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# An Empirical Analysis of Conservative, Liberal, and Other "Biases" in the United States Courts of Appeals for the Eighth & Ninth Circuits

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## An Empirical Analysis of Conservative, Liberal, and Other “Biases” in the United States Courts of Appeals for the Eighth & Ninth Circuits

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Robert Steinbuch\*

### I. INTRODUCTION

The Supreme Court is, by definition, at the pinnacle of our federal system; therefore, many legal scholars properly focus their scrutiny on its actions and decisions. While this focus and scrutiny is warranted, academics should not ignore the importance of the federal courts of appeals, the courts of last resort for virtually all federal litigants.<sup>1</sup> After all,

[t]he decisions of the lower courts are rarely reviewed by the Supreme Court; [as such,] their decisions are effectively final. As a

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<sup>1</sup> CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 3 (2006).

result, the courts of appeals play an exceedingly large role both in settling disputes and determining the likely direction of the law. It is for this reason that the likely votes of lower court nominees have played a significant role in national debates.<sup>2</sup>

Moreover, when investigating courts, including the federal courts of appeals, contemporary researchers should employ the investigatory tool appropriately adopted by other disciplines interested in scientific and testable theories—empirical analysis.<sup>3</sup> Indeed, “[a] dearth of quantitative scholarship has been a serious shortcoming of legal research . . . [and w]hen hypotheses cannot be tested by means of experiments . . . and the results assessed rigorously by reference to the conventions of statistical inference, speculation is rampant and knowledge meager.”<sup>4</sup> Empirical research is posited on the belief that “[i]t is never easy to evaluate judges, or to evaluate their [anecdotal] evaluators, especially when those evaluators insist on anonymity . . . , [and given that] data on judicial performance exist, and although the data have problems as well, they provide a firmer basis for evaluation.”<sup>5</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> See Robert Steinbuch, *An Empirical Analysis of the Influence of Political Party Affiliation on Reversal Rates in the Eighth Circuit for 2008*, 43 LOY. L.A. L. REV. 51 (2009) [hereinafter Steinbuch, *An Empirical Analysis*]; Robert Steinbuch, *Further Empirical Insights and Discussion of the Eighth Circuit*, 44 LOY. L.A. L. REV. 339 (2011) [hereinafter Steinbuch, *Further Empirical Insights*].

<sup>4</sup> RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 411 (2001); see also ROBERT LAWLESS ET AL., *EMPIRICAL METHODS IN LAW* 4 (2009).

There is some empirical evidence (as seems fitting to cite) that the use of empirical techniques for investigating law is the most discernible recent trend in legal scholarship. Law schools are now full of scholars who are less persuaded by argumentation and more persuaded by empirical evidence. We think the next generation of judges, lawyers, legislators, and other policy makers trained by these legal scholars will be similarly more persuaded by empirical results (footnote omitted).

*Id.*; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 339.

<sup>5</sup> Eric Posner, *Judge Sonia Sotomayor: What the Data Show*, VOLOKH CONSPIRACY (May 13, 2009, 11:40 AM), <http://volokh.com/posts/1242229209.shtml>; see also Steinbuch, *Further Empirical Insights*, *supra* note 3, at 340; cf. Nicholas Wade, *A*

Quantitative legal scholarship, however, has not garnered universal appeal. For example, one academic echoing this sentiment wrote:

I eschew empirical descriptions of how female judges are doing their jobs, taking a more anecdotal approach. . . . While it has become fashionable in legal academic circles for scholars to rely on or even conduct empirical research, there is much to be gained by other forms of knowledge. Cases tell stories.<sup>6</sup>

Legal academics who shun quantitative examination in favor of finger-in-the-air analyses often do so as a consequence of a lack of aptitude in the scientific approach of statistical analysis.<sup>7</sup> But, “[r]efocusing legal scholarship on what the data actually shows, rather than fuzzy case studies or suppositions about testable realities, would help increase the likelihood of legal scholarship producing meaningful real world effects.”<sup>8</sup> Fortunately, empirical analyses—such as the investigation that follows—are emerging as the critical tool for the advancement of legal research through the examination of, *inter alia*, judges.<sup>9</sup>

In this paper, I continue to analyze the effect that several attributes of a trial judge have on whether the judge is reversed by a federal circuit court of appeals.<sup>10</sup> I consider the political party of the trial judge, the gender of the trial judge, whether the trial judge was active or not (i.e., whether the judge

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*Decade Later, Gene Map Yields Few New Cures*, N.Y. TIMES, June 13, 2010, at A1, available at [http://www.nytimes.com/2010/06/13/health/research/13genome.html?\\_r=1&pagewanted=all#](http://www.nytimes.com/2010/06/13/health/research/13genome.html?_r=1&pagewanted=all#). “One can prefer to be an optimist or a pessimist, but the best approach is to be an empiricist.” *Id.*

<sup>6</sup> Theresa M. Beiner, *Female Judging*, 36 U. TOL. L. REV. 821, 821–22 (2005); see also Steinbuch, *Further Empirical Insights*, *supra* note 3, at 340.

<sup>7</sup> See Steinbuch, *Further Empirical Insights*, *supra* note 3, at 351.

<sup>8</sup> Geoffrey Christopher Rapp, *Doctors, Duties, Death and Data: A Critical Review of the Empirical Literature on Medical Malpractice and Tort Reform*, 26 N. ILL. U. L. REV. 439, 441 (2006); see Tracy E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141 (2006).

<sup>9</sup> See LAWLESS ET AL., *supra* note 4 at 172; see also Steinbuch, *Further Empirical Insights*, *supra* note 3, at 340.

<sup>10</sup> See Steinbuch, *An Empirical Analysis*, *supra* note 3, at 52–58; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 341–42.

was senior status with a reduced load), the number of appeals taken from the judge's decisions that year, the type of cases appealed, and the interactions of the above factors.<sup>11</sup> I conducted this analysis for the most liberal and the most conservative circuits with the hope of revealing some differences between them. Some expectations proved true, others did not, and still other unforeseen patterns emerged. Both the predicted and surprising patterns are informative, even assuming a lack of consensus on cause, because such patterns can frequently assist in predicting appellate outcomes.<sup>12</sup>

## II. EIGHTH AND NINTH CIRCUIT INVESTIGATIVE INQUIRY

### *A. Choosing the "Right" and "Left" Circuits*

My primary (but not exclusive) inquest was to determine whether decisions of appellate courts are affected by the political makeup of the judges on those courts. As such, I sought to compare the most conservative and liberal circuits of the US Courts of Appeals.

An analysis and comparison of the most polarized circuits would best demonstrate any party effect at the appellate level (i.e., greater level of reversal resulting from disparity between the party of the trial judge and the party of the appellate panel), because the less politically balanced the court, the lower the chances that intra-circuit, individual-panel decisions with opposing bias would offset each other in an aggregate analysis. That is, for example, if a court produced five liberally biased opinions and five conservatively biased opinions, a cumulative analysis would not well perceive any political bias. If, however, the political bias largely goes in one direction—i.e., if the individual panels are in phase politically—the bias is far more readily observed. To be clear, however, from the perspective of an

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<sup>11</sup> See Steinbuch, *An Empirical Analysis*, *supra* note 3, at 52–58; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 341–42.

<sup>12</sup> See Steinbuch, *Further Empirical Insights*, *supra* note 3, at 343.

individual undefined litigant—someone in the original Rawlsian position behind the veil of ignorance, one might say—the court with the offsetting biases is no better than the one with the apparent slant. Indeed, the latter situation may be better, *a priori*, because it at least offers predictability to litigants, which is absent from the former situation.

In addition, the comparison of the most polarized circuits better reveals party effect at the appellate level, because, as discussed below, a phenomenon known as the “panel effect” causes panels on single-party dominated circuits to more greatly express political biases.<sup>13</sup> Thus, choosing the most polarized circuits allows for the exploitation of this effect.

It was relatively straightforward to select the most polarized opposing circuits. The Eighth Circuit is the most “right” circuit.<sup>14</sup> It is composed overwhelmingly of judges affiliated with the Republican party. All but three were Republican at the time of the initial investigation (2008), and it has the most Republican judges (nine of its eleven active judges) of any US court of appeals.<sup>15</sup> President George W. Bush appointed seven of them,<sup>16</sup> and, to date, President Barack Obama has appointed none. As such, the appellate panels are almost invariably Republican dominated, if not entirely so.<sup>17</sup>

The Ninth Circuit, in contrast, is the most “left” circuit—although it is not as far left as the Eighth Circuit is far right (I use the attitudinal model, described below, to determine this measurement). The Ninth Circuit has had slightly more than half of its judges appointed by Democratic presidents (57 percent).<sup>18</sup>

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<sup>13</sup> SUNSTEIN ET AL., *supra* note 1, at 83.

<sup>14</sup> See Steinbuch, *Further Empirical Insights*, *supra* note 3, at 349.

<sup>15</sup> *Infinity Project: Talking Points*, HUBERT H. HUMPHREY SCH. OF PUB. AFFAIRS, <http://www.hhh.umn.edu/centers/wpp/infinity/> (last visited May 25, 2012).

<sup>16</sup> *Id.* President Clinton appointed seven of the Second Circuit’s thirteen active judges. *Id.*

<sup>17</sup> See Steinbuch, *Further Empirical Insights*, *supra* note 3, at 349.

<sup>18</sup> *Id.*; LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 109 (2005). The Ninth Circuit might have had a larger percentage of Democratic appointees, but,

### *B. Eighth and Ninth Circuit Modeling*

This ongoing study is composed of three distinct elements. I began my study of the Eighth Circuit in 2008, and presented some preliminary findings shortly thereafter. I initiated the study of the Ninth Circuit in 2010, exclusively for this article—this data has never before been examined. And in 2011, I updated and expanded the data sets for the Eighth Circuit to obtain the latest available information for the most critical comparisons with the Ninth Circuit.

In developing the initial model to test the likelihood of reversal in various circuits in light of literature in the field,<sup>19</sup> I considered the party of the judge,<sup>20</sup> whether the judge was active or not, the number of appeals taken from the judge's decisions that year, the type of cases appealed, and the interactions of these factors.<sup>21</sup> The gender variable was added later.

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The Senate took twice as long to process Clinton's nominees to the Ninth than it did for all of his appointees (five months versus ten months). Conservatives in the Senate, [two researchers said], believed that 'confirming Clinton nominees [to the Ninth] would have squandered a potential opportunity to reverse the liberal tilt of a precariously balanced court.

*Id.*

<sup>19</sup> See, e.g., *id.* at 143–44; DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 157–60 (1997); RICHARD A. POSNER, HOW JUDGES THINK 174 (2008); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87 (2008); Harry Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 837–38 (1991); Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 827–28 (1990); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 433–34 (2004); Joanna M. Shepard, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 171 (2009); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 614 (2004); see also Steinbuch, *Further Empirical Insights*, *supra* note 3, at 341; see generally SUNSTEIN ET AL., *supra* note 1.

<sup>20</sup> See, e.g., EPSTEIN & SEGAL, *supra* note 18; KENNEDY, *supra* note 19; POSNER, *supra* note 19; SUNSTEIN, *supra* note 1; Choi & Gulati, *supra* note 19, at 87; Edwards, *supra* note 19, at 837; Epstein, *supra* note 19; Shepard, *supra* note 19; Staudt, *supra* note 19, at 79; see also Steinbuch, *An Empirical Analysis*, *supra* note 3, at 51.

<sup>21</sup> For example, my study analyzed the interaction of political party and the number of appeals taken from each judge to see whether any disparity in reversal rate that correlated

These investigative variables were chosen to examine the following primary and secondary questions:

- Does the political identity of a trial judge correlate to how likely she is to be overturned?<sup>22</sup> A positive correlation could be caused by a disparity in the view of the law, the view of the role of judges, and/or differences in world view between the trial judge and the appellate court.<sup>23</sup> Indeed, the appellate court could be biased against judges of a particular political party, making them more likely to overturn district judges of the other party.<sup>24</sup>
- Does a trial judge's status as active or senior correlate to reversal rate?<sup>25</sup> A positive correlation could be caused by a decreased competence of the trial judge incident to age.<sup>26</sup> It could be caused by the appellate

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to political affiliation of the trial judge could also be related to the fact that more appeals were taken from judges of one party. The data presented no such interaction. I did not include other factors in the regression analysis, such as who won at the trial level or whether the variable was highly collinear with my included factors (e.g., party affiliation). See, e.g., Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1585 (2008) (using this variable would result in multicollinearity, thereby undermining the study's results). The best regression models are those in which the independent variables each correlate highly with the dependent variable, but correlate only minimally with each other. Such a model is often called "low noise" and will be statistically robust; in other words, it will predict reliably across numerous samples of variable sets drawn from the same statistical population. Statisticians and empiricists strive to eliminate multicollinearity in their studies. See LAWLESS ET AL., *supra* note 4, at 326 (discussing the risks of multicollinearity and the need to avoid it: "[t]he most obvious method of avoiding the problems associated with multicollinearity is to think carefully about the independent variables that you will include and *not* to include those that are likely to be collinear") (emphasis added); see also Steinbuch, *An Empirical Analysis*, *supra* note 3, at 51; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 342; cf. LAWLESS ET AL., *supra* note 4, at 236 (regarding the relevance of reporting determinations of no statistically significant correlation of examined factors).

<sup>22</sup> Steinbuch, *An Empirical Analysis*, *supra* note 3, at 52.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 53.

<sup>26</sup> *Id.*

court's *perceived* decrease in competence of the trial judge incident to age.<sup>27</sup> It could be caused by a different world view not reflected in political identity.<sup>28</sup> A negative correlation could be caused by an increased competence of the trial judge incident to age—or the appellate court's *perceived* increase in competence of the trial judge incident to age.<sup>29</sup>

- Does the number of appeals taken from the judge's decisions correlate to reversal rate?<sup>30</sup> A positive correlation could reflect the legal community's understanding that the trial judge at issue is less competent than the norm.<sup>31</sup> Thus, under this theory, lawyers would appeal these judges' decisions more often, and the appellate court would reverse these judges more often.<sup>32</sup>
- Does the case type taken on appeal—e.g., civil or criminal—correlate to reversal rate?<sup>33</sup> A positive correlation might show a propensity of the appellate court not to intervene in one type of case over another.<sup>34</sup>

Later, I added a gender variable to address this inquiry: Does the gender of a trial judge correlate to how likely she is to be overturned? A positive correlation could be caused by a disparity in the view of the law by gender and/or discrimination.

Other variables were not considered to eliminate collinearity, and the interaction of the analyzed terms was studied.<sup>35</sup> For example, I examined whether liberal trial judges' decisions in criminal cases were more likely to

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 54.

be overturned than conservative judges' decisions in criminal cases.<sup>36</sup> A positive correlation could show a particular behavior by liberal trial judges in criminal cases that is disfavored by the appellate court, with no similar "disconnect" for civil cases.<sup>37</sup> For instance, do Republican trial judges have a "law and order approach" in criminal cases more in line with the appellate courts' view of this area of the law—a view which simply does not come into play in civil cases?<sup>38</sup>

One question regarding these analyses is whether the reversal outcomes may be considered independent of the trial judges involved—in other words, whether or not there is a "judge effect." Accordingly, mixed-effect model<sup>39</sup> analyses were conducted that assumed a random effect of the trial judge on reversals; and while some of those results are included here for comparison, there was no empirical evidence for a judge effect. Results from fixed-effect models considering only the factors involved in the hypotheses, assuming independence of the outcome from the individual judges are also included, therefore.

The inquiry conducted for the Ninth Circuit excepted the senior-status variable because this factor was quite small, and proved unavailing in the Eighth Circuit, and because the model was becoming over-parameterized, already requiring additional processing to filter out excess noise.

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<sup>36</sup> *Id.*, at 54; *see, e.g.*, Clermont & Eisenberg, *supra* note 21, at 1585 (showing a correlation between political affiliation and ruling for or against a particular party).

<sup>37</sup> Steinbuch, *An Empirical Analysis*, *supra* note 3, at 54.

<sup>38</sup> *Id.* at 53.

<sup>39</sup> The mixed effects model is essentially a logistic regression analysis, but with an additional error term included to account for gender and title being measured at the level of the judge rather than the individual judgment. The logistic regression is used when predicting the probability of a particular event, in this case, the event that a decision is reversed. The odds of reversing a decision are compared based on various factors (gender, case type, etc.) and the model determines (through the use of P-values) whether the odds of reversal are significantly different for one type of case (or judge) than for another.

### *C. Adopting the Attitudinal Model for Judges' Parties*

For the political party of each judge, I employed the attitudinal model (i.e., coded based on the party of the appointing president).<sup>40</sup>

"The 'attitudinal model,' influential and well known in law and politics, attempts to explain judicial votes in . . . terms" of the political affiliation of judges.<sup>41</sup> This model assigns the political affiliation to judges based upon the party of the appointing president.<sup>42</sup>

This approach circumvents the intractable task of implementing an unbounded continuous variable for political party based on inherently subjective evaluations of philosophy.<sup>43</sup> In fact, "the political affiliation of the appointing president actually provides a more interesting benchmark than ideology itself, assuming we could [even] obtain direct access to [the

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<sup>40</sup> See, e.g., JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64 (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002); Clermont & Eisenberg, *supra* note 21, at 1585 (showing a correlation between political affiliation and ruling for or against a particular party, e.g., plaintiff or defendant); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 302–03 (2004).

Many people believe that political ideology should not and generally does not affect legal judgments, and this belief contains some truth. . . . It might be predicted that even when the law is unclear, ideology does not matter; the legal culture imposes a discipline on judges, so that judges vote as judges, rather than as ideologues. Or it might be predicted that in hard cases, the judges' 'attitudes' end up predicting their votes, so that liberal judges show systematically different votes . . . from those of conservative judges. . . . It is extremely difficult to investigate these questions directly. It is possible, however, to identify a proxy for political ideology: the political affiliation of the appointing president. Presidents are frequently interested in ensuring that judicial appointees are of a certain stripe.

*Id.*; see also Steinbuch, *An Empirical Analysis*, *supra* note 3, at 56; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 342.

<sup>41</sup> SUNSTEIN ET AL., *supra* note 1, at 5–6.

<sup>42</sup> SUNSTEIN ET AL., *supra* note 1, at 5–6.

<sup>43</sup> See, e.g., Clermont & Eisenberg, *supra* note 21, at 1585 (showing a correlation between political affiliation and ruling for or against a particular party, e.g., plaintiff or defendant); see also Steinbuch, *An Empirical Analysis*, *supra* note 3, at 54; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 342.

latter].”<sup>44</sup> And, in any event, “the political party of the appointing president is a fairly good predictor of how individual judges will vote,”<sup>45</sup> because “the decisions of judges . . . reflect the judges’ partisan affiliation, which *just so happens* to coincide often with that of their appointing president.”<sup>46</sup> Studies have aptly demonstrated that despite the fact that “judges are supposed to ‘rise above’ and ‘put aside’ . . . their partisan group affiliations,”<sup>47</sup>

Republican appointees are more likely to uphold the interpretations of Republican administrations than those of Democratic administrations. Democratic appointees are more likely to uphold the interpretations of Democratic administrations than those of Republican administrations. . . . There is a definite “tilt,” on the part of federal judges, in the direction of administrations of the same political party as their appointing president.<sup>48</sup>

Of course, this is no mere coincidence: “However loud the critics may be, the simple reality is that both the Senate and the president take into account nominees’ partisanship and ideology, in addition to their professional qualifications, when they make their decisions, and they always have.”<sup>49</sup> In fact, “across the entire 135-year period, 92.5% of all 3,082 appointments to the lower federal courts (through 2004) have gone to candidates affiliating with the president’s party.”<sup>50</sup>

#### *D. The Logistic Model for Reversal*

A logistic model was used for binary response variable “reversal.” The response in each model is the logit of the probability of an appealed ruling being reversed, i.e.,  $\ln\left(\frac{p}{1-p}\right)$ , where  $p$  denotes the probability of an appealed

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<sup>44</sup> SUNSTEIN ET AL., *supra* note 1, at 7.

<sup>45</sup> *Id.* at 10.

<sup>46</sup> EPSTEIN & SEGAL, *supra* note 18, at 3 (emphasis added).

<sup>47</sup> KENNEDY, *supra* note 19, at 3.

<sup>48</sup> SUNSTEIN ET AL., *supra* note 1, at 43.

<sup>49</sup> EPSTEIN & SEGAL, *supra* note 18, at 26.

<sup>50</sup> *Id.*

ruling being reversed, and  $\{X_1, \dots, X_k\}$  denote the set of explanatory variables.<sup>51</sup>

The logistic model is,

$$\ln\left(\frac{p}{1-p}\right) = \beta_0 + \beta_1 X_1 + \dots + \beta_k X_k$$

Where,

$\{\beta_0, \dots, \beta_k\}$  = the intercept

$\{\beta_1, \dots, \beta_k\}$  = the regression coefficients

$\ln$  = the natural logarithm function

The prediction equation is,

$$P(\text{reversal} | X_1, \dots, X_k) = \frac{\exp(\beta_0 + \beta_1 X_1 + \dots + \beta_k X_k)}{1 + \exp(\beta_0 + \beta_1 X_1 + \dots + \beta_k X_k)}$$

Where,

$\exp$  = the exponential function ( $1/\ln$ )

If  $\beta_0$  is significantly different from zero,  $X_1$  has a significant effect on the likelihood of reversal.<sup>52</sup>

### III. RESULTS—THE EIGHTH CIRCUIT

#### *A. Conclusions on the Eighth Circuit: Political Party Bias*

The primary Eighth Circuit study examined all of the appellate cases from that court of appeals for the 2008 calendar year.<sup>53</sup> The full year ensured, inter alia, that disparity in reversal rates throughout the year would be captured. In other words, if appellate judges deliberated longer about reversing lower courts, reversing certain types of cases, or reversing based

<sup>51</sup> See Steinbuch, *An Empirical Analysis*, *supra* note 3, at 59.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 55.

on, for example, political philosophy, these variations would all be reflected in the analysis. This data is presented in Tables 1.0-1.1.

**Table 1.0. Eighth Circuit—Reversals Based on Case Type  
(2008 Data)**

<b>Total Appealed</b>	<b>Civ. Appealed</b>	<b>Crim. Appealed</b>	<b>Total Reversed</b>	<b>Civ. Reversed</b>	<b>Crim. Reversed</b>
1068	488	580	192	94	98

**Table 1.1. Eighth Circuit—Reversals Based on Party  
(2008 Data)**

<b>Total Appealed</b>	<b>Dem. Appealed</b>	<b>Repub. Appealed</b>	<b>Total Reversed</b>	<b>Dem. Reversed</b>	<b>Repub. Reversed</b>
1068	457	611	192	100	92

The conclusion of the Eighth Circuit empirical study for the 2008 data was a distinct, statistically significant correlation between a district court judge's political affiliation and the rate at which the Eighth Circuit reversed the judge on appeal.<sup>54</sup> Democratic trial court judges were reversed on appeal by the Eighth Circuit approximately one and a half times more often than district court judges affiliated with the Republican Party.<sup>55</sup>

Of all of the variables considered, only the party variable showed a statistically significant correlation, as demonstrated in Table 1.2. Note that two p-values are presented for each variable. The first p-value presented is from a fixed-effects model that considers the outcomes of each judge's appealed trials to be independent of one another. The second is from a mixed-effects model that assumes there is a random contribution of each judge to the probability of reversal, in addition to the other factors

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<sup>54</sup> *Id.* at 61; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 342.

<sup>55</sup> See Steinbuch, *An Empirical Analysis*, *supra* note 3, at 61; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 342.

considered. This mixed model essentially considers trial results to be grouped by judge and takes into account that the variables title and party are properties of these judges. Both p-values are presented, as there was minimal evidence that the individual judges contributed to the variability in the probability of reversal (in each case, the covariance of the judges with respect to the logit response was not significantly different from zero). The AIC and BIC<sup>56</sup> values presented are from the fixed-effects models only.

**Table 1.2.<sup>57</sup> Logistic Regression Results for Probability of Reversal for All Appealed Cases**

Model	Explanatory variables included	P-value (fixed-effects model)	P-value (mixed-effects model)	AIC	BIC
1	Title (Senior)	0.3123	0.3264	1009.113	1019.060
2	Party (Democrat)	0.0042	0.0086	1001.986	1011.933
3	Total Appealed	0.1131	0.1184	1007.577	1017.524
4	Type (Criminal)	0.3162	0.3214	1009.165	1019.112
5	Party (Democrat)	0.0132	0.0214	1006.155	1031.023
	Title (Senior)	0.5093	0.4879		
	Type (Criminal)	0.5102	0.4626		
	Total Appealed	0.3280	0.3398		

<sup>56</sup> AIC stands for "Akaike Information Criteria." BIC stands for "Bayesian Information Criteria." These values are adjusted versions of the "likelihood" of the model—how likely it is that the model could produce the data at hand. Because of the adjustment, the lower the AIC and BIC, the more likely the model is to be able to produce the data.

<sup>57</sup> See Steinbuch, *An Empirical Analysis*, *supra* note 3, at 61; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 346.

The showing of a dramatic and statistically significant correlation between party affiliation and reversal rate most likely reveals that the judicial viewpoint of the largely Republican Eighth Circuit is more in line with the perspective of the Republican district judges when compared to their Democratic colleagues.<sup>58</sup> As such, this study “provides [further] information on the relationship of what might be called ‘political ideology’ and judicial judgments.”<sup>59</sup>

The visibility of this party effect is enhanced because the Eighth Circuit is overwhelmingly Republican—with nine Republicans amongst its eleven active judges during the initial study period (with President George W. Bush appointing seven of them).<sup>60</sup> As such, the appellate panels were almost invariably Republican dominated, if not entirely so.<sup>61</sup>

For “panels [that] are unified—a likelier event in periods in which a large majority of judges have been appointed by [p]residents of a single party—we would expect to see much larger party differences.”<sup>62</sup> Unified panel composition amplifies the ideological voting pattern, party effect of the mostly Republican Eighth Circuit because judges on an appellate panel tend to be influenced by the other judges on their panel—i.e., the “panel”<sup>63</sup> or “whistleblower” effect.<sup>64</sup> Thus, a panel made up of judges of all one party will not worry that a nonpartisan “whistleblower may be willing to expose the [remaining] majority’s deviant [decision-making] behavior by means of a dissent that might draw the attention of the high court and possibly lead to a reversal of the appellate court’s decision.”<sup>65</sup> In fact,

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<sup>58</sup> See Steinbuch, *An Empirical Analysis*, *supra* note 3, at 61; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 346.

<sup>59</sup> SUNSTEIN ET AL., *supra* note 1, at 4.

<sup>60</sup> *Infinity Project: Talking Points*, *supra* note 15; see Steinbuch, *Further Empirical Insights*, *supra* note 3, at 349.

<sup>61</sup> See Steinbuch, *Further Empirical Insights*, *supra* note 3, at 349.

<sup>62</sup> SUNSTEIN ET AL., *supra* note 1, at 83.

<sup>63</sup> *Id.* at vii, 7, 10, 22–23, 45.

<sup>64</sup> EPSTEIN & SEGAL, *supra* note 18, at 117–18, 129.

<sup>65</sup> *Id.* at 118.

[a]mplification effects are so strong that if the data set in the relevant cases is taken as a whole, Democratic appointees sitting with two Democratic appointees are about *twice* as likely to vote in the stereotypically liberal fashion as are Republican appointees sitting with two Republican appointees. This is a far larger disparity than the disparity between Democratic and Republican votes when either is sitting with one Democratic appointee and one Republican appointee.<sup>66</sup>

One group of researchers believes that this effect reflects the “pervasive process that leads like-minded people to go to extremes.”<sup>67</sup> Regardless of the cause, the effect exists.

Moreover, putting aside the panel effect for a moment, a more politically balanced court would also, at least partially, mask intra-circuit party effect, even if it was significant, because strongly Democratically “biased” panel decisions would be offset in the data by strongly Republican “biased” panel decisions.

To slightly alter the sentiment of one academic (who was speaking about the effect of the political parties of the circuit judges that litigants on appeal encounter), “[t]he political affiliation of the appointing president [of trial judge within the Eighth Circuit] is hardly everything. But there can be no doubt that the litigant’s chances [on appeal to the Eighth Circuit] . . . are significantly affected by the luck of [this original] draw.”<sup>68</sup>

For sure, the study *alone* does not propose that the Eighth Circuit consciously considers the political affiliation of the judge whose opinion is under review.<sup>69</sup> More reasonably, the study validates the notion that judicial decision-making is a product of many factors, including judges’ political philosophies and the amplification (panel) effect.<sup>70</sup> Two academics suggest that this effect is demonstrable because “[f]ederal judges . . . are more often

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<sup>66</sup> SUNSTEIN ET AL., *supra* note 1, at 10.

<sup>67</sup> *Id.* at 86.

<sup>68</sup> *Id.* at 12.

<sup>69</sup> See Steinbuch, *Further Empirical Insights*, *supra* note 3, at 346.

<sup>70</sup> See *id.* at 346–47; Steinbuch, *An Empirical Analysis*, *supra* note 3, at 64–65.

than not ideological rather than principled decision makers, and ideological in ways that their nominating presidents would applaud.”<sup>71</sup> Another posits that “an informed observer might [rightfully] be suspicious of the claim that legal discourse, and particularly legal policy argument, is autonomous from ideological discourse.”<sup>72</sup> And while academics, jurists, and politicians, among others, disagree on whether any certain political philosophy should be disqualifying,<sup>73</sup> the underlying idea that political philosophies do, in fact, affect how judges act is fortified through this research.<sup>74</sup>

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<sup>71</sup> EPSTEIN & SEGAL, *supra* note 18, at 119.

<sup>72</sup> KENNEDY, *supra* note 19, at 157.

<sup>73</sup> See also Robert Steinbuch, *Bonding Justice*, 80 MISS. L.J. 377, 385 n.9 (2010) (citing Peltz, *infra*); Steinbuch, *Further Empirical Insights*, *supra* note 3, at 347; cf. Richard J. Peltz, *From the Ivory Tower to the Glass House: Access to De-Identified Public University Admission Records to Study Affirmative Action*, 25 HARV. BLACK LETTER L.J. 181, 197 n.23 (2009) (discussing how a University of Arkansas at Little Rock, Bowen Law School administrator suggested that individuals with a certain political or philosophical preference should be excluded from certain decision-making positions). Compare CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 188 (2007).

In this way, each and every justice has identified some set of values and principles that, in his or her view, deserve judicial protection. Values and principles of this kind, define a justice’s judicial philosophy. . . . When the president nominates a justice, the Senate must assess the nominee’s judicial philosophy and determine whether it is sound enough to warrant confirmation.

*Id.*, with Michael Saul, *Supreme Court Nominee Sonia Sotomayor ‘Open,’ Will Follow Law on Abortion Issue, Says Friend*, N.Y. DAILY NEWS, May 29, 2009, [http://www.nydailynews.com/news/politics/2009/05/29/2009-05-29\\_supreme\\_court.html](http://www.nydailynews.com/news/politics/2009/05/29/2009-05-29_supreme_court.html) (“[Supreme Court nominee Sonia Sotomayor] will follow what she thinks is the law on that, and her personal beliefs will not interfere with that analysis because my view of her is that she does not allow her personal beliefs to interfere with her analysis of legal issues.”).

<sup>74</sup> See Steinbuch, *Further Empirical Insights*, *supra* note 3, at 347; see also Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007); but see Michael A. Wolff, *Law Matters: What Do Judges Believe . . . Really?*, YOUR MO. CTS. (Feb. 27, 2006), <http://www.courts.mo.gov/page.jsp?id=1080>.

Court opinions are not personal beliefs. Supreme Court opinions are directed at one result: resolving a legal dispute. They do not necessarily reflect any judge’s personal views about the subject matter, nor are they pronouncements of political policy. A review of the Court’s opinions would show that decisions

While I have discussed the likely reason for the correlation, the benefit of the Eighth Circuit findings is that correlation *itself* is helpful, particularly regarding a factor out of the control of litigants.<sup>75</sup> Correlation is often able to inform despite a lack of consensus on cause because it alone frequently aids in predicting appellate outcomes.<sup>76</sup> In this situation, the previously described findings inform a litigant in the Eighth Circuit who lost in the district court that he has a better (albeit still not high) chance of winning on appeal if the trial judge was a Democrat.<sup>77</sup>

Prediction of success is of paramount importance in the system for several reasons. In the course of litigation, lawyers constantly make strategic decisions and/or advise their clients on the basis of these predictions. Attorneys make decisions about future courses of action, such as . . . whether to advise the client to enter into settlement negotiations, and whether to accept a settlement offer or proceed to trial. Thus, these professional judgments by lawyers are influential in shaping the cases and the mechanisms selected to resolve them. Clients' choices and outcomes therefore depend on

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are based on laws enacted by the General Assembly, previous court decisions, court rules, constitutional provisions or other guiding legal authority. Different judges may differ on what a legal provision means or what legal principle controls a case. An individual judge may write a separate opinion dissenting or concurring with the opinion of the Court; there you may find an expression of one judge's individual views about what a legal provision means or what legal principle should control. . . . Judges, as other citizens, have personal beliefs. When citizens come to courts to serve as jurors, we instruct them to set aside their persons beliefs and decide cases based on the law and the facts. The same is true for judges, who take an oath to do just that.

*Id.* See generally EILEEN BRAMAN, LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING (2009) (discussing how judges' views affect outcomes in judicial decisions and how judges unconsciously find legal authority to support their preferences, while recognizing that some factors limit the judges' ability to impose their personal views).

<sup>75</sup> Steinbuch, *An Empirical Analysis*, *supra* note 3, at 65; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 343.

<sup>76</sup> Steinbuch, *Further Empirical Insights*, *supra* note 3, at 343.

<sup>77</sup> *Id.* at 346.

the abilities of their counsel to make reasonably accurate forecasts concerning case outcomes.<sup>78</sup>

Thus, an attorney considering whether to appeal to the Eighth Circuit should look at the party of the trial judge from whom the appeal is taken to aid in making a more accurate, critical prediction of success. And, *all else being equal*, an attorney in the Eighth Circuit should be more inclined to appeal decisions of Democratic district judges.<sup>79</sup>

### *B. Gender Analysis of the Eighth Circuit*

The Eighth Circuit's heavily Republican composition served to motivate an additional examination, conducted in 2011 (with 2008 data), of whether the gender of the appealed district judge correlates with reversal in that Court. Recall that the hypothesis behind the party-affiliation inquiry was that politically like-minded appellate judges would look more favorably on the decision-making of district judges with similar philosophies. Moreover, the theory posited that any political bias in the Eighth Circuit would be highly apparent because it would point in one direction—i.e., Republican. And, as discussed, that theory proved true. This conclusion prompted an analysis of gender bias because as Republican as the Eighth Circuit is, it is even more male. The Eighth Circuit has only one female judge, and she is a

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<sup>78</sup> Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133, 134 (2010); see Steinbuch, *Further Empirical Insights*, *supra* note 3, at 344.

<sup>79</sup> The study of the Eighth Circuit also disclosed that only nine out of the over sixty district judges in the Eighth Circuit were reversed for abusing their discretion more than once in 2008, which constituted over half of all of the reversals under the abuse of discretion standard by the Eighth Circuit in 2008. These judges are Judge Gary A. Fenner, Western District of Missouri; Judge Fernando J. Gaitan, Jr., Western District of Missouri; Judge Jean C. Hamilton, Eastern District of Missouri; Judge Charles B. Kornmann, District of South Dakota; Judge Nanette K. Laughrey, Western District of Missouri; Judge James M. Rosenbaum, District of Minnesota; Judge Karen E. Schreier, District of South Dakota; and Judge William R. Wilson, Jr., Eastern District of Arkansas. The remaining minority abuse of discretion cases were shared by twenty-one judges. See Steinbuch, *An Empirical Analysis*, *supra* note 3, at 73–78, Table B; Steinbuch, *Further Empirical Insights*, *supra* note 3, at 349.

Democrat. The Eighth Circuit trails behind all other non-specialty circuits in appointing women. The data from 1995 through 2008 (the year of the original Eighth Circuit data analyzed herein) for male and female judges in the US courts of appeals is detailed below.<sup>80</sup> However, notwithstanding the stark gender disparity, the gender variable had no effect. Thus, notwithstanding that the Eighth Circuit is extremely male-populated, it treats decisions from its diverse district courts the same, regardless of whether the trial judges are male or female.

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<sup>80</sup> *Infinity Project: Case Statement*, HUBERT H. HUMPHREY SCH. OF PUB. AFFAIRS, <http://www.hhh.umn.edu/centers/wpp/infinity/> (last visited May 25, 2012). In 1993, Judge Diana Murphy (at the request of the Eighth Circuit's chief judge) organized and appointed a gender task force for the Eighth Circuit. *Id.* The task force calculated that the Eighth Circuit mostly employed women. *Id.* Women held 73 percent of the staff positions; 65 percent of management positions were occupied by men. *Id.* And, as discussed, Eighth Circuit judges were, save one, all male. *Id.*

The Infinity Project [views . . . t]he existence of only one female judge on the Eighth Circuit bench in unacceptable in light of the significant number of qualified women and the situation should be remedied as soon as possible. . . . The infinity Project believes it is necessary to have a bench that reflects the society as a whole in order that judicial decisions reflect public policy that takes into account differing life experiences and points of view.

*Id.*; Lisa Montpetit Brabbit, *Infinity Project Seeks to Close the Gender Gap on the 8th Circuit*, ST. THOMAS LAWYER (Winter 2009), <http://www.stthomas.edu/lawmagazine/2009/Winter/Infinity.html>.

The Infinity Project, created in 2008, sees the gender gap . . . as a judicial tragedy demanding both attention and action. The Infinity Project is a coalition of lawyers, scholars, community leaders and organizations working to increase the gender diversity of the federal bench to ensure the quality of justice in the 8th Circuit.

*Id.*

**Table 2.0. Male and female appointments in all United States Courts of Appeals from 1995–2008**

<b>Circuit</b>	<b>Female Appointments</b>	<b>Male Appointments</b>
<b>First</b>	1	2
<b>Second</b>	2	6
<b>Third</b>	1	9
<b>Fourth</b>	1	5
<b>Fifth</b>	3	4
<b>Sixth</b>	4	7
<b>Seventh</b>	3	2
<b>Eighth</b>	0	9
<b>Ninth</b>	6	14
<b>Tenth</b>	1	8
<b>Eleventh</b>	0	4
<b>District of Columbia</b>	1	3

Only the Eighth and Eleventh Circuits had no female appointments during the relevant time period. The Eighth Circuit had nine male appointments, while the Eleventh had only four. Moreover, a large portion of the district judges in the Eighth Circuit was also male. Such a stark bifurcation on both courts should allow any gender-based reversal correlation, *if one exists*, to be readily apparent. Consequently, I added a gender variable and re-ran the 2008 Eighth Circuit analysis. The data follows.

Tables 2.1–2.2 show that a somewhat larger proportion of district judges in the Eighth Circuit were appointed by Republican presidents than Democratic presidents, and that over 85 percent of district judges in the Eighth Circuit sample are male.

**Table 2.1. Frequency Table of Political Parties for District Judges in the Eighth Circuit**

<b>Party</b>	<b>Frequency</b>	<b>Percent</b>
<b>R</b>	40	58.82
<b>D</b>	28	41.18
<b>Total</b>	68	100.00

**Table 2.2. Frequency Table of District Judges' Genders in the Eighth Circuit**

<b>Gender</b>	<b>Frequency</b>	<b>Percent</b>
<b>F</b>	10	14.71
<b>M</b>	58	85.29
<b>Total</b>	68	100.00

However, this data includes six male judges (three Democratic and three Republican) who did not have any rulings appealed during the examined time period. So Tables 2.1 and 2.2 are recalculated below based only on judges included in the analysis. These results are shown in Tables 2.3 and 2.4, respectively.

**Table 2.3. Frequency Table of Appointing Political Parties for District Judges in the Eighth Circuit, Appealed Judges Only**

<b>Party</b>	<b>Frequency</b>	<b>Percent</b>
<b>R</b>	37	59.68
<b>D</b>	25	40.32
<b>Total</b>	62	100.00

**Table 2.4. Frequency Table of Genders of District Judges in the Eighth Circuit, Appealed Judges Only**

<b>Gender</b>	<b>Frequency</b>	<b>Percent</b>
<b>F</b>	10	16.13
<b>M</b>	52	83.87
<b>Total</b>	62	100.00

Finally, the combination of gender and party traits is examined below. Table 2.5 indicates the number and percentage of district judges with appealed cases in the Eighth Circuit sample from each gender and political party. Table 2.6 indicates the number and percentage of appealed rulings of district judges in the Eighth Circuit sample by gender and political party.

**Table 2.5. Frequencies and Percentages of District Judges in the Eighth Circuit by Gender and Political Party**

<b>Table of Gender by Party</b>			
	<b>Party</b>		
	<b>Dem.</b>	<b>Rep.</b>	<b>Total</b>
<b>Female</b>	4 6.45%	6 9.68%	10 16.13%
<b>Male</b>	21 33.87%	31 50.00%	52 83.87%
<b>Total</b>	25 40.32%	37 59.68%	62 100.00%

**Table 2.6. Frequencies and Percentages of Analyzed Appealed Rulings by Gender and Political Party**

<b>Table of Gender by Party</b>			
	<b>Party</b>		
	<b>Dem.</b>	<b>Rep.</b>	<b>Total</b>
<b>Female</b>	71 6.65%	165 15.45%	236 22.10%
<b>Male</b>	386 36.14%	446 41.76%	832 77.90%
<b>Total</b>	457 42.79%	611 57.21%	1068 100.00%

Table 2.5 indicates that the largest percentage of judges in the sample is composed of male Republicans (50.00%) and the smallest percentage of judges in the sample is composed of female Democrats (6.45%). Table 2.6 demonstrates a similar distribution of appealed rulings, though the

percentage of rulings appealed for female Republican judges is somewhat higher than the percentage of female Republican judges in the sample.

Table 2.7 indicates the average number of appealed rulings per judge of each gender and appointed by each political party.

**Table 2.7. Average Number of Appealed Rulings per Judge by Gender and Political Party**

Table of Average Number of Appeals per Judge			
Gender	Party		
	D	R	Total
F	17.7	27.5	23.6
M	18.4	14.4	16.0
Total	18.3	16.5	17.2

Table 2.7 shows that there are 17.2 rulings on average appealed per judge in this sample. That number varies from an average of 14.4 appealed rulings per male Republican-appointed judge to 27.5 appealed rulings per female Republican-appointed judge. This variation in number of appealed rulings is much larger than the variation in number of appealed rulings in the Ninth Circuit, but the Eighth Circuit has fewer district judges, so there will inherently be more variation in the averages.

Table 2.8 indicates that even after the addition of the gender variable, the Democratic indicator remains the only variable correlating with reversal.

**Table 2.8. Logistic Regression Results for Probability of Reversal for All Appealed Cases**

Model	Explanatory Variables	P-value (fixed-effects model)	P-value (mixed-effects model)	AIC	BIC
1	Party (Democrat)	0.0042	0.0086	1001.986	1011.933
2	Gender (Female)	0.1069	0.3719	1007.439	1017.386
3	Type (Criminal)	0.3162	0.3214	1009.165	1019.112
4	Total Appealed	0.1131	0.1184	1007.577	1017.524
5	Title (Senior)	0.3123	0.3264	1009.113	1019.060
6	Party (Democrat)	0.0249	0.0268	1006.702	1036.543
	Gender (Female)	0.2351	0.2375		
	Type (Criminal)	0.4888	0.4902		
	Total Appealed	0.5166	0.5178		
	Title (Senior)	0.3700	0.3719		

And Table 2.9 indicates that, even after the addition of the gender variable, there are no significant interactions for any of the variables. This table is presented for the fixed-effects model, but similar results were found for the mixed-effects model. Thus, while an attorney considering whether to appeal to the Eighth Circuit should look at the party of the trial judge from whom the appeal is taken to aid in making more accurate the prediction of success, none of the other investigated factors are useful for such analysis.

**Table 2.9. Variable Interactions**

<b>Analysis of Maximum Likelihood Estimates</b>					
<b>Parameter</b>	<b>DF</b>	<b>Estimate</b>	<b>Standard Error</b>	<b>Wald Chi-Square</b>	<b>P-value</b>
<b>Intercept</b>	1	-1.0907	0.3513	9.6403	0.0019
<b>Status</b>	1	-0.7538	0.5193	2.1069	0.1466
<b>Democrat</b>	1	-0.0372	0.4147	0.0081	0.9284
<b>Criminal</b>	1	-0.7101	0.4420	2.5806	0.1082
<b>TotAppealed</b>	1	-0.0342	0.0315	1.1780	0.2778
<b>Democrat*Criminal</b>	1	-0.0666	0.3526	0.0357	0.8502
<b>Democrat*TotAppealed</b>	1	0.0329	0.0302	1.1844	0.2765
<b>Criminal*TotAppealed</b>	1	0.0407	0.0267	2.3345	0.1265
<b>Status*Democrat</b>	1	0.4350	0.5570	0.6099	0.4348
<b>Status*Criminal</b>	1	0.4364	0.4803	0.8256	0.3636
<b>Status*TotAppealed</b>	1	0.0303	0.0418	0.5250	0.4687
<b>Status*Female</b>	0	0	.	.	.
<b>Democrat*Female</b>	1	0.0390	0.4091	0.0091	0.9240
<b>Criminal*Female</b>	1	0.4751	0.4233	1.2595	0.2617
<b>TotAppealed*Female</b>	1	-0.0301	0.0239	1.5837	0.2082

### III. RESULTS—THE NINTH CIRCUIT

Like the study of the Eighth Circuit, this investigation sought to determine whether the political party of the appointing president, gender of the judge, type of case, number of cases appealed, or some combination of these factors influences the likelihood that a case would be reversed on appeal.

The 2010 data contains records of 169 district judges in the Ninth Circuit. Each district judge was scored according to his or her political party (using the same attitudinal model that relies upon the party of the appointing president), gender, the number of cases appealed, and the case type. These variables were run in a logistic regression model to determine whether they can aid in predicting the probability of an appealed ruling being reversed.

While the Ninth Circuit data showed a correlation between case type and reversal, an analysis of the case type indicates that an attorney should not consider this factor when deciding whether to appeal because the results are deceptive.

*A. Ninth Circuit Background Data*

Table 3.0 demonstrates that in the Ninth Circuit dataset there are a total of 2610 cases, 544 of which have been reversed. While only 186 out of 1315 criminal cases were reversed, 356 out of 1295 civil cases were reversed.

**Table 3.0. Case-Type and Reversal Totals**

<b>Cases Appealed</b>	<b>Crim. Cases</b>	<b>Civ. Cases</b>	<b>Total Reversed</b>	<b>Crim. Reversed</b>	<b>Civil Reversed</b>
2610	1315	1295	544	186	358

Table 3.1 shows that the Ninth Circuit has slightly more Republican district judges than Democratic district judges.

**Table 3.1. Frequency of District Judge Appointing Political Parties**

<b>Party</b>	<b>Frequency</b>	<b>Percent</b>
<b>R</b>	97	57.40
<b>D</b>	72	42.60
<b>Total</b>	169	100

Table 3.2 demonstrates that the Ninth Circuit has far more male district judges than female district judges.

**Table 3.2. Frequency Table of Judges' Genders**

<b>Gender</b>	<b>Frequency</b>	<b>Percent</b>
<b>F</b>	38	22.49
<b>M</b>	131	77.51
<b>Total</b>	169	100

Overall, these tables signify that a somewhat larger proportion of district judges in the sample were appointed by Republican presidents, and that over 75 percent of judges in the sample are male. Note, however, that in this sample there are six female district judges appointed by Democratic President Obama who have not had any rulings appealed because not enough time has passed since their appointments. Because they have had no rulings appealed, they were not included in the analysis. Accordingly, Tables 3.1 and 3.2 are recalculated based only on judges who will be included in the analysis. The results are as follows:

**Table 3.3. Frequency Table of Appointing Political Parties, Appealed Judges Only**

<b>Party</b>	<b>Frequency</b>	<b>Percent</b>
<b>R</b>	97	59.51
<b>D</b>	66	40.49
<b>Total</b>	163	100

**Table 3.4. Frequency Table of Judges' Genders, Appealed Judges Only**

<b>Gender</b>	<b>Frequency</b>	<b>Percent</b>
<b>F</b>	32	19.63
<b>M</b>	131	80.37
<b>Total</b>	163	100

The next tables look at the combination of these two traits. Table 3.5 indicates the number and percentage of judges with appealed cases in the sample from each gender and political party. Table 3.6 indicates the number and percentage of appealed rulings in the sample from each gender and political party.

**Table 3.5. Frequencies and Percentages of Judges in Sample by Gender and Political Party**

<b>Table of Gender by Party</b>			
	<b>Party</b>		<b>Total</b>
<b>Gender</b>	<b>D</b>	<b>R</b>	
<b>F</b>	23 (14.11%)	9 (5.52%)	32 (19.63%)
<b>M</b>	43 (26.38%)	88 (53.99%)	131 (80.37%)
<b>Total</b>	66 (40.49%)	97 (59.51%)	163 (100.00%)

**Table 3.6. Frequencies and Percentages of Appealed Rulings in Sample by Gender and Political Party**

<b>Table of Gender by Party</b>			
	<b>Party</b>		<b>Total</b>
<b>Gender</b>	<b>D</b>	<b>R</b>	
<b>F</b>	385 (14.75%)	131 (5.02%)	516 (19.77%)
<b>M</b>	713 (27.32%)	1381 (52.91%)	2094 (80.23%)
<b>Total</b>	1098 (42.07%)	1512 (57.93%)	2610 (100.00%)

Table 3.5 indicates that the largest proportion of district judges in the sample is male Republicans (53.99%), and that the smallest proportion of district judges in the sample is female Republicans (5.52%). Table 3.6 demonstrates a similar distribution of appealed rulings. The last table, Table 3.7, indicates the average number of appealed rulings per judge, according to gender of the judge and political party of each appointing president.

**Table 3.7: Average Number of Appealed Rulings per Judge by Gender and Political Party**

Table of Average Number of Appeals per Judge			
	Party		Total
Gender	D	R	
F	16.7	14.6	16.1
M	16.6	15.7	16.0
Total	16.6	15.6	16.0

Table 3.7 indicates that, overall, the average number of appealed rulings per judge is sixteen. That number varies from an average of 14.6 appealed rulings per female, Republican-appointed judge to an average of 16.7 appealed rulings per female, Democrat-appointed judge.

*B. Conclusions of Ninth Circuit Data: Case-Type Bias*

In the presence of all other variables in the Ninth Circuit, the case type indicator (i.e., criminal or civil) was the only significant one. Thus, in statistically significant terms, the Ninth Circuit is less likely to reverse a criminal appeal than a civil appeal. Table 4.1 shows this result.

**Table 4.1: Logistic Regression Results for Probability of Reversal for All Appealed Cases<sup>81</sup>**

Model Number	Explanatory Variables Included	P-value (fixed-effects model)	P-value (mixed-effects model)	AIC	BIC
1	Party (Democrat)	0.4433	0.4219	2675.361	2687.095
2	Gender (Female)	0.3675	0.3744	2675.148	2686.882

<sup>81</sup> Typically, a P-value of 0.05 or less is said to indicate that a variable is a significant predictor of the probability. AIC and BIC are model fit criteria; for both of these criteria, a smaller value indicates a better fit of the model to the data.

3	Type (Criminal)	< 0.0001	<0.0001	2602.908	2614.642
4	Total Appealed	0.8426	0.9942	2675.911	2687.646
5	Party (Democrat)	0.2231	0.2242	2607.179	2636.514
	Gender (Female)	0.3757	0.3764		
	Type (Criminal)	< 0.0001	<0.0001		
	Total Appealed	0.8450	0.8451		

The analysis in Table 4.2 indicates no interactions between any pair of predictor variables. This table is presented for the fixed-effects model, but similar results were found for the mixed-effects model.

**Table 4.2: Interaction of Terms**

Analysis of Maximum Likelihood Estimates					
Parameter	DF	Estimate	Standard Error	Wald Chi-Square	P-value
Intercept	1	-0.8662	0.1824	22.5553	<.0001
Female	1	-0.5553	0.4188	1.7580	0.1849
Democrat	1	-0.4274	0.3016	2.0091	0.1564
Criminal	1	-0.7545	0.2537	8.8470	0.0029
TotAppealed	1	-0.00061	0.00755	0.0066	0.9352
Female*Democrat	1	0.2595	0.2985	0.7558	0.3846
Female*Criminal	1	0.1660	0.2698	0.3785	0.5384
Democrat*Criminal	1	0.1779	0.2211	0.6475	0.4210
Female*TotAppealed	1	0.0211	0.0178	1.4072	0.2355
Democrat*TotAppealed	1	0.00752	0.0112	0.4531	0.5009
Criminal*TotAppealed	1	-0.00810	0.0101	0.6420	0.4230

The case type indicator is a highly significant predictor of reversal ( $P$ -value  $< 0.0001$ ), and the best model contains only the criminal indicator.

By inverting the logit response of the model, we see that 14.14% of appealed criminal cases and 27.64% of appealed civil cases were reversed. Thus, the odds of a criminal case being reversed is estimated to be only 0.431 times the odds of a civil case being reversed; the 95 percent confidence interval range is 0.354–0.525. In other words, the Ninth Circuit is *twice* as likely to reverse a civil case as a criminal case.

### *C. Basis for Lower Reversal Rate for Criminal Cases*

Likely, more criminal cases were affirmed because higher rates of criminal cases properly decided at the trial level were appealed. Criminal defendants, often in jail with free attorneys, have virtually nothing to lose by appealing:

Unlike in the civil context, criminal defendants will appeal even when the law is fairly clearly against them, because (with rare exceptions) they are not paying for the appeal. Because their liberty is on the line, and because economic incentives do not discipline appeals, convicted criminals will often seek appellate review even if it is most unlikely that they will prevail. As a result, most criminal appeals lack merit.<sup>82</sup>

In civil cases, in contrast, appellants must conduct cost-benefit analyses. Because they are paying their attorneys, the resolution of their cases almost always has monetary implications. So, only better cases (in terms of likelihood of reversal) are appealed in the first place.<sup>83</sup>

To test this hypothesis, I investigated whether there was a higher quantity of civil cases than criminal cases filed at the district level. An affirmative finding would support my hypothesis because Table 3.0 showed us that virtually the same numbers of civil and criminal appeals were filed in the

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<sup>82</sup> SUNSTEIN ET AL., *supra* note 1, at 61.

<sup>83</sup> *Id.*

Ninth Circuit. And, in fact, Table 5.1 supports my hypothesis by showing that there were far more civil cases at the trial level than there were at the appellate level in the Ninth Circuit. The contrasting, near-even number of appeals between civil and criminal cases leads to the conclusion that litigants exercise greater selectivity when appealing civil cases than when appealing criminal cases.

**Table 5.1: Civil and Criminal Cases Filed in Each District in the Ninth Circuit for the Data Set Year and the Two Years Prior**

	2010		2009		2008	
<b>Ninth Circuit Districts</b>	<b>Civil</b>	<b>Crim.</b>	<b>Civil</b>	<b>Crim.</b>	<b>Civil</b>	<b>Crim.</b>
Alaska	492	141	382	127	361	135
Arizona	3875	5875	3629	4263	3529	2995
Cal Central	14334	1247	13607	1430	12130	1761
Cal East	5818	799	5698	807	4807	836
Cal North	6170	685	6059	888	6175	575
Cal South	3007	5046	3175	4728	2650	3995
Guam	35	50	35	39	22	51
Hawaii	791	163	622	162	578	206
Idaho	665	267	864	268	576	263
Montana	530	321	621	346	610	398
Nevada	3162	662	3326	544	2588	359
N. Mariana Islands	31	18	54	17	46	17
Oregon	2266	661	2158	640	2239	668
Washington East	792	384	706	348	650	349
Washington West	2975	408	2720	506	2938	488
<b>Total</b>	<b>44943</b>	<b>16727</b>	<b>43656</b>	<b>15113</b>	<b>39899</b>	<b>13096</b>

As can be seen, in 2010 and in the two years prior, roughly three civil trial-level cases were filed for each criminal trial-level case. The Ninth Circuit, however, decided virtually the same number of criminal and civil cases in 2010 (Table 3.0). Thus, approximately one in eleven criminal cases were appealed, while only one in thirty-three civil cases were appealed. Accordingly, as the theory presented here suggests, litigants in civil cases were three times more selective in appealing than litigants in criminal cases were. And, as the data show, the Ninth Circuit was significantly more selective in reversing criminal cases than civil cases. Given the discussed, underlying basis for such heightened discrimination, the case type factor will not serve as a useful predictor for would-be litigants.

#### IV. COMPARISON OF EIGHTH AND NINTH CIRCUITS

##### *A. Comparison of Eighth and Ninth Circuits on Case-Type Effect*

While the Ninth Circuit was significantly more selective in reversing criminal cases when compared to civil cases, we did not see this phenomenon with the 2008 Eighth Circuit data. Several theories can be presented for why the 2008 Eighth Circuit data contrasts from the Ninth Circuit data in this respect.

First, perhaps criminal defendants in the Eighth Circuit (and/or their counsel) were more discriminating in appealing. A higher selectivity rate could represent a better filtering of cases not worthy of reversal. Table 5.2, however, refutes such hypothesis.

**Table 5.2: Civil and Criminal Cases Filed in Each District in the Eighth Circuit for the Data Set Year and the Two Years Prior**

<b>Eighth Circuit</b>	<b>2008</b>		<b>2007</b>		<b>2006</b>	
<b>Districts</b>	<b>Civil</b>	<b>Crim.</b>	<b>Civil</b>	<b>Crim.</b>	<b>Civil</b>	<b>Crim.</b>
Eastern District of Arkansas	4723	338	2063	313	2987	345
Western District of Arkansas	860	196	803	217	848	191
Northern District of Iowa	551	539	549	306	551	391
Southern District of Iowa	765	352	779	434	845	327
District of Minnesota	6186	341	5412	367	4714	386
Eastern District of Missouri	2250	778	2414	785	2455	837
Western District of Missouri	2013	574	2037	611	2401	664
District of Nebraska	751	607	891	570	1086	539
District of North Dakota	267	205	203	213	211	244
District of South Dakota	342	453	418	430	418	391
<b>Total</b>	<b>18708</b>	<b>4383</b>	<b>15569</b>	<b>4246</b>	<b>16516</b>	<b>4315</b>

The rate at which criminal defendants in the Eighth Circuit pursued appeals was actually *above* that of criminal defendants in the Ninth Circuit. In 2008 and the two years prior, roughly four civil cases were filed in district courts for every criminal case. After applying the data from Tables 1.0–1.1, we see that approximately one in eight criminal cases was appealed and one in thirty-five civil cases was appealed to the Eighth Circuit. Accordingly, litigants in civil cases were over four times more selective than litigants in criminal cases in appealing. And, more importantly,

litigants in the Eighth Circuit were *more* selective in appealing civil cases and less selective in appealing criminal cases than those in the Ninth Circuit. Thus, the theory that criminal defendants in the Eighth Circuit (and/or their counsel) were more discriminating in appealing must be rejected.

Another possible explanation for the disparity between the Eighth and the Ninth Circuits regarding the correlation of reversal to case type is that the reversal rate for criminal cases in the Eighth Circuit during 2008 was simply anomalous. The available, but more limited, data from 2011 gives some support to this hypothesis.

The 2008 data for the Eighth Circuit showed a 19 percent greater reversal rate for civil cases than criminal cases, but the correlation did not prove statistically significant. The data from January through July of 2011 showed a different distribution. This partial year 2011 data showed that from January to July, 2011, of the 217 civil cases appealed, thirty-nine were reversed (17.97%); and of the 307 criminal cases appealed, twenty-five were reversed (8.14%). This very large difference in reversal rate by type of case (criminal versus civil) was also statistically significant. In comparison, the 2010 data for the Ninth Circuit showed a 95 percent greater likelihood of reversal for civil cases than for criminal cases, which was also statistically significant.

Coupling these findings with the total number of civil and criminal cases appealed in each data set, we see the Ninth Circuit intervening in the decisions of trial judges more frequently than the Eighth Circuit. To the extent that the oft-heard critique of the Ninth Circuit—that it is an “activist” Circuit—refers to how often the appellate court intervenes in the decisions of trial judges, then the above data provides evidence in support of that claim.<sup>84</sup>

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<sup>84</sup> EPSTEIN & SEGAL, *supra* note 18, at 191 (explaining that sometimes “activist” is used as a synonym for “liberal,” as the Ninth Circuit has, overall, produced the most liberal decisions of the courts of appeals).

*B. Comparison of Eighth and Ninth Circuits on Political-Party Effect*

While we saw a clear correlation in the 2008 Eighth Circuit data between the party of the trial judge and reversal, the data set for the Ninth Circuit data showed no political-party effect. Interestingly, however, the new, preliminary 2011 data from the Eighth Circuit also did not show a statistically significant correlation between reversal and party of the trial judge. And the actual difference for the data set was small, irrespective of significance. However, the data analyzed from 2011 initially ended with cases from July. Given the close reversal rate by party, I hypothesized that the data from August and September might be particularly important, because the Eighth Circuit, like most others, does not hear cases in July and August. As such, August effectively becomes the end of the Court's term. And it is often during August and September that judges play "catch up." They frequently finish the year's remaining cases during those months. Perhaps, I postulated, some of the more difficult cases—those that require the exercise of judgment concerning judicial and political philosophy, rather than the routine application of basic legal principles—get pushed off by judges until this time. Furthermore, judicial clerks typically leave during August. Clerks will sometimes push off the more complex cases until the end of the session as well. As such, I sought to investigate whether August and September would alter the initial Eighth Circuit results, which did not show much of a difference in reversal rates for Democratic versus Republican trial judges.

Testing the "end-of-cycle" hypothesis by analyzing the additional 2011 Eighth Circuit data from August and September 2011 produced some interesting results. Republican trial judges were reversed during this period 17.71% of the time, while Democrat district judges were reversed 26.23% of the time. Thus, during this period, the Eighth Circuit again reversed Democratic district judges approximately 50 percent more often than

Republican trial judges. When this data is combined with the January–July 2011 data for the Eighth Circuit, we still see the Eighth Circuit reversing Democrats 15 percent more often than Republicans. However, these samples were *not* sufficient to conclude that the differences are statistically significant, and, as a consequence, further study is needed.

Additionally, I conducted a logistic regression of the January–September 2011 data for the Eighth Circuit that included party and time. The analysis showed an effect for the time factor. Thus, reversal rates *were* significantly different between the January–July 2011 data and the August–September 2011 data—with that higher rate, as seen, occurring in the later timeframe. This evidence supports my hypothesis that the Eighth Circuit changes its behavior during the “catch-up” months.

In addition, we must at least consider the effect of my having previously shared my conclusions from the 2008 Eighth Circuit data with the Eighth Circuit. It is possible that this had some effect on the 2011 data, as well. Future study of cases from additional years for the Eighth Circuit will further clarify these conclusions. Putting aside the partial 2011 data due to the fact that the greater reversal rate of Democrats needs further study, however, the 2008 Eighth Circuit data nonetheless represents a real political-party effect phenomenon not seen in the Ninth Circuit. This is likely a function of the fact that the Ninth Circuit has a much closer distribution of Democratic and Republican appellate judges (57 percent Democratic). Therefore, even if, *arguendo*, the panels somehow were all Democratic or Republican, they would largely cancel each other out in the collective analysis performed herein. Additionally, the Ninth Circuit panels simply were often not party unified (i.e., all Democrat or Republican). As such, the previously discussed panel effect moderated the influence of the political philosophy of individual judges on mixed panels.

## V. CONCLUSION

I analyzed the effect of several attributes of a trial judge on whether the judge is reversed by the circuit court of appeals. I considered various factors including the party of the trial judge, the gender of the trial judge, the type of case appealed, and the interactions of these factors. I conducted this analysis for the most liberal and the most conservative US courts of appeals with the hope of revealing some differences between them. Some expectations proved true, others did not, and other unforeseen patterns emerged.

This study concludes that for the full-year data sets analyzed, the Eighth Circuit has a political-party bias, while the Ninth Circuit does not. To the extent that this phenomenon repeats itself, it is likely reflective of the fact that the Eighth Circuit is almost completely Republican, while the Ninth Circuit is only marginally Democratic. This difference affects the likelihood of getting a panel with judges all from one party and the willingness of the appellate judges to take strident positions. The Eighth Circuit's lack of political diversity results in most panels consisting of *all* Republicans, while the Ninth Circuit's panels are more diverse, both intra-panel and inter-panel. In addition, the willingness of judges to express strident views is positively related to whether the panel is all of one party—an occurrence far more likely in the Eighth Circuit. The Eighth Circuit pattern provides a useful tool in predicting appellate outcomes in that court.

Both circuits, to varying degrees, reverse fewer criminal cases than civil cases. The case type, though, is not the cause of reversal. Rather, because convicted criminals have little to lose, and a lot to gain, by appealing, a lower percentage of criminal cases—relative to civil cases—warranting reversal are appealed, notwithstanding the low likelihood of success. As such, this revealed effect does not provide predictive value.