Reassessing Random Assignment on the U.S. Courts of Appeals*

Jeremy R. Johnson
Jeremy.Johnson@psu.edu

Pennsylvania State University

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Abstract

This is a test of the emergency abstract placeholder system. If this had been an actual abstract, it would have briefly summarized the main points of the paper, so that a casual reader could quickly understand what the paper is about. A high-quality abstract may also entice that person to read the entire paper, and possibly even to think about its contents. This has been a test of the emergency abstract placeholder system.

*This paper is part of a larger project for which a grant was received from The Pennsylvania State University Department of Political Science. All errors and omissions are the responsibility of the reader for not understanding what I wrote. All data and code for replication can be found at http://www.mydataisfake.com

Introduction

It has been long argued that federal judges are not unbiased, but are swayed by their political and ideological leanings (Segal and Spaeth, 2002). However, the United States federal judiciary is considered to be one of the most independent of all countries (Linzer and Staton, 2014). One of the hallmarks of that system is that judges in both the trial and appellate level are randomly assigned. This prevents both litigants and judges from improperly swaying a judicial proceeding. This random assignment of judges is taken as a normative truth. However, recently studies have disputed this finding (Chilton and Levy, 2014). We will expand on the finding by Chilton and Levy and seek to find a more robust explanation for panel assignment.

The United States Circuit Courts of Appeal (COA) are some of the most important federal courts in the United States. They are second only to the United States Supreme Court in their influence, and some would argue even more so. The Supreme Court hears less than 150 cases a year, while the COA hear over 50,000 per year (Administrative Office of the US Courts, 2014). Precedents set by these courts are biding over wide geographic areas, and due to the low case acceptance rate by the Supreme Court are often the last word on federal cases.

There are numerous consequences of a positive finding in this study. The primary consequence is that a covert process for assigning appellate panels violates the normative theory of an independent, transparent judiciary. A second normative consequence is that if panels are not randomly assigned, why doesn't the judiciary simply admit that is the case and publish the procedures for assigning appellate panels?

The third consequence of this lack of transparency is that if there is a non-random method of assigning panels, what is the purpose and biases related to this method? One of the hallmarks of a democracy is that those in power are accountable to the citizens. Typically judicial branches are considered a special case in which independence as opposed to accountability is desired. However, this is premised on the fact that the judges are not corrupt. If these judges are responding to some other influence, whether it is a desire to influence policy outcomes, or if they are receiving illegal compensations, whether in the form of promotions or payments, this would seriously bring in to question the equitably

This paper proceeds as follows: Section 1 discusses the previous studies of panel and case assignment in the U.S. Circuit Courts, Section 2 discusses both the practical and normative theories relating to panel assignment, including the possible indicators of corrupt acts, Section 3 discusses the hypotheses to be tested, Section 4 discusses the data that will be collected, Section 5 discusses the methodology used to assess and test the hypotheses, and Section 6 concludes with a discussion of the research yet to be undertaken as well as the applications of this research.

1 Previous Studies

Atkins and Zavoina (1974)

Brown and Lee (2000)

Chilton and Levy (2014)

The most recent and revealing previous study into how judges are assigned cases in the COA is Chilton and Levy (2014). Chilton and Levy examine all cases for September 2008 through August 2013. There are a total of 10,364 cases in this dataset. Similar to the Songer dataset, they examine cases as they actually happened, rather than cases as they were scheduled. However, one drawback to Chilton and Levy's work is that they only test for one hypotheses and do not collect relevant data to test for others. While the data amassed in the process of this project was extensive, it collected a great number of observations on a very small number of variables. Chilton and Levy only examine the partisan make-up of panels to test for random assignment of the partisan make up. We propose to make up for that deficit of information by not only examining a much longer period of time, but also on many more variables. These will be explained in depth in Sections 3 and 4.

Chilton and Levy's primary hypothesis is "whether the ideological balance of panels is consistent with the balance that would haven be produced by a truly random process," (Chilton and Levy, 2014, 20). While the partisan balance of panel assignment is obviously important, there there should be much finer tuned hypotheses to examine as well. Chilton and Levy find statistical evidence for non-randomness is four of the twelve circuits, the D.C. Circuit, Second Circuit, Eighth Circuit, and the Ninth Circuit. The D.C. Circuit has long been known as a stepping stone to the Supreme Court, with four of the current nine justices on the Supreme Court having been promoted from D.C. Circuit. The Ninth Circuit has long been accused of a pronounced liberal bias as well (Farris, 1997). Chilton and Levy did not find any significant partisan bias in the other circuits.

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2 Theory

The United States Courts of Appeals are broken into eleven geographic circuits plus the D.C. Circuit and the Federal Circuit. These courts' primary responsibility is to hear appeals from the 94 U.S. District Courts. Traditionally these courts hear cases in panels of three judges. In normal practice, panels are randomly chosen then a series of cases are randomly assigned to these panels (Hooper, Miletich and Levy, 2011; *A Journalist's Guide to the Federal Courts*, 2011; Chilton and Levy, 2014; Songer, Kuersten and Haire, 2007). These assignments are made to all current circuit judges and available senior judges. There is variation from circuit to circuit on panel length and the number of cases that each panel hears before judges are assigned to a different panel as well as the number of judges on the circuit; however, the randomness is nominally standard across all circuit courts. While this process is generally taken to be the normal procedure in the Federal Appellate courts, a substantial literature has challenged this as fact (Atkins and Zavoina, 1974; Brown and Lee, 2000; Chilton and Levy, 2014).

Find more citations for this claim.

3 Hypotheses

As a continuation of Chilton and Levy's theory, which is "whether the ideological balance of panels is consistent with the balance that would have been produced by a truly random process," (Chilton and Levy, 2014, 20). However, this is not a directional hypothesis, and we will expand it through tests of subsequent hypotheses.

Despite the theoretically randomness of panel assignment, the Chief Judge of the Circuit has the ability to assign judges who are sitting by designation.[1] Through this mechanism, as well as the wide array of other administrative responsibilities, the Chief Judge wields a large amount of power in the Circuit. Therefore, we hypothesize that being a co-partisan with the Chief Judge will enhance a judge's chance of being in the majority on a highly salient case. Or the reverse of that situation, that a member of the opposite party will make them less likely to be in the minority on a salient case.

4 Data

The data for this project will come from the Songer Court of Appeals Database for the case data (Songer, Kuersten and Haire, 2007).[2] This dataset is uniquely suited to examine the effects of random assignment of judges. While the stratification of this data presents an interesting methodological challenge, it cannot be overcome. This dataset takes all Court of Appeals cases decided since 1925 and randomly selects either 15 or 30 cases to fully code (Hurwitz, 2006; Hurtwitz and Kuersten, 2012). This provides approximately 25,000 observations of cases in a random sample.

The data for the individual judge level variables will come from the Federal Judicial Center biographical database with supplemental information coming from the U.S. Court of Appeals Judge Attribute Database (*History of the Federal Judiciary*, N.d.). Measures of case salience are already coded into the Songer, Kuersten and Haire Dataset which reduces any additional coding, using the method developed by Hettinger, Lindquist and Martinek (2003). As noted above, case salience is likely to be an important factor in determining panel assignment.

5 Methodology

For any given year t there are 13 circuits c of which there are a certain number of active circuit judges J, which is J_{ct}. In theory, cases are assigned randomly to randomly assigned panels. This theoretically creates two stages of randomization in the assignment of cases. This theory is the primary premise that we are testing against. The number of cases assigned to be decided in each circuit year are N_{ct}. These cases are assigned in groups to panels, approximately once per month. These panels will sit for approximately a week and hear the cases assigned for that month, and

[1] This could be judges who are District Judges who have been "called up" to sit on one case or one panel in the case of scheduling or case-specific recusals of a particular judge.

[2] All data and documentation for this dataset can be found at http://artsandsciences.sc.edu/poli/juri/appct.htm

then convene in different panels the next month. The Songer Database samples cases in a stratified way (Songer, Kuersten and Haire, 2007). The sample M for each circuit-year is M_{ct} (Songer, Kuersten and Haire, 2007). There is a split number of how these cases are sampled from 1961-2002, $M_{ct} = 30$ and from 1925-1960, $M_{ct} = 15$.

Deriving the actual sampling distribution of those judges who appear in the Songer Dataset, is mathematically difficult, as well as being highly susceptible to omitted variable bias such as judges' vacation schedules, as well as individual recusals. A much simpler way to accomplish this is the simulate the distribution of judges and use these empirical probabilities as a baseline for comparison to the Songer dataset (Songer, Kuersten and Haire, 2007). This can be compared to the caseload statistics available to establish a baseline. The simulation will establish a baseline of panel and case assignment probability which will show how under or over represented a judge is on the panels.

We will build a circuit-judge-year dataset using data collected from the Federal Judicial Center which has biographical and career information for all federal judges (*History of the Federal Judiciary*, N.d.). This will create a simulated universe of judges who are available to be chosen for a particular panel. This will be a dataset of judge with one observation for each judge, per circuit, per term for the active judges on the circuit for a total of $\sum_{c=1}^{C}\sum_{t=1925}^{2002} J_{ct}$ judge-terms. We will then create a similar simulated universe of "cases." We will have one simulated case for each real case for a total of $\sum_{c=1}^{C}\sum_{t=1925}^{2002} N_{ct}$ cases. For each circuit year, we will draw Q_{ct} three-judge panels from the J_{ct} available to be selected on a given circuit. We will then draw a selection of cases, S, without replacement from the N_{ct} cases in that circuit-term. Each selection of cases will then be assigned randomly to a panel. We will then sample from the simulated universe of cases in the same manner as Songer, without replacement, which is M_{ct}. This gives us a sample of cases with three judges attached to it. This mimics the procedure used in the real observations by Songer, Kuersten and Haire (2007). We will then calculate A_{jt}, which is the number of times that judge j appears on the M_{ct} cases in circuit c during term t. For example, if Judge Richard Posner of the Seventh Circuit appears on two of the cases in the Songer sample, for the Seventh Circuit in 2000, he would have an $A_{jt} = 2$. From this we can calculate the empirical estimate of the fraction of the time each judge appears on a case decided by a circuit, which is[3]:

$$\Pi_{jt} = \frac{A_{jt}}{M_{jt}} \tag{1}$$

We will then repeat the procedure above, approximately 100,000 times, which will create a repeated sample of this universe of cases and judges with the result being a 100,000 simulations of Songer's database. This will give us an empirical estimate of how often each judge should appear in the Songer database, as well as an estimate of the variability of that estimate. We can then use the mean of this estimate to create a set of estimates for $\bar{\Pi}_{jt}$ for all the judges in the data. We will then compare this to the actual frequency of times that each eligible judge appeared in the Songer database P_{jt}. This will be calculated the same as in Equation 1. This gives us the quantity of $P_{jt} - \bar{\Pi}_{jt}$ which is an empirical measure of how over- or under-represented each judge was on

[3]We don't multiply the denominator by three because a judge can only occupy one of the three seats on a panel. Note as well that Π_{jt} will – in theory – be the same for every judge in a given circuit-year

panels in each term she sat on the COA. This will be the dependent variable for the subsequent testing of our hypotheses. We will then apply a hierarchical generalized linear model with various judge level and circuit level effects. This HLGM will be used to test our several hypotheses.

6 Going Forward

This project can provide several useful avenues of future research as well as provide important evidence to those in the policy community. If panels are not randomly assigned, as we hypothesize, then the most important consequence to this is the potential loss of trust in the judicial system by the public. While it is typically accepted in the political science literature that judges are ideological in the decisions that they make, one of the key constraints on this is the random assignment of COA judges to panels and cases. If this constraint turns out to be a false one, this would signify that ideology is much more prevalent in the appellate process than previously thought. This would also signify that one or more actors can influence the outcome of a COA case. This is especially important due to the large numbers of cases which are terminated at the COA level. In the year 2002, the Courts of Appeal heard 5,488 cases while the Supreme Court only heard 84 cases, slightly over 1.5% of the number of cases that the COA heard (Roberts, 2003; Songer, Kuersten and Haire, 2007).

Another important ramification is in the field of judicial politics in political science. In recent years there has been an increase in assessing causality, and many recent articles have leveraged randomized panel and case assignment in the COA to learn about judicial decision making and racial and gender characteristics of COA judges (Kastellec, 2010; Glynn and Sen, 2015; Farhang, Kastellec and Wawro, 2014). If this research shows that panels and cases are not in fact randomly assigned, then those studies will have lost their leverage calling in to question their ability to assign causality.

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A List of Hypotheses

1. Observed panel assignment is statistically significantly different than random assignment.
2. Co-partisanship with the Chief Judge will make a judge more likely to receive a highly salient case in the majority.