Abstract: By taking senior status, a federal judge “leaves” the bench and creates a vacancy. Unlike outright retirements, senior judges continue to decide cases. Since 1984, over 90% of U.S. Courts of Appeals’ judges eligible for retirement have exercised this option. The presence of senior judges is not symbolic; they participated in 20% of the cases terminated in 2004 at the merits stage on the federal courts of appeals. On average, a senior judge will assume approximately one-third of an active judge’s workload. Free from administrative responsibilities and constraints associated with court governance, senior judges may view cases differently during this phase of their careers. Testing for differences between active and senior judges in decisions before the U.S. Courts of Appeals (1969-1997), this analysis found individual judicial ideology to be a strong predictor of voting by those on active service; however, this indicator was not related to senior judges’ voting behavior. The results suggest the need to consider whether influences on decision making are conditioned by longitudinal considerations, including those associated with judicial careers.
Introduction. The Constitution guarantees life tenure to federal judges who may remain on active service far longer than their age or health would advise. Congress recognized the potential problems created by lifetime appointments and established the senior status concept in 1919. Amended in 1984, the current senior status system follows a “rule of 80” in which judges 65 and over, with a certain number of years of service, are eligible to retire, draw a pension, but continue to hear cases.\(^1\) By taking senior status, a judge creates a vacancy and continues to enjoy the prestige associated with a position on the federal bench. Although there is little financial incentive to choose senior status over outright retirement,\(^2\) the proportion of the bench made up of senior judges has been increasing dramatically over time (see Figure 1). Throughout the history of the courts of appeals, 95% of senior judges have served until the year of their death with an average tenure of seven years. Moreover, their presence is not symbolic; senior appeals court judges participated in 20% of the cases terminated on the merits in 2004. In the twilight of their careers, senior judges’ identities appear to be closely tied to their roles in the institution. As described by one judge who explained the decision to opt for senior status rather than retiring, “judging is what I do; it is what I am.” (Yoon 2005:495). Yet, upon taking senior status, the institutional environment associated with judging changes. With reduced caseloads and released from responsibilities associated with circuit governance, senior judges decide cases under different conditions when compared to active service.

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\(^1\) The current statute, 28 U.S.C. 371(c), provides for retirement from regular active service at age seventy with ten years of service, at age sixty-nine with eleven years of service and so forth. The earliest eligible age is 65 with at least fifteen years of service.

\(^2\) There is only one financial incentive: senior judges’ pensions will increase with any cost-of-living adjustments to salaries for active judges. In contrast, those who retire completely from the bench do not receive these adjustments.
To explore whether these differences affect decision making, I model voting behavior of judges on the U.S. Courts of Appeals from 1969-1997. In developing theorized relationships to be tested in this model, I focus on links between career choices, socializing experiences on the bench, and decision making.

**Paths to the bench.** Federal judicial recruitment processes are designed to select those who will generally share the views of the appointing president. Empirical support for this theorized relationship between presidential policy views and appointees’ decisions is well-documented in studies of the U.S. Courts of Appeals (Giles, Hettinger, and Peppers 2001; Songer and Ginn 2002). Those appointed by recent Democratic and Republican presidents hold different policy views, but they share demographic profiles as these same recruitment processes act as filters to yield judges of “similar mold.” (Howard 1981). Recent appointees to the courts of appeals are predominantly Caucasian, affluent, politically active, fifty-year-old males who attended prestigious educational institutions (Goldman, Slotnick, Gryski, Zuk, and Schiavoni 2003). Common career experiences also characterized their paths to the appeals court bench. Since the Carter administration, most appointees have possessed judicial and/or prosecutorial experience. By the 1990s, approximately 35-40% of sitting circuit judges had been elevated from positions on the federal district courts.³

Several scholars argue that there is a cost associated with homogeneity in career paths as common socializing experiences among judges will reduce innovation and

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³ From an administration’s perspective, selecting a nominee from the district court makes perfect sense as confirmation of a sitting judge is likely. More importantly, for administrations advancing a policy agenda with judicial appointments, a nominee with a trial court record reduces the uncertainty associated with selecting those who will share the president’s views (Savchak et al 2006). In this respect, the trend toward selecting those with judicial experience may result in a stronger observed empirical relationship between presidential policy preferences and appointees’ decision making.
diversity in group decision making on appellate courts (Epstein, Knight, and Martin 2003). For judges on the U.S. Courts of Appeals, Howard noted that the process of recruitment, viewed broadly, tended to homogenize the social composition, training and value structure of members of circuit courts." (1981: 102). Paths to the bench, therefore, would be expected to yield judges who will advance the policy views of the appointing administration and, at the same time, share professional beliefs that would be expected to promote institutional loyalty to the courts.

**On the bench.** Scholars, legal academics, and judges themselves acknowledge the role of individual policy preferences in deciding cases. However, the decision making environment on the courts of appeals places constraints on judges who wish to act on the basis of their personal policy views. Cases are adjudicated by rotating three-member panels, a practice which contributes to deference to the majority position (Posner 2005). The potential for rehearing and reversal by the circuit en banc acts as a further constraint (Van Winkle 1996). Other informal practices and norms governing opinion writing, collegiality, and work relationships within and between chambers also shape the decision making environment (Cohen 2002). Judges learn these institutional practices through a socialization process that has been described as “continuous and cumulative.” (Howard 1981). This learning period is particularly intense during the first few years on the bench (Howard 1981). Not surprisingly, scholars have found that judges are more deferential in the initial stages of service on the courts of appeals. During the first two years following appointment, judges are less likely to dissent or write separately (Hettinger, Lindquist, Martinek 2003b). Judges give careful attention to opinion writing
well beyond this initial stage. This focus on opinions stems from the belief that an appeals court judge’s prestige is tied to citations of their “work” (Posner 2005).

Interviews of judges suggest that they are interested in furthering institutional goals as well, including the desire to promote the clarity and coherence of circuit law (Klein 2002). Although many works assume that judicial interest in institutional goals is assumed with appointment to the position, it is more likely that judges’ attachment to institutional goals increases with length of service. Experience on the bench contributes to this process in a number of different ways. For example, over time, active judges will be called upon to assume administrative responsibilities that range from chairing circuit committees to coordinating screening panels that deal with specialized appeals. Rules governing administrative leadership also place a premium on seniority. For example, the most senior active judge on a panel acts as the presiding judge during hearings. In addition, seniority is the only selection criterion for the position of chief judge on the circuit.\(^4\) Experience also appears to correlate with policy leadership on the appeals court bench (Howard 1981). In a study of three circuits’ caseloads in the 1960s, Howard found that there was a tendency to concentrate opinion assignment and decision making to those judges with more experience. By the time they leave active service, appeals court judges will have developed a greater understanding of their role in strengthening their court as an institution.

**Paths from the bench.** Once eligible for a pension, personal, political, and institutional considerations appear to shape the decision to stay, or retire, for judges at all levels of the federal court system (Zorn and Van Winkle 2000; Nixon and Haskin 2000; Barrow and Zuk 1990). Scholarship on the timing of departures from the courts of

\(^4\) Advanced age, however, will disqualify an active judge from being selected.
appeals’ suggests that there is a tendency to leave when the White House is occupied by
the party of the judge’s appointing president (Spriggs and Wahlbeck 1995; Baker 2000). Yet, it is less clear whether these decisions indicate strategic judicial behavior as most
appeals court judges assume senior status within 1.5 years of their pension eligibility
date. Moreover, for judges on the U.S. Courts of Appeals, they must weigh the relative
costs and benefits of three options:5 1) remain on active service 2) take senior status 3) retire from service altogether. Understanding the preference for senior status requires comparing these choices (Yoon 2005).

In terms of financial incentives, senior status is preferable to active service as
senior judges’ pensions are exempt from federal taxes. Yet, other motives also play an
important role in taking senior status rather than remaining on active service. In a recent
survey, appeals court judges who took senior status responded that they did so because it
(1) created a vacancy (2) allowed more time for leisure (3) permitted the judge to work at
a reduced caseload (Yoon 2005). Interestingly, the desire to create a vacancy appeared to
be tied to institutional concerns as judges voiced the need for “additional help.” Thirty-
eight percent of senior circuit judges reported a perceived norm to assume senior status as
soon as they became eligible (Yoon 2005). Political considerations were not completely
irrelevant as many judges recognized the desirability of having a replacement named by a
president of the same party affiliation. Yet, this factor appeared to play a minimal role
for many, in part because, “coincidentally the President at the time happened to be of my
party affiliation.” (Yoon 2005:528)

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5 Yoon (2005) provides a clear summary of the differences across alternatives, including financial
incentives and administrative support.
When comparing costs and benefits associated with selecting senior status over retirement, it appears that non-financial considerations are important factors. In Yoon’s survey, over 30% reported that their reason for continuing on as a senior judge was simply because they liked what they were doing. One-fourth of the judges surveyed reported an obligation to help out their respective courts as their primary reason for assuming senior status rather than retiring.

**Research hypotheses.** The portrait that emerges from existing scholarship reviewed above suggests two sets of competing hypotheses. The first set of hypotheses posits that appeals court judges, including those on senior status, are motivated primarily by policy preferences, a view supported by studies of federal judicial selection and voting behavior that document a strong relationship between presidential policy views and appointees’ decision making. This view is also supported by scholarship that found political factors affect departures, as there is a tendency for appeals court judges to retire, and create vacancies, that will be filled by a president of their party (Spriggs and Wahlbeck 1995). From this perspective, senior appeals court judges would be expected to continue to decide cases on the basis of their own policy preferences. Moreover, if individual policy preferences are important determinants of decision making, then senior judges will vote in a manner that reflects on their freedom from institutional constraints, including those stemming from the preferences of their colleagues on the panel and the circuit en banc.

\[ H_1: \text{Senior judges, similar to those on active service, will decide cases on the basis of their policy preferences.} \]
$H_2$: When compared to active judges, those on senior status will be less likely to follow the preferences of colleagues on the panel.

$H_3$: When compared to active judges, those on senior status will be less likely to follow the preferences of the circuit majority.

An alternative view of senior judges also emerged from existing scholarship. From this perspective, judicial recruitment processes ensure the selection of those who will share professional values, including those that focus on strengthening the courts as institutions. Over time, judges are likely to develop their sensitivity to institutional concerns on their court. From this viewpoint, the decision to retire and assume senior status is understood to support the functioning of the court. Senior judges, focused on institutional concerns, will be more likely to defer to judicial institutions and less likely to decide on the basis of individual policy preferences.

$H_4$: When compared to active judges, those on senior status will be less likely to decide cases on the basis of policy preferences.

$H_5$: When compared to active judges, those on senior status will be more likely to follow the preferences of colleagues on the panel.
$H_0$: When compared to active judges, those on senior status will be more likely to follow the preferences of the circuit majority.

**Data.** The observations used for this analysis were drawn from the Multi-User Database on the U.S. Courts of Appeals available at the web site for the S. Sidney Ulmer Project at the University of Kentucky, [http://www.as.uky.edu/polisci/ulmerproject/appctdata.htm](http://www.as.uky.edu/polisci/ulmerproject/appctdata.htm) This dataset was supplemented with cases decided from 1997. This supplement is part of a second dataset funded by a grant from the National Science Foundation (SES-0318349). This update to the multi-user database will extend observations for all circuits from 1997-2002. The collection of the database is near completion; data for all circuits are expected to be available in the spring, 2006. 

The starting point for this analysis, 1969, corresponds to the start of the Nixon Administration, and the approximate beginning of the Burger Court. After excluding cases with mixed outcomes or containing no policy content, and narrowing it further to those decided by regular appeals court judges on active and senior status, the observation set consisted of 16,812 votes. Since the dataset samples only decisions accompanied by a published opinion, the results of this analysis should be interpreted with caution as the observations are limited to decisions with greater policy content.

The dependent variable for this analysis is the judge’s vote. Votes are coded in terms of the policy content along a liberal-conservative dimension. For example, a vote supporting the position of a litigant claiming a civil rights violation is coded as “liberal”.

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6 The data for 1997 used in this analysis may be retrieved at [http://www.wmich.edu/nsf-coa/](http://www.wmich.edu/nsf-coa/)
whereas a vote against that position is coded as “conservative.” In criminal cases, a vote supporting the position of the defendant (or prisoner) is coded as “liberal” whereas a vote against is “conservative.” In labor-economics cases, liberal votes include those in which judges supported the positions taken by unions, the federal government in regulatory and tax cases and individual plaintiffs in tort cases. Conservative votes include those in which judges supported the positions taken by management (against unions), opposed those taken by the federal government in regulatory and tax cases, and supported corporate defendants in tort and insurance cases filed by individuals.

Data on judicial appointments and retirement were drawn from a dataset compiled by Professors Gryski, Barrow, and Zuk (NSF #SBR 93-11999). It is available at the web page of the S. Sidney Ulmer Project at the University of Kentucky, http://www.as.uky.edu/polisci/ulmerproject/appctdata.htm. These observations were updated with biographical information from the Federal Judicial Center web site. These data resulted in the identification of judges who took senior status (and when). This information was used to create a variable which indicates whether the judge was on active or senior status at the time of that s/he participated in the decision.

Testing the hypotheses also required measures of individual policy views, circuit preferences, and the ideological predisposition of the panel. To measure individual judges’ policy views, I relied on scores developed by Giles, Hettinger, and Peppers (2001). Drawing on accounts of judicial selection, these scores assume that appeals court judges’ views will closely parallel those of the appointing president, unless there is a home state senator of the president’s party. In those instances, the judge’s score is adjusted to account for the preferences of the home state senator. To measure circuit
preferences and the ideological predisposition of the panel, I utilize NOMINATE scores for the appointing president\(^7\). After collecting scores for all active judges sitting during the time period, I identified the median judge for each circuit-year to estimate circuit preferences. To estimate panel preferences, I identified the median from the NOMINATE scores for appeals court judges sitting on the panel.

The model included controls for hierarchical relationships, including the tendency of the circuits to affirm lower court judgments and to follow the doctrinal trends established by the U.S. Supreme Court. In addition, effects for the circuits were estimated through dummy variables (the DC circuit is the excluded, reference category).

Given the binary nature of the dependent variable, logit models were used to estimate these effects. The table below reports the maximum likelihood estimated coefficient, along with the robust standard error, clustered by judge, for each independent variable.\(^8\) Separate models were estimated to compare the determinants of decision making by active and senior judges.

**Results.**

[Table 1 about here]

Judicial policy preferences were strong predictors of active judges’ voting behavior. For those who were selected by those who held the most liberal policy views at

\(^7\) I multiplied these scores by -1 so that higher scores correlate with increased liberalism. In contrast, the Giles et al scores are scaled so that higher scores correlated with increased conservatism.

\(^8\) Initially, I estimated a single model with multiplicative terms to test whether senior status conditioned the effects of policy views, circuit preferences, and the ideological predisposition of the panel on judicial decision making. This model suggested that senior status conditioned the effects of individual policy views and circuit preferences, but did not shape the influence of the panel. These results suggested that I should estimate separate models which are presented in the results section of this paper.
the time of their appointment, the predicted probability of an active judge supporting the
liberal outcome is .44. This figure falls to .29 for judges on active service who were
selected by strong conservatives. In contrast, for senior judges, the estimated coefficient
for individual judicial policy preferences was not statistically significant. Although the
indicator of panel preferences was a strong predictor of active judges’ voting, this
relationship was relatively weak in the model of senior judges’ voting.

For both active and senior judges, the preferences of the circuit majority affected
decision making. This effect was slightly more pronounced, however, for those on senior
status. In the most conservative circuits, the predicted probability of a liberal vote is .29
for senior judges and .32 for those on active service. In the most liberal circuits, the
predicted probability of a liberal vote is .39 for senior judges and .37 for active judges.

**Discussion.** The findings reported here support the conclusions of a recent survey
that found appeals court judges to be focused on institutional goals at this stage of their
careers (Yoon 2005). Measures of ideology at the time of appointment no longer
predicted voting behavior for those on senior status. Additional research on career effects
with judicial voting records as the unit of analysis will be helpful in sorting out these
findings. In addition, future studies will need to examine more closely how aging
processes shape effects associated with senior status on the bench.

The notion that judicial policy preferences change over time has been examined in
other courts, particularly in studies of the U.S. Supreme Court where scholars found that
several justices’ policy views evolve—frequently to the dismay of those who appoint
them. Although a discussion questioning the assumption of preference stability is

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9 In calculating these predicted probabilities, all independent variables, except the variable of interest, were
set at their means.
beyond the scope of this paper, at a minimum, these results suggest that courts of appeals’ scholars consider the implications of pooling active and senior judges’ votes in models of decision making.
<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Active Judges</th>
<th>Senior Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual policy preferences</td>
<td>-0.396***</td>
<td>-0.128</td>
</tr>
<tr>
<td></td>
<td>(0.073)</td>
<td>(0.137)</td>
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<tr>
<td>Ideological center of circuit</td>
<td>0.251***</td>
<td>0.490***</td>
</tr>
<tr>
<td></td>
<td>(0.067)</td>
<td>(0.132)</td>
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<tr>
<td>Panel median</td>
<td>0.229***</td>
<td>0.159</td>
</tr>
<tr>
<td></td>
<td>(0.059)</td>
<td>(0.124)</td>
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<tr>
<td>Directionality of lower court decision</td>
<td>1.007***</td>
<td>0.966***</td>
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<tr>
<td></td>
<td>(0.059)</td>
<td>(0.105)</td>
</tr>
<tr>
<td>Percent liberal Supreme Court decisions, prior term</td>
<td>0.329*</td>
<td>0.487</td>
</tr>
<tr>
<td></td>
<td>(0.247)</td>
<td>(0.664)</td>
</tr>
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(circuit dummy variables output omitted)

Constant                                | -1.138        | -0.762        |
Likelihood ratio (LR)                    | 984.905       | 178.566       |
PRE                                      | 0.05          | 0.02          |
N                                        | 14,039        | 2,773         |

*p=.09 ***p<.001 (one- and two-tailed tests)
Robust standard errors, clustered by judge (348 active judges; 160 senior judges)
References


### Active judges

<table>
<thead>
<tr>
<th>Measure</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min</th>
<th>Max</th>
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<tr>
<td>Judges’ votes (0=conservative; 1=liberal)</td>
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<td></td>
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<tr>
<td>Indiv. policy prefs. (Giles et al, higher scores are associated with more conservative policy preferences)</td>
<td>-.006</td>
<td>.358</td>
<td>-.66</td>
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<td>Ideological center of circuit (NOMINATE scores, higher scores are associated with more liberal policy preferences)</td>
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<td>.395</td>
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<td>.402</td>
<td>-.57</td>
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<td>Percent liberal Supreme Court decisions during previous term</td>
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<td>.073</td>
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<td>DC Circuit</td>
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For dichotomous/dummy variables, mean is simply the percent that fell into the category labeled “1.” Standard deviation is reported only for continuous measures.
### Senior judges

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<th>Std. Dev.</th>
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<td>-.014</td>
<td>.292</td>
<td>-.59</td>
<td>.61</td>
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<td>Ideological center of circuit (NOMINATE scores, higher scores are associated with more liberal policy preferences)</td>
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<td>.38</td>
<td>-.48</td>
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<td>Panel Median (NOMINATE scores, higher scores are associated with more liberal policy preferences)</td>
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<tr>
<td>Percent liberal Supreme Court decisions during previous term</td>
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Standard deviation is reported only for continuous measures.