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Placing Federal District Courts in the Judicial Hierarchy

by

Christina L. Boyd, J.D.

A dissertation presented to the
Graduate School of Arts and Sciences
of Washington University in
partial fulfillment of the
requirements for the degree
of Doctor of Philosophy

August 2009

St. Louis, Missouri

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2009

ABSTRACT OF THE DISSERTATION

Placing Federal District Courts in the Judicial Hierarchy

by

Christina L. Boyd

Doctor of Philosophy in Political Science

Washington University in St. Louis, 2009

Andrew D. Martin, Chair

Over forty years after Richardson and Vines (1967) complained that federal courts “have seldom been investigated as a system of interactions,” the same problem continues to plague judicial scholarship, particularly concerning federal district courts. Viewed as the sum of its three essays, this dissertation project seeks to remedy this deficit. The project relies on the collection and coding of thousands of case dockets, opinions, and other court documents across multiple years (2000-2006 for essay 1, 2000-2004 for essays 2 and 3), nearly 30 district courts, and numerous issues areas that together account for about 40% of federal district court civil filings.

The project evaluates three questions related to placing district courts in the judicial hierarchy. **Question 1** tests the influence of case developments and actor characteristics on the disposition method (settlement, non-trial adjudication, and trial) and winning party in district court civil cases. With **Question 2**, I examine what features lead to a change in a case’s winning party and disposition method after the case has been appealed and remanded back to the district court. Finally, **Question 3** models the decision of a losing litigant to appeal to the courts of appeals and captures the implications of this decision for the outcome of the case on appeal.

The result is that this project provides unprecedented insights into the development of law, the strategies of parties, the managerial role of judges, the influence

of appellate judges and appellate opinions, and the overall place of federal district courts in the judicial hierarchy.

ACKNOWLEDGEMENTS

Over the past five years, I have been incredibly lucky to be mentored by some wonderful professors who also happen to be some of the best scholars in the country. I am truly, truly thankful to have gotten to work with each of them. I thank Andrew Martin for the countless opportunities he has given me and confidence he has placed in me. I have learned so much from him and had a great time doing so along the way. I am grateful to Jim Spriggs for immediately stepping in as a mentor upon his arrival in St. Louis and for always providing detailed feedback and encouragement on my projects. I am thankful to have had the opportunity to work with Lee Epstein, a truly great and inspiring teacher and researcher. I also owe a debt of gratitude to Pauline Kim and Margo Schlanger, two very careful and creative researchers whose willingness to work with me has allowed me to study district courts. A number of other Washington University faculty have been helpful to me along the way, including (but not limited to) Brian Crisp, Matt Gabel, Jim Gibson, Rebecca Hollander-Blumoff, Bill Lowry, Gary Miller, Michael Minta, Sunita Parikh, and Melanie Springer. Thank you also to my great law school mentor, Margaret Taylor, for always sticking by me and supporting me.

Ryan Black, despite always beating me at video games, has been a great office mate, co-author, colleague, and friend, and I am really glad that I have gotten to go through this crazy experience called graduate school with him. I am grateful for my many other graduate school friends and colleagues, including Xun Pang, Yael Shomer, Amanda Driscoll, Diana O'Brien, Mariana Medina, Hong Min Park, Michael Malecki, Michael Lynch, Scott Hendrickson, Ryan Owens, Tony Madonna, and Jong Hee Park.

I gratefully acknowledge the support for this project by National Science Foundation Dissertation Improvement Grant SES-0818751 and the Center for Empirical

Research in the Law at Washington University. I am also thankful to the many district court chief judges who granted me fee exempt status to access electronic case materials from their districts on PACER. I appreciate the able work of a number of research assistants including Sophie Fortin, Erica Woodruff, Gregg Re, Annie Rushman, Benjamin Guthorn, Shadi Peterman, and Laura Johnson.

And, finally, I thank my parents. Jack and Cathy Boyd have always been so supportive and wanted the best for me. They have instilled in me an appreciation for hard work, a confidence in myself, and a faith in something far greater than myself. I am so very proud to be their daughter, and I can't wait to share the next part of this journey with them.

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Chapter 1

Introduction

Over forty years after Richardson and Vines (1967) complained that federal courts “have seldom been investigated as a system of interactions,” the same problem continues to plague judicial scholarship, particularly concerning federal district courts. This deficit is not trivial. District courts are the only face of justice for many federal litigants. And yet, our knowledge of the business of these important courts is quite limited.

Viewed as the sum of its chapters, this dissertation project seeks to remedy this deficit. By collecting and coding thousands of case dockets, opinions, and other court documents across multiple years, district courts, and issue areas, this project provides unprecedented insights into the development of law, the strategies of parties, the managerial role of judges, the influence of appellate judges and appellate opinions, and the overall place of federal district courts in the judicial hierarchy.

Chapter 2, *Integrating Process, Policy, and Outcomes in Judicial Studies*, examines why certain district court cases end via compromise (settlement) while others end in a more disputed fashion (trial or non-trial adjudication). The chapter also

examines who ultimately wins in district court adjudications. The empirical findings from the chapter reveal that litigant and judge-specific factors present in district court cases affect both their method of termination and who ultimately prevails in a dispute.

Chapter 3, *The Impact of Courts of Appeals on Substantive and Procedural Success in the Federal District Courts*, examines the impact that courts of appeals have on district court decision making after a case is appealed to the circuit court and then returned to the district court on remand. Specifically, this essay examines what features lead to a change in a case's winning party and method of termination after the case has been appealed and remanded back to the district court. In particular, the specificity of appellate court directions given to district courts are an important determinant of impact, as is the appellate court decision to publish the opinion remanding the case to the district court.

Finally, in Chapter 4, *Quantifying Appeals*, I examine why litigants decide to appeal from federal district courts. While every district court case arguably has a loser, only some litigants choose to seek higher review after their loss. The results reveal that strategy and procedural fairness are both important considerations in the decision of a litigant to appeal.

Chapter 2

Integrating Process, Policy, and Outcomes in Judicial Studies

The settlement of cases produces “greater disputant satisfaction with the decision or with the courts generally” and permits “compromise positions that are unattainable through adjudication” (Galanter, 1985). By choosing to settle a case, litigants are able to control their case’s outcome, rather than risking the result that may happen if the case’s outcome is left solely in the hands of the political institution that is the judiciary — from the trial courts to the appellate courts. While settlements are common in our court system, perhaps increasingly so (e.g. Galanter, 2004), they are by no means the only way that cases terminate in our trial courts. Indeed, many cases continue to end through very adversarial proceedings, such as trials or the granting of motions for summary judgment. With such clear benefits for all parties involved, why do only some cases settle while others continue on to contentious terminations via trials and non-trial judge-based decision making? And, what does this all mean for who ultimately wins in trial courts?

Such a pre-merits and process based focus is common in other studies of political institutions. At the Supreme Court, for example, recent work examines the agenda setting decision making and pre-merits bargaining that takes place on the Court (Maltzman, Spriggs and Wahlbeck, 2000). Looking beyond the judiciary, studies of congressional committee decision makers (e.g. Cox and McCubbins, 2005; Deering and Smith, 1997) have proven to be key in adding to our overall understanding of the business of that institution.

Despite a recognition of the merits of studying early and varied decision making in our other political institutions, such studies are only in their infancy in the context of much of the judiciary. For example, the result of the existing work on federal district courts, the trial courts of the federal system that serve as courts of first instance and set the judicial agenda for much of the federal system, is that much of the process and decision making that takes place remains unstudied. While we have some empirical work on the published decision making of district judges and we have some formal accounts of the strategic actions of litigants in these courts, a huge gap exists in the research in this area that tends to ignore the intersection of these two groups of actors and how they both act and make choices that have an influence on the process and outcomes of district court cases.

The preferences and actions of these two sets of actors are likely to have important implications for many parts of district court case activity. Chief among them are the two areas of focus here: the method by which district court cases terminate and who ultimately wins district court cases. Because of the actions, choices, and preferences of judges and the litigants, some cases in federal district courts are resolved through a settlement while others continue on to a court determined outcome — whether that be through a contentious, granted motion or a trial. Each type of case termination carries with it different risks and potential payoffs to the actors involved.

The type of termination method is important to the parties involved but, perhaps more importantly, has even greater implications for legal development, the threat of reversal on appeal, and the like. When it comes to the direct parties involved in litigation, nothing is likely to be more important than who the ultimate winner in the case is. This second inquiry is also directly related to a wide variety of the previous district court work that has been done, allowing this study’s broader research design to illuminate and compare the findings.

In what follows, this article presents theories for why both sets of these actors and the decisions that they make may influence cases in these ways. Using newly collected data spanning 25 district courts and seven years, the empirical findings reveal that both litigant and judge-specific factors present in district court cases affect both their method of termination and who ultimately prevails in a dispute. The presence and size of these results have important implications for the study of judicial processes and political institutions more generally.

2.1 Theory

Often referred to as the workhorses of the federal judiciary, district courts are the courts of first instance in the federal system and, in recent years, terminate over 300,000 cases per year (Administrative Office of the U.S. Courts, 2007). And, for most cases, district courts are not just the first court they encounter, but are also the last. While advancing a case to a higher court after a district court termination is often possible, appeals are rare, and reversals of lower court decisions are even rarer (see Eisenberg, 2004). As one district court judge put it, “[j]ustice stops in the district. They either get it here or they can’t get it at all” (Carp and Wheeler, 1972, quoting anonymous judge)

Political scientists studying district courts have found that politics sometimes plays a role in decision making in those courts. The research reveals, for example, that district court judges appointed by Democratic presidents are more likely to support “underdog” claimants in standing disputes (Rowland and Todd, 1991) and defendants in criminal cases (Rowland, Carp and Stidham, 1984). Other empirical district court work finds that district court judges strategically anticipate the preferences of their courts of appeals superiors Randazzo (2008). While this previous research certainly advances our knowledge of much of the business of district courts, it also fails, at least empirically, to capture the institutional interactions and decision making that take place in these trial courts. In particular, district court litigation is dominated by the development of a case record and proceedings, all of which, at least in theory, leads toward a trial date. During this development stage, and continuing through case termination, the parties and the judge are in constant interaction with one another.

This continuing, potentially years-long interaction between the parties and the judge in a case stands in sharp contrast to proceedings in the U.S. Courts of Appeals or the U.S. Supreme Court, the appellate courts in the federal systems and the judicial institutions that have received the bulk of attention from political scientists. The very different process in the district courts, compared to the appellate courts, means that applying the empirical models that are so often used in these higher courts to our work on the lower courts is an imperfect solution. Instead, studying district courts calls for theoretical and empirical consideration of the multiple important players and the litigation process. This also means studying the different ways that cases terminate in district courts, including by settlement, and, after accounting for those multiple outcome methods, which parties win. As Mather points out, such an account is appropriate and relevant for our field. She astutely notes that “political scientists can observe a wide range of policy-making activities in federal and state trial courts:

the judge is not the only political actor in court, and formal decisions at the end of trial are not the only vehicle for making policy (Mather, 1995, 200).

2.1.1 Judges in District Courts

Beginning first with the role of judges in district court litigation, very little empirical evidence exists about their behavior beyond how they vote in published cases. This deficit is troubling since, unlike in appellate courts, judges in district courts have the potential to be actively involved in the entire case's proceedings and with its litigants and attorneys. Since judges make many decisions and take many actions before cases yield an authored judicial opinion or a final victorious party, examining the role of the judge in these early stages of a case may provide us with useful information on the total package of judging. We can begin to fill this important gap by examining judicial behavior while judges are managing cases in district courts.

What, then, does the judge's role look like in the different stages of district court cases that proceed the cases' terminations? Under the Federal Rules of Civil Procedure, the district court judges serving on cases are to provide a "just, speedy, and inexpensive determination of every action and proceeding" (Rule 1). Within the broad auspices of this rule, district court judges have many opportunities to engage in diverse activities — including presiding over trials, conferring and advising the parties in the stages before a trial takes place, ruling on motions, monitoring the implementation of agreed injunctive decrees, and approving plea bargains (see e.g. Cannon and O'Brien, 1985, 29). The result of this varied job description is that the district court judges have the potential to be a mediator, a fact-finder, a law-applier, and a law-creator with enormous discretion in how a case develops and is resolved, meaning that they "to a greater degree than appellate judges, experience the drama

of the adversary process” (Cannon and O’Brien, 1985, 29). This role allows the district court judge to have a frequently unrecognized ability to formulate and shape wide-reaching judicial agendas and policy in a way that is often only credited to appellate judges (Mather, 1995). To further bolster the importance of the district court judge’s role, his actions and conclusions are on the whole given a tremendous level of deference by reviewing courts.

Given the design of federal district courts, it is very likely that judges, as case managers (Resnik, 1982), are actively involved in controlling the disposition of cases, regardless of the method by which those cases terminate. When ruling on potentially case-ending motions (such as motions for summary judgment) or presiding of a bench trial, judges serve in their most publicly salient post. And, even with jury trials, district judges have a great deal of responsibility. As Judge Charles Wyzanski notes, judges must assure that “the jurors, the parties, the witnesses, the counsel, and the spectators not only follow the red threads of fact and of law but [also] leave the courtroom persuaded of the fairness of the procedures and the high responsibility of courts of justice in advancing the values we cherish most deeply” (Cannon and O’Brien, 1985, 28-29).

And while not as facially obvious, many believe that judges, as case managers, can also have an active part in leading cases to terminate by settlement. Galanter (1985), for example, argues that settlement negotiations are often “encouraged, brokered or actively mediated by the judge.” Within a case’s proceedings, judges can “meet with parties in chambers to encourage settlement of disputes and to supervise case preparation” (Resnik, 1982). And, indeed, Federal Rule of Civil Procedure Rule 16 now lists “facilitating settlement” as one of the express purposes of a case’s pretrial conference. Given this potential role, district court judges can actively communicate with the parties as to the status of the case, particularly in cases that are not disposed

of almost immediately upon being filed. If a judge so chooses, he can *actively* encourage settlement — and he has many opportunities to do so. And, as Molot (2003, 93) argues, pressure from a judge to settle a case can be quite persuasive to litigants: “[a]lthough a litigant certainly is free to refuse to settle on terms he or she knows to be unfair, a litigant asked by a judge to settle a case has strong incentives to agree to a settlement and thereby avoid trying the case — or proceeding with discovery — before a potentially hostile judge.”

Not all judges, and their differing case management techniques, should affect cases, both in terms of how they terminate and who wins them, in the same way. Rather, judges with certain background characteristics, preferences, and institutional roles should be, for example, more likely push their cases toward settlement or more likely to favor pro-defendant outcomes. Similarly, judges can use tools at their disposal, such as mandating mediation or settlement conferences, if they want to more actively encourage party settlement. In section 2.2 below, I discuss these specific features and actions and the effect on the two questions of interest here that each should have.

2.1.2 The Importance of the Litigant

Litigants, and the choices that they make, also have a potentially huge impact on the way that their cases proceed. Indeed, the litigant’s position is far more salient, discretionary, and hands-on in district courts than it is in any of the appellate courts. Litigants in trial courts create their strategy and tailor their actions based on a consideration of “both how the opposing party will react to a possible move and how the court might rule at trial” (Gross and Syverud, 1991, 328).

Because of their role and their presumably strategic consideration of how to proceed in a case, litigants seemingly have a huge impact in determining how their cases

are resolved, both in terms of the method of the resolution and the winner. These actors file the cases, control the discovery of evidence, and motion for rulings on procedural and outcome based activities in the case. And, while a judge may take actions to strongly encourage settlement, the litigants themselves are also ultimately responsible for choosing whether a case will settle or will continue on toward trial.

While parties involved in litigation want to achieve their best possible outcome — injunctive and/or monetary relief for plaintiffs and and a finding of no liability for defendants — and do so for the smallest amount of expense possible, achieving this outcome can be a long and risk-filled process. Based on the relevant standards that will be applied and the development of the case along the way, litigants may be able to inform themselves, at least to some degree, about their likelihood at success in having certain pre-trial motions granted or gaining a favorable outcome if the case advances to trial. However, given that strategic litigants will be accounting for a number of relatively uncertain factors, such as the preferences and ideology of the assigned judge and the strength, resources, and motivation of the opposing party, much uncertainty is likely to exist for litigating parties. And, since “even a perfect prediction leaves crucial questions unanswered” (Gross and Syverud, 1991, 327), lawyers must “anticipate the adjudicatory alternative” (Kritzer, 1986, 165). As Haire, Lindquist and Hartley (1999) cogently point out: “In making strategic calculations about whether to proceed with trial . . . more expert counsel will seek settlement rather than risk trial when the probability of success at trial is low due to the legal standard or to the contextual variables such as the predilections of judge or jury...those counsel with less expertise may instead choose to litigate even when the probability of success is low, since their ability to assess or predict success is less well developed and thus less accurate.”

Litigants, and the decisions that they make in district courts, have not gone completely unstudied by scholars. Indeed, law and economics scholars have frequently formally modeled litigant behavior in trial courts and how that behavior determines whether cases will settle or continue toward trial (e.g. Priest and Klein, 1984; Spier, 1992; Waldfogel, 1998; Bebchuk, 1984). Bebchuk (1984) presents an asymmetric information screening model where the uninformed player makes an initial demand that the informed player can either accept (settlement occurs) or reject (the players go to trial). The model predicts that cases with high levels of damages will go to trial, as will cases with a large range of expected stakes and cases with low court costs. And, in one of the most influential law and economics pieces ever written, Priest and Klein (1984) model the selection of cases for trial.

Formal models of settlement practice coming after the early, seminal pieces have focused on better representing the entire process, including the intricacies involved in the stages and timing. For example, Spier (1992) models pretrial negotiation and finds that a “deadline effect” emerges as a case’s trial date approaches. Watanabe (2004)’s article likely provides the most litigation stage-inclusiveness of any piece in existence. His model has the special ability to allow the rates of information to vary for each of the repeated phases. As Watanabe notes, this feature can account for the “discovery process” and the different legal devices used by the plaintiff and defendant at different times throughout the process. In the litigation phase of his model, players in equilibrium “choose to settle if the joint surplus of settling today is larger than the joint surplus of continuing the case” (Watanabe, 2004).

This extensive formal modeling of litigant case resolution activity provides an excellent theoretical background for the incorporation of litigant preferences, choices, and actions into an empirical model of district court decision making. Among other things, systematically collecting and modeling data on litigant actions, such as the

different types of motions, may help provide evidence on the calculations of these litigants and how these calculations change as additional information is revealed. Just as with judges, litigant activity and characteristics should have an effect on the proceedings in district courts, particularly when it comes to the method by which the case terminates and who wins. In section 2.2 below, I discuss these features and their expected effects in greater detail.

2.2 Hypotheses

2.2.1 Judge Preferences, Experiences, and Characteristics

As noted above, a number of the previous district court studies have found that the judges in these courts often behave in ways that are consistent with their political preferences (e.g. Rowland and Todd, 1991). As Lyles (1995*a*, 2) notes, such findings are comparable with the job description of district court judges: “[T]he frequency and salience of district court policymaking, their gatekeeping role in the federal judiciary, the characteristics and attitudes of the individual judges appointed to these courts, as well as the dynamics of the appointment process itself, suggest a political nature and function that should be rigorously analyzed.” District judges themselves also believe that their preferences enter into their decision making. When asked whether their “personal attitudes and values affect their discretionary judgments,” 58 percent of the district judges responded “often” or “sometimes”; when asked the same question about other district judges’ judgements, that number skyrocketed to 75 percent (Lyles, 1995*a*, 25).

Since district judges’ discretionary judgment opportunities are present throughout the litigation process and are not likely to be limited to published, opinion-based

outcomes, so too should the occasions for these judge's preferences to enter their decision making. In particular, this means that it is likely that district judges preferences may influence case termination methods and case winners. According to Baum (e.g. 2005, 85), conservative judges are likely to be predisposed to favor defendants, especially those serving as business or governmental interests. Certain case areas, such as personal injury torts, nearly always involve individual plaintiffs suing these organized defendants. In these cases, where potential jury awards could be very damaging to the business interests, conservative judges may be more likely to encourage the parties to settle their lawsuit prior to trial.

Given the theories on female decision making (see also Sherry, 1986; George, 2001; Resnik, 1988; Karst, 1984; Gilligan, 1982), female district court judges, based upon their social and background experiences and their communication and problem solving skills, should be more apt to dispose of the cases before them by settlement than will male judges. The most tangible representation of this is by comparing the use of the heavily adversarial and rule-based nature of trials and non-trial adjudications to the non-adversarial and compromise-driven nature of settlements by male and female judges.¹ Previous work studying civil rights and personal injury cases across four federal district courts found that female judges are marginally but consistently more likely to settle their cases than male judges (Boyd, 2006). Additionally, female district judges have been found to be more willing to protect the interests of the weak, which is often the plaintiff. For example, when given the statement that "Poor litigants are treated fairly in the courts," 80 percent of female judges agreed while only 60 percent

¹While acknowledging that such an inquiry into the judging of male and females on the district courts is not causal in nature (Boyd, Epstein and Martin, 2007), as a descriptive matter it should nonetheless provide insight into judging and decision making more generally.

of the male judges did (Lyles, 1995*a*). Thus, female judges should be more likely than their male colleagues to support the plaintiff's claims over defendants in civil cases.

Just like the ideology and gender of the assigned judge might affect decisionmaking in district courts, so too might the judge's time on the court and his institutional roles. As has been theorized, "life tenure permits federal judges to become entrenched in their ways and resistant to new ideas" (Sisk, Heise and Morriss, 1998, 1486). Applied here, the more time that a judge has spent on the bench, the more he may prefer to utilize trials over settlement. Judges with a lot of judicial seniority may be more accustomed to trials being a more common feature of district court decision making and judging and will be less accustomed to working within a system that contains such features that actively encourage case settlement such as mediation. Similarly, the longer the tenure of the judge, the more likely he will be to make decisions that benefit the plaintiff, since concerns over a perceived rising litigiousness are a relatively new phenomenon.

Judges with senior status, or, in other words, those judges that have retired and now serve a part-time, as-desired role, are not likely to feel the same pressures as active district court judges. Judges with senior status do not serve on a districts' random assignment wheel and are more likely to be able to choose their cases or at least the characteristics of the cases that they work on. Additionally, unlike active judges, senior judges do not need to worry about developing a speedy work record that makes them attractive for elevation to a higher court, and thus, will not feel as constrained to resolve as many of their cases in as short of time as possible (see, e.g., Hettinger, Lindquist and Martinek, 2006). This means that senior status judges should be less likely to terminate their cases by settlement and more likely to have them end with a plaintiff victory than active judges.

Chief judges, on the other hand, are responsible for the administrative success of their district. As a result, the chief judges are likely to feel more constrained by fast case termination and low case load than their colleagues on the bench. This means that chiefs should be more likely to have their cases terminate through settlement and should be more likely to have cases ending in defendant victories (since this sends a message to future plaintiffs that litigiousness is not a successful strategy) (see, e.g., Hettinger, Lindquist and Martinek, 2006).

Under the Federal Magistrate Act of 1968, magistrate judges serving in federal district courts may determine pretrial matters, conduct hearings, try misdemeanors, and, upon the consent of the parties, conduct civil jury and bench proceedings. These judges are not appointed under Article III of the Constitution but rather serve a district for eight years (full-time) or four years (part-time) after being selected by the district court judges. Their purpose is “to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers” (Legislative History 1968 U.S.Cong. and Adm.News, p. 4255).

Magistrate judges, serving as the presiding judge in civil cases by the consent of the parties, are likely to desire appointment to the district courts. And, indeed, many current district court judges were once magistrates. These judges are likely to be particularly concerned about avoiding drawing negative attention to themselves. Similarly, because of their training in handling pre-trial matters such as discovery and presiding over things like settlement conferences, these judges are also likely to help cases resolve through settlement. They should also be more likely than regular judges to have their cases go to trial, something that is likely the case because the parties have explicitly consented to “trial before a magistrate.” On the flip side, presiding magistrates should be less likely to dispose of cases through non-trial adjudications,

largely because these inexperienced judges will not want to make such a contentious ruling where deference is supposed to be given to the non-moving party.

While magistrates are sometimes the primary presiding judge in a district court case, more often, these judges act as the second judge in the case, where they serve alongside the assigned Article III judge. For cases with a magistrate on the record to assist the assigned judge, dispositions by settlements should be more likely since the presence of the additional magistrate should lead to more hands-on proceedings. However, based on the gendered theories of decision making discussed above, these effects should be mitigated by the sex of the magistrate, meaning that female magistrates assisting in a case should make that case more likely to settle than a male judge assisting. This expectation is consistent with the findings of Carroll (2003), who found that male and female magistrates vote differently from one another.

2.2.2 Judge Actions

As noted above, district court judges can take an active part in encouraging parties to settle. To this end, district judges can mandate that parties attempt to settle their cases during the course of litigation. Two common and institutionalized methods of doing so include referring the case to a type of Alternative Dispute Resolution (ADR), such as mediation, or requiring the parties to participate in a settlement conference.² When ADR is required, the parties are required to appoint a neutral arbitrator that will facilitate discussions between them. Generally these facilitators have no decision making authority and frequently are not even required to hold a law degree (see e.g. Ravindra, 2005, 295). For settlement conferences, a similar sort of discussion

²Apparently in most district courts, when the judge requires litigants to participate in an activity such as one of these, “the referral is only presumptively mandatory” (Plapinger and Stienstra, 1996, 7).

takes place, only this time in front of a court official like another district judge or a magistrate. In either case, upon completion of the formalized negotiation discussion, the facilitator will report to the district judge at the end of the effort on whether or not a settlement was achieved (Ravindra, 2005). If no settlement is reached, the case will continue.

The occurrence of alternative dispute resolution (ADR) or settlement conferences forces parties to formally come together and discuss the possibilities of settling their case. Generally with the help of a neutral evaluator, parties are able to better understand their chances of success and the expectations of their opponent. Since bringing up the possibility of settlement on their own can be perceived as a sign of case weakness, lawyers tend to delay talk of settlement as long as possible (Provine, 1986, 10). Because of this, the judge's role in facilitating settlement discussions can not only breathe realism into the case but also alleviate the pressure from the attorneys to force the issue themselves. As Ravindra (2005, 304) put it,

The settlement conference may be the first time both sides to the dispute are presented, and attorneys may benefit from a judge's take on the contrasting presentation. In addition, lawyers want to engage in a process that creates movement. They want the judge to be an influence on the process, not merely a message carrier. The attorneys already know their case and the other side's case. What they often need is another perspective to add to this dynamic.

As such, the presence of court-mandated settlement conferences or ADR in a case should increase the likelihood of case settlement and decrease the chances of trial and non-trial adjudication.

2.2.3 Litigant Action

When a party motions the court for some sort of pre-trial termination of the case, the likelihood of the case settling is lessened since some of the motions should be successful. The two most common types of pre-trial termination motions are motions for summary judgment and motions to dismiss. Motions for summary judgment are based on the standard present in F.R.C.P. Rule 56 which reads that the motion should be granted if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” As Molot (2003, 45) notes, “no one questions that summary judgment is an important part of contemporary pretrial practice.” Motions to dismiss come for a variety of reasons, but are commonly based on F.R.C.P. Rule 12(b)(6) for failure to state a claim upon which relief can be granted or F.R.C.P. Rule 12(b)(1) or (2) for lack of jurisdiction. Motions to dismiss present the motioning party with an extremely difficult barrier to overcome — nearly all cases are able to state a claim or state a ground for federal jurisdiction — and thus, these motions will rarely be successful and may provide only limited information on whether a case will or will not settle. Alternatively, summary judgment motions are granted far more frequently since the standard effectively says that this kind of relief will be granted if the defendant “most certainly will win at trial.” Thus, the presence of either motion should make a non-trial adjudication more likely, although a summary judgment motion should have a larger effect than a motion to dismiss.

On the other hand, the request for a jury trial by either party in the district court case serves as a signal that one or both of the parties are expressing that they do not want the district judge to be the final and sole decision maker in the case.³ This

³While a judge still decides issues of law during jury trials, the jury is responsible for all fact-finding.

is consistent with Hersh's (2006) empirical findings that cases with a jury demand are more likely to settle than cases without. As such, the presence of a jury demand should lead to more case settlements and fewer trials and non-trial adjudications.

2.2.4 Litigant Status

Beginning with Galanter (1974), a large body of research has studied litigant status and how differences in litigant resources impact the success of one party over another. As is frequently the case in these suits, an individual litigant sues a corporate or government party – a lineup that means that a generally meager-resourced litigant is suing a relative deep-pocketed and experienced one. These asymmetries in power, resources, and experience often mean that there will also be asymmetries in outcomes, with strong parties more often than not coming out on top. While most of the research in this area has studied the impact of resources differences on success at the merits – i.e. who *wins* – the theory underlying this body of research should also directly apply to the decisions about the continuation of the case made by litigants prior to the termination of their case in district courts.

As such, cases with weak plaintiffs relative to the defendants should be less likely to settle or go to trial and more likely to end in non-trial adjudication. As the parties approach equal status levels, and consistent with Priest and Klein (1984), they should have their highest likelihood of going to trial. As the plaintiff's strength grows relative to the defendants, settlement should be increasingly likely. A similar structure should be expected when it comes to victories. Defendants should be most likely to win when they are strong and facing a weak plaintiff. Settlement and plaintiff victories should be more likely as the plaintiff strengthens. Within this study, litigant resources are assessed in a similar fashion to that used in the long line of previous work on this

subject (see e.g., Black and Boyd, 2007; Brace and Hall, 2001; Collins, 2004; Farole, 1999; Rowland and Todd, 1991; Sheehan, 1992; Sheehan, Mishler and Songer, 1992; Songer, Sheehan and Haire, 1999; Wheeler et al., 1987).

2.2.5 Hierarchical Constraints

While a district court case is proceeding, the judge and the parties have no idea whether the case will ultimately end up before the appellate courts. Nonetheless, the looming presence of potential review in these courts may alter the decision making of both litigants and judges in district courts. This is particularly the case in federal district courts where the right to appeal to the courts of appeals is generally guaranteed and is exercised in a non-trivial number of cases (see Eisenberg, 2004).⁴ These factors mean that appellate courts are an ever-present influence in case dispositions. District court judges are likely to account for the preferences of the higher court judges when making their decisions (Randazzo, 2008), and the litigants are likely to weigh their chances of success before these higher courts when deciding how to proceed in the lower court (and whether perhaps to actively pursue settlement, which effectively removes the appellate court from the scenario) (see e.g., Priest and Klein, 1984). As Eisenberg and Heise (2009) note, we should expect that baseline circuit judges will be likely to favor the original defendant in the case over plaintiff, something the authors argue is a product of either a real or perceived pro-plaintiff bias in trial courts. As the supervising circuit court grows increasingly conservative, its likelihood of support for

⁴The appeal rate in federal civil cases is around 11 percent. Approximately half of these appeals are never heard on the merits by the appellate court. (I.e., only 5.6 percent of district court cases are appealed and decided on the merits by the courts of appeals). When Eisenberg limits his analysis to only those cases with a clear victory for the defendant or plaintiff in the lower court, appeal rates rise to 21 percent (all appeals) and 11.4 percent (appeals that then go to merits conclusion).

the defendant should also grow, something that district court actors are likely to take into account. As such, as the circuit court gets more conservative, defendant victories should be more likely in the district court and settlements and plaintiff victories should be less likely.

2.3 Data

To capture the method and winner of cases terminated in federal district courts, I turn to a newly collected dataset of cases terminated in 25 federal district courts. These cases are an ideal arena for examining district court litigation in the broadest of terms since they terminate in a variety of different ways, at different stages, and often lead to outcomes that do not result in a judge-authored opinion.

This project seeks to improve on the data collection shortcomings of previous projects studying some aspect of district court decision making, thus enabling the findings of this research project to be both generalizable and wide-reaching. To do this, I collect data on cases terminated from 2000 to 2006 in 25 of the 94 federal district courts. All of the twelve traditional, geographically-based circuit courts except the Circuit Court of Appeals for the District of Columbia are represented.⁵ Table 2.1 displays more details on the 25 districts included in the study.

⁵The districts included in the study were selected simply because they provide circuit and geographic diversity and because the chief judges agreed to provide me PACER (described below) fee exemptions for studying the case materials from their courts. Note that of the district courts to be studied here, the chief judges (who granted me free PACER access) have varied ideological backgrounds.

| <i>1st Circuit</i> | <i>2nd Circuit</i> | <i>3rd Circuit</i> | <i>4th Circuit</i> | <i>5th Circuit</i> | <i>6th Circuit</i> |
|--------------------|---------------------|--------------------|---------------------|----------------------|----------------------|
| DRI | SDNY EDNY | MDPA DDE | DMD EDVA | NDTX EDLA | NDOH EDMI WDTN |
| <i>7th Circuit</i> | <i>8th Circuit</i> | <i>9th Circuit</i> | <i>10th Circuit</i> | <i>11th Circuit</i> | |
| NDIL NDIN | EDMO NDIA DSD | WDWA CDCA | DCO DKS NDOK | MDFL NDFL NDGA | |

Table 2.1: The 25 federal district courts, arranged by their circuit, included in the study.

To identify the population of all cases that terminate in these district courts during the years of my study, I turn to the Federal Judicial Center’s (FJC) Integrated Databases, which includes standardized filing and termination information reported from district court clerks of court for *every* case terminated in the district courts for the years in my study. To narrow the data down to the cases of interest, I rely on the filing party’s chosen coding of the case’s nature of suit (NOS). In particular, I focus here on cases involving business, civil rights, and personal injury torts issues.⁶ For purposes of this study, I draw a stratified random sample of 250 cases per district. With these cases in hand, I gathered and coded from PACER (“Public Access to Court Electronic Records”) the case docket and other relevant case documents for each case in the sample.

The traditional district court studies mentioned above generally only study district court outcomes that are published in the *Federal Supplement*. For a district court judge, the decision to publish an opinion is wholly discretionary, and the resulting published cases appear to be in no way a random sample of all district court decisions (Songer, 1988; Siegelman and Donohue III, 1990; Swenson, 2004; Ringquist and Emmert, 1999). Unlike that previous research, the research design in the present study allows for the investigation of cases that resolve through a variety of methods and that often times yield no judge-authored opinion, including those ending in trials and settlements. In addition, for the small handful of studies that provide a detailed investigation of district court process or unpublished decisions, the analysis tends to be of a small number of districts (e.g. Waldfogel, 1998, Southern District of New

⁶The exact NOS codes are: civil rights cases (440, 442, 443, 444), personal injury cases (310, 320, 340, 350, 360), and business-related cases (190, 820, 830, 840). The NOS code is a issue area classification for a case. It is assigned to the case based on the identification by the plaintiff’s attorney filing the case when he fills out his Civil Cover Sheet.

York; Smith, 2006, District of D.C.; Rowland and Carp, 1996, Kansas City, MO and Detroit, MI; but see Kim et al., 2009, Boyd and Hoffman, 2010), something that this study is also able to vastly improve on.⁷

2.4 Results

2.4.1 Termination Method

Turning first to an examination of what explains whether a case terminates by settlement, trial, or non-trial adjudication in district courts, I estimate a multinomial logistic regression model with robust standard errors clustered on the assigned judge. Details on the covariates and their measurement are included in Table 2.5 in the appendix. Tables 2.2 and 2.3 report the results of this estimation.

⁷In the past, before electronic case dockets were available, researchers had to make copies of individual dockets in each district’s courthouse. With today’s nearly universal reliance on PACER (“Public Access to Court Electronic Records”) by district courts, such geographic limitations are no longer in place. It is worth noting, however, that electronic dockets and case materials are only available from the mid-1990s forward, meaning that for more longitudinal studies of district courts, previously-used techniques are the only possibility.

| | Non-Trial Adjudication vs. Settled | Trial vs. Settled |
|--------------------------------|------------------------------------------|-------------------------|
| District Judge Ideology | -0.085 (0.16) | 0.148 (0.29) |
| Circuit Court Ideology | 0.203 (0.24) | -0.006 (0.36) |
| Litigant Status Difference | -0.236* (0.03) | -0.133* (0.06) |
| District Judge Years on Bench | 0.001 (0.01) | 0.001 (0.01) |
| Motion to Dismiss | 0.733* (0.11) | 0.760* (0.16) |
| Motion for Summary Judgment | 1.979* (0.11) | 1.612* (0.18) |
| Alternative Dispute Resolution | -1.296* (0.17) | 0.090 (0.18) |
| Settlement Conference | -1.461* (0.15) | 0.105 (0.18) |
| Jury Demand | -0.842* (0.11) | -0.515* (0.18) |
| Female District Judge | 0.001 (0.13) | -0.223 (0.22) |
| Senior District Judge | -0.305 (0.21) | 0.130 (0.32) |
| Chief District Judge | 0.235 (0.28) | -0.057 (0.24) |
| Female Magistrate Assistance | -0.303 (0.22) | -0.752 (0.43) |
| Male Magistrate Assistance | -0.134 (0.14) | -0.105 (0.22) |
| Magistrate Assigned Case | -0.619* (0.23) | 0.843* (0.26) |
| Civil Rights Case | 0.781* (0.16) | -0.164 (0.23) |
| Business Case | 0.121 (0.20) | -0.332 (0.27) |
| Constant | -2.010* (0.21) | -3.213* (0.36) |
| Log Likelihood | -2890.995 | |
| Pseudo R ² | 0.208 | |
| Observations | 4956 | |

Table 2.2: Multinomial regression results for the termination method of cases in federal district courts. Cases terminated by settlement are the baseline. Statistical significance is represented with * (p<0.05, two-tailed). Tort Cases are the baseline issue area and are excluded from the model.

| | Non-Trial Adjudication vs. Settled | Trial vs. Settled |
|--------------------------------|------------------------------------------|-------------------------|
| District Judge Ideology | -0.140 (0.17) | 0.169 (0.28) |
| Circuit Court Ideology | 0.265 (0.22) | 0.062 (0.35) |
| Litigant Status Difference | -0.211* (0.04) | -0.140* (0.06) |
| District Judge Years on Bench | -0.000 (0.01) | 0.002 (0.01) |
| Motion to Dismiss | 0.927* (0.12) | 0.808* (0.16) |
| Motion for Summary Judgment | 2.349* (0.11) | 1.646* (0.18) |
| Alternative Dispute Resolution | -1.167* (0.18) | 0.042 (0.19) |
| Settlement Conference | -1.389* (0.15) | 0.214 (0.19) |
| Jury Demand | -0.685* (0.13) | -0.479* (0.20) |
| Female District Judge | -0.138 (0.13) | -0.184 (0.22) |
| Senior District Judge | -0.330 (0.21) | 0.071 (0.33) |
| Chief District Judge | -0.212 (0.23) | -0.099 (0.26) |
| Female Magistrate Assistance | -0.196 (0.24) | -0.669 (0.44) |
| Male Magistrate Assistance | 0.031 (0.14) | -0.132 (0.21) |
| Magistrate Assigned Case | -0.525* (0.24) | 0.803* (0.26) |
| Civil Rights Case | 0.647* (0.17) | -0.207 (0.24) |
| Business Case | 0.165 (0.22) | -0.224 (0.27) |
| Constant | -2.451* (0.23) | -3.384* (0.39) |
| Log Likelihood | -2474.372 | |
| Pseudo R ² | 0.231 | |
| Observations | 4547 | |

Table 2.3: Multinomial regression results for the termination method of cases terminating greater than 60 days from filing in federal district courts. Cases terminated by settlement are the baseline. Statistical significance is represented with * ($p < 0.05$, two-tailed). **Tort Cases** are the baseline issue area and are excluded from the model.

The estimation reported in Table 2.3 mirrors that reported in 2.2 with one exception: the later model estimates the results only for those cases terminating more than 60 days from filing. Re-estimating the results solely for terminations in the post-60 days from filing period helps ensure that the results are not being driven by parties strategically dismissing their cases (for later re-filing) after discovering the identity of the case's assigned judge. Of note, the results from the two models are virtually identical, thus alleviating any concerns that the results are being driven by litigants strategically settling or dismissing their cases based solely on the identity of the assigned judge. Now returning to the main model, as expected, a number of variables related to judge characteristics, judge activity, litigant strategy, and litigant status reach statistical significance. To better understand the substantive effect of these results, I turn to estimations of the predicted probabilities that these characteristics will lead to a particular type of termination method in a case.

Focusing first on the judge-specific factors that have an effect on termination method, three variables — judge mandated ADR and settlement conferences along with the assignment and consent of the parties to have a magistrate to preside over the case — have an influence. As is visible in Figure 2.1 and as expected, ADR and settlement conferences each have a strong, positive (and nearly identical) effect on increasing the chances of settlement of a case. Mandated ADR in a case increases the likelihood of case settlement by 11 percent. Similarly, court-directed settlement conferences lead to an 0.12 increase in the chance of case settlement. Each of these negotiation scenarios acts to decrease the likelihood of a case terminating by a non-trial adjudication but has no significant effect on a case ending via trial.

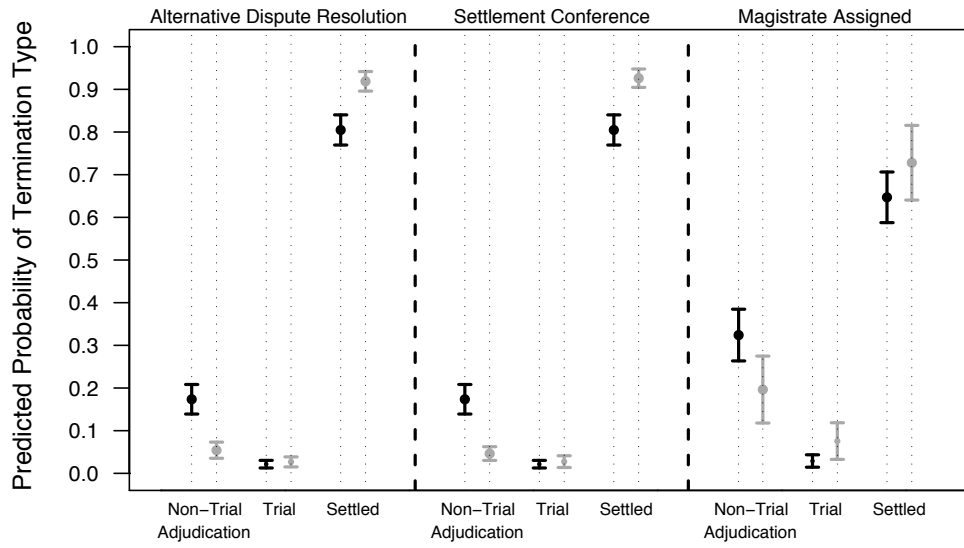


Figure 2.1: The predicted probability that a case will terminate by settlement, trial, or non-trial adjudication given the presence or lack of alternative dispute resolution, settlement conferences, and magistrate assigned.

Cases where the parties consent to a magistrate presiding over all of their proceedings, compared to those with a traditional Article III district court judges, also have their termination methods affected. In particular, as is shown in the right-hand panel of Figure 2.1, assigned magistrates have their cases terminate more frequently by trial than district court judges and less frequently by non-trial adjudications. Specifically, a magistrate-case has a predicted probability of ending with a non-trial adjudication of 0.20 and a 0.08 probability of going to trial while a district judge-case has a non-trial adjudication probability of 0.32 and a trial probability of 0.03.⁸

Turning now to litigant-specific characteristics and their effect on the termination method of a case, Figures 2.2 and 2.3 indicate that four relevant variables are significant. The two types of motions by litigants to involuntarily dismiss the case early both have strong effects in the expected direction. Motions for summary judgment have a particularly strong impact on case termination method, with their presence making non-trial adjudications 41 percent more likely and settlements 43 percent less likely. In comparison, motions to dismiss have a more modest effect. Cases without such a motion have a probability of terminating through a non-trial adjudication of 0.17 while cases with such a motion have an 0.30 probability of such a termination. A similar difference is found for settlement, but the likelihood of trial is effectively unaffected by the presence of a motion to dismiss. As expected and as graphed in

⁸Overlapping confidence intervals for predictions does not necessarily mean that no statistically significant difference exists between two probabilities. Rather, the real value of interest is the the difference in the probability, and it has a separate distribution with its own mean and confidence interval (Austin and Hux, 2002; Epstein, Martin and Schneider, 2006). The difference between settlement probabilities here is 0.08 and has a confidence interval of [-0.0020, 0.1641]. Because the confidence interval on this difference contains 0, settled cases just miss statistical significance. The difference between the non-trial adjudication probabilities is 0.1277 [0.0540, 0.2015], and the difference between trial probabilities is 0.0467 [0.0014, 0.082], both of which are significant differences.

the right-hand panel of Figure 2.2, the presence of a jury demand has the opposite effect of summary judgment motions and motions to dismiss. Cases with a jury demand are 16 percent more likely to settle and 15 less likely to terminate through a non-trial adjudication; the likelihood of trial is, statistically speaking, unaffected by the presence of a jury demand. This finding is consistent with the expectation that, by requesting a trial by the jury, the parties are making clear that they want to avoid a case termination with the judge as the final decision maker.

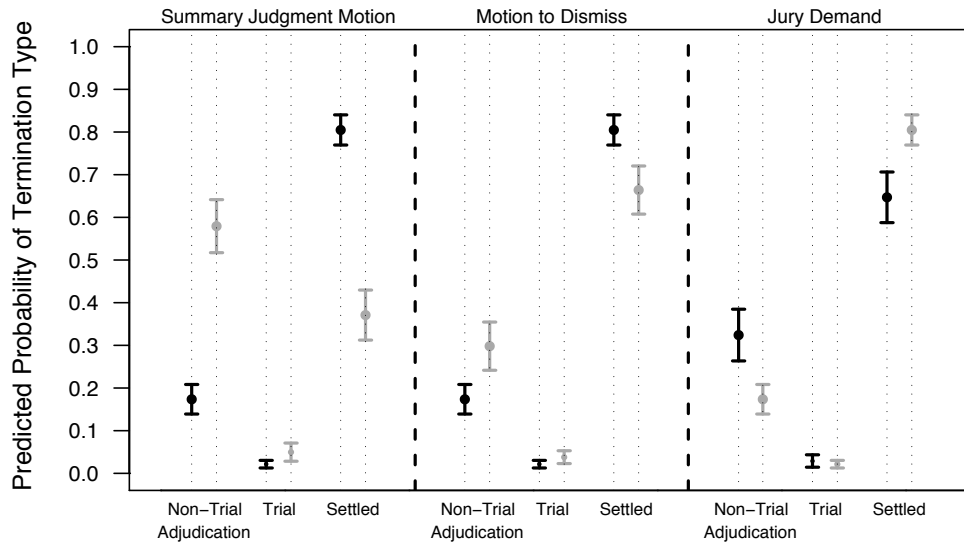


Figure 2.2: The predicted probability that a case will terminate by settlement, trial, or non-trial adjudication given the presence or lack of summary judgment motions, motions to dismiss, and jury demands.

The final litigant-specific factor of significance with regard to case termination method is the status of the plaintiff and defendant in relation to each other. Figure 2.3 displays the predicted probability of a case terminating by a particular method as the plaintiff's status grows relative to the status of the defendant. The figure reveals a number of very interesting things. First of all, relative litigant status has no effect on the probability of a case going to trial, something that is obvious by viewing the effectively horizontal medium gray band that hovers just above "0." As expected, the probability of a case settling is at its lowest when a weak plaintiff faces a strong defendant. In those cases, the probability of a case settling compared to terminating through a non-trial adjudication is, after accounting for confidence intervals, effectively a draw. Interestingly, as the plaintiff's status increases relative to the defendant, the likelihood of settlement continues to rise, even after the plaintiff has a much higher status than the defendant. Indeed, when a very strong plaintiff is facing a weak defendant, the predicted probability of the case terminating through settlement is nearly guaranteed. In reality, though, this result is driven by a handful of cases with the federal government as the plaintiff and a consent judgment as the final settled outcome.

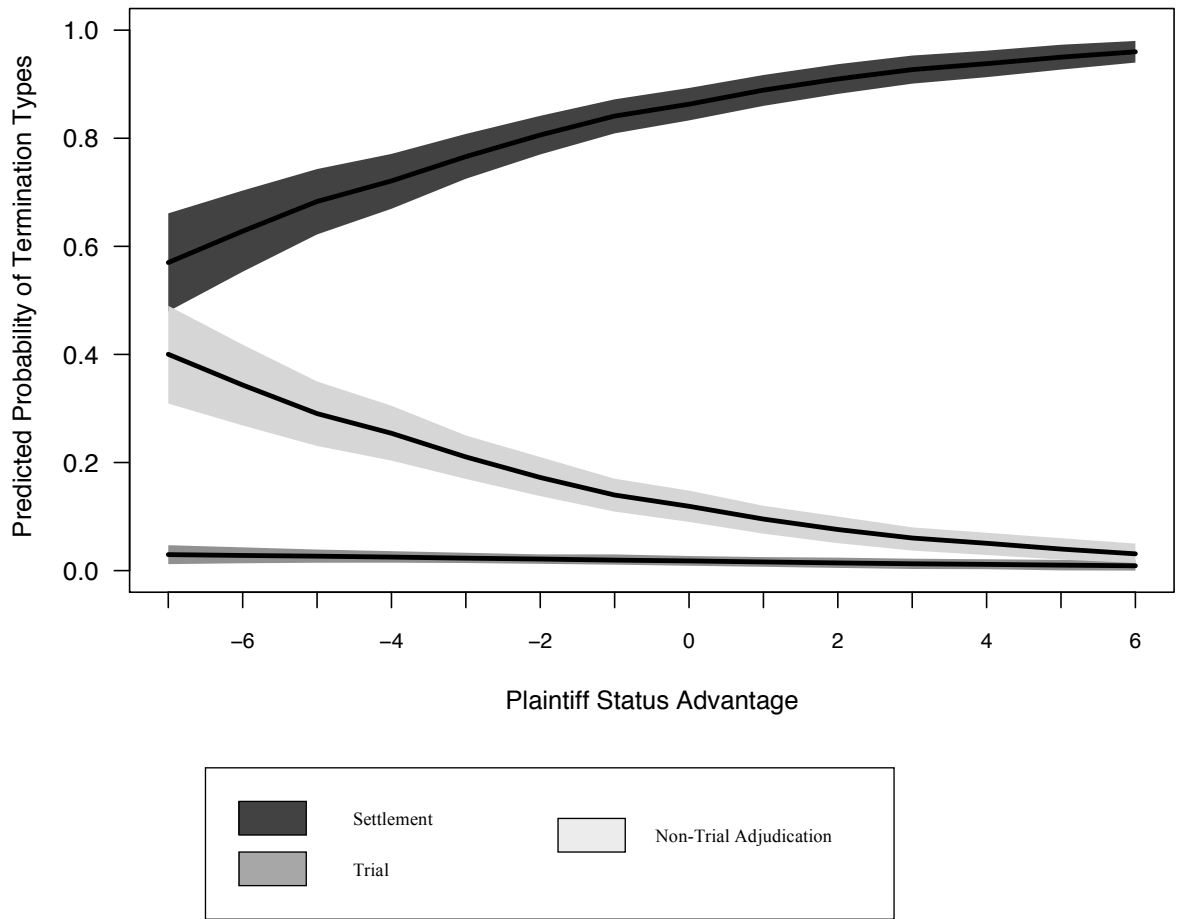


Figure 2.3: The predicted probability that a case will terminate by settlement, trial, or non-trial adjudication given the changing difference in status between the plaintiff and the defendant. Negative status advantages indicate that a weak plaintiff is facing a stronger defendant while positive status advantages indicate that a strong plaintiff is suing a weaker defendant.

2.4.2 Winner

I turn next to a model of the ultimate winner of a district court case: the plaintiff, the defendant, or both (through a settlement). Once again, the data are fit using a multinomial logistic regression model with standard errors clustered on the appointed judge. The results of this model are displayed in Table 2.4.

| | Defendant Wins vs. Settled | Plaintiff Wins vs. Settled |
|--------------------------------|----------------------------------|----------------------------------|
| District Judge Ideology | -0.047 (0.11) | 0.213 (0.23) |
| Circuit Court Ideology | 0.433* (0.15) | -0.173 (0.28) |
| Litigant Status Difference | -0.225* (0.02) | 0.163* (0.05) |
| District Judge Years on Bench | 0.003 (0.01) | -0.009 (0.01) |
| Alternative Dispute Resolution | -1.066* (0.13) | -0.394* (0.20) |
| Settlement Conference | -1.014* (0.11) | -0.107 (0.20) |
| Female District Judge | -0.005 (0.09) | -0.019 (0.19) |
| Senior District Judge | -0.200 (0.16) | -0.075 (0.30) |
| Chief District Judge | 0.112 (0.18) | -0.619* (0.25) |
| Magistrate Assigned Case | -0.236 (0.18) | 0.319 (0.33) |
| Civil Rights Case | 0.763* (0.12) | -0.030 (0.28) |
| Business Case | 0.312* (0.15) | 1.280* (0.24) |
| Constant | -1.284* (0.15) | -2.600* (0.26) |
| Log Likelihood | -4297.479 | |
| Pseudo R ² | 0.107 | |
| Observations | 5698 | |

Table 2.4: Multinomial regression results for the winner of cases terminating in federal district courts. Cases ending in a settled outcome are the baseline. Statistical significance is represented with * (p<0.05, two-tailed). **Tort Cases** are the baseline issue area and are excluded from the model.

Of the district judge-specific variables, three reach standard levels of statistical significance: chief judge, ADR, and settlement conference.⁹ Figure 2.4 depicts the predicted probabilities for a particular winner in a case based on the presence of court-mandated ADR or a settlement conference. As is clear in the figure, these required negotiation sessions have very similar effects. Their presence moves civil rights cases from having nearly equal likelihood of the defendant winning to the case settling to an approximately 0.70 chance of the parties reaching a compromised outcome. The likelihood of a pure plaintiff victory remains untouched by the presence or lack of ADR or settlement conferences, indicating that judges' decisions to require these formalized negotiations are solely eating away at defendant victories and, as such, are to the benefit of plaintiffs.

⁹While a judge being the chief district court judge reaches statistical significance, it does not have a substantive effect on the probability that a case will have a particular winner. Whether the case ends with a plaintiff or defendant victory or ends through a settlement, the presence of a chief judge as the assigned judge makes anywhere from a 0.01 to 0.03 difference. For defendant victories and settlements, the confidence intervals around this slight difference also contain 0.

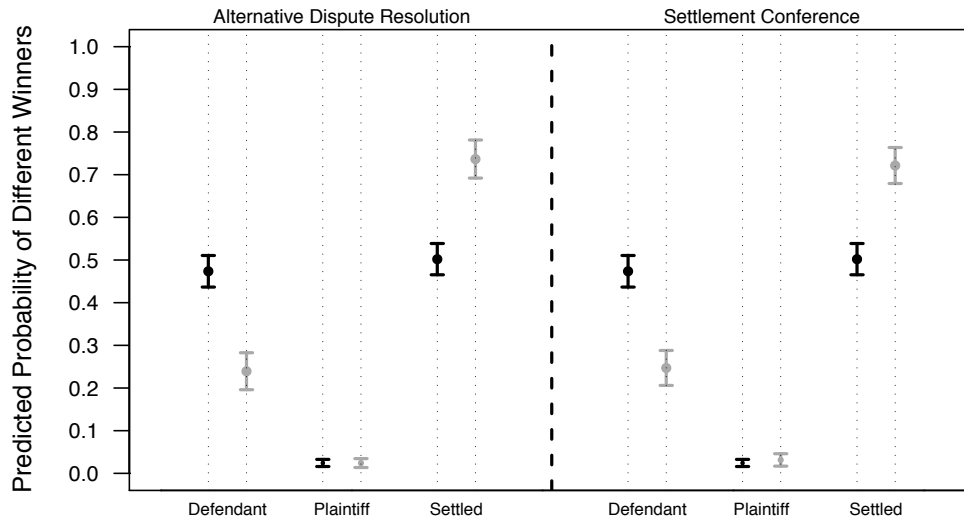


Figure 2.4: The predicted probability that a case will have a particular winner given the presence or lack of ADR and settlement conferences.

The supervising circuit court's ideology, which represents a potential constraint on the decision making and strategy of both litigants and judges in district courts, also has a significant effect on who wins in the district courts. Figure 2.5 depicts the predicted probabilities based on circuit court ideology. As expected, as the supervising circuit court gets more conservative, the more likely defendants are to win and the less likely cases are to settle. And, as the circuit court gets more liberal, the opposite is true. Settlements and defendant victories are equally likely when the circuit court has a moderate ideology. Somewhat surprisingly, circuit ideology has no effect on the likelihood of plaintiff victories.

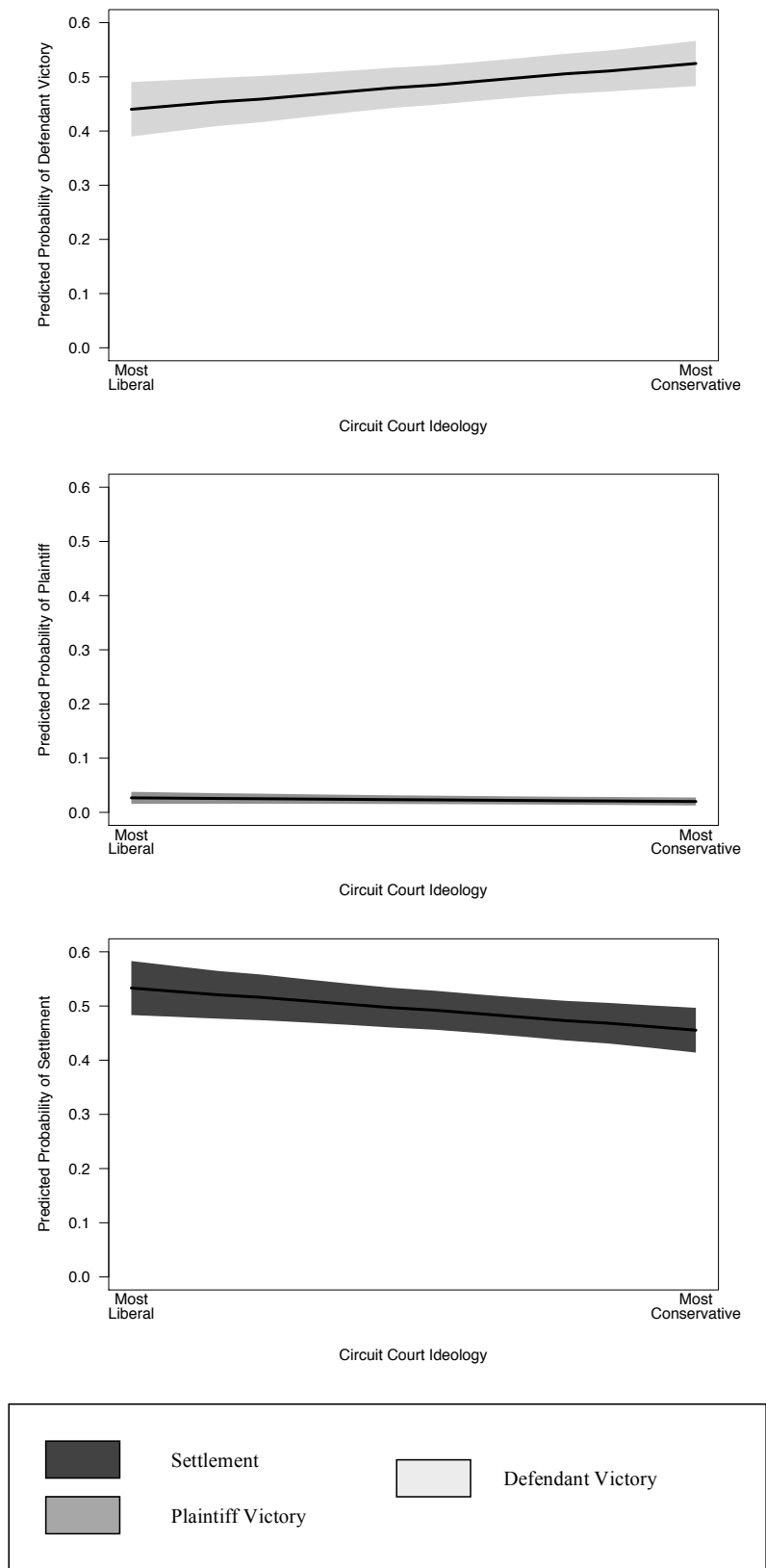


Figure 2.5: The predicted probability that a case will have a particular winner based on the supervising circuit court's median ideology.

In addition, just as in the termination model, the difference between the status of the defendants' and plaintiffs' resources and status have an effect on who wins a district court case. As shown in Figure 2.6, as plaintiffs increase their status advantage over the defendant, they see a modest increase in their pure victories over defendants. When weak plaintiffs sue strong defendants, the defendants are highly advantaged, with nearly 80 percent of civil rights cases with (poor individuals suing the federal government) ending with a defendant victory. When defendants have just a slight status advantage over plaintiffs, defendant victories are equally likely and, when as defendants find themselves being sued by strong plaintiffs, settlement is increasingly likely.

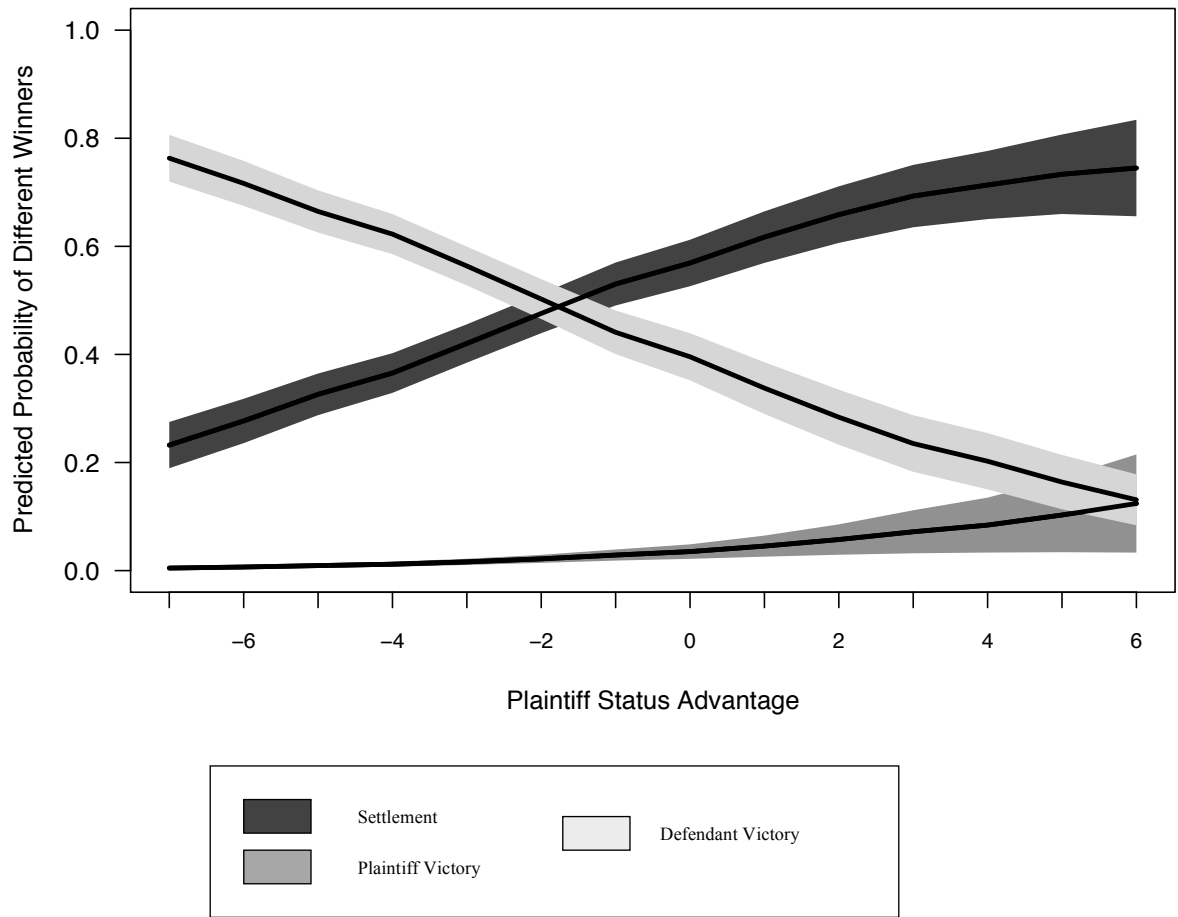


Figure 2.6: The predicted probability that a case will have a plaintiff or defendant winner or a settled outcome by the changing status differentials between the parties. Negative status advantages indicate that a weak plaintiff is facing a stronger defendant while positive status advantages indicate that a strong plaintiff is suing a weaker defendant.

2.5 Discussion

With a new dataset of district court case activity across 25 districts and seven years, this study provides one of the first attempts to empirically capture the role of judges and litigants in district court cases. In so doing, this research finds that the actions, characteristics, and roles of both key actors can have an influence on how the cases terminate and who wins them. These findings reiterate some things that we may have already known about the case management stage of judicial decision making. As we can see from all of the model’s estimates, cases are very likely to be disposed of by settlement under almost all circumstances. Given the “vanishing trial” literature that exists, this is neither a new nor a surprising finding. However, as discussed in the introduction, the real question is why certain cases do not settle. As revealed in the analysis here, the answer to this is one based both on the parties and their actions and the judge and his actions. Such insight into district court activity would not be possible with reliance on a traditional research design using only published opinions.

For those connoisseurs of judicial politics research across courts, the lack of statistically significant findings with regard to the district judge ideology variable and the modest findings in only one model for the circuit ideology variable may come as a surprise. At the same rate, however, because the complete litigation process and the large caseload within district courts is so complex, it is quite possible that political preferences and constraints are muted in most day-to-day decisions and activities within federal trial courts.

While judge ideology is not a significant predictor of the dependent variables, other judge-related features such as assigned magistrate judges and judge mandated settlement conferences and ADR have strong effects. Including court required ADR and settlement conferences in the models captures very explicit ways that the assigned

judge in the case can encourage the parties to settle their case. It is quite likely that judges, if they so choose, use far less explicit ways, like during pretrial conferences, to encourage the same. Unlike ADR and settlement conferences, these alternative methods for judges to encourage settlement cannot be systematically captured from case materials. This means that in many ways, the test for judge-encouragement of settlement provided here is a conservative one, and, as such it makes the large effect on settlement found in both models all the more impressive.

The present work is not without its own caveats. Notably, it is limited in its longitudinal scope. The cases covered here (those terminating from 2000-2006) come from an era of homogeneity on the district courts. The reliance on electronic dockets and other case materials means that a study such as this can only systematically extend back ten or so years. Beyond that, dockets are not reliably available online. Similar case materials from earlier years are available in court archives, but their large-scale retrieval would be prohibitively expensive and time consuming. This means that for studies of district courts extending further back in time, the data relied upon in other district court studies (e.g., Rowland and Carp 1996), when properly caveated, remain the best resource available.

The litigant status-difference results in both models are quite substantial and telling. Galanter's (1974) important work predicts a huge advantage for "haves" in litigation, and that is exactly what we see here, both in terms of case termination methods and case winners. While the litigant status effects are large, we might be able to see even more differences among litigants based on their status if we could systematically view all case settlement terms. In other words, while we are seeing a lot of settlements here across the board, a plaintiff might be able to negotiate higher levels of injunctive and monetary relief as he has a higher level of status, and as such, more experienced attorneys and more resources at his disposal.

In the broadest sense, the study of federal district courts (and the actors/decisions within them) is a study of the future of litigation, including Supreme Court decision making. As cases develop in district courts and as parties decide to settle some cases while letting other continue on to a contested outcome through a trial or a non-trial adjudication, the resulting trends in terms of termination methods and winners are indicative of the future case composition in the federal appellate courts – the courts of appeals and the Supreme Court — and also tells us about what issues are likely to settle outside of the formal legal system in the future and what case areas will continue to be subject to judicial intervention.

2.6 Appendix

| Variables | Measurement |
|--------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Judge Ideology | Measured based on Judicial Common Space (JCS) scores using the methodology described in the Giles et al. (2001) and Epstein et al. (2007) papers. These scores are the Poole and Rosenthal NOMINATE Common Space score (available at http://voteview.com/readmeb.htm) of the senator from a judge's home state (or average of the two senators) if that senator(s) is from the same party as the appointing president. If neither senator is from the same party as the president, the judge is assigned the Common Space score of the appointing president. The resulting computed ideology scores range from -1 (the most liberal) to 1 (the most conservative). For magistrate judges presiding over a case, I code the ideology of these actors by taking the median district court judge JCS score for the year that they assumed their position. For the courts of appeals score, I collected the individual JCS scores (available from Epstein et al. 2007) for the judges in the majority and then computed the median for each majority panel. |
| Litigant Status Difference | Measured as the difference between plaintiff status and defendant status. Measures for each party are as follows: (0) poor individual, (1) individual, (2) interest group and unions, (3) business, (4) local government, (5) big business, (6) state government, and (7) federal government |
| District Judge Years on Bench | Measured as the number of years that a district judge has been serving in that position from confirmation to case termination |
| Motion to Dismiss | The presence on the case's docket of any involuntary motion to dismiss the case in full |
| Motion for Summary Judgment | The presence on the case's docket of a motion for summary judgment in full |
| Alternative Dispute Resolution | The presence on the case's docket of any court-required ADR. ADR that appears based solely on the consent of the parties or is because of contractual obligations is not recorded here. |
| Settlement Conference | The presence on the case's docket of a required settlement conference. |
| Jury Demand | A request for a jury demand by either or both parties in the case, as recorded in the case's docket header. |
| Female District Judge | The presence of a female assigned judge at the time of case termination |

| | |
|------------------------------|--------------------------------------------------------------------------------------------------------------------------------|
| Senior District Judge | The presence of a senior district judge assigned at the time of case termination |
| Chief District Judge | The presence of a chief district judge at the time of case termination |
| Female Magistrate Assistance | The presence of assistance by a female judge (in addition to the assigned district judge) in a case, as recorded on the docket |
| Male Magistrate Assistance | The presence of assistance by a male judge (in addition to the assigned district judge) in a case, as recorded on the docket |
| Magistrate Assigned Case | Per the consent of the parties, the assignment of a magistrate judge as the assigned/presiding judge in a case |

Chapter 3

The Impact of Courts of Appeals on Substantive and Procedural Success in the Federal District Courts

Long ago, Richardson and Vines (1967, 597) complained that federal courts “have seldom been investigated as a system of interactions.” Today, this problem continues to plague judicial scholarship, particularly concerning lower federal courts. To help rectify this deficit, this article examines the influence that U.S. courts of appeals have on the outcomes and procedural mechanisms of federal district courts. While previous research has examined judicial impact within the federal hierarchy, little work has studied this topic without focusing specifically on the United States Supreme Court or on case outcomes.

By turning the focus to the impact of the federal system’s intermediate appellate courts on district courts, we can begin to understand the effectiveness of the federal judicial hierarchy in a way that centers on the institutional setting where most federal litigation takes place. Although scholars have long theorized about the impact that higher courts have on district court decision making (e.g Gruhl, 1980; Richardson and Vines, 1967; Baum, 1980), this article provides some of the first direct and comprehensive empirical examination of this question, both in terms of case outcomes and with regard to the procedures used to dispose of the case.

Utilizing an original database of cases terminating in 29 federal district courts from 2000 to 2004, I assess the impact that courts of appeals have on district court decision making after a case is appealed to the circuit court and then returned to the district court on remand. I find that appellate courts do impact district courts, both in terms of the parties that win and in the disposition methods that take place. In particular, the specificity of appellate court directions given to district courts are an important determinant of impact, as is the appellate court decision to publish the opinion remanding the case to the district court. With the ability to speak to the nuances of impact, this study has implications not just for those litigating in these lower federal courts, but also for a broader view of the effectiveness of federal courts and hierarchical constraints and our overall perceptions of judicial fairness and legitimacy.

3.1 The Hierarchical Setting

Modern circuit courts are central actors in the federal appellate system. Indeed, while these courts have always served as the first line of appellate review in the federal system, they are increasingly “the de facto (if not the de jure) venue for final

appellate review” (Hettinger, Lindquist and Martinek, 2006, 89). While we can point to a number of reasons for this shift in appellate importance, the primary candidate is likely the Supreme Court’s shrinking docket, now with only 75-80 cases granted certiorari per year.

These appellate courts have been the subject of quite a bit of scholarship over the past few years, including on the decision to dissent (Hettinger, Lindquist and Martinek, 2004), the presence of en banc decisions (Giles, Walker and Zorn, 2006), the adoption of legal rules (Klein, 2002), inter-panel dynamics (Cross and Tiller, 1998; Boyd, Epstein and Martin, 2007; Sunstein et al., 2006), and variation in decisions over time (Kaheny, Haire and Benesh, 2008). While much of this work alludes to the hierarchical role played by circuit courts, this work largely avoids modeling the interactions of circuit courts with their judicial subordinates. Thus, although these studies have come a long way in informing us on these hierarchical encounters, they are not able to speak to the broader impact that courts of appeals have on lower court decision making. For approximately three-quarters of appeals heard by courts of appeals, “subordinate” means the federal district courts (Administrative Office of U.S. Courts, 2007).

While studying the decisions and actions of the federal courts in isolation may be interesting, the more important inquiry, or at least one with broader implications, is whether the actions and rulings of circuit courts have a lasting impact and can influence future law and litigant experiences and public perceptions of the courts. Indeed, the nature and health of the relationship of district courts to these appellate courts has “consequences both for immediate litigants and for shaping the legal landscape” (Hettinger, Lindquist and Martinek, 2006, 27). Because of this, it is important to turn to the interactions that courts of appeals have with their federal subordinates.

In the federal judiciary, the 94 district courts are the face of justice for most litigants.¹ In recent years, district courts have been disposing of well over 300,000 cases per year (Administrative Office of the U.S. Courts, 2007). Appellate courts, with a burden to hear cases in panels and provide lengthy and thoughtful reasoning for every disposition, are simply not equipped to handle the case management and record development that is done solely in the courts of first instance, the trial courts. Because of this critical filtering function, district courts are an invaluable institution within the judiciary. Their positions also enable them to make law (e.g. Mather, 1995; Lyles, 1995*b*) and serve as primary implementers of national policies (e.g. Giles and Walker, 1975; Vines, 1964). And, yet, of all the federal courts, district courts have certainly received the least amount of attention from political scientists.

While a district court case is proceeding, the judge and the parties have no idea whether the case will ultimately end up before the appellate courts. This means that appellate courts likely serve as an ever-present influence in case dispositions. District court judges are likely to account for the preferences of the higher court judges when making their decisions (Randazzo, 2003), and the litigants are likely to weigh their chances of success before these higher courts when deciding how to proceed in the lower court (and whether perhaps to actively pursue settlement) (see e.g. Priest and Klein, 1984).

¹Like the circuit courts, district courts hold their jurisdiction based on their geographic location. Cases come to these courts not only based on original federal filings but also on removal from state courts. For details regarding the rules that govern district court filings and procedure, see the Federal Rules of Civil Procedure. Kim et al. (See also 2009*b*) for other more general details on the business of these courts.

3.2 Judicial Impact in the Hierarchy

3.2.1 Impact in Theory

While we know some about the proclivity of appellate courts to affirm or reverse district court decisions (e.g. Hettinger, Lindquist and Martinek, 2006; Haire, Lindquist and Songer, 2003; Smith, 2006) or to utilize the precedent of higher courts (e.g. Baum, 1980; Hansford and Spriggs, 2006), we know very little about the impact that courts of appeals decisions have on these lower courts. This latter inquiry is just as important since when the preferences of appellate courts have an impact on district courts, litigants, judges, and the public are all influenced, both in terms of actions and perceptions. If appellate courts impact district courts, we should expect that appellate courts will shape the legal policy that governs the decisions made in the lower courts. For litigants, this congruent hierarchical legal system provides stability and, often, predictability in expectations. And, since district courts are the ones handling the mass of cases and are the face of justice for litigants, the question of whether these courts, as subordinates, are constrained and impacted by circuit court preferences is important.

Theoretical frameworks from the study of courts and other political institutions provide a good backdrop for understanding when and why courts of appeals should have an impact on district court outcomes and proceedings. Many of these expectations come from the hierarchical nature of the relationship between these two judicial institutions, with courts of appeals standing in authority over district courts. The presence of this formalized relationship is particularly important in the judicial system. Since courts are generally believed to be weak, toothless implementers (Johnson, 1979; Baum, 1976), district courts, like other institutions external to the judiciary, need to credibly believe that their appellate superior will stand by and enforce its

rulings. Under a theory of principal-agency interactions, superiors, like courts of appeals, have the potential, if effective, to control the output of their subordinates, like district courts.

Principal-agency theory argues that due to limited resources and information, principals delegate tasks and decision making to agents (Holmstrom, 1979). The theory continues that only properly incentivized agents will avoid shirking and effectively serve their principals (Miller, 2005). Through this service, district courts can disseminate the legal policy preferences of the courts of appeals while the circuit courts only conduct “fire alarm” oversight (McCubbins and Schwartz, 1984) through the appellate process. The lifetime appointments held by federal judges may make them imperfect vessels to act as agents in principal-agency theory, but because many of the characteristics native to principal-agency theory are present between the hierarchically-situated courts of appeals and district courts (such as effective monitoring and tools of punishment), we have evidence that strongly supports the application of the theory to district court-circuit court relationships (Haire, Lindquist and Songer, 2003, 147).

Circuit courts can sanction district courts in a number of ways. A primary way that district judges are controlled by circuit judges is through reversals, since such an outcome overturns a district judge’s decision and, when accompanied by a remand, adds additional work to the judge. Caminker (1994) argues that lower court judges want to avoid reversals because of the reputational costs. Very connected to this, circuit judges will on occasion use their opinions to personally criticize the work of the district judge in the case. It is far more common for circuit judges to be collegial and withhold personal statements about district court judges or to express support,

even in the face of reversals or vacations,² so these criticisms, when they happen, are likely to be particularly troubling.

District court judges are also often highly motivated to be elevated to the courts of appeals (Caminker, 1994; Hettinger, Lindquist and Martinek, 2006), something that for district judges is a very real possibility. Thus, the high likelihood of judge elevation from district courts to appellate courts, the existence of strong precedential norms, and the potential for appellate reversals of district court decisions (and the additional district court work required by remands) all work to transform district court judges into appropriate agents within principal-agency theory (Haire, Lindquist and Songer, 2003, 147).

3.2.2 Impact in Action: Outcome-Based and Procedural

Studying the impact of higher courts on lower courts or political bodies has a long history in judicial politics. These studies are largely concerned with effects on policies and outcomes, with findings including that the Supreme Court influences the policies that administrative agencies and courts of appeals implement (Spriggs, 1996) and that the Supreme Court impacts outcomes in lower federal courts (e.g. Baum, 1978; Gruhl, 1980; Johnson, 1979; Songer, 1987). This body of previous work certainly points to the potential for appellate courts to bring about a substantive impact in the policies and outcomes of their agents. When thinking about courts of appeals' impact on district court cases, these appellate courts will certainly have an impact if they cause a change in the party that ultimately wins the case.

²For example, in *Darst-Webbe Tenant Association Board v. St. Louis Housing Authority*, 339 F.3d 702 (8th 2003), the circuit court, in vacating the district court's decision, noted that "[w]e sympathize with the difficult situation the district court faced in resolving this complicated case."

Of course, impact can also be felt in more subtle ways than changing the outcome. For district court litigation, such an impact may come through the proceedings that take place and the ultimate method by which a case is disposed of. While litigant satisfaction and perceptions of fairness are surely at their highest when victory is achieved, those encountering the judicial system can come away from their experience with varying levels of satisfaction and perceptions of justice depending on the procedures in place. More generally, Tyler and Huo (2002) suggest that when legal processes are perceived as fair, people are more likely to perceive the law as legitimate. Within trial courts, parties will often choose to settle their cases rather than allow the court to control the case outcome. While this settlement process by necessity involves compromise, the component of control increases litigant satisfaction. Similarly, Lind et al. (1990) find that litigants perceived trials as dignified procedures that produced fair outcomes.

If an appellate court's intervention can alter the procedures that lead to a case's termination, surely this too is impact that litigants can appreciate. Settlement and even trial allude to a more "fair shot" of justice, enabling litigants to come away from the judicial system, even as losers, with a sense of fairness and a feeling that the legal system embodies legitimacy and provides an opportunity for them to air their disputes. Impact of this typology may even be more critical for federal courts to embody, since this allows the judiciary to maintain an influential, policy making role over American society and be perceived as legitimate institutions – a characteristic necessary for judicial success and stability (see Gibson, Caldeira and Baird, 1998).

3.3 Tools of Impact

While an ideal system might allow district courts to always perfectly perceive the preferences of courts of appeals, changing preferences, along with shifting court membership, random appellate panel assignment, and an evolving external environment, mean that some degree of uncertainty will exist. Written opinions from circuit courts can serve to help close this gap of uncertainty. Courts of appeals have a number of ways to signal their preferences to lower courts and impact the decisions made in these courts, the most explicit means of which is likely through written opinions. Through these opinions, appellate courts can denounce lower court behavior and legal interpretation, signal changing preferences, develop legal parameters, and provide instructions for future decision making.

The content of appellate opinions can vary greatly. While the results of this are wide-reaching, one major implication is that lower courts, using these opinions as guidance in proceedings below, will have varying amounts of discretion in how they carry out the circuit courts' mandates. And, as a number of scholars have argued, as judicial opinions become more specified in nature, implementation of higher court goals and policies becomes more likely (Spriggs, 1996; Baum, 1980; Wasby, 1970). When courts of appeals write opinions with very specific directions as to, for example, the procedures and case development that need to take place in the trial court, lower courts have limited discretion in the actions that they can take while remaining in good favor with the higher court. However, highly specified decisions are costly for appellate courts and tend to be inflexible (Spriggs, 1996). And, particularly in the context of remands, highly specific opinions require courts of appeals judges to step out of their traditional role as appellate judges and instead, think as if they were trial

judges. As opinions are written with less specific directions, district courts pick up increasing amounts of discretion on the behavior that they can partake in.

Hypothesis 1a (Outcome Model): As the circuit court provides increasingly specific directions, we should be more likely to see a change in the case's winner from pre-appeal to post-remand.

Hypothesis 1b (Procedures Model): Highly specific directions should decrease the likelihood of a case changing termination procedures. Excluding highly specific directions, more opinion specificity should increase the likelihood of a case changing termination procedures.

In addition to the language utilized in its decisions, the circumstances surrounding appellate court opinions can serve to signal their strength to lower courts. For example, circuit courts of appeals can mandate whether their opinions should be published. Although each circuit has different rules with regard to opinion publication, the tone and content of these rules is essentially the same: the circuit panel may designate a decision as “not for publication” when it is determined to not have precedential value (e.g. 11th Circuit R. 36-2 and IOP 6). Until 2007, each circuit set its own rules on if and when unpublished opinions could be cited. Starting in 2007, the Federal Rules of Appellate Procedure now mandate that all unpublished circuit decisions can be cited by parties (Fed. R. App. Proc. 32.1). The ability to designate decisions as unpublished, even under the new rules of citation, mean that a circuit panel is declaring an opinion to be of less long-term value and general utility.

Hypothesis 2: A circuit court's decision not to publish an opinion should decrease the likelihood of impact.

Similarly, judges serving on a panel with one another reserve the right to dissent from the majority's opinion. Dissenting opinions signal that there was discord among the circuit judges in resolving the case. They may also indicate to a district court

judge that there is room to shirk and that there may be limited repercussions if he fails to implement the changes that the majority opinion specifies. To put it another way, circuit court oversight is more likely to be viewed as credible and constraining when the panel speaks in one voice about the law and necessary directions on remand (Spriggs, 1996; Baum, 1980). And particularly for a district court judge observing the opinions of a circuit panel, dissensus may also impart doubt that the panel majority's opinion represents the views of the circuit majority. The presence of a dissenting judge at the courts of appeals may negate the ability of the panel majority to impact district court decision making. By stating reasons for his disagreement with the majority in writing, the dissenter provides a district court judge, perhaps already unhappy with the stigma of reversal, hope that his case management and outcome preferences need not sway (entirely) with the directions of the appellate panel.

Hypothesis 3: The presence of a dissenting opinion should decrease the likelihood of impact.

In thinking about the relationship between these courts, we would be remiss to not consider ideology and its possible dampening effect on impact. A long line of judicial scholarship posits that federal judges at all levels make decisions based, at least in part, on their policy preferences (e.g. Segal and Spaeth, 2002; Rowland and Carp, 1996). In the context of impact, how much of an impact courts of appeals have through intervention in a case and how willing district courts are to follow the directives of circuit courts can arguably be explained by how similar the ideological interests of these actors are. Stated more formally,

Hypothesis 4: An increase in the ideological distance between the district court judge and the circuit court judges (in the majority) should decrease the likelihood of impact.

3.4 Data & Methods

To capture the impact that courts of appeals have on district court decision making, I turn to a newly collected dataset of 1,045 cases remanded to 29 federal district courts from the circuit courts of appeals. These cases are an ideal outlet for examining impact both in terms of case outcome and, as an alternative measure of litigant satisfaction, in terms of the differing procedures utilized in the latter outcome.

Previous studies of impact related to district courts have been hampered by data limitations. While traditional studies of judicial impact reflect on the movement of a case through the judicial hierarchy or the positive citation to appellate decisions by lower courts, such a research design is troubling with regard to federal district courts. Most district court cases resolve via settlement, so there simply is no judge decision or opinion. For those cases terminating by some alternative means, judges have no burden to author opinions or if they choose to write, publish those opinions, meaning that using traditional research techniques, there will often be no written record of the impact of appellate decisions on a district court outcome. Scholars usually search sources such as *Lexis-Nexis* or *Westlaw* for their cases, but, again, these sources will not reflect the presence of cases terminated without published opinions.

The research designed employed in this study enables me to study the impact that courts of appeals have on all types of district court cases — even those that end in settlement. To do this, I identified the population of district court data using the Federal Judicial Center’s (FJC) Integrated Databases for 2000-2004 compiled by the FJC from standardized filing and termination information reported from district court clerks of court for *every* case terminated in the district courts. These data were then merged with the corresponding data from the Appellate Terminations and Pending Databases (also from the FJC), thus yielding the population of cases that

were appealed from the district courts to the courts of appeals. From this list of cases, I collected the circuit court method of disposition to find all final appeals that were eventually remanded to the district court (reverse and remand, vacate and remand, and partial versions of each). After a case was identified as having a remand, the dispositions of the case in the district court before and after the appeal was collected. All case coding was conducted using district court and appellate court dockets as well as courts of appeals opinions, and where necessary to surmise the method of case termination, district court orders, memorandums, and opinions.

This project seeks to improve on the data collection shortcomings of previous projects studying some aspect of district court decision making, thus enabling the findings of this research project to be both generalizable and wide-reaching. To do this, I collect a breadth of data along a number of continuums, including data from 30 district courts across 13 broad issue areas. Many existing studies analyze only a small number of districts (e.g. Waldfoegel, 1998, SDNY; Smith, 2006, DDC). In the past, before electronic case dockets were available, researchers had to make copies of individual dockets in each district's courthouse. With today's nearly universal reliance on PACER ("Public Access to Court Electronic Records") by district courts, such geographic limitations are no longer necessary. As a result, this study collects data on an unprecedented number of districts across all multi-member circuits, something that is potentially very important given the local norms that exist within individual districts. As displayed in Table 3.1, data are collected from 29 of the 94 federal district courts, and all of the traditional, geographically-based circuit courts but the Circuit Court of Appeals for the District of Columbia are represented. The districts included in the study were selected simply because they provide circuit and geographic diversity

and because the chief judges agreed to provide me fee exemptions for studying the case materials from their courts.³

³Note that of the district courts to be studied here, the chief judges (who granted me free PACER access) have varied ideological backgrounds (one Carter appointee, ten Reagan appointees, four Bush I appointees, ten Clinton appointees, and four Bush II appointees).

| <i>1st Circuit</i> | <i>2nd Circuit</i> | <i>3rd Circuit</i> | <i>4th Circuit</i> | <i>5th Circuit</i> | <i>6th Circuit</i> |
|--------------------|--------------------|--------------------|---------------------|---------------------|--------------------|
| DME | SDNY | MDPA | DMD | NDTX | NDOH |
| DRI | EDNY | DDE | WDNC | EDLA | EDMI |
| | | | EDVA | | WDTN |
| <i>7th Circuit</i> | <i>8th Circuit</i> | <i>9th Circuit</i> | <i>10th Circuit</i> | <i>11th Circuit</i> | |
| NDIL | EDMO | WDWA | DCO | MDFL | |
| NDIN | NDIA | CDCA | DKS | NDFL | |
| | DSD | DMT | NDOK | NDGA | |
| | | | | MDAL | |

Table 3.1: The 29 federal district courts, arranged by their circuit, included in the study.

For many years, scholars studying district courts focused only on the small number of cases with decisions published in the Federal Supplement. For a district court judge, the decision to publish a decision is wholly discretionary, and the resulting published cases appear to be in no way a random sample of all district court decisions (Songer, 1988; Siegelman and Donohue III, 1990; Swenson, 2004; Ringquist and Emmert, 1999). Following in the footsteps of these scholars recognizing the potential import of unpublished district decisions, and, by encompassing settled disputes, cases that yield neither published nor unpublished opinions, along with those terminated via court oversight, this project has potential for broad applicability. A simple examination of the disposition types within the present study, depicted in Figure 3.1, clarifies how much data would be lost if this study were to be conducted in the traditional fashion – through searches of case opinions on *Lexis* or *Westlaw*. While a very small proportion of the data end in settlement prior to appeal, approximately one-half of the cases terminate via settlement after remand. These settled cases would be invisible to scholars using traditional techniques. And, yet, as will be discussed in greater detail below, these settlements are a part of the impact that courts of appeals have on district court decision making.

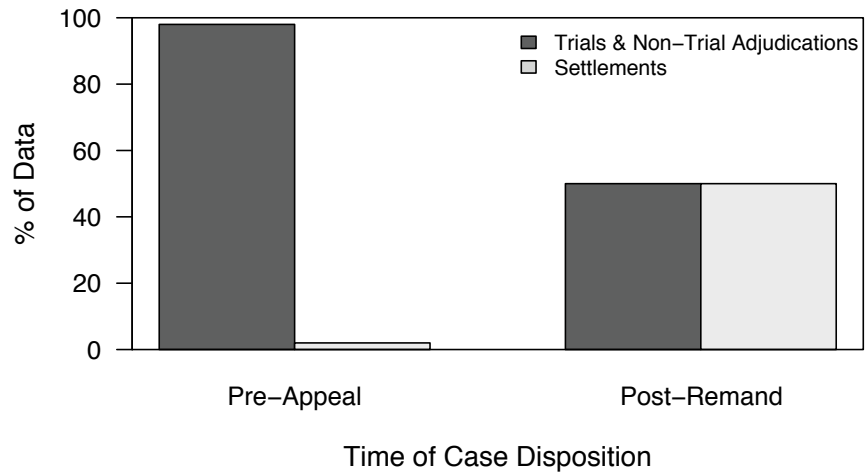


Figure 3.1: Percentage of cases in data terminating by settlement or trial/non-trial adjudication, pre-appeal and post-remand. Cases terminating by settlement are represented in light grey and those ending by trial or non-trial adjudication are depicted in dark grey.

Nearly all work on district courts limits itself to narrow issue areas. Although this limitation is frequently appropriate when one’s research is driven by a substantive question based on a particular area of law, such work has limited generalizability. This is particularly the case for work that seeks to address broad issues of a legal and/or political nature. With this in mind, this project will study three large issue areas, identified based on their Nature of Suit (NOS) code.⁴ To be studied here are: civil rights cases, personal injury torts, and a variety of business-related cases, including general contracts, copyrights, patents, and trademarks.⁵

3.4.1 Dependent Variables

As noted above, the impact of courts of appeals can happen both through changes in outcomes (“substantive impact”) and through changes in the procedures by which cases terminate (“procedural impact”). To study these two types of impact, I rely on two dichotomous dependent variables: `change in winner` and `change in disposition type`.

The variable for `change in winner` is coded as 1 when the district court case prior to appeal has a different winning party than after remand and 0 otherwise. Generally speaking, defining the winning party is easy. For district cases prior to appeal, usually only one party appeals the case outcome, so that party is defined as the loser. If more than one party appeals, the winner is the party whose outcome is affirmed on appeal. For cases ending in settlement, the plaintiff is defined as the winner, as is the case post-remand when there is mixed relief. Approximately 58

⁴The NOS code is a issue area classification for a case. It is assigned to the case based on the identification by the plaintiff’s attorney filing the case when he fills out his Civil Cover Sheet.

⁵The exact NOS codes are: civil rights cases (440, 442, 443, 444), personal injury cases (310, 320, 340, 350, 360), and business-related cases (190, 820, 830, 840).

percent of the cases in the dataset have a change in the case's winner from pre-appeal to post-remand.

Turning to `change in disposition type`, this variable represents a change from one of three types of disposition to another from the termination of the case prior to appeal to after remand. The three types of disposition are settlement, non-trial adjudication, and trial. Prior to appeal, nearly all cases (85 percent) terminate by non-trial adjudications (generally summary judgments and involuntary dismissals) while after remand, the majority of cases (just over 50 percent) end with settlements. Within my data, over 61 percent of the cases have a change in disposition.

3.4.2 Independent Variables and Expectations

Variables of Interest

As noted above, opinions (and the directions within), publication status of the opinions, and written dissents from opinions are all means by which circuit courts may be able to impact district court decision making and procedures on remand. To account for the specificity of directions in appellate court opinions, I code four dummy variables. These variables, High Opinion Specificity, Medium-High Opinion Specificity, Medium Opinion Specificity, and Low Opinion Specificity, represent four different levels of specificity in the directions within circuit court opinions. The definitions of each of these four levels of direction specificity, along with examples characterizing them, are provided in Table 3.2 and the inter-coder reliability for the coding of this variable is provided in Table 3.3. Within the data, 61 percent of the cases are considered to be of low specificity, while 18 percent are of medium specificity, 11 percent have high specificity, and 10 percent are of medium-high specificity.

| Specificity of Directions | Opinion Characteristics | Representative Examples |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| High | Explicit directions on what outcome district court should reach on remand | “Remand with instructions to dismiss the federal action” |
| Medium-High | Specific directions given with regard to some district court actions or partial outcomes, but the court of appeals does not direct the final outcome of the case | “Remand for a new trial limited to age discrimination claims”; “On remand the district court should award costs to Metropolitan or state reasons why costs should be denied” |
| Medium | Directions regarding procedures that should take place but no explicit directions on the final or partial outcomes of the case | “Remand for further discovery to allow 100% Girls Brand the opportunity to discover evidence of Hilson’s possible wrongful conduct in refusing to consent to the proposed sublease” |
| Low | The court of appeal’s directions on remand are either non-existent (other than the statement that the previous outcome is nullified) or merely provide suggestions or hints on what might need to be considered as the case progresses | “Remand is required to resolve factual questions consistent with this opinion”; “Remand for further proceedings consistent with this opinion” |

Table 3.2: The specificity of directions in courts of appeals opinions for the cases in this dataset. Representative examples of each type of specificity are drawn from the author’s data.

| Opinion Specificity | Expected Agreement (By Chance) | Observed Agreement | Kappa |
|---------------------|--------------------------------|--------------------|-------|
| High | 77% | 97.6% | 0.89 |
| Medium-High | 79.5% | 93.8% | 0.7 |
| Medium | 66.4% | 89.3% | 0.68 |
| Low | 53% | 89.6% | 0.78 |

Table 3.3: Intercoder reliability for the coding of Opinion Specificity. The Kappa statistic ranges from 0 to 1, with 1 being a perfect value.

Opinion publication status is coded dichotomously, with `unpublished` opinions coded as 1. Within my data, `unpublished` cases account for 43 percent of the cases. Similarly, the presence of a `dissenting` opinion is coded dichotomously. 8 percent of the cases within the dataset have the presence of a `dissent`.

Finally, I code `Difference in Ideology` to operationalize the ideological dampening effect hypothesis. This variable represents the absolute difference in the ideologies of the district court judge and the circuit panel's majority. To measure this difference, I collect the Judicial Common Space (JCS) scores for these actors, a variable coded using the methodology described in the Giles et al. (2001) and Epstein et al. (2007) papers. In short, these scores are the Poole and Rosenthal NOMINATE Common Space score (available at <http://voteview.com/readmeb.htm>) of the senator from a judge's home state (or average of the two senators) if that senator(s) is from the same party as the appointing president. If neither senator is from the same party as the president, the judge is assigned the Common Space score of the appointing president. The resulting computed ideology scores range from -1 (the most liberal) to 1 (the most conservative).

For the district court judges in my dataset, the JCS score is collected for the judge presiding over the case at the termination of the case after remand. For the cases in the dataset where the assigned district court judge in the case is a magistrate judge rather than an Article III district court judge, an additional step was taken to capture ideology. Since magistrates are appointed to their position (for eight years) by a vote of the active judges in their district, I code the ideology of these actors by taking the median district court judge JCS score for the year that they assumed their position. For the courts of appeals score, I collected the individual JCS scores (available from Epstein et al. 2007) for the judges in the majority and then computed the median

for each majority panel. `Difference in Ideology` values range from 0 to 1.07, with a median ideological difference of 0.365.

Control Variables

While the opinions of appellate courts and ideological differences may be a strong impetus of impact, other institutional factors and actor characteristics may also influence changes in outcome and procedures in federal district courts following a remand. Because of this, I control for a number of likely suspects across these areas.

Ninth Circuit: With so few of their cases subject to Supreme Court review, district court judges are likely to rarely forgo the preferences of their immediate appellate court principal, the circuit court, for the potential preferences of the Supreme Court. It is possible, however, that district court judges serving in the Ninth Circuit are far more cognizant of the preferences of Supreme Court justices. It is this circuit, of course, that receives a large amount of Supreme Court attention, largely in the form of reversals. Because of this high reversal rate, district court judges, both in terms of precedent and with regard to elevation considerations, may be hesitant to attach themselves too closely to the circuit.

Female District Judge: Female judges are likely to want to increase (or not decrease) their chances of elevation to the circuit courts (since appointing qualified women to these courts is such a politically hotbed issue). In addition, given the theories on female decision making (see also Sherry, 1986; George, 2001; Resnik, 1988; Karst, 1984; Gilligan, 1982), it is quite plausible that female district court judges, based upon their social and background experiences and their communication and problem solving skills, will be more apt to dispose of the cases before them by settlement than will male judges. This propensity may increase even more so

on remand after circuit courts have opened up the opportunity for additional case proceedings.

District Judge Years on Bench: Measured in years as a district court judge, this variable provides an important measure of the differing concerns that district judges may have as they serve on the bench. If elevation to an appellate court is a judge's desire, we would expect judges that are relatively new to the bench to embrace outcome change following circuit court intervention in a case. After being on the bench for many years, however, a district judge's chances of elevation are likely to greatly diminish, and so too might the judge's concerns about following the circuit's preferences for change. Within my data, this time on bench variable ranges from less than one year to 42 years, with a median of 10 years. When it comes to procedural change, newer judges may be less accustomed to the features that enable a change in case dispositions, especially when it comes to encouraging parties to settle.

Magistrate Assigned Case: Magistrates, serving as the presiding judge in civil cases by the consent of the parties, are likely to desire elevation as well – only this time they want appointment to the district courts. And, indeed, many current district court judges were once magistrates. These judges are likely to be particularly concerned about avoiding drawing negative attention to themselves. This should lead them to be more likely to change case outcomes on remand. Similarly, because of their training in handling pre-trial matters and presiding over things like settlement conferences, these judges are also likely to help cases resolve by a changed disposition type on remand.

New District Judge on Remand: A number of circuits, by default, assign cases to a new district court on remand. When this is the case, we should expect that change will be more likely. A new judge will not be tied to the decision making made

by the original district judge in the case and thus will be more likely to implement change on remand.

Pro Se Litigant (Loser Below): By their very nature, these litigants are weak. They represent themselves and often file frivolous lawsuits. In this dataset, their disputes may not be wholly frivolous (the circuit courts do reverse the trial courts' decisions to dismiss the cases), but it is likely that the cases are often proceeding solely to provide a few additional constitutional protections. In my data, nearly 21 percent of the cases have a pro se litigant (generally plaintiff) that lost the dispute below. The presence of these weak parties in a case should make change less likely.

Finally, because this study incorporates three broad issue areas, **civil rights**, **business**, and **torts**, controlling for them ensures that any results are not driven by qualities that might be unique to only one area.

3.5 Modeling & Results

Both impact inquires will be modeled using probit regression. Turning first to an inquiry of substantive impact, where the dependent variable is **change in winner**, the results are provided in Figure 3.2. The model does a decent job of predicting outcomes, with nearly 61 percent correctly predicted and a reduction of error of over 5 percent.

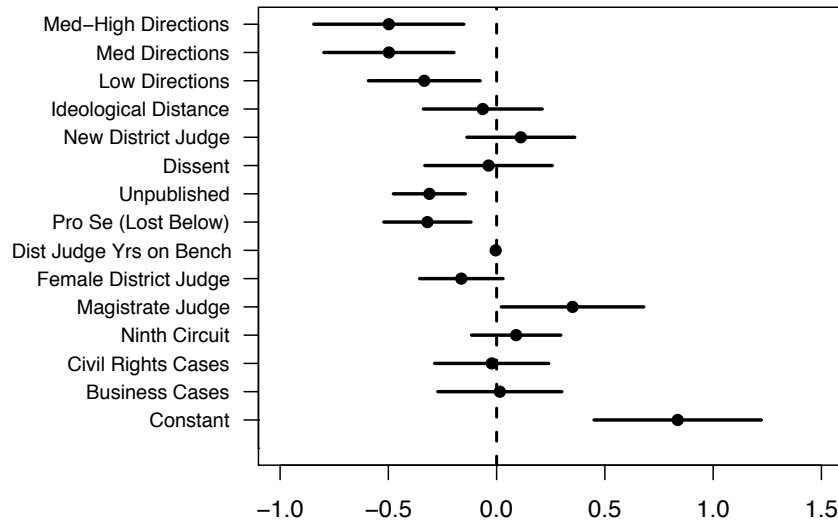


Figure 3.2: Nomogram of probit regression results for the effects on change in a case’s winner from pre-appeal to post-remand. Solid dots represent the coefficients on the estimates while the solid line around those dots are a 95 % confidence interval. When the confidence interval intersects with the dotted vertical line located at 0, the estimate is not statistically significant at ($p < 0.05$, two-tailed). *High Opinion Specificity* and *Tort Cases* are baseline variables and are excluded from the model. A traditional regression table is available in the appendix.

In contrast to predictions, some of the variables do not reach statistical significance. However, for a number of the variables that are central to this study, the results are statistically significant and in the predicted direction. These include highly specific appellate court directions, unpublished circuit court opinions, and the presence of two actors: a magistrate assigned to the case and a weak pro se litigant. To grasp a better understanding of the substantive effect of these variables, I present an array of predicted probability graphs in Figure 3.3.

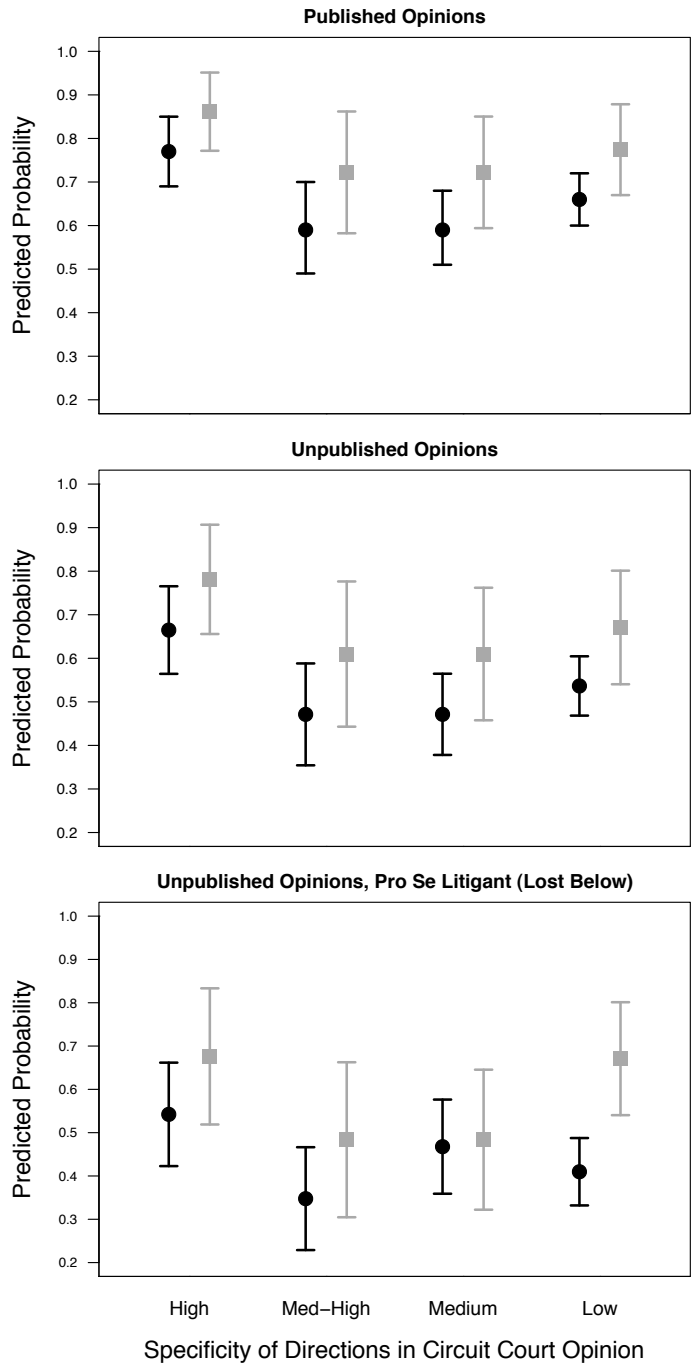


Figure 3.3: The predicted probability that a case will have a change in winner from pre-appeal to post-remand based on the opinion publication status and the presence of a weak, pro se litigant. The black markings represent cases with a presiding district court judge, while the grey markings represent cases where a magistrate has been assigned. The circles/squares represent the mean predicted probability of change while the lines represent 95% confidence intervals around those predictions. All other variable values are held at their mean or modal values.

Figure 3.3 plots the predicted probability of a modal case having a change in winner based on the four types of circuit court opinion specificity present in a decision (both published and unpublished). The graphic includes the probability of change both when a traditional district court judge is assigned to the case (black line) and when a magistrate officially presides (grey line). In the top panel of Figure 3.3, we can see that for cases remanded to district courts with a published circuit court opinion with highly specific directions, the probability of the case winner changing from prior to the appeal is nearly 0.8. This number increases to 0.85 when the district case is presided over by a magistrate rather than an Article III district judge. When the circuit court opinion has less specific directions, this number falls to between 0.6 and 0.65 for cases assigned to district judges and 0.7 to 0.8 for cases assigned to magistrates. These numbers include a slight increase in the probability of change for those cases with non-specific directions (e.g. “for proceedings consistent with this opinion”) (as compared to those cases with specificity of directions in the middle range).

The trends for those cases represented in the middle (for unpublished circuit court decisions) and bottom (for unpublished opinions with the presence of a pro se litigant who lost below) panels of Figure 3.3 are similar to those for the top panel; however, across the board, the predicted probabilities for change in case winner are substantially lower. For example, for the middle panel, we can see that highly specified opinions presided over by a district judge have a probability of change around 0.65. For the bottom panel, this number drops to around 0.55.

These depictions help clarify the impact that courts of appeals have on district courts. In particular, the opinions of circuit courts are important determinants of the likelihood of change in district court outcome. When circuit courts provide very specific directions in their opinions, district courts are far more likely to change the cases’

outcomes than when the circuit courts leave the district courts plentiful discretion for action.

Similarly, a circuit court panel's decision to publish an opinion has a strong effect on district court outcome change. The predicted probabilities for modal cases with unpublished circuit opinions are depicted in the middle panel of Figure 3.3. No matter the level of circuit court opinion specificity, an unpublished opinion makes it about 10 percent less likely that the district court outcome will change from pre-appeal to post-remand.

The characteristics of the actors is important to impact as well. Nearly across the board, magistrates presiding over district cases are more likely – anywhere from 5 percent to 30 percent – to have their cases change in outcome than traditional district judges. With solid excuses to be elevation-minded, it is no surprise that these judges pursue a course of action that avoids controversy and makes them appear as good agents. It is also consistent with predictions that cases with weak litigants with no formalized representation are far less likely than modal cases to change outcomes.

I turn next to a model of procedural impact, where the dependent variable is *change in disposition type*. The results of this model are presented in Figure 3.4. This regression model has a 68 percent prediction rate and reduces error by nearly 17 percent.

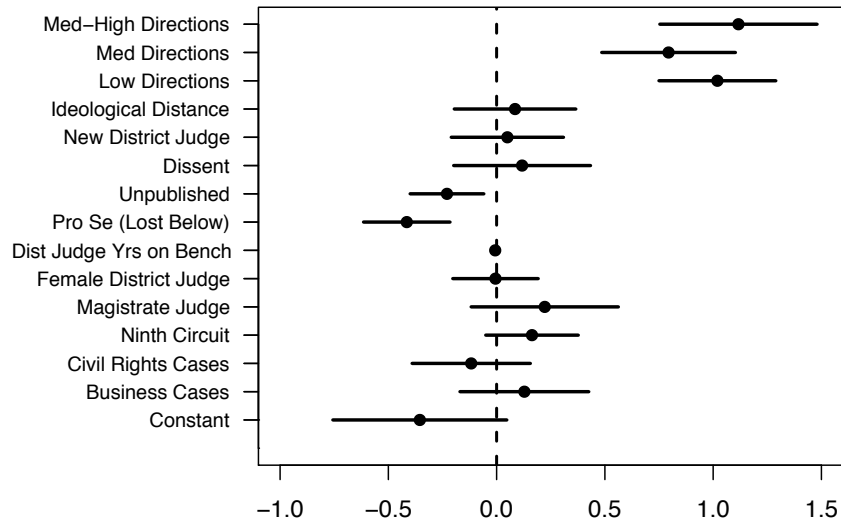


Figure 3.4: Nomogram of probit regression results for the effects on change in a case's termination method from pre-appeal to post-remand. Solid dots represent the coefficients on the estimates while the solid line around those dots are a 95 % confidence interval. When the confidence interval intersects with the dotted vertical line located at 0, the estimate is not statistically significant at ($p < 0.05$, two-tailed). *High Opinion Specificity* and *Tort Cases* are baseline variables and are excluded from the model. A traditional regression table is available in the appendix.

Once again, my expectations are met with mixed results. I find no support for my ideological distance hypothesis, as is the case for my expectations with regard to district court actors (time on bench, new district judge on remand, magistrate, female) and Supreme Court threat of intervention (Ninth Circuit). However, appellate court opinions are once again a major determinate of impact. The same is true for weak litigants.

Based on the changing values of these significant variables, the predicted probabilities of change in disposition type are depicted in Figure 3.5. As with the substantive impact figure, the plots are arranged by the changing levels of appellate court opinion specificity, the publication status of opinions, and the presence of a weak pro se litigant. Since the presence of a magistrate assigned to the case does not have a statistically significant effect, the plots only present the probabilities for cases presided over by district judges. At first glance, these predicted probabilities seem to indicate that courts of appeals may *not* have an impact on changing the procedures that lead to a case's termination. After all, for opinions that are highly specific in nature, the likelihood of disposition method change ranges from only 10 percent to about 30 percent. However, cases with very specific directions, by their very definition, include directions on how the cases should be disposed of (see Table 3.2). Since the appellate courts are not likely to direct that the case be disposed of by, for example, settlement, these circuit courts are envisioning termination via non-trial adjudication. Since most cases going to the circuit courts on appeal reach there by non-trial adjudication, seeing a change in disposition in these circumstances is not likely.

Because of this, I instead turn the focus to the three other degrees of circuit court opinion directions and the procedural impact connected to them. In so doing, we can see that circuit court opinions of “medium-high” specificity are particularly good at bringing about procedural change in district courts. Less specific appellate

court opinions have somewhat lower levels of procedural impact, with the likelihood of disposition change being 5 to 10 percent lower in these cases.

Just as with outcomes, the decision of an appellate court to publish its opinion has a very strong impact on the change in case procedures following remand. Cases with published appellate opinions are at least 10 percent more likely to have a change in disposition type following remand. The combined effect of the choice of whether to publish an opinion and how specific to be in the directions given to the district court lead to quite a large procedural effect. A published opinion with medium high specificity has a 72 percent chance of leading to a change in the district court disposition method while an unpublished opinion with medium specificity has a 52 percent chance. When we account for weak, pro se litigants (the bottom panel of Figure 3.5), these disparities grow even further.

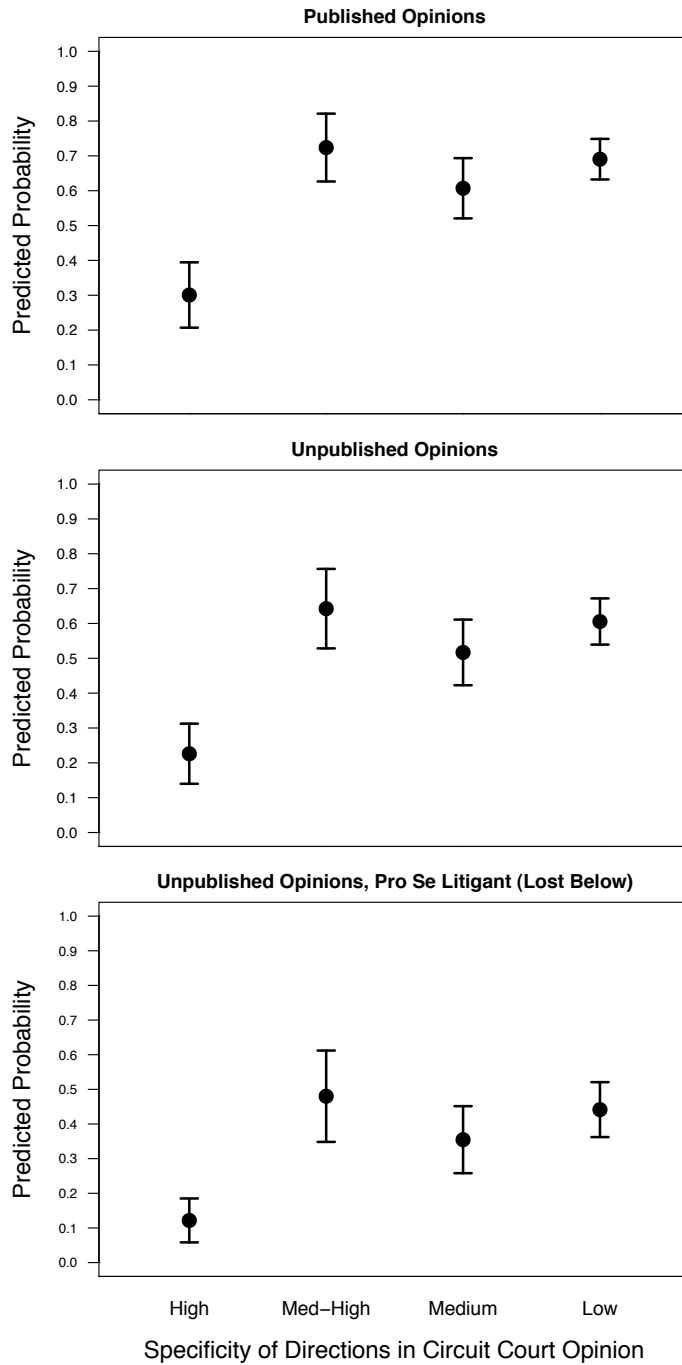


Figure 3.5: The predicted probability that a case will have a change in disposition type from pre-appeal to post-remand. The top panel represents cases with published opinions, the middle panel depicts unpublished opinion cases, and the bottom panel shows unpublished opinion cases with a weak, pro se litigant. The black markings represent cases with a district court judge presiding over the case. The circles represent the mean predicted probability of change while the lines represent 95% confidence intervals on those predictions. All other variable values are held at their mean or modal values

3.6 Discussion

This article attempts to bring new insight into the ever-present question of judicial politics — how much of an impact do higher courts have on the decision making of lower courts. The research design and data provide a fresh and comprehensive approach to this question, enabling it to be assessed for a systematic sample of district court cases for both substantive and procedural impact. The results are quite illustrative about the overarching impact that courts of appeals have over their hierarchical agents—the federal district courts. After comparing district court cases pre-appeal to post-remand, this impact comes in two important ways: a change in who wins the case and a change in the method by which the case terminates. I find that courts of appeals, through the specificity of directions provided in their opinions and the decision about whether to published their opinions, have a substantial impact on district courts. By using these tools, courts of appeals can increase the likelihood of a case having a change by nearly 30 percent.

The implications of these findings are vast. These results indicate, for example, that the federal judicial hierarchy is healthy and that, generally speaking, district court judges are good and faithful agents that tend to defer to their superiors' presumed preferences even when they are given vast discretion. Similarly, these results should give hope to those in favor of predictability and stability in the law as directed by the appellate courts.

The findings also indicate that the politics of judicial appointments remain an important concern. Although the variables for ideological difference were not statistically significant, the fact that the appellate courts were able to implement their preferences on district courts *regardless* of how ideologically distant those lower court judges were from them means that politically extreme circuit judges (or panels) may

be able to implement sweeping changes in the trial-level policies of our judiciary. At the same time, the strong findings with regard to the specificity of directions in circuit court opinions indicate that opinion language matters. This should thus provide an additional layer of complexity to existing research on the bargaining that exists (or is theorized to exist) among circuit judges over the texts of their opinions.

And, last but certainly not least, these results are important for our overall perception of the courts. Generally speaking, the federal judiciary is a political institution that is held in high regard by the public (Gibson, 1989). With a finding that circuit courts are able to impact district court disposition procedures — and do so in a way that is likely to increase litigant satisfaction with the process — we should expect that perceptions of judicial legitimacy will be retained as long as the judicial hierarchy remains strong.

3.7 Appendix: Traditional Regression Tables

3.7.1 Probit Regression Results for Change in Winner

| | Coefficient | Robust Standard Error |
|-----------------------------------------|-------------|-----------------------|
| Medium-High Opinion Specificity | -0.498* | 0.18 |
| Medium Opinion Specificity | -0.498* | 0.15 |
| Low Opinion Specificity | -0.334* | 0.13 |
| Ideological Distance between COA and DC | -0.064 | 0.14 |
| New District Judge on Remand | 0.112 | 0.13 |
| Presence of COA Dissent | -0.037 | 0.15 |
| Unpublished COA Opinion | -0.310* | 0.08 |
| Pro Se Litigant (Loser Below) | -0.320* | 0.10 |
| District Judge Years on Bench | -0.004 | 0.00 |
| Female District Judge | -0.163 | 0.10 |
| Magistrate Assigned Case on Remand | 0.351* | 0.17 |
| Ninth Circuit | 0.090 | 0.11 |
| Civil Rights Case | -0.023 | 0.13 |
| Business Case | 0.015 | 0.15 |
| Constant | 0.836* | 0.20 |
| Log Likelihood | -683.378 | |
| Pseudo R ² | 0.037 | |
| Percent Correctly Predicted | 60.57 | |
| Percent Reduction in Error | 5.29 | |
| Observations | 1045 | |

Table 3.4: Probit regression results for the effects on change in a case's winner from pre-appeal to post-remand. Statistical significance is represented with * ($p < 0.05$, two-tailed). **High Opinion Specificity** and **Tort Cases** are baseline variables and are excluded from the model.

3.7.2 Probit Regression Results for Change in Termination

Method

| | Coefficient | Robust Standard Error |
|-----------------------------------------|-------------|-----------------------|
| Medium-High Opinion Specificity | 1.117* | 0.19 |
| Medium Opinion Specificity | 0.794* | 0.16 |
| Low Opinion Specificity | 1.020* | 0.14 |
| Ideological Distance between COA and DC | 0.085 | 0.14 |
| New District Judge on Remand | 0.050 | 0.13 |
| Presence of COA Dissent | 0.118 | 0.16 |
| Unpublished COA Opinion | -0.229* | 0.09 |
| Pro Se Litigant (Loser Below) | -0.415* | 0.10 |
| District Judge Years on Bench | -0.006 | 0.00 |
| Female District Judge | -0.005 | 0.10 |
| Magistrate Assigned Case on Remand | 0.222 | 0.17 |
| Ninth Circuit | 0.163 | 0.11 |
| Civil Rights Case | -0.117 | 0.14 |
| Business Case | 0.128 | 0.15 |
| Constant | -0.355 | 0.20 |
| Log Likelihood | -640.355 | |
| Pseudo R ² | 0.080 | |
| Percent Correctly Predicted | 68.04 | |
| Percent Reduction in Error | 16.92 | |
| Observations | 1045 | |

Table 3.5: Probit regression results for the effects on change in a case's disposition method from pre-appeal to post-remand. Statistical significance is represented with * (p<0.05, two-tailed). High Opinion Specificity and torts cases are baseline variables and are excluded from the model.

Chapter 4

Quantifying Appeals

The hierarchical structure present in the American judicial system sets the stage for any decision making that will ultimately take place at our nation's highest court, the U.S. Supreme Court. As Atkins (1993, 780) puts it, “[l]ike other political institutions, much of the power exercised by courts centers around their ability to use some form of sequential decision making to define the agenda for issues considered on the merits.” Within our judicial institutions, the power to define this future agenda lies first and foremost with litigants, not judges.

Litigants are faced with many decisions while engaged in legal disputes, including whether to file suit, whether to settle their case or continue to pursue litigative remedies, and whether to file an appeal after an outcome has been reached in a lower-level judicial body. It is this latter decision that has the greatest possible potential for increasing a case's salience and elevating its potential for overall impact. In addition, the decision to appeal to an appellate court positions litigants as the only actors capable of presenting appellate judges with “the range of opportunities within which [those] judges can actually specify alternatives (Atkins, 1993, 780-81). With the ex-

tensive focus on appellate decision making in our literature, understanding the process by which the agendas of those higher courts are formed is particularly important.

Others have argued that studying the decision of litigants to appeal from a lower court to a higher one is an important, politically relevant one. Seabury (2009) posits, for example, that the decision of a litigant to appeal activates a system of oversight in the judicial system, an argument that makes the judicial appeal process seem very similar to the fire-alarm oversight that Congress has over the Executive Branch (McCubbins and Schwartz, 1984). Priest and Klein (1984, 1) also argue that studying lower court decisions (and appeals from them) is important, but for an entirely different reason. As they put it, “[a]ppellate cases may tell us which disputes courts find troublesome and which they find easy to decide. But this doctrinal information discloses very little about how legal rules affect the behavior of those subject to them or affect the generation of legal disputes themselves.”

A ideal arena for the study of this topic in the American context is with the decision of litigants in the federal district courts, the trial courts and deciders of most federal cases, to appeal to the federal courts of appeals, the intermediate federal appellate courts responsible for the final decisions on nearly all federal appeals. Within civil cases in the federal judiciary, this appeal to a multi-member appellate court is generally guaranteed, and as such, is considered to be a great, nearly axiomatic, protection of the American legal system (see Dalton, 1985, quoting Robert Leflar).

While virtually every litigant has the right to appeal at least once, very few actually do. A recent study of appeals conducted by Eisenberg (2004) found that the appeal rate in federal civil cases is around 11 percent.¹ Given the guaranteed right to

¹Approximately half of these appeals are never heard on the merits by the appellate court. Only 5.6 percent of district court cases are appealed and decided on the merits by the COA. When Eisenberg limits his analysis to only those cases with a clear

an appeal and that by most definitions every non-settled case has a loser, why would the appeal rate from federal trial courts to courts of appeals be so small? As theory explains and as I explore in more detail below, the choice to mobilize one's case for appeal is a strategic, political, and procedural one. After detailing these theories, I turn to an empirical exploration of them in the judicial system. The results are rather revealing, indicating that strategy and procedural fairness are both important considerations in the decision of a litigant to appeal.

4.1 Theorizing Appeals

Political and economic research provides plentiful details on judicial decision making and the role of litigants within institutionalized legal disputes. More so than any other time in the judicial process, in the context of the decision to appeal, litigants' decision making shapes the judicial agenda. This is particularly true in the lower tier of the federal judiciary, where losing litigants have a right to appeal their final judgments from federal district courts to courts of appeals. And, because courts of appeals are increasingly "the de facto (if not the de jure) venue for final appellate review" (Hettinger, Lindquist and Martinek, 2006, 89), studying the process of cases reaching these courts is particularly critical.

Two broad theories, at times in competition with one another, provide explanations for when litigants will appeal from trial courts to courts of appeals. The first is based on the strategic considerations of the litigant, defined both in economic and political terms. The second revolves around alternative motivations of litigation,

victory for the defendant or plaintiff in the lower court, appeal rates rise to 21 percent (all appeals) and 11.4 percent (appeals that go to merits conclusion).

whether that be to achieve long-term political change or a sense of justice without regard to the outcome of the litigation.

4.1.1 Strategic Considerations For Appeal

Litigants, even when they are just *potential* litigants, face a variety of strategic calculations when deciding whether to advance their cases through the judicial system. Many of these calculations early in a case are shrouded in uncertainty, since litigants often know a limited amount about the strength of their case relative to their opponents' and the chances of their success once the judicial system gets formally involved. As Gross and Syverud (1991, 327) argue, "even a perfect prediction leaves crucial questions unanswered." Nonetheless, litigants in trial courts create their strategy and tailor their actions based on a consideration of "both how the opposing party will react to a possible move and how the court might rule at trial" (Gross and Syverud, 1991, 328).

As with litigative activity in and prior to trial courts, the decision to appeal is also governed by a rational, strategic actor determining if continued action in the legal system is wise. Posner's cost-benefit analysis model (see Posner, 1985, 1996) guides litigants in determining when it is rational for them to appeal. In describing the decision to appeal in economic terms, Posner famously stated that "everyone prefers winning to losing and winning big to winning small" (Posner, 1985, 8). Consistent with this model, a losing litigant will likely evaluate his odds of success and the reward he would recover if he were to pursue an appeal. However, not all potential appellants are created equally in their ability to make determinations of rational appealing behavior. As Songer, Cameron and Segal (1995, 1121), following in the footsteps of Elder (1989) and Landes (1971), argue, litigants are rational in making

the decision to appeal to the Supreme Court when they consider their likelihood of winning and the resources at their disposal. Similar factors are important here.

Galanter's (1974) work and the numerous related projects that have since followed establish the important advantages that "haves" hold in the litigation system, particularly when they face weaker opponents. Empirical research confirms that these resource and experience-based advantages provide litigants the upper hand in a variety of litigation settings. These research findings indicate that resource and experience rich litigants have the ability and patience to be rational actors, both in their litigation within district courts and, upon the conclusion of their case, in determining whether to seek appeal.

This means that high-stated actors, unlike their one-shotter, individual litigant counterparts in the case, will be able to better see what appeals will successfully lead to reversals of lower court decisions. As such, stronger parties, like businesses and governments, will not appeal as many cases but, when they do, their likelihood of success should be higher than weak litigants. As Barclay (1999, 50) puts it, "[b]y selecting appropriate precedent-setting cases and settling cases that are disadvantageous to their long-term position, repeat players shape the appellate courts' case pool, and through shaping the case pool, they shape subsequently the courts' decision-making process."

While the status of the litigants in isolation tells us a lot about their potential abilities and strategies within the litigation process, even more telling is the status of the opposing litigants relative to one another. Coleman's (1982, 22) theory of asymmetric relationships posits that the stronger actor "almost always controls most of the conditions surrounding the relationship." Such party strength asymmetries and resulting activity should be present, in various forms, throughout the litigation system, including in the decision to appeal from the trial court to the appropriate

appellate court. As Atkins (1993, 782) notes, “since party capability theory emphasizes the effects of power differentials between litigants, and especially those in which stronger parties oppose weaker ones, appeal behavior should also be a function of the type of litigants that oppose each other in a dispute. Intrinsic to such differentials is the concept of power asymmetry.”

Weak litigants, like individuals and poor individuals, plagued by inexperience, caught up in the emotion of litigation and a desire to secure justice, and assisted by less seasoned counsel, are likely to pursue appeals even when it is not rational to do so. These appeals, often coming against stronger governmental and business opponents, are likely the function of the litigants being unable to properly assess their chances of success on appeal.

Stronger litigants, as noted above, will have an advantage in this arena, since using their resources and experience, they will be able to account for the appellate court circumstances that lie ahead. Nonetheless, the ability of these powerful litigants will also be affected by the relative strength of their opponents. In particular, when strong litigants oppose other strong litigants in the legal process, uncertainty in outcomes should increase and, as a result, their aptness for determining future success should decrease. Within the appellate process, such a relationship means that appeals are likely to take place with relatively high frequency, especially compared to when a strong litigant (plaintiff) is facing a weak one (defendant) where the strong party’s ability to evaluate his circumstances and chances of future success are unmasked by his opponent’s resources and experience.

Litigants considering an appeal will certainly evaluate the judicial body that they will be appealing to very carefully. No matter the court of appeals that will take their appeal, litigants know that the intermediate appellate court faces a high caseload and a very limited ability to exercise discretion over its agenda. As Posner (1996) argues,

this means that circuit court judges are naturally going to work to keep caseload growth in check while making decisions.

One likely product of the federal intermediate appellate court's design is that the majority of appeals are affirmed. Of those cases reaching the merits on appeal, over 90 percent are affirmed (Administrative Office of the U.S. Courts). When only considering those cases that yield a published opinion, the number drops a bit, to around 70 percent (Songer, Sheehan and Haire, 2000). Either way that one looks at the numbers, though, the prospect of a successful appeal is a tall order for a potential appellant.

For litigants wishing to rationally and strategically try their odds in an appellate court, a consideration of the judges' preferences that will be hearing that appeal is certainly in order. After all, many judicial studies have found that federal judges at all levels make decisions based, at least in part, on their policy preferences (e.g. Segal and Spaeth, 2002; Rowland and Carp, 1996). As such, strategic potential appellants will likely account for the ideological preferences of the appellate court and how those preferences compare to the district court judge that was involved in their case disposition.

Since the courts hear cases in panels of three rather than immediately en banc, litigants won't know the identity of their decision makers when deciding whether to appeal. And, in fact, depending on the circuit, the identities of the three judges presiding over a case may not be known until right before oral argument in the case.²

²In the U.S. Court of Appeals for the First Circuit, "[t]he names of the judges on each panel may be disclosed for a particular session seven (7) days in advance of the session" (Internal Operating Procedures VIII(B) (2008)). However, in, e.g., the U.S. Court of Appeals for the District of Columbia Circuit, "the Court discloses merits panels to counsel in the order setting the case for oral argument." (Handbook of Practice and Internal Procedures II.B.8(a) (2007)).

Thus, while predicting an appellate panel's exact composition is largely impossible, accounting for the possible preferences of that panel is critical for strategic litigants considering an appeal.

Finally, rational/strategic actors considering whether to appeal are going to take into account the cost and time invested in the case up to the point of appeal. For these litigants, the cost of an appeal is really relative to what has already been spent litigating the case to a losing outcome. This consideration means that for long, complex cases in district courts, the likelihood of an appeal should increase. Since these cases have already been so expensive to litigate, the cost of an appeal relative to the potential of overturning the adverse judgment below is quite small and, thus, likely worth it for many potential appellants.

4.1.2 Other Motivations for Appeal

Recently, Barclay (1999) developed a process-based explanation for the decision to appeal from a trial court to an appellate court that argues that litigants will likely choose to appeal because of procedural justice considerations. In particular, Barclay (1999) posits that litigants, in deciding whether to appeal, are motivated by a desire to be treated fairly in the legal system. This means, according to Barclay, that litigants are not concerned about whether they win or lose but rather whether the process that they are involved in while litigating their case is perceived to be fair.

A process-based focus has been utilized by others studying the judiciary. For example, Tyler and Huo (2002) suggest that when legal processes are perceived as fair, people are more likely to perceive the law as legitimate. Within trial courts, parties will often choose to settle their cases rather than allow the court to control the case outcome. While this settlement process, by necessity, involves compromise,

the component of outcome control increases litigant satisfaction. Similarly, Lind et al. (1990) find that litigants perceived trials, and particularly those involving a jury, as dignified procedures that produced fair outcomes.

Settlement and even trial allude to a more “fair shot” of justice, enabling litigants to come away from the judicial system, even as losers, with a sense of fairness and a feeling that the legal system embodies legitimacy and provides an opportunity to air their disputes. For these litigants, having their “day in court” in front of a “jury of their peers” helped them perceive their litigative process as a fair, just, and legitimate one, even without regard to the outcome of their case. Impact of this typology may even be more critical for federal courts to embody, since this allows the judiciary to maintain an influential, policy making role over American society and be perceived as legitimate institutions – a characteristic necessary for judicial success and stability (see Gibson, Caldeira and Baird, 1998).

As argued by Baum (1981), a group of litigants are not motivated by achieving a sense of fairness or strategic, economic success when deciding to appeal. Rather, these individuals are involved in appeals, and litigation more generally, solely for advancing political and institutional goals. As Baum (1981, 69) notes, some people “bring cases to court or appeal adverse judgments because of a direct personal institutional interest which they seek to advance. Whatever the negative consequences of litigation, people see these as outweighed by what they may gain.” For these litigants, “gain” is usually measured in a very long-term sense, meaning that they are content to wait for many years and cases for change to arise in their political area of interest.

4.2 Research Design and Data

To test these theories, I turn to a study of whether a losing litigant in federal district court civil cases decides to appeal to the courts of appeals. Within civil cases in the federal judicial hierarchy, the right to appeal from the trial court (district court) to the intermediate appellate court (courts of appeals) is generally guaranteed to litigants and is not subject to the discretionary, agenda setting decision making of the appellate court. This guaranteed right of appeal has been referred to by the American Bar Association as “a fundamental element of procedural fairness as generally understood in this country” (ABA’s Commission on Standards of Judicial Administration, cited in Dalton (1985, 66)). This thus stands in sharp contrast to agenda setting at the U.S. Supreme Court, where that body votes on whether to review cases on the merits. The right to an appeal from the federal trial courts to the courts of appeals is also lauded, since the latter judicial body decides cases with multiple judges. As Hettinger, Lindquist and Martinek (2006, 1) argue, “[t]he rationale underlying this system is that arbitrary decision making in collegial bodies will be reduced by the moderating influence of alternative points of view.”

To conduct this study, I rely on a newly collected dataset of federal district court and courts of appeals case information. In particular, I collect data on civil cases terminated from 2000 to 2004 in 29 of the 94 federal district courts and, where applicable, the notice of appeal to the courts of appeals following the termination of the cases in the district courts. All of the twelve traditional, geographically-based circuit courts except the Circuit Court of Appeals for the District of Columbia are represented. Table 4.1 details the districts included.

| <i>1st Circuit</i> | <i>2nd Circuit</i> | <i>3rd Circuit</i> | <i>4th Circuit</i> | <i>5th Circuit</i> | <i>6th Circuit</i> |
|--------------------|--------------------|--------------------|---------------------|---------------------|--------------------|
| DRI | SDNY | MDPA | DMD | NDTX | NDOH |
| DME | EDNY | DDE | EDVA | EDLA | EDMI |
| | | | WDNC | | WDTN |
| <i>7th Circuit</i> | <i>8th Circuit</i> | <i>9th Circuit</i> | <i>10th Circuit</i> | <i>11th Circuit</i> | |
| NDIL | EDMO | WDWA | DCO | MDFL | |
| NDIN | NDIA | CDCA | DKS | NDFL | |
| | DSD | DMT | NDOK | NDGA | |
| | | | | MDAL | |

Table 4.1: The 29 federal district courts, arranged by their circuit, included in the study.

To identify the population of all cases that terminate in these district courts during the years of my study, I turn to the Federal Judicial Center’s (FJC) Integrated Databases, which includes standardized filing and termination information reported from district court clerks of court for each case in my study. When the FJC’s Civil Terminations Database is merged with its Appellate Terminations Database, the presence of any appeals and basic information relevant thereto is also available. To further narrow the data down to the cases of interest, I rely on the filing party’s chosen coding of the case’s nature of suit (NOS). In particular, I focus here on cases involving business, civil rights, and personal injury torts issues.³ For purposes of this study, I draw a stratified random sample of 250 cases per district without an appeal and up to 100 cases per district with an appeal.⁴ With these cases in hand, I gathered and coded from PACER (“Public Access to Court Electronic Records”) the case docket and other relevant case documents for each case in the sample.

4.2.1 Dependent Variable

The dependent variable in this study is whether a litigant that loses in the district court decides to appeal his or her case to the courts of appeals. In coding whether a losing litigant in the district court decides to appeal, “loser” must be defined. As those working in this area have noted, such a task is not objectively easy. As Kritzer and his coauthors (1984, 1991, 1985) have argued, to truly understand who wins and loses, we

³The exact NOS codes are: civil rights cases (440, 442, 443, 444), personal injury cases (310, 320, 340, 350, 360), and business-related cases (190, 820, 830, 840). The NOS code is a issue area classification for a case. It is assigned to the case based on the identification by the plaintiff’s attorney filing the case when he fills out his Civil Cover Sheet.

⁴For the districts that had fewer than 100 appeals during the years of my sample, I sampled the entire population of appealed cases.

must also know the parties' expectations upon filing their lawsuits (see also Barclay, 1999, 17). For the purposes of this study, a "loser" is generally apparent because he is the only one that decides to appeal. However, for the relatively rare occasions where multiple parties appeal the judgment or outcome of the district court and where the judgment is mixed, the data were dealt with following the lead of Eisenberg (2004).⁵ In addition, in these mixed outcome cases, the original plaintiff is always assigned the "loser" designation.

4.2.2 Strategic Variables

Litigant Status Difference is measured as the difference in the status of the case's original plaintiff and defendant. Within this study, litigant resources are assessed in a similar fashion to that used in the long line of previous work on this subject (see e.g., Black and Boyd, 2007; Brace and Hall, 2001; Collins, 2004; Farole, 1999; Rowland and Todd, 1991; Sheehan, 1992; Sheehan, Mishler and Songer, 1992; Songer, Sheehan and Haire, 1999; Wheeler et al., 1987), with the following ordering: (0) poor individual, (1) individual, (2) interest group and unions, (3) business, (4) local government, (5) big business, (6) state government, and (7) federal government.

I code **Ideological Difference** to operationalize the potential appellant's view of the supervising circuit court's ideology and her chances of achieving a different outcome in that court compared to the district court. This variable represents the absolute difference in the ideologies of the district court judge and the relevant circuit's median judge. To measure this difference, I collect the Judicial Common Space (JCS) scores for these actors, a variable coded using the methodology described in Giles

⁵As Eisenberg (2004, 666) notes, "The matching of the district court and appellate court data attempts to eliminate duplicate case records, and adjusts for cross, consolidated, and reopened appeals."

et al. (2001) and Epstein et al. (2007). In short, these scores are the Poole and Rosenthal NOMINATE Common Space score of the senator from a judge's home state (or average of the two senators) if that senator(s) is from the same party as the appointing president. If neither senator is from the same party as the president, the judge is assigned the Common Space score of the appointing president. The resulting computed ideology scores range from -1 (the most liberal) to 1 (the most conservative).

For the district court judges in my dataset, the JCS score is collected for the judge presiding over the case at its district court termination leading to the potential appeal. Where the assigned district court judge in the case is a magistrate judge rather than an Article III district court judge, an additional step was taken to capture ideology. Since magistrates are appointed to their position (for eight years) by a vote of the active judges in their district, I code the ideology of these actors by taking the median district court judge JCS score for the year that they assumed their position. For the courts of appeals score, I collected the median circuit JCS scores (available from Epstein et al. 2007) by year of the case's district court termination.

To account for the length and complexity of the district court case prior to its termination, I measure the time that it takes for the case to conclude, measured in months. `Months to District Court Termination`, as expected, is positively skewed, with most cases terminating within the first two years of filing.

4.2.3 Process and Political Motivation Variables

To account for the possibility that appeals are driven not (just) by strategic considerations, but by procedural and fairness-minded ones as well, I include variables for the type of case disposition in the district court. As noted above, cases terminat-

ing by settlement are compromise-based, meaning that they tend to lead to greater satisfaction with the process leading to case termination. As such, these cases should rarely be appealed. Similarly, cases concluding through a jury trial should be perceived as more legitimate than those ending in a judge-decided non-trial adjudication or a bench trial. And, while bench trials and non-trial adjudications are each judge-decided, the former should still produce more litigant satisfaction, since it allows for the litigants to fully present their cases in open court after a complete discovery process. Each of these types of district court case disposition methods is included in the model below (while the baseline category of “other” dispositions is excluded).

Plaintiffs are responsible for initiating the civil lawsuit and, as a result, likely invest a great deal emotionally (and financially) before and after filing. As a result, they are likely to be less satisfied than defendants with the litigation process when it leads to a defeat and thus more likely to appeal. Because of this, **Plaintiff Loser** accounts for the presence of these actors as potential appellants.

Finally, to control for Baum’s (1981) theory that some litigants are solely motivated by long-term political gains when deciding whether to appeal, I include the variable **Interest Group Loser**. The rationale here is that interest groups are the most likely to be positioned and motivated to use courts for achieving their political goals and are likely willing to have a long-term mindset when doing so.

4.3 Results

To model the losing district court litigant’s decision to appeal to courts of appeals, I estimate a logistic regression model. The results of this estimation are presented in Table 4.2. Notably, the model performs relatively well, predicting 73 percent correctly and reducing error by approximately 5 percent.

| | |
|---------------------------------------|-------------------|
| Ideological Difference | -0.034 (0.15) |
| Litigant Status Difference | -0.131* (0.02) |
| Interest Group Loser | 0.340 (1.13) |
| Plaintiff Loser | 0.327* (0.13) |
| District Court Settlement | -0.651* (0.10) |
| District Court Non-Trial Adjudication | 1.682* (0.12) |
| District Court Bench Trial | 2.007* (0.24) |
| District Court Jury Trial | 1.479* (0.18) |
| Months to District Court Termination | 0.018* (0.00) |
| Constant | -3.024* (0.11) |
| Log Likelihood | -2472.234 |
| Pseudo R ² | 0.211 |
| Correctly Predicted | 73% |
| Reduction in Error | 5% |
| Observations | 9927 |

Table 4.2: Logistic regression results for whether a case is appealed following the termination of the case in the federal district courts. Statistical significance is represented with * ($p < 0.05$, two-tailed).

All of the variables save **Ideological Difference** and **Interest Group Loser** reach statistical significance at the standard level of 0.05. The failure of **Ideological Difference** to reach statistical significance means that there is no support for the theory that litigants are strategically accounting for the difference in ideology of the district court judge who helped decide their case and the median circuit judge. For **Interest Group Loser**, its lack of significance means that there is no evidence that these groups are overwhelmingly filing political appeals without regard to their merit or other strategic considerations.

To further detail the size of the effect of the significant variables, I simulate their predicted probabilities and present them graphically. I turn first to the predicted probability that a case will be appealed based on the method of case termination in the district court, displayed in Figure 4.1. Recall that these variables are designed to test whether litigants pursue appeals based on how satisfied they are with the procedures and fairness of the district court litigation activity. As expected, cases that end in settlement are very unlikely to be appealed, while those with non-trial adjudications (like summary judgments) and bench and jury trials are much more likely. Specifically, the mean predicted probability for a settled case to be appealed is 0.04. A case terminating with a jury trial has an appeal probability of 0.26, and a case ending in a non-trial adjudication will be appealed with a 0.30 probability. Finally, cases ending in a bench trial have the greatest likelihood of going up on appeal, doing so with a probability of 0.37.



Figure 4.1: The predicted probability that a case will have an appeal following the termination of the case in the district court in different ways.

While each of these later three is visibly significantly different in their likelihood of producing an appeal from settlements, they are not necessarily different *from one another*. To assess this, we have to compute the differences in the mean predicted probability of generating an appeal (and the confidence interval around that mean) for each termination type compared to the others. Figure 4.2 depicts the differences in likelihood of an appeal for the three sets of pairs of these three variables. For each pair, the effect indicates that one is more or less likely to lead to an appeal than the other only if the confidence interval for the difference does not intersect with 0. As is visible, this is only the case when jury trials are compared to bench trials, with jury trials being, on average, 0.11 less likely to produce an appeal than bench trials. This thus amounts to mixed support for the procedural fairness hypothesis.⁶

⁶Plaintiff Loser's predicted probabilities are not presented graphically. The presence of the variable leads to a very modest 0.0253 increase (confidence interval on difference: [0.0052, 0.0454]) in the likelihood of a case's appeal.

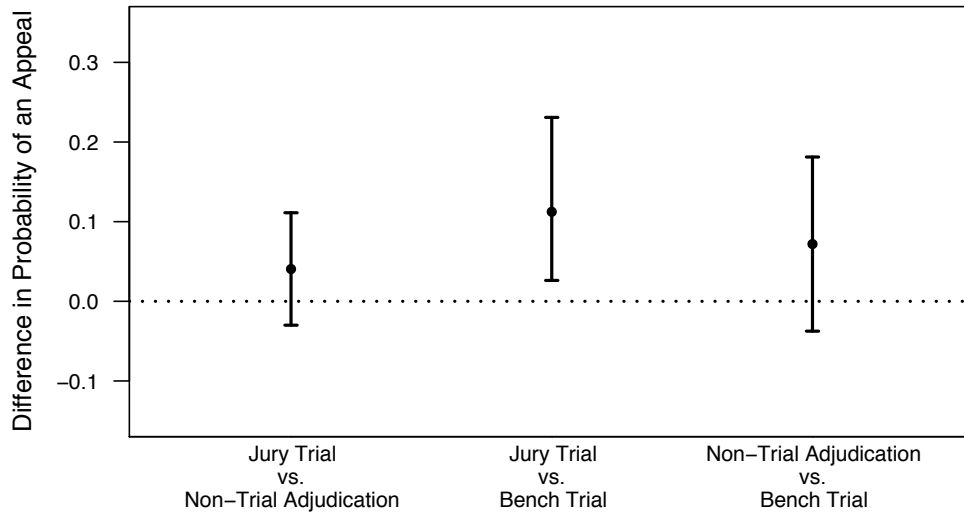


Figure 4.2: The predicted probability that a case will have an appeal following the termination of the case in the district court in different ways.

Focusing next on the asymmetries in the status and resources of the parties, Figure 4.3 reveals the likelihood of appeal as these asymmetries change. As is visible, changes in this variable lead to large changes in the probability that a case will be appealed, with district court cases pitting a very weak plaintiff against a very strong defendant having the highest chance of being appealed. And, as expected, cases with weak plaintiffs facing strong defendants are the most likely to have an appeal, with this result likely being driven by the losing weak plaintiffs' disregard for strategic considerations while deciding whether to appeal. Equally statused parties are less likely to appeal, but not non-trivially so. As noted above, this is likely the case because of the large uncertainty of resources and chances of success present in cases of this sort.

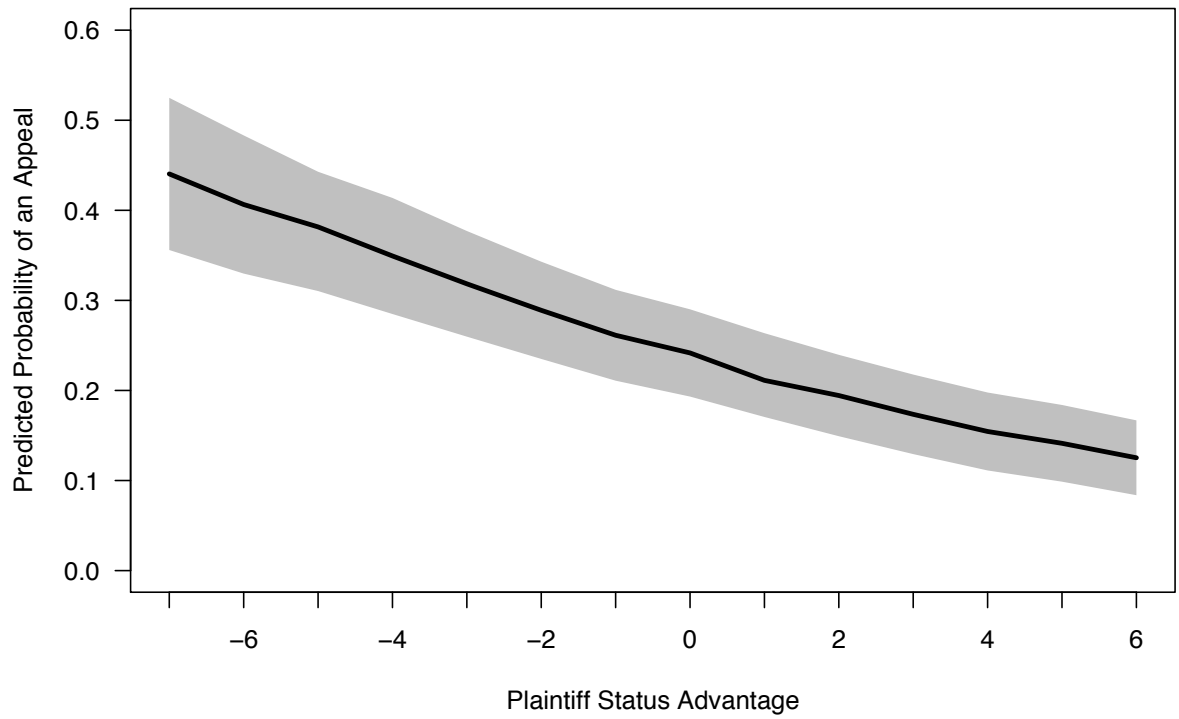


Figure 4.3: The predicted probability that a case will have an appeal based on the difference in the status of the plaintiff and defendant in the district court.

Finally, the variable measuring the length and complexity of a district court case up to termination, **Months to Termination**, has strong results. This variable indicates that longer, more complex cases are much more likely to be appealed than those that terminate relatively quickly. Indeed, cases terminating in the first few months of filing have a predicted probability of being appealed of just over 0.20, but as that number grows to over 10 years to termination, there is over an 80 percent chance of appeal. This finding is consistent with with expectations that as more has been invested in the litigation process, the less expensive (relatively speaking) pursuing an appeal is, especially when accounting for the potential of reversal once the case is on appeal.

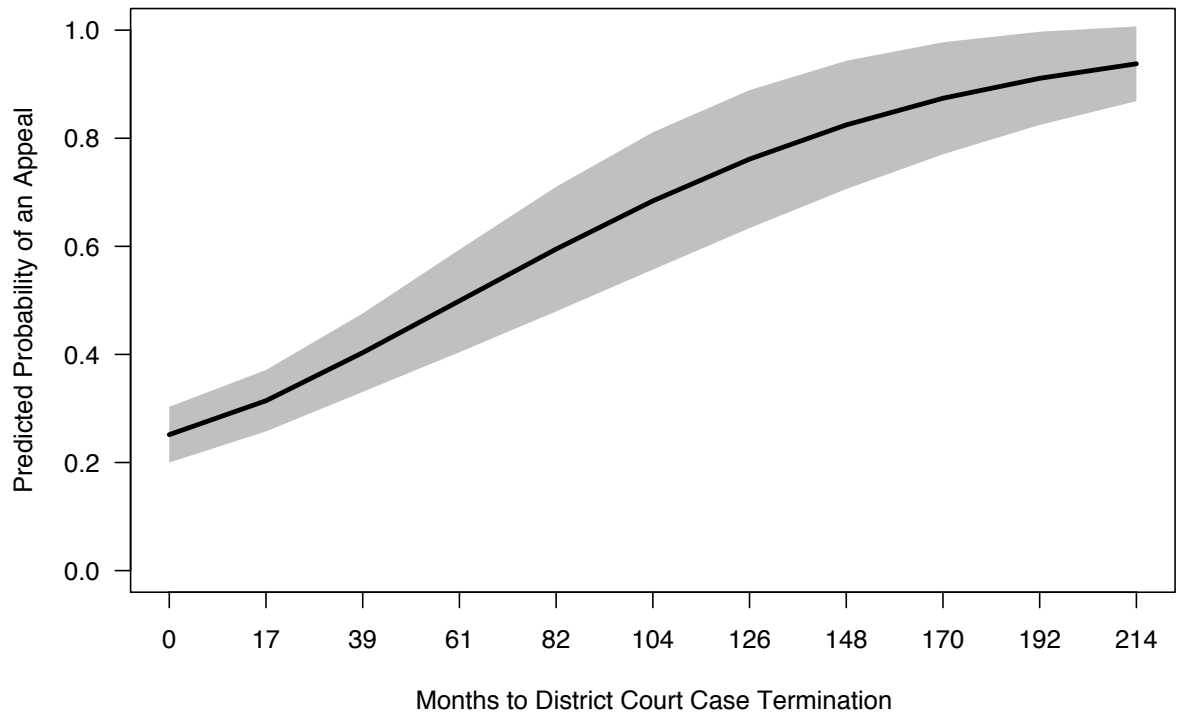


Figure 4.4: The predicted probability that a case will have an appeal based on the time that it takes for the case to terminate in the district court.

4.4 Discussion

The litigant's decision to appeal from a federal district court to the courts of appeals is an important one, since it has implications for the content of the legal agenda for the federal appellate judicial system. As Songer, Cameron and Segal (1995, 1119) put it, "higher courts cannot exercise control over lower courts unless litigants appeal lower-court decisions that are divergent from upper-court preferences." And, yet, little work, particularly empirical work, has examined what motivates a litigant to appeal. Doing just that here, this study finds that litigants appeal their cases for strategic and fairness reasons.

Indeed, strategic decisions to appeal are present based on asymmetries in the status, resources, and experience of the parties as well as in lengthy and complex cases. Settled cases, by their very nature producing a compromised, fair outcome, are less likely than other cases to be appealed while jury trials are about 11 percent less likely to be appealed than bench trials, indicating that those cases where a litigant gets his day in court and does so in front of a jury of his peers are more likely to produce an outcome that is perceived to be fair and undeserving of an appeal.

While these results are quite revealing, the lack of statistical significance on some of the modeled variables may surprise some. In particular, the ideological difference between the district court judge and the median circuit court judge is not significant. While it is possible that potential appellants simply do not consider the ideological preferences of the appellate court when deciding to appeal, it is also possible that the measures utilized here are simply too preliminary to pick up strategic behavior. Future work will attempt to better measure both the ideological direction of the case outcome and the variation in circuit court ideology. Similarly, future iterations will

operationalize the political motivation hypothesis to include not only interest group litigants but other litigants that are represented in their lawsuit *by* interest groups.

These caveats aside, the findings here no doubt are important for our understanding of the lower federal courts. They also, however, have implications for the appeals process and judicial and litigant decision making in other courts, particularly those with a guaranteed, non-discretionary agenda setting process. This means that the many state courts with intermediate appellate courts or even those with a non-discretionary appeal to the state's court of last resort likely face a similar story. Looking at judicial institutions beyond the U.S., the same is also likely to be true. Previous research already confirms that Galanter's "haves" hypothesis often holds in foreign courts (e.g., Haynie, 1994; Dotan, 1999; Flemming and Krutz, 2002; Haynie, 2003; Smyth, 2000). We should expect the rational litigant appeal behavior based on status differentials to find support in these contexts as well.

This study also indicates, in a much broader sense, that when studying our courts, the actions of many actors beyond the judges deciding cases are of critical importance. While there has no doubt been work been an increase in the empirical study of alternative actors involved in the litigation process (like interest groups and the Solicitor General), much of the scholarship remains judge-centric. As the present study reveals, particularly when studying lower courts, this focus is likely misplaced.

Chapter 5

Conclusion

As discussed above, this dissertation, using newly collected data, studies the business of district courts and the actions of federal litigants at three different stages. Chapter 2 studies decision making at the district court, with a focus on both how cases terminate and who wins in these trial courts. In Chapter 3, this project examines the impact that federal courts of appeals have on district court case winners and termination methods after a case is appealed and then remanded to the district court for a second proceeding. Finally, Chapter 4 studies why some litigants decide to appeal following a loss in their district court proceedings. Viewed together, these chapters reveal that litigants and judges along with hierarchical considerations are all important in the decision making that takes place in these federal trial courts. While this work goes a long way in revealing more about these important courts, it also makes it clear that there is much left to be revealed about them in future projects.

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