

NEITHER GONE NOR FORGOTTEN:

Evaluating the potential impact of senior status judges on the U.S. Courts of Appeals

Senior status judges serve an important, albeit often overlooked, role on the federal bench.

by LISA M. HOLMES, RORIE L. SPILL SOLBERG AND SUSAN B. HAIRE

In his 2010 Year-End Report on the Federal Judiciary, Chief Justice John Roberts emphasized his concern with the partisan gridlock stalling the judicial appointment process for lower federal court judges.¹ This gridlock, according to the Chief Justice, has raised concerns over caseloads, particularly “in critically overworked districts.”² In his report, Roberts noted that the situation would be especially dire but for the service of judges who continue to work after taking senior status.³

Other recent accounts have substantiated the important role served by senior judges on the bench, and on certain courts in particular. In early 2011, when judges had been leaving the active bench at a rate of one per week, workload pressures and reliance on senior judges were apparent on courts in Arizona and central Illinois.⁴ The critical importance of senior judges to the operation of the U.S. Court of Appeals for the Ninth Circuit was also highlighted after the recent deaths of senior judges on that court.⁵ In Kansas, U.S. District Court Judge Wesley Brown was still hearing a full docket well after his 100th birthday and continued to work a reduced caseload until his death in January of 2012 at the age of 104.⁶

Roberts’ comments, coupled with these anecdotes related to specific courts, are reminders that senior

status judges serve an important, albeit often overlooked, role on the federal bench. Most scholarly work on the composition and output of the judiciary tends to focus exclusively on the active bench without consideration of the continuing service of the senior bench. In this study, we examine the potential impact of senior judges on the composition and work of the U.S. Courts of Appeals. In doing so, we highlight not only the increasing importance of these judges to the circuit courts, but also the need to include consideration of senior judges in studies of decision making on the U.S. Courts of Appeals.

The Effects of Senior Status: Creating Vacancies and Remaining on the Bench

Recognizing the potential drawbacks of lifetime tenure for federal judges, Congress established a retirement system in 1869 and later enacted legislation in 1919 that provided an

additional option for pension-eligible judges: senior status. The 1919 legislation allowed older judges to hear a reduced caseload and, at the same time, permitted the president to appoint a successor to the active bench with the advice and consent of the Senate. The current system provides for judges to become pension eligible under the “rule of 80.” Beginning at age 65, a federal judge may retire or take senior status after 15 years of service as an Article III judge. Using a sliding scale of increasing age and decreasing service, judges may be eligible for retirement at age 70 with a minimum of ten years of service. To retain some staff, senior judges must carry a minimum of a 25 percent active annual caseload.⁷

Existing scholarship on decisions to take senior status emphasizes the increasing importance of voluntary departures for the creation of vacancies on the bench.⁸ Prior to 1932, for

1. Roberts, *2010 Year-End Report on the Federal Judiciary*, <http://supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> (Accessed 21 January 2011).

2. *Ibid.* at 5.

3. In this paper, we use the term senior judge to refer to judges who elect senior status after obtaining eligibility. Similarly, active judges refers to judges remaining on active service before or after eligibility for senior status.

4. Markon and Shailagh, *Vacancies on Federal Bench Hit Crisis Point*, Wash Post, February 8, 2011 at A-1.

5. Williams, *Senior Judges Keep Courts Open: As Caseloads Soar and Judgeships Go Unfilled*, LA Times, March 14, 2011 at A-1.

6. Hegeman, *At 103, Federal Judge is Still Hearing Cases*, Wash Post, April 21, 2011. http://www.washingtonpost.com/local/politics/at-103-federal-judge-is-still-hearing-cases/2011/04/20/AFZHG4GE_story.html. Last accessed on June 16, 2011. Sylvester, *Federal Judge Wesley Brown Dies at Age 104 in Wichita*, The Wichita Eagle, January 24, 2012. <http://www.kansas.com/2012/01/24/2187734/federal-judge-wesley-brown-dies.html>. Last accessed on March 27, 2012.

7. For a discussion of the history of judicial pensions and senior status, see Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. OF EMP. LEG. STUD. 495-549 (2005).

example, vacancies arising from the decision to depart voluntarily constituted 39 percent of all vacancies, a number that has increased to 55 percent in the years since 1969. In a thorough analysis of the contributions of senior judges, Yoon documents the steady rise in the number of senior judges over time.⁹ Senior judges comprised roughly 5 percent of the judiciary for the first 15 years after the creation of that option in 1919, whereas the percentage had increased to 37 percent in 2000.¹⁰ With respect to caseload, on the district courts, from 1980 to 2002 the caseloads of senior judges nearly doubled.¹¹ Yoon noted that the contributions of senior judges on the appeals court bench are more difficult to evaluate due to the dramatic increase in the number of appeals from 1980-2002.¹² Although the rate of growth in the number of appeals heard by senior judges on the courts of appeals increased, active judges also experienced a similar rate of growth in their workload.

In addition, Yoon found that the presence of senior judges on the bench differed by circuit. In 2002, the number of senior judges on some circuits (such as the First Circuit) nearly equaled the number of authorized judgeships in that circuit.¹³ On other circuits, few senior judges sat on the bench. On the D.C. Circuit, with 12 authorized judgeships in 2002, only two senior judges served. Furthermore, the Fourth Circuit contained 11 active judges but only one senior judge in that year. Yoon also noted that, by 2002, no circuit had less than 5 percent of the caseload handled by senior judges and on two circuits, they handled more than 26 percent of the caseload.¹⁴

Building on Yoon's analysis,¹⁵ we examine the potential policy impact of judges taking senior status. In addition to analyzing workload considerations and comparing the ratio of active to senior judges over time and by circuit, we also study how the continued presence of senior judges affects the policy predisposition of the circuit courts.

As part of this assessment, we build

on the expectation that appeals court judges "chosen by a democratically elected president can be expected in a general sense to reflect the values and policy outlook of the appointing administration."¹⁶ Over the past four decades, both Democratic and Republican administration officials designed judicial selection procedures that reflect an understanding of the policy significance of appointing federal judges who enjoy life tenure on these courts.¹⁷ The voting records of judges on the U.S. Courts of Appeals appear to vary substantially by presidential appointment cohort with more liberal decisions cast by those appointed by Democratic presidents and more conservative decisions made by judges appointed by Republican presidents.¹⁸

In addition, the organization of the appeals courts may exaggerate—or mitigate—the policy impact of a particular president. For example, President Clinton appointed approximately 35 percent of all appeals court judges on active service by the end of this two-term administration. However, he disproportionately shaped the composition of the Second and Ninth Circuits, filling at least half of the authorized vacancies on these courts. In contrast, Clinton appointees were relatively fewer in number in the 5th, 7th, 8th, and DC circuits.¹⁹ Since the potential policy impact of an appointment cohort will vary with the number of vacancies in a circuit, pension-eligible judges may play a role in shaping an appointing president's impact by taking senior status and creating a vacancy. However, senior judges' policy influence is not limited to vacancy creation. As the judiciary increasingly relies on senior judges to decide cases in the federal appeals courts, we expect that their presence could blunt, or enhance, the efforts of a president to alter the ideological make-up for the appellate bench through his appointment power.

Data and Methods

The purpose of our study is to evaluate empirically the potential impact of judges' decisions to take senior

status and remain on the bench. Therefore, our analysis proceeds in three parts. First, we offer a descriptive profile of the actual composition of the bench including both active and senior status judges. Second, we analyze the proportion of the caseload handled by senior judges and the changing caseload responsibility that falls to these judges over time and across circuits. Third, we examine more closely how the presence of senior judges affects the overall policy predisposition of each circuit. In this respect, we consider how the presence of senior judges influences the partisan composition of the total bench, as well as how decisions to take senior status alter the ideological composition of the bench with the appointment of the senior's successor.

Data were drawn from several sources. Beginning with data on attributes collected by Gary Zuk, Deborah J. Barrow, and Gerard S. Gryski²⁰ and supplementing with biographical information available from the Federal Judicial Center, we recorded information on the careers of judges who served on the U.S. Courts of Appeals (either on active or senior status) from 1977-2008 including dates of commission,

8. Zuk, Gryski, and Barrow, *Partisan Transformation of the Federal Judiciary*, 12 AMER. POL. Q. 439-457 (1993).

9. Yoon, *supra* n. 7.

10. *Ibid.*

11. *Ibid.*

12. *Ibid.*

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. Goldman, *Federal Judicial Recruitment* in Gates and Johnson, eds, *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* at 190 (Washington, D.C.: CQ Press, 1991).

17. Goldman, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN*, (New Haven: Yale University Press, 1997).

18. Giles, Hettinger, and Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623-641 (2001), Haire, Humphries, and Songer, *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274-281, Kuersten and Songer, *Presidential Success Through Appointments to the United States Courts of Appeals*, 31 AMER. POL. RES. 2 107-137 (2003).

19. Haire, Humphries, and Songer *supra* n.18.

20. These data are available at the JURI website (<http://www.cas.sc.edu/poli/juri/attributes.html>).

senior status (if they chose to do so), and departure from judicial service. Data on the caseload handled by active and senior judges were collected from annual filings furnished by the U.S. Courts.²¹

With respect to the ideological predisposition of circuit court judges, we relied on the Judicial Common Space (JCS) scores to measure the ideological predisposition of appeals court judges in a manner that permitted us to compare the policy views of judges on senior status with those of their successors.²² Building on NOMINATE scores for presidents and members of Congress²³ and similar scores for the preferences for judges on the courts of appeals,²⁴ Epstein et al. developed common space scores for judges at all levels of the federal bench.²⁵ Higher scores indicate more conservative policy views.

Senior Judges and the Composition of the Courts of Appeals

We begin our analysis by examining the consequences of senior judges' continuing service for the composition of the bench. First, we determined the ratio of senior to active judges over time (Figure 1).

21. More recent data on case participations are available at <http://www.uscourts.gov/statistics.aspx>. Data for earlier years are housed on microfiche in the government documents section of our university libraries.

22. This measure is an estimate of the judge's predisposition; although the measure has been used to predict voting behavior, it is not derived from judges' votes. Epstein, Martin, Segal, and Westerland, *The Judicial Common Space*, 23 J. OF LAW ECON. & ORG. 303-325 (2007). JCS scores were collected from Lee Epstein's website at <http://epstein.law.northwestern.edu/research/JCS.html>.

23. Poole, *Estimating a Basic Space from a Set of Issue Scales*, 42 AMER. JOUR. POL. SCI. 954-993 (1998); Poole and Rosenthal, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL-CALL VOTING, (Oxford, Oxford University Press (1997)).

24. Giles, Hettinger, and Peppers, *supra* n.18.

25. Epstein, Martin, Segal, Westerland, *supra* n.22.

26. Goldman, *supra* n.17.

27. By 2000, Goldman's index of obstruction and delay for the Courts of Appeal reached .79. This index is formulated using the number of nominees without a hearing and the number of nominees waiting six months or longer to receive their vote on the floor. Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251-257 (2003).

FIGURE 1. Composition of the U.S. Courts of Appeals, 1977-2008

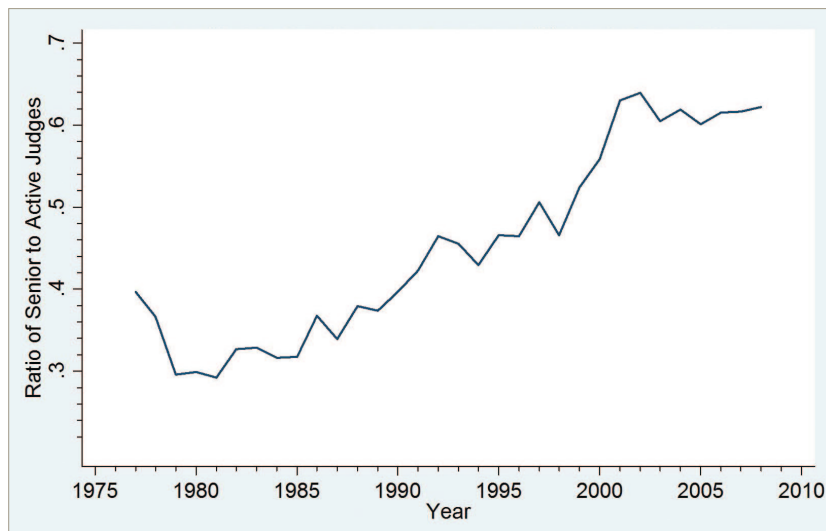
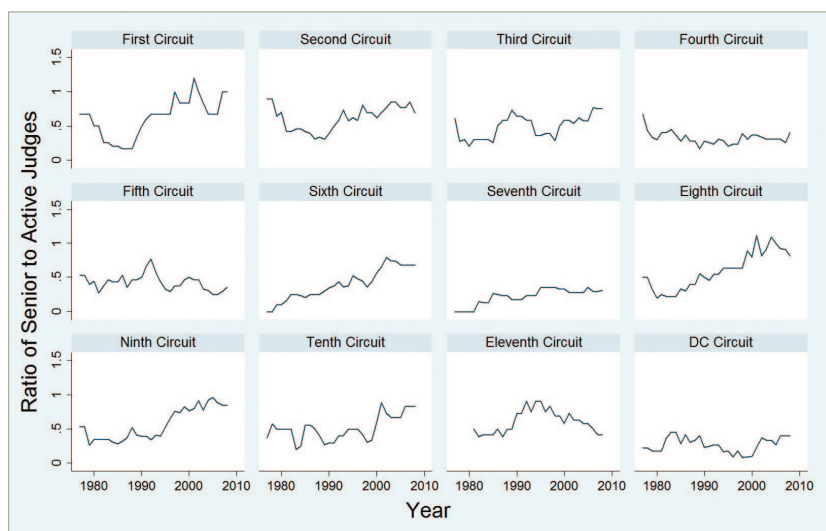


FIGURE 2. Composition of Individual Circuits, 1977-2008



Although the proportion of senior to active judges in 1977 was nearly 0.40, it dropped to a low of 0.296 in 1979. This drop was likely due to the large number of courts of appeals appointments made by President Jimmy Carter in the wake of the Judgeship Bill of 1978, which created 35 new positions on the courts of appeals.²⁶

The increasing cohort of judges on senior status evident in Figure 1 appeared to be fueled by statu-

tory changes in 1984 that made it more desirable to take senior status rather than remain on active service. By 2002, the ratio of senior to active judges had increased to 0.64. Increasing numbers of judges remaining on the bench after taking senior status and delays in the appointment of new judges have contributed to a high ratio of senior to active judges (over 0.60) since 2001.²⁷

While the overall ratio seems to

suggest the U.S. Courts of Appeals are teeming with senior status judges, the effect of their presence varies dramatically across the circuits. In Figure 2, we provide data on the ratio of senior to active judges by circuit. With some circuits, the number of senior judges equaled or even slightly exceeded active judges in particular years; in others, senior judges constituted a smaller proportion of the bench. On the U.S. Court of Appeals for the Sixth Circuit, the proportion of the bench consisting of senior judges increased dramatically from 1977 (at 0) to 2002 (at 0.79), largely due to a prolonged conflict over filling vacancies on this circuit.²⁸ On the Fourth Circuit, on the other hand, the ratio of senior to active judges has remained more stable over time.

Senior Judges and the Workload of the U.S. Courts of Appeals

We are also interested in the contributions of senior judges in handling caseloads on the U.S. Courts of Appeals. To examine this, we determined case participations by active judges and senior judges from 1977 to 2008. Case filings data furnished by the U.S. Courts define case participation by an individual judge as “an appeal in which the judge hears oral argument or where the appeal is submitted on briefs. Thus, where a single appeal is heard before a panel of three judges, the number of participations would be three.”²⁹

Across all 12 circuit courts, the proportion of case participations handled by active judges has remained fairly steady from 1977 to 2008 (see Figure 3). Throughout that time frame, active judges consistently handled about 80 percent of all case participations, ranging from a low of 76.2 percent in 2002 to a high of 82.8 percent in 1988. Over time, however, the proportion of case participations managed by senior judges has increased. In 1981 (soon after President Carter’s appointment of more than 40 judges on the courts of appeals during the last two years of his administration), senior judges heard only 7.5 percent of case par-

FIGURE 3. Case Participations by Active and Senior Judges, 1977-2008

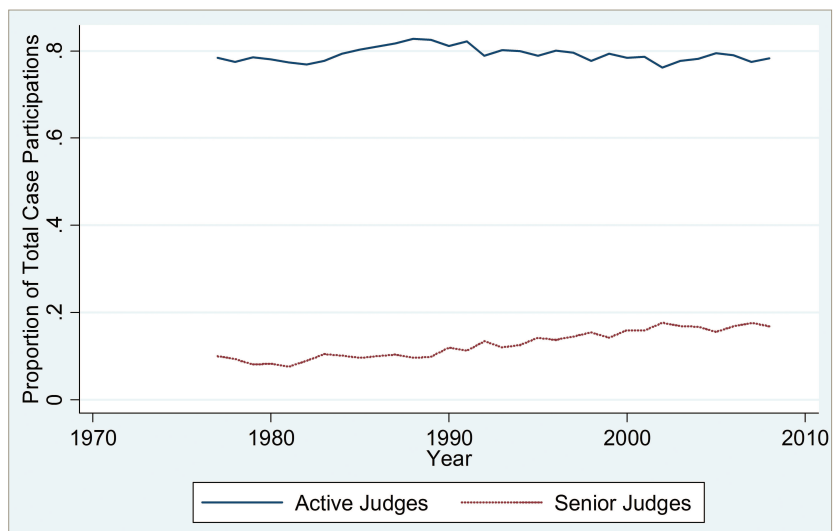
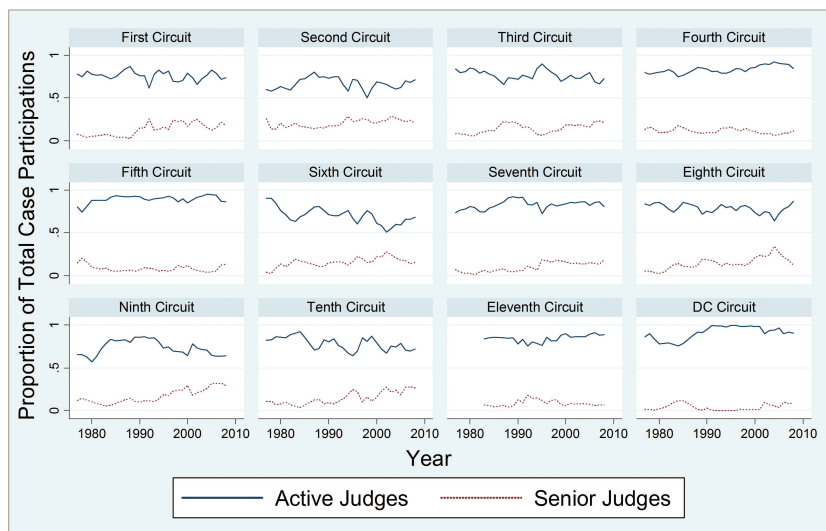


FIGURE 4. Case Participations by Active and Senior Judges by Circuit, 1977-2008



ticipations on the courts of appeals. Senior judges have handled more than 15 percent of all case participations since 2000.³⁰ The data indicate that senior judges are, over time, occupying a more important place on the federal bench, as far as managing caseload is concerned.

With respect to specific circuits, the proportion of case participations managed by senior judges has also varied over time (see Figure 4). On the Second Circuit, for example,

28. Goldman, *Judicial Confirmation Crisis?*, JURIST (2004), <http://jurist.law.pitt.edu/forum/Symposium-jc/goldman-printer.php>, last accessed Sept. 22, 2011.

29. The data collected from U.S. Courts federal court caseload statistics and the quote come directly from the tables available on microfiche in government docs (KF180 .A34). The best available data on microfiche for the earlier years are at times difficult to read. As a check, we added together the values on the proportion of cases heard by active, senior, and visiting judges. In only nine cases out of 363 did the aggregated proportions number deviate more than 5% from the expected value of one. And, of these nine cases, the deviation from one was between 5.5% and 12.3% from the expected value of

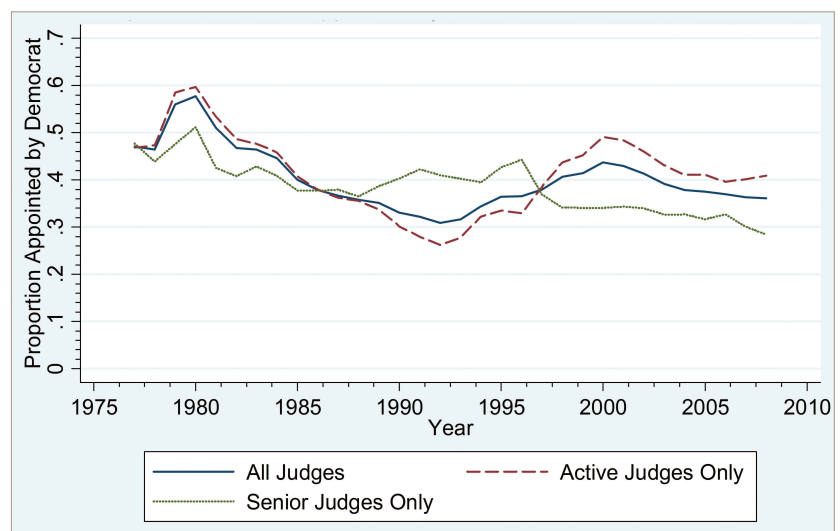
TABLE 1. Composition of Active, Senior, and Total Bench, 1977-2008

President	Proportion of Active Bench Appt by Democrat (start of Admin)	Proportion of Senior Bench Appt by Democrat (start of Admin)	Proportion of Total Bench Appt by Democrat (start of Admin)	Proportion of Active Bench Appt by Democrat (end of Admin)	Proportion of Senior Bench Appt by Democrat (end of Admin)	Proportion of Total Bench Appt by Democrat (end of Admin)
Carter	.47	.48	.47	.53	.43	.51
Reagan	.53	.43	.51	.34	.39	.35
GHW Bush	.34	.39	.35	.28	.40	.32
Clinton	.28	.40	.32	.48	.34	.43
W. Bush	.48	.34	.43	.41	.28	.36

For W. Bush, the data on composition of the bench at the end of his administration was determined as the composition in 2008, rather than 2009 after the end of his term.

senior judges have consistently handled a larger proportion of cases than is the case for courts of appeals in general. On that circuit, senior judges have never resolved less than 13 percent of case participations from 1977 to 2008. On the 6th, 8th, 9th, and 10th circuits, the proportion of each circuit's caseload heard by senior judges has increased over time, whereas the proportion of the caseload heard by active judges has diminished.³¹ These circuits, unsurprisingly, correspond to those where the ratio of senior to active judges has increased over time, as seen in Figure 2.

Across the circuit courts of appeals, senior judges have increased in their prominence, both in terms of

FIGURE 5. Proportion of Bench Appointed by Democratic Presidents, 1977-2008

one, indicating that the data collected from the older microfiche were appropriate to use in this analysis. Data for 1986 were unavailable. Additionally, the calendar used by the US Courts for annual calculations shifted in 1987 requiring that we averaged data for every two years prior to 1987 to reflect this change.

30. The data indicate that over this same period of time, the proportion of case participations handled by visiting judges has decreased from a high of 12.9% in 1980 to less than 5% in every year after 2005.

31. Over the last few decades, the demands of the federal appellate docket have required utilizing judges who are not on the active circuit bench. Circuits have relied on visiting judges, in varying degrees, to meet these demands. In addition to district court judges sitting by designation, visiting judges may also include senior judges from other circuits as well as those with appointments in other specialized federal courts. Although it is beyond the scope of this paper, existing research suggests the need for further study of the contributions of visiting judges to the federal appellate docket. Collins and Martinek, *The Small Group Context: Designated District Court Judges in the U.S. Courts of Appeals*, 8, J. EMPIR. LEG. STUD. 177-205 (2011).

the overall composition of the bench and the proportion of cases handled by senior judges. Underlying these aggregated figures is substantial circuit level variation. Senior judges, in some appeals courts, are serving a need that had previously been met by visiting judges. As a result, the workload of senior judges in these circuits increased so that it mirrors that assumed by judges on the active bench. On other circuits, the role of senior judges has been more consistent over time.

Senior Judges and the Partisan Composition of the U.S. Courts of Appeals

Demonstrating the growing presence of senior judges on the U.S.

Courts of Appeals is only an initial step in determining the importance of these judges to the work of these courts. We are also interested in how the presence of senior judges impacts the partisan composition of the courts of appeals. We therefore identified the party of the appointing president for judges taking senior status from 1977 through 2008, as well as the party of the president who appointed that judge's successor. We then compared trends in the party of the appointing president of active judges, senior judges, and all judges (Figure 5). Democrat-appointed active judges held fewer than 28 percent of active-judge seats on the bench by the end of the administration of President George H.W. Bush.

TABLE 2. Opportunities and Replacements for Judges Taking Senior Status, 1977-2008

	Replacement Opportunities (Vacancies Created through Senior Status)	Party of Judge Taking Senior Status	Potential Impact of Replacement
Overall	171	99 Republican (57.89%) 72 Democrat (42.11%)	13 more liberal (7.60%) 124 similar (72.51%) 34 more conservative (19.88%)
Rep. Appoints Successor	116	71 Republican (61.21%) 45 Democrat (38.79%)	0 more liberal 82 similar (70.69%) 34 more conservative (29.31%)
Dem. Appoints Successor	55	28 Republicans (50.91%) 27 Democrats (49.09%)	13 more liberal (23.64%) 42 similar (76.36%) 0 more conservative

Potential impact calculations are based on JCS scores. After calculating the absolute value of the difference between scores for the senior judge and his/her replacement, the replacement was considered to be "more" liberal or conservative if the difference was at least 2 standard deviations away.

By 2000, the partisan makeup of the bench had shifted substantially as the Clinton administration appointed enough circuit court judges to have the active bench divided almost evenly between Republican and Democratic appointees.

As suggested by Figure 5 and Table 1, the continuing presence of senior judges on the courts of appeals may serve to moderate the impact of changing partisan control of the executive branch on the composition of the bench. For example, by the end of the G.H.W. Bush administration, the proportion of the active bench appointed by Democratic presidents dropped to its lowest point (.28); however, at the same time 40 percent of the senior judges still serving had been appointed by Democratic presidents. Then the Clinton Administration pushed the active bench back to the left. By 2001, Democratic presidents had appointed 48 percent of the judges on active service, but these judges sat on cases with a senior bench that was decidedly more conservative (34 percent appointed by a Democratic president). Shifts in partisan control of the White House during the period of analysis result in a trend whereby the presence of senior judges generally blunts swings in the partisan composition

of the bench produced by changing administrations. This effect is potentially exacerbated by the politics of obstruction in the judicial selection process during the latter portion of our time period, which pushed seniors to take on larger caseloads.³² Upon pension eligibility, if senior judges had opted for full retirement, leaving only active judges on the bench, the partisan composition of the circuit courts would respond more dramatically to changing partisan control of the White House.

Replacement Opportunities and the Ideological Composition of the U.S. Courts of Appeals

When an active judge chooses to take senior status, a vacancy is created that may be filled by the president. Thus, a judge's decision to take senior status presents an opportunity to the president. Most scholarly interest has focused on the question of whether or not judges choose to take senior status at a time that would maximize their partisan or ideological interests. Building on the work of Nixon and Haskin, who analyzed the retirement decisions of judges who leave at a time that "helps" their party compared to those whose retirements "hurt" their party, we examine whether or not presidents

take advantage of the appointment opportunities presented by those taking senior status.³³ Do presidents find themselves replacing judges who take senior status with those who are ideologically similar to the senior judge, or do presidents seize upon the opportunity to replace an ideologically distant judge with one who is more similar to the president's preferences?

Using the measures of a judge's ideological predisposition referenced earlier (Judicial Common Space, or JCS, scores), we compare the estimated ideology of the judge taking senior status with that of the succeeding judge. JCS scores are determined based on the identity and ideology of the senators from the home state of the nominee (if one or both senators is from the president's party) or of the appointing president. JCS scores, therefore, represent the *expected* ideological predisposition of a judge based on the ideology of those responsible for appointing that judge, rather than the observed ideological direction of the judge's decisions.³⁴ In Table 2, we provide

32. Goldman, *supra* n.27.

33. Nixon and Haskin, *Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts*, 28 AMER. POL. Q. 458-489 (2000).

data on the opportunities afforded to presidents to replace judges who took senior status between 1977 and 2008.

From 1977 to 2008, 171 active judges on the U.S. Courts of Appeals took senior status.³⁵ Of those 171 judges taking senior status, Republican presidents appointed 99 replacements while 72 were appointed by Democrats. In order to determine whether the successor judge was ideologically similar or dissimilar to the judge taking senior status, we calculated the absolute difference between the JCS score of the judge taking senior status and the successor judge. Then we determined the mean and the standard deviation for that absolute difference. We identified those successor judges who were at least two standard deviations more liberal or more conservative than the judge taking senior status. All cases where the difference between the senior judge and the succeeding judge was less than two standard deviations from the mean distance were coded as being similar, whereas those senior judges who were at least two standard deviations from the mean distance were coded as being more liberal or more conservative than their predecessor.

Ideologically similar judges filled most of the vacancies created by judges taking senior status (72.5 percent). Nearly 20 percent of the successor judges were expected to be more conservative than the judge taking senior status, and only 7.6 percent were expected to be more liberal. Unsurprisingly, when a Republican appointed a successor, which occurred 116 times in our analysis with Republican presidents replacing 71 judges appointed by Republicans and 45 appointed

34. JCS scores range from -1 to +1, with scores below zero indicating a predicted liberal ideology and those above zero indicating a predicted conservative ideology.

35. We dropped five cases where the judge taking senior status had not been replaced at the end point for our analysis (2008), as well as five additional cases where the successors were appointed too recently to have published JCS scores, reducing the number of judge-observations in this part of our analysis to 171.

TABLE 3. Opportunities to Replace Judges Taking Senior Status by President, 1977-2008

Pres. Appointing The Successor	Opportunity	Replacement Impact Potential
Republicans	Replacing Republicans – 71	More liberal – 0 Similar – 67 (94.37%) More conservative – 4 (5.63%)
	Replacing Democrats – 45	More liberal – 0 Similar – 15 (33.33%) More conservative – 30 (66.67%)
<i>Reagan</i>	Replacing Republicans – 25	More liberal – 0 Similar – 23 (92.00%) More conservative – 2 (8.00%)
	Replacing Democrats – 18	More liberal – 0 Similar – 10 (55.56%) More conservative – 8 (44.44%)
<i>G.H.W. Bush</i>	Replacing Republicans – 10	More liberal – 0 Similar – 9 (90.00%) More conservative – 1 (10.00%)
	Replacing Democrats – 15	More liberal – 0 Similar – 4 (26.67%) More conservative – 11 (73.33%)
<i>G.W. Bush</i>	Replacing Republicans – 36	More liberal – 0 Similar – 35 (97.22%) More conservative – 1 (2.78%)
	Replacing Democrats – 12	More liberal – 0 Similar – 1 (8.33%) More conservative – 11 (91.67%)
Democrats	Replacing Republicans – 28	More liberal – 13 (46.43%) Similar – 15 (53.57%) More conservative – 0
	Replacing Democrats – 27	More liberal – 0 Similar – 27 (100%) More conservative – 0
<i>Carter</i>	Replacing Republicans – 3	More liberal – 2 (66.67%) Similar – 1 (33.33%) More conservative – 0
	Replacing Democrats – 9	More liberal – 0 Similar – 9 (100%) More conservative – 0
<i>Clinton</i>	Replacing Republicans – 25	More liberal – 11 (44.00%) Similar – 14 (56.00%) More conservative – 0
	Replacing Democrats – 18	More liberal – 0 Similar – 18 (100%) More conservative – 0

Potential impact calculations are based on JCS scores. After calculating the absolute value of the difference between scores for the senior judge and his/her replacement, the replacement was considered to be "more" liberal or conservative if the difference was at least 2 standard deviations away.

by Democrats, the successor was expected to be either ideologically similar to the senior judge (70.69 percent of the time) or more conservative (29.31 percent). In no case in our dataset did a Republican president appoint a judge expected to be decidedly more liberal than his or her predecessor, whether the predecessor had been appointed by a Democrat or a Republican.

A similar trend held for the 55 successors appointed by Democratic presidents to replace 28 judges appointed by Republicans and 27 judges appointed by Democrats. In no case did the Democratic president appoint a successor who was expected to be decidedly more conservative than the judge taking senior status. Most of the time (76.35 percent), the succeeding judge was ideologically similar to the senior judge, and 23.6 percent of the time the succeeding judge was decidedly more liberal. Republican presidents appointed a smaller percentage of judges to replace opposite-party judges (38.79 percent of the judges appointed by Republican presidents replaced judges who had been appointed by Democrats, compared to 50.91 percent of Democratic appointees who replaced Republican-appointed judges taking senior status). Nevertheless, Republican presidents were able to appoint a slightly higher percentage of judges who were expected to be decidedly closer to the president and ideologically distant from their predecessors (29.31 percent compared to 23.64 percent of ideologically distant judges appointed by Democrats).

In Table 3, we break these data down further by party and by president. Notably, presidents do not have equal opportunities to influence the composition of the bench through the replacement of senior judges. Among recent Republican presidents, for example, George H.W. Bush appointed far fewer judges, but among those appointments, he was able to replace a significant number of judges appointed by Democratic presidents. Fully 60 percent (15 of 25) of G.H.W. Bush's judges replaced

Democrat-appointed judges who took senior status, compared to 42 percent for Reagan (18 of 43 appointments) and only 25 percent for G.W. Bush (12 of 48 appointments). In addition to statutory changes that altered financial incentives to take senior status, Democrat-appointed active judges were more likely to depart during George H.W. Bush's presidency given the long period of Republican control of the White House.

Furthermore, all Republican presidents demonstrated similar behavior when it came to replacing judges appointed by Republicans. Over 90 percent of Republican replacements for Republican-appointed judges held policy views that were similar to their predecessors. When it came to replacing judges appointed by Democrats who assumed senior status, Republican presidents frequently appointed judges who shared the appointing administration's views, with two-thirds of these successors holding more conservative views than their Democratic predecessors. Of the judges appointed by Reagan, 44 percent were expected to be more conservative than the Democrat-appointed senior judges. For G.H.W. Bush, this increased to 73.33 percent, and for G.W. Bush, it increased further to 91.67 percent. Thus, during this time period, Republican presidents have increasingly been in a position to replace judges taking senior status with those who hold views that are more favorable to the president.

With respect to the two Democratic presidents in our analysis, fewer opportunities to alter the composition of the bench were evident. Although Carter had only three opportunities to replace judges taking senior status who were appointed by Republicans, two of the three were replaced by ideologically-distant successors who would presumably share Carter's views. President Clinton, on the other hand, had 25 opportunities to replace Republican-appointed judges assuming senior status, and he used these opportunities to appoint more liberal

judges 44 percent of the time. Compared to his most recent Republican peers, Clinton did not generate the same potential policy impact when replacing opposite-party judges.³⁶ Indeed, scholarship on trends in judicial decision making note that Clinton's appointees did not have particularly strong voting records of liberalism.³⁷

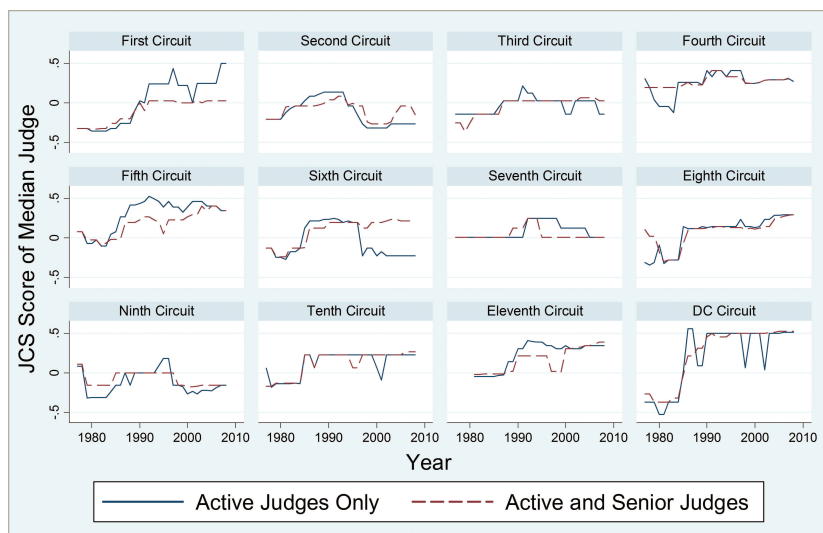
In the final stage of our analysis, we are interested in determining how the ongoing presence of senior judges affects the ideological composition of the circuit courts. Our earlier results suggested that the ongoing presence of senior judges affects the partisan composition of the bench in the aggregate (Figure 5). But, how might senior judges affect the presumed ideological center of the circuits? For this part of our analysis, we again rely on the JCS scores, using them to identify the median judge for each circuit, annually, from 1977 to 2008. In Figure 6, we present data comparing the annual median JCS score for each circuit's active judges with the annual median JCS score among all (active and senior) judges on each circuit. The position of the median among active judges is important in the light of en banc review. However, most case law from a circuit represents the decisions of three-judge panels, with en banc review being relatively rare. Thus an examination of the ideological composition of the full bench, including senior status judges, is important to our understanding of the potential policy impact of the U.S. Courts of Appeals.

In some circuits, the ongoing presence of senior judges had little effect on the expected ideological middle of the court. In the Eighth Circuit, for

36. We should note here that the ideological opportunity presented to the president is influenced by the state where the created vacancy resides. Since JCS scores are influenced by the identity and ideology of the home-state senators (if of the president's party), the expected ideology of an appointed judge is reflective of where vacancies arise and which vacancies a president is able to fill. As such, we acknowledge the importance of where positions happen to reside when speaking of a president "taking advantage of" the ability to replace senior judges.

37. Haire, Humphries, and Songer, *supra* n.18.

FIGURE 6. Judicial Common Space Score of Median Circuit Judge, 1977-2008



JCS scores range from -1 to +1, with scores below zero indicating a predicted liberal ideology and those above zero indicating a predicted conservative ideology.

example, aside from the late 1970's when the median active judge was more liberal than the median judge when senior judges were also considered, the ideological center of the court has been very consistent over time, regardless of whether or not senior judges are considered. On the Fifth Circuit, on the other hand, the presence of senior judges has tended to moderate the more conservative ideological predisposition of those on active service. Underlying aggregated indicators of moderation may be differences between those on active and senior status. For example, in the past few years, active judges on the First Circuit have leaned to the "right" in contrast to their more liberal-leaning colleagues on senior status. In the Sixth Circuit, judges on active status lean more to the "left"

than those on senior status. For some circuits (such as the D.C. Circuit), the position of the median judge on active service varied substantially from year to year, contrasting with the consistently moderate predisposition of the senior cohort.

Conclusions

In 1998, Judge Betty Fletcher announced that she would step down from her position on the Ninth Circuit to pave the way for the confirmation of her son to that circuit. Thirteen years later, Fletcher is still hearing cases as a senior status judge. As Alliance for Justice President Nan Aron has noted, "Betty Fletcher is having the last laugh," due to Fletcher's continued ability to "hold down the fort on the far left" of the circuit as a senior status judge.³⁸ Although the circumstances of her decision to take senior status were atypical, Fletcher provides a useful example of how senior status judges can continue to exert an important policymaking presence on the court long after they have given up active status. This is particularly the case when the senior judge remains on the bench during an opposite-party administration

interested in making its own ideological mark on the bench.

Federal judges have an option unlike most other professionals, save perhaps academics. They need not make a stark choice between career and retirement; judges can take the status of emeriti by taking senior status. Previous research has focused on the complexities of the choice; however, the consequences of the senior status option go beyond the immediate impact of the choice. Once a judge takes senior status, her contribution is not necessarily diminished and, therefore, there are heady implications for those who study judicial decision-making and presidential legacies, particularly when we consider that in the past few decades the party holding the White House changes fairly quickly when compared to earlier eras in our history.

With partisan control of the White House shifting back to the Democrats after the 2008 election, President Obama's ability to influence the makeup of the active federal appellate bench has been affected by the partisan and ideological background of those judges who have elected to take senior status during his presidency.³⁹ By the midterm, Obama had named 15 judges to the US Courts of Appeals, with seven replacing those who had been appointed by Republicans.⁴⁰ These appointments have pushed the partisan composition slightly toward the Democratic side as more recent vacancies are being created by the departure of judges appointed by Reagan and G.H. Bush. The senior bench that Obama inherited now weighs heavily in favor of Republicans, with nearly three-fourths of senior judges having been appointed by Republican presidents (see Table 1). This reality only serves to heighten the challenge facing President Obama in changing the partisan and ideological composition of the judiciary.⁴¹ As active judges appointed by Republicans take senior status, they are not leaving the bench altogether, continuing to hear cases with their colleagues on the active bench. Understanding the potential

38. Shapiro, *Judge Betty's Revenge: Conservatives Thought They'd Sidelined the 9th Circuit's Lion on Liberalism. They were Wrong*, at 1 and 7, *Seattle Weekly*, Aug. 9, 2009. <http://www.seattleweekly.com/content/printVersion/744151/>, last accessed June 14, 2011.

39. Goldman, Slotnick, and Schiavoni, *Obama's Judiciary at Midterm: The Confirmation Drama Continues*, 94 *JUDICATURE* 262-303 (2011), at 298-300.

40. *Ibid.* n 39.

41. *Ibid.* at 300.

policy impact of the Obama cohort will require taking into account these dynamics. More broadly, our analysis suggests the need to re-evaluate research that examines presidential policy legacies on the lower federal courts. Consistent conservative (or liberal) appointments may not yield the predicted changes in judicial decision making due to the presence of a large and moderating senior cohort.

Furthermore, as the number of senior status judges increases on the bench and their successors' nominations remain stalled due to partisan gridlock, the probability that senior judges will be selected to hear a case increases. Increased reliance on senior judges may obviate recognition of problems generated by the high number of vacancies on the appeals court bench. Although the conventional wisdom is that senior judges, district court judges sitting by designation, and other visitors fill a need without generating a cost to the judiciary, the consequences of relying on non-active judges deserve further study. ★

LISA M. HOLMES

is an associate professor at the
University of Vermont.
(lisa.m.holmes@uvm.edu)

RORIE L. SPILL SOLBERG

is an associate professor at Oregon
State University.
(rorie.spillsolberg@oregonstate.edu)

SUSAN B. HAIRE

is an associate professor at the
University of Georgia.
(cmshaire@uga.edu)