the Supreme Court.

These findings build on the important contributions of Baum (2006, 1997) who theorizes that various audiences influence judicial behavior. The results also underscore Morris, Heise and Sisk (2005), who note there is “a need for closer attention to the opportunity for ‘advancement’ within the judiciary as an influence on judicial decision-making” (96).

At the same time, these results have practical and normative implications. If judges behave insincerely prior to their nominations, once confirmed they are likely to vote in ways their nominating presidents dislike (Epstein, Martin, Quinn and Segal 2007; Owens and Wedeking Forthcoming). That is, presidents who make nominations based on judges’ past behavior—and senators who confirm them for the same reasons—may be victims of judicial misrepresentation.

In what follows, we begin with a brief discussion of the Supreme Court nomination and confirmation process and recent findings which show that presidents typically nominate sitting circuit court judges to the Supreme Court. We then theorize how circuit court judges might use their positions to signal their interest and qualifications for elevation. Next, we present our data, measures, and results. We conclude by briefly discussing how our findings relate to one proposed appointment reform.

The Norm of Prior Judicial Experience for Supreme Court Justices

Though the constitution sets no formal requirements on whom the president may nominate to the Supreme Court, three primary features drive the president’s selection: the nominee’s qualifications, the nominee’s policy preferences, and awareness of the nominee’s likelihood of confirmation (Nemacheck 2007). Legal qualifications matter dearly when presidents select nominees—and when senators vote to confirm them. The last thing a president wants to do is use political capital to nominate an unqualified dud. Such a nominee would not likely be confirmed and, if confirmed, would fail to exercise influence over other justices.
As such, numerous studies report that a nominee who is perceived as qualified is much more likely to be confirmed than one who is perceived as unqualified. Epstein and Segal (2005), for example, find that holding all else equal, a well qualified nominee is likely to capture 45 more Senate confirmation votes than a nominee perceived to be unqualified (103). At the same time, presidents wish to place justices on the Court who share their policy preferences (Nemacheck 2007; Snyder and Weingast 2000). Their nominees are likely to serve on the Court for decades. So, presidents seek to appoint loyal agents—people who think like they do (Balkin and Levinson 2001). Indeed, Nemacheck (2007) reports that “when they have the freedom to do so, presidents are more likely to select candidates whose ideologies are relatively closer to the president’s own” (127).

Finally, when selecting nominees to the Court, presidents must overcome uncertainty regarding the nominee’s chances of confirmation success. Whether they overcome these uncertainties will define confirmation success. As Yalof (1999) puts it: “Successful confirmation politics often depends on whether the president has made astute selection decisions during...earlier stages of the appointment process” (168).

Because of circuit court judges’ built-in advantages related to qualifications, “known” preferences, and increased probability of confirmation, presidents in recent years have almost exclusively nominated them (rather than non-judges) to the Supreme Court. Circuit court judges enjoy nearly instant perceived legal qualifications. A nominee who already enjoys a station as a federal appellate judge comes across with a cache of potential. Having already served as judges, they often appear to be qualified before the public even explores their backgrounds. What is more, circuit judges’ preferences are (allegedly) better known and, thus, they may be more predictable. Having already ruled on important policy and legal issues, circuit judges have a track record to which presidents can look to predict future voting behavior. That is, presidents may be less likely to be surprised by a justices’ ideological behavior when they elevate sitting judges. As Yalof (2005) states: “federal appeals judges

1 Relatedly, Epstein and Segal (2005) point out that senators are much more likely to vote to confirm a nominee who is ideologically close to them.
offer a better (if hardly dispositive) gauge of future Supreme Court behavior than anyone else” (697). In some instances, “entire fields of law are left” to circuit court judges (Posner 2005, 1273). As a consequence, “presidents now look primarily to the U.S. courts of appeals to identify potential nominees” (Epstein, Knight and Martin 2003, 908).

Circuit court judges, of course, know that they “have become ‘the darlings’ of the selection process in modern times” (Yalof 1999, 170). In fact, the names of circuit court judges have been on every president’s Supreme Court shortlist for decades. Circuit court judges thus have every reason to believe that under the right set of conditions, they might be nominated by the president to the Court. Accordingly, they have an incentive to think about elevation, what it might mean for their careers and their abilities to influence law and policy. In short, circuit court judges know that if they play their cards right, strike out on their own when necessary, and make names for themselves, they might have a legitimate chance of being elevated to the United States Supreme Court.

Judges and Their Promoting Audiences

Do circuit judges alter their behavior to get promoted? At least one influential jurist thinks so. Judge Richard Posner suggests that for some judges, the possibility of elevation to the Supreme Court is sufficient to motivate their actions. “[I]f the judge attaches enormous value to being a Supreme Court Justice,” he argues, “the expected utility of such an appointment . . . may influence behavior” (Posner 2005, 1274). Posner is not alone in making this point. A number of influential scholars argue that judges and justices are motivated to satisfy various audiences—and not just their own personal policy preferences. Baum (2006) states: “judges’ interest in what their audiences think of them has fundamental effects on their behavior as decision makers . . . [they] engage in self-presentation to audiences whose esteem is important to them” (4). Judicial decision making, he argues, is a function not

\footnote{Yalof (2005) even refers to some nominations to federal circuit courts as “dress rehearsal politics.”}
only of judges’ policy goals, but also of their desire to satisfy relevant audiences outside the judiciary. These motivations are particular relevant when they influence a judge’s position in office.

Consider the importance of voters to reelection-seeking judges. Empirical evidence shows that public opinion influences their votes. Brace and Hall (1997), for example, examine the conditions under which state supreme court justices support the death penalty. They find that liberal judges who face reelection cast conservative votes in order to retain their offices: “Having to face voters more frequently, thereby risking the chance of being removed from office, encourages judges in state supreme courts, who otherwise might vote consistently to overturn death sentences, instead, to manifest conservative voting patterns in these cases” (1223). In a similar examination of four southern courts of last resort, Hall (1992) finds that liberal Southern judges opposed to the death penalty were more likely to join the majority that supports it when they must face voters (see also Brace and Hall 1997; Hall 1995; Hall and Brace 1992; Hall 1987; Langer 2002). Simply put, elected state supreme court justices often modify their behavior to accommodate the voting public and keep their jobs.

Consider, next, how elected officials who have the power to elevate judges to higher posts might influence judges looking to improve their stations. For district court judges looking to jump to the appellate court level, political support from home state senators and the president is particularly important. These judges must show their political caretakers that they are trustworthy and qualified. They do so, in part, by casting particular votes. For example, to understand the influence of promotion ambition among federal district court judges, a series of studies took advantage of district court judges’ votes on the constitutionality of the federal Sentencing Commission (Morris, Heise and Sisk 2005; Sisk, Heise and Morris 1998; Cohen 1991). Immediately after its creation, the Commission was challenged in numerous district courts on the grounds that it violated the separation of powers. The disputes provided a natural experiment for scholars examining whether promotion influenced judges’ votes. Cohen (1991) examined whether judges who were likely candidates for promotion to
the circuit court supported the commission, since the president and senate—both of whom were necessary to promote them—supported it. He found that judges who were objectively strong contenders for promotion were, in fact, more likely to support the commission (see also Sisk, Heise and Morris 1998). In a later study, Cohen (1992) examined whether federal district court judges imposed different fines against companies for anti-trust violations when they were contenders for elevation to the circuit court. His results suggested that Democrat judges who were objectively strong contenders for promotion imposed significantly higher fines than judges who were not contenders.

To be sure, these studies focus on the behavior of district court judges seeking elevation to the federal circuit courts. Yet, their logic applies equally to circuit court judges seeking promotion. Indeed, studies of circuit court judges suggest that they, too, behave strategically toward promotion. For example, Gaille (1997) analyzed the amount of articles circuit court judges published before and after the Bork hearings, finding that circuit court judges authored significantly fewer articles after the Bork debacle than they did before it. What is more, judges authored significantly fewer articles mentioning “race” or “abortion” in the aftermath of the Bork hearing. Simply put, circuit court judges who harbored ambitions for elevation to the Supreme Court made the strategic calculation to publish fewer articles, articles that might later be used against them.

We build off these important works and examine whether federal circuit court judges alter their official behavior in an effort to be noticed by the president—or to solidify their standing with the president—and elevated to the Supreme Court. That is, our main hypothesis is that circuit court judges with the potential for promotion to the Supreme Court will manifest behavior during a Supreme Court vacancy that is different from their behavior when there is no vacancy. But, what kind of behavior modification might we expect? There are a host of actions that come to mind.

First, and most obviously, we might expect these judges to vote in line with the

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3Bork, of course, was chastised, in large part, over his academic writings.
president’s ideology more often during vacancy periods. Judges’ votes are, of course, among their most important official actions, and if they really want to make a statement about their trustworthiness and desire for elevation, they might make themselves look like more loyal agents of the president by voting in line with his preferences. That is, we expect judges with potential to be nominated to the Court by Democrat presidents to be more likely to vote liberally during a vacancy than in the absence of a vacancy. Conversely, we expect judges with the potential to be nominated to the Court by Republican presidents to be more likely to vote conservatively when there is a vacancy versus when there is not.

At the same time, opinion writing is critical for judges, not only as they make legal policy, but as they attempt to signal their worthiness for promotion. The opinions they write, then, can be strong signals to the president and his advisors. On this score, we take our cue from Morris, Heise and Sisk (2005), who find that district court judges publish their opinions to signal their viability for elevation. Opinions, they argue, “attract the attention necessary for nomination” to higher office (72). Each judge can write and publish an opinion and attract attention to themselves, or they can render decisions without published opinions. The decision whether to write an opinion, they found, is partly a function of whether the judge seeks promotion. Judges with greater promotion potential were more likely to write and publish opinions.

As such, we argue that circuit court judges seeking elevation will be more likely to write opinions in the face of a Supreme Court vacancy. One aspect of this dynamic simply looks at the propensity to write an opinion. If judges seek to make their policy views known to the president and his advisors, they must write more opinions. We believe that judges will use their opinions to put in writing their views on the legal issues before them in an effort to stand out from the crowd and show the president that they are worthy of elevation. Majority opinions are useful for this purpose. Perhaps more useful, though, are concurring opinions. Concurring opinions allow judges to make their precise views known in a case without having to dilute their purity in an effort to acquire a majority coalition. That is,
a concurring judge can speak directly to the president and his advisors but still look like a
team player by joining the majority. A dissenting opinion, on the other hand, while allowing
a judge to speak sincerely, may make the judge look like an outcast or like someone who
cannot forge majority coalitions. Thus, we expect that judges who are strong contenders
for promotion will be more likely to write majority and concurring opinions when there is
a Supreme Court vacancy than when there is no vacancy. We expect no difference in the
probability of authoring a dissenting opinion.

Along the same lines, we expect authorship to matter to judges seeking elevation.
Circuit panels have the option of writing their decisions “per curiam” (through the court)
rather than by attributing the decision an author. While many claim that per curiam opin-
ions are simply used to dispose of mundane cases—and many of them are—there is a growing
belief that judges might strategically issue per curiam opinions to evade external hostility
to their decisions. Readers will recall, for example, that the Supreme Court’s decision in
*Bush v. Gore*, 531 U.S. 98 (2000) was a per curiam decision, likely for strategic reasons, so
that one particular justices would not be vilified, as Justice Blackmun was for writing *Roe
DeStefano*, which dismissed the claims of 18 white firefighters of racial discrimination by
New Haven, then-Judge Sotomayor’s per curiam decision affirmed the lower court’s decision
with a single paragraph.\(^4\) Critics, of course, argued that Sotomayor and her colleagues used
a per curiam opinion so that one of them would not be tagged with having written a low
quality, controversial opinion (see, e.g., Liptak 2009). We therefore expect that when a judge
rules against the president’s preferences, she will seek to have the opinion published as a per
curiam opinion. Similarly, when the judge must rule against the interests of the United
States, she will likewise seek to have it published as a per curiam opinion. And when the
judge rules in favor of the president or the United States, she will ensure that the opinion is
not per curiam.

\(^4\)See *Ricci v. DeStafano*, 530 F.3d 87 (2d Cir. 2008).
Courts of appeals judges are allowed to dispose of cases through an opinion which they declare to be unpublished and, thus, non-precedential. While many of these opinions are elementary cases that simply affirm existing settled law, there is a belief among some that judges may refuse to publish controversial decisions. For example, Judge Wald of the D.C. Circuit once suggested that the publication system might generate “deviousness and abuse” and allow judges to use the power strategically (Wald 1995, 1374). Judge Richard Arnold once stated that “if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result...by deciding the case in an unpublished opinion and sweeping the difficulties under the rug” (Arnold 1999, 223; cited in Law 2005, 823). And, as Law (2005) notes: “judges may exploit the unpublished format to reach ideologically driven results that would attract criticism or even reversal if published” (820). Indeed, Law finds that a number of Democrat appointed judges were more likely to write unpublished opinions in asylum cases so as to avoid the threat of reversal.

We believe that similar considerations might influence judges to avoid publishing their opinions. That is, judges may want to minimize the effects of decisions against the president’s policies or against the United States, which might thereby diminish their chances of elevation to the Supreme Court. Thus, in the face of a Supreme Court vacancy, a circuit judge who is a strong contender for elevation will be more likely to render an unpublished decision when she rules against the president’s preferences or against the United States. At the same time, a contending judge who rules in favor of the president or in favor of the United States during a vacancy will be less likely to render an unpublished decision.

Data and Measures

To determine whether the possibility of promotion causes circuit court judges to modify their behavior, we analyzed a sample of cases decided by every circuit court “contender judge” for all nominations since Hugo Black filled Willis Van Devanter’s seat in 1937. More specifically, we compared contender judges’ behavior in 2048 cases decided during the “treat-
ment period” with their behavior in 900 cases decided during the “non-treatment period.”

Our first order of business was to determine which judges could be considered contenders for promotion. To define contender judges, we looked at the names of people who made the presidents’ “short lists” over time. The president’s short list is simply a list of the names of individuals the president has strongly considered nominating to the Court. We obtained the presidents’ short lists from Nemacheck (2007), who undertook an extensive and exhaustive archival search of the private papers of presidents since FDR. From these short lists, we observed a total of sixty different circuit court judges. Our next step was to define the treatment and non-treatment periods. We define the treatment period (i.e., the “vacancy period”) to be the time between when a Supreme Court vacancy was made public and when the final nominee for that position was confirmed by the Senate. To obtain these data, we relied on Epstein, Segal, Spaeth and Walker (2007).

Once we identified the contender judges and the treatment periods, we turned to matching analysis. We matched cases such that they were nearly identical, with exception being the treatment effect—whether the decision was made in the vacancy period. Essentially, our goal was to select a sample of cases decided by circuit court judges who were strong contenders for promotion, and observe whether these judges behaved differently during the vacancy period than they did in the non-vacancy period. Such a technique allows us to come closer to examining whether vacancies—and the possibility of promotion—cause judges to behave differently.

More specifically, we relied on coarsened exact matching (CEM) (Iacus, King and Porro 2009). The benefits of CEM are great. CEM allows the analyst, who has substantive knowledge of the underlying data, to define the level of tolerable “imbalance” in the data.

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5We assume that judges who are on the short list know that they are strong contenders for nomination to the Court. While presidents need not—and generally do not—let people know they are on the short list, we believe that they should nevertheless have a strong suspicion that they are under consideration.
The researcher can then evaluate how many matched units remain, given that level of balance. In other words, the CEM approach allows the analyst to define acceptable balance not just in some overall sense, but for each individual pre-treatment variable of interest. This benefit is important because for continuous variables, exact matching is often unnecessary. Once the data are balanced (or less imbalanced), the analyst can fit a standard parametric model to the data. Such approximately balanced data lead to stronger statistical estimates and less model dependence.\(^6\) After approximately balancing the data the only inferences necessary “are those relatively close to the data, leading to less model dependence and reduced statistical bias than without matching” (Iacus, King and Porro 2009, 1).

We matched cases on a host of characteristics that might influence a judge’s behavior but are non-randomly distributed among cases and judges. In particular, we examined the judge’s Judicial Common Space (JCS) score, the JCS score of the median justice on the Supreme Court at the time of the decision, and the JCS score of the median judge on the circuit at the time of the decision.\(^7\)

Each Judge’s JCS Score. We matched on each judge’s JCS score so that we could compare the behavior of judges who held similar policy views. That is, we wanted to ensure that we compared the behavior of liberal (conservative) judges with the behavior of other liberal (conservative) judges.\(^8\) For example, if we compared the voting behavior of a conser-

\(^6\)To be sure, matching forces the researcher to discard portions of the data, sometimes large. Nevertheless, the loss in data is a small price to pay to make stronger causal inferences. As Boyd, Epstein and Martin (2010) state: “While it may seem counterintuitive, balanced data that are comparable—even if smaller in number—are preferable to a complete sample for the purpose of estimating causal effects” (398, fn. 25).

\(^7\)While we could match on more variables (such as the ideological distance between the senate and president at the time of the circuit court decision), it would come at a steep cost in terms of data loss.

\(^8\)An alternative approach would be to conduct our treatment vs. non-treatment compar-
ervative judge with a Republican president in the vacancy period with the voting behavior of a liberal judge in the non-vacancy period, we would get an inflated perception of the treatment effect (the vacancy period). We would expect the conservative judge to be more likely to vote with the president’s policy position than the liberal. The benefit of using JCS scores in this capacity is that they are exogenous to the judges’ votes.\(^9\)

*JCS Score of the Median Supreme Court Justice.* To minimize the noise from the threat of review by the Supreme Court, we also matched observations on the ideological location of the median Supreme Court justice. There is some evidence to suggest that lower court judges render decisions strategically so as to avoid Supreme Court review. For example, Westerland et al. (2010) find that circuit court judges who interpret and apply precedent look to the preferences of current Supreme Court justices. When the Supreme Court no longer looks invested ideologically in a precedent (and thus as the threat of review subsides), lower court judges will be more likely to treat it negatively. As Westerland et al.

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\(^9\)The Judicial Common Space estimates circuit court judges’ preferences by looking to the pivotal actor(s) who nominated them. More specifically, it uses the coding method suggested by Giles, Hettinger and Peppers (2001), who argued that when the norm of senatorial courtesy applies to a judge’s appointment, that judge’s ideal point estimate mirrors the home state senators’ preferences. The estimate for such a judge is thus her home state senators’ Poole and Rosenthal first dimension Common Space scores. If there are two home state senators from the president’s party, the point estimate is the mean of the two; if only one senator hails from the president’s party, the point estimate is that senator’s score. When senatorial courtesy does not apply to the judge’s appointment, the judge’s ideal point estimate is the president’s first dimension Common Space score.
(2010) state: “increasing ideological estrangement between the enacting and contemporary high courts has a substantial impact on the behavior of the contemporary lower court” (899). Benesh and Reddick (2002) examine whether lower courts comply with Supreme Court decisions that overrule precedent and find that all circuit courts, while they varied in speed, quickly follow such ground breaking Supreme Court decision. Baum (1980) similarly finds that federal district courts are likely to follow their circuit courts in the area of patent law. And, Wahlbeck (1998) reveals that the Court’s decisions on public nuisance led to a change in behavior by the lower courts. Simply put, there is considerable evidence to suggest that circuit court judges follow the Supreme Court. As such, we wanted to ensure that our comparison of cases was fair—that the Court was roughly the same ideologically in the treatment and non-treatment cases.

**JSC Score of the Circuit as a Whole.** Finally, there is evidence to suggest that circuit judges may render decisions strategically with en banc review in mind. As Hettinger and Lindquist (2012) note: “Cases can be heard or panel decisions reheard en banc if a majority of the judges in the circuit vote to do so” (142 n.2). That is, if a three-judge panel renders a decision that is inconsistent with the law of the circuit—or if a majority of circuit judges disagrees ideologically with one of their panel’s decision—the circuit, upon majority vote, can review the panel decision en banc and thereby set circuit-wide precedent. A number of studies suggest that panel judges may be influenced to moderate their votes so as to avoid en banc review (Giles et al. 2007; George 1999; Cross and Tiller 1998, see, generally). If judges are in fact influenced by the threat of en banc review, we must account for this dynamic. As such, we match observations so that treatment cases are compared to non-treatment cases where judges are overseen by similar circuit court colleagues.

**Methods and Results**

After we used CEM to match on the above described pre-treatment covariates, we estimated a series of logistic regression models for our treatment variable (whether the case was decided in the vacancy period). The labels on the y-axis on Figure 1 denote the de-
ependent variables used for each of the models. In addition to a dummy variable for each treatment group, we also include each of the three pre-treatment variables described above: each judge’s JCS score, the JCS score of the median Supreme Court justice, and the JCS score of the median judge on the circuit. In so doing, we follow the advice of Ho et al. (2007), who advocate including pre-treatment variables in parametric models as a way to neutralize further any imbalance that remains in the data.

Before we present our results, we pause to highlight the value of our matching technique. We summarize balance using $L_1$, a measure developed by Iacus, King and Porro (2010) to provides an index of the degree of imbalance across all multivariate combinations of pre-treatment variables in a data set. Zero is the minimum value of $L_1$ and represents perfect balance between the treatment and control groups. The theoretical maximum of $L_1$, 1, indicates that no overlap exists between the two groups. Our matching approach generated a 91% reduction of imbalance, dropping $L_1$ from 0.57 (pre-CEM) to 0.05 (post-CEM). The

10 More specifically we examine: (1) Whether the judge voted with the president’s policy preferences; (2) Whether the judge wrote the majority opinion; (3) Whether the judge wrote a concurring opinion; (4) Whether the judge wrote a dissenting opinion; (5) Whether the judge wrote any separate opinion; (6) Whether the judge wrote any opinion; (7) Whether the judge wrote a per curiam opinion; (8) Whether the judge wrote a strategic per curiam opinion based on the president’s preferences; (9) Whether the judge wrote a strategic per curiam opinion based on the United States’s position; (10) Whether the judge published the opinion; (11) Whether the judge strategically published an opinion based on the president’s preferences; (12) Whether the judge strategically published an opinion based on the United States’s position; and (13) Whether the judge voted in favor of the United States.

11 The calculation of $L_1$ is analogous to the construction of a univariate histogram in the sense that the number of bins an analyst uses will alter the shape of the resulting figure. So, too, is the case in the calculation of $L_1$, where the cutpoints used will affect the degree of overlap calculated. To ensure that an arbitrary set of cutpoints is not driving our apparent
matching method, in short, has left us with data that allows for stronger causal inferences related to the influence of vacancies on judicial behavior.

Figure 1 illustrates the substantive size of the treatment effect for our treatment variables. These values come from stochastic simulations (similar to Clarify) performed after estimating our regression models. The labels on the y-axis denote the dependent variables used for each of the models. Broadly, our results suggest that judges systematically alter their behavior including the ideological direction of their votes—and the differences are sizable. Consider, first, whether the contender judge’s vote accords with the president’s ideology (e.g., whether a judge cast a conservative [liberal] vote when a Republican [Democrat] president was in office). We hypothesized that when a vacancy existed on the Supreme Court, circuit court judges would be more likely to vote in line with the president’s preferences. The data support our hypothesis. We observe that judges are roughly 0.09 more likely to vote in line with the president’s preferences when a vacancy exists on the Supreme Court versus when no vacancy exists. This result, again, occurs even when we match other possible confounding variables (judge ideology, Supreme Court review, and en banc review) so that they are nearly identical to the case decided in the vacancy period. Stated otherwise, holding all else equal, save for the fact that in one case there is a vacancy on the Supreme Court and in the other there is not, a judge contending for elevation to the Court is roughly 0.09 more likely to vote for the disposition favored by the president. This, we believe, is to curry favor with the president who might nominate her.

[Reduction in imbalance, we follow ? by taking 500 draws from the L1-profile.
Figure 1: Summary dot plot of treatment effect for our treatment variables of interest. CEM matching was performed using the cem package in R. Labels on the y-axis denote the dependent variables used for each of the models. The circles are the median estimates obtained from stochastic simulations using the matched data. The thickest whiskers are 80% simulation intervals, the vertical ticks are 90% simulation intervals, and the thinnest whiskers are 95% simulation intervals (all two-tailed).

We next hypothesized that circuit judges who are strong contenders for elevation to the Supreme Court might be more likely to write additional opinions when there is a vacancy on the Court. They might do so, we argued, to make their positions better known, to stand out from the crowd, and to show the president and his advisors that they are suitable for
the Court. The data support these hypotheses. For example, looking first at the decision to write a majority opinion, we find that contending judges are roughly 0.14 more likely to write a majority opinion when there is a vacancy on the Court than when there is no vacancy. Similarly, but perhaps more importantly, we observe that contending judges are much more likely to write concurring opinions when there is a vacancy on the Supreme Court. These judges are nearly 0.24 more likely to write concurring opinions when there is a vacancy on the Court. The decision to write separately is critical; a concurring opinion shows that the judge can be a team player, can be part of a majority, but at the same time allows the judge to state his or her views more specifically. All these features are important for judges seeking to be justices on the Supreme Court. At the same time, consistent with our beliefs, we observe no treatment effect on the decision to author a dissenting opinion. While dissenting opinions allow judges to state their views clearly, without the need to compromise with a majority, they also signal weakness to the extent that they show the judge could not forge a majority coalition and may not, therefore, be persuasive.

We next hypothesized that contending judges would be more likely to write strategic per curiam opinions during a vacancy period. The results confirm one of our two hypothesis. A decision joined in (or perhaps written by) a contending judge against the United States during a vacancy period is 0.16 more likely to be a per curiam decision than a decision against the United States outside a vacancy period. Contending judges, it would appear, seek to hide their involvement when ruling against the United States during this critical vacancy period. We do not, however, find any results to suggest that they write or join per curiam opinions when deciding against the president’s perceived position. Underscoring the fact that this relationship is conditional is the finding that contending judges are less likely to write or join per curiam opinions in vacancy periods than in non-vacancy periods.

The decision to publish an opinion follows the same lines, with contending judges acting strategically to obfuscate decisions running against the president (and the United States) and publishing those that are consistent with the president’s preferences (and the United
States’s position). We argued that when a contending judge rendered a decision during a vacancy period that ran against the president’s preferences, the judge would be less likely to publish that decision; and that if the judge decided in favor of the president’s position she would be more likely to publish the decision. Our results confirm this “strategic publishing” hypothesis. A contending judge is 0.05 more likely to engage in strategic publishing vis-à-vis presidential ideology during a vacancy period than in a non-vacancy period. The results are more dramatic when we examine strategic publishing vis-à-vis the United States. A contending judge is 0.21 more likely to engage in strategic publishing during a vacancy period than in a non-vacancy period. Put plainly, when the judge rules against the president or the United States during a vacancy period, she tries to hide it; and when she rules consistent with the president or the United States during a vacancy period, she highlights it, exactly what we would expect from a judge seeking elevation to the high court.\(^{12}\)

**Conclusion**

Circuit court judges who are strong contenders for elevation to the Supreme Court clearly alter their behavior during vacancy periods. When a vacancy opens up on the Supreme Court, these judges are significantly more likely to side with the current president, to write majority and concurring opinions, to highlight decisions that will curry favor with key politicians, and to obfuscate decisions that contradict the preferences of key politicians. Put simply, we find significant empirical evidence to support the claim that judges use their institutional powers to get ahead.

These results suggest that policymakers should be highly skeptical of the behavior of judges during the vacancy period. If these judge change their behavior to look more suitable—and are insincere when so doing—their selection might come with considerable costs. To be sure, presidents are not likely to select judges simply because of their behavior

\(^{12}\)Contending judges are also much more likely to observe published decisions during vacancy periods than in non-vacancy periods.
during vacancy periods alone. But, when the decision between or among judges is close, and presidents look for behavior that tips their decision, they may wish to avoid looking at the behavior of judges during the vacancy period.

Along the same lines, the findings suggest that circuit law can change directly as a function of contending judges’ desires for promotion to the Supreme Court. A circuit with a number of likely candidates for the Court could see a considerable change in legal doctrine as a result of panels constituted with contending judges scrapping for the president’s favor. Indeed, if our data tell us anything, it is that presidents might seek to delay the announcement of nominations in order to influence the doctrine of circuits during the vacancy period.

What is more, these results suggest that proposals to institute term limits on Supreme Court justices (Calabresi and Lindgren 2006) could have negative downstream consequences on circuit courts. With more vacancies on the Supreme Court, there would be an increasing number of vacancy periods and, consequently, more possibility that circuit law could change as a function of contending circuit judges seeking elevation to the high court. Indeed, a circuit like the D.C. Circuit, with many contending judges, could see its law severely changed every two years by a group of judges constantly vying for elevation.

We leave these broader policy debates to others. Our goal here, rather, was to determine whether circuit court judges modify their behavior in order to gain promotion to the Supreme Court. The data show that they do. Of course, we are not finished. We are still in the process of collecting additional data so as to increase the number of observations in our matched data pool. Additionally, we plan in the future to match cases based on panel composition so that we match, for example, Democrat (Republican) majority panels against other Democrat (Republican) majority panels. These and other changes must be made as we move forward. If the data hold up, however, the results cast light on important empirical and normative questions about nomination politics and the evolution of legal doctrine.
References


