

**Setting a Judicial Agenda: The Decision to Grant En Banc  
Review in the U.S. Courts of Appeals**

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## **Abstract**

Agenda setting has received only modest attention in studies of the judiciary. This reflects the limited control most courts exercise over the cases they hear. We analyze the influence of ideological and legal factors on the grant of en banc rehearing in the U.S. Courts of Appeals -- one of the few instances of agenda control in the lower federal courts. Unlike previous research, we examine multiple decision points in the agenda-setting process. Our results indicate that the influence of attitudinal and legal factors varies across decision points revealing a complexity obscured in previous work. Our research underscores the importance of treating agenda setting as a process rather than as a single decision.

For scholars interested in legislative, executive, and administrative politics, understanding the process by which some issues command the attention of an institution and others do not is a topic of central concern (Baumgartner and Jones 1993; Bendor and Moe 1986; Cohen 1995; Hammond 1986; Mouw and MacKuen 1992; Wood and Peake 1998). For students of judicial politics, however, agenda setting has assumed a less central position, reflecting the lack of control that courts typically exercise over the cases they hear. Unlike most other political institutions, courts are generally reactive in nature and typically must wait for a party to introduce an issue in the form of a lawsuit. The U.S. Supreme Court provides the major exception to the judiciary's lack of agenda control. While the Supreme Court is dependent on litigants to seek review, it plays the major role in setting its own agenda through the grant or denial of certiorari. Accordingly, the study of agenda setting in the field of judicial politics has focused almost entirely on the Supreme Court and the certiorari decision (Caldeira and Wright 1988; Caldeira et. al. 1999).

Another major exception to the lack of agenda control by federal courts is the little-studied decision to grant en banc review by the U.S. courts of appeals. By exercising their discretion to invoke en banc review, court of appeals judges remove a case from the normal three-judge panel setting and place it before all of the circuit's active appellate judges. En banc review is the sole means by which the court as a whole can insure that decisions by its panels are in line with circuit preferences. Moreover, previous studies have demonstrated that en banc review acts as a key signal in the Supreme Court's certiorari decisions (Caldeira and Wright 1988; Caldeira et al. 1999). Despite its significance, scholars have paid little attention to the process by which courts of appeals determine which cases to hear en banc. The goal of this

paper is to examine the decision to grant en banc review, using an analytic approach that recognizes the multiple stages and multiple players involved in the process.

### **The Courts of Appeals and En Banc Review**

The federal courts of appeals typically do not exercise discretion over their agendas. Appeals from U.S. district courts and administrative agencies are considered a matter of right and for nearly all appeals three-judge panels provide the final disposition. However, over the past decade roughly 80 to 90 cases per year have been granted en banc review by the courts of appeals.<sup>1</sup> These cases are considered by the full complement of active circuit judges, a number that currently ranges from six in the First Circuit to twenty-eight in the Ninth Circuit.<sup>2</sup>

Consideration of cases for en banc review typically involves three major decisions. First, a litigant disappointed with a panel decision must file a suggestion for a rehearing en banc.<sup>3</sup> Second, a judge in active service on the circuit must request that the entire court be polled on the suggestion. Third, a majority of the judges in active service must vote to grant the petition. Only if all three conditions are met is the case reheard by the entire circuit.

The decision to grant en banc review has considerable significance. First, en banc review is the only procedure, save Supreme Court intervention, by which a final panel decision may be modified or reversed. Second, an en banc rehearing broadens the playing field, allowing disappointed litigants to argue their cause before an expanded set of decision makers. Third, while three-judge panels can establish new precedent binding on the other judges of the circuit,<sup>4</sup> only the court, sitting en banc, has authority to modify existing circuit law. It is through the en banc rehearing that a circuit is able to impose consistency on its panels and review its own circuit law in light of the possibly conflicting interpretations of other circuits. Fourth, although many

cases heard by the full circuit involve legally narrow and technical issues, the circuits often use the en banc procedure to decide cases of special significance.

Previous studies of en banc review have characterized the en banc procedure as a means by which a circuit majority can control ideologically wayward panels (Banks 1999; Note 1989; Oliphant 1991; Solimine 1988; Zarone 2000). In general, however, this work has failed to consider (or control for) alternative explanatory reasons for full court review of panel decisions. Only George (1999) has made a rigorous, comprehensive effort to examine the determinants of en banc review. George's research, however, like all other work in this area, is limited by its analytic approach. In particular, existing studies have simply compared the traits of cases granted en banc review with those cases not granted en banc review -- that is, they have focused exclusively on the final stage of what is in fact a complex, multistage process. Such an approach fails to acknowledge that en banc agenda setting involves a series of interrelated decisions by litigants and judges. It is clear that simply comparing cases granted en banc review with those not granted may obfuscate important causal linkages. While a panel decision may not be reviewed because litigants did not petition for en banc rehearing, no judge requested a poll, or a requested poll did not receive majority support, previous work cannot distinguish among these very different outcomes.

Here, we conduct the first comprehensive consideration of the factors determining the agenda for en banc review, drawing on a sample of cases from the Fifth Circuit Court of Appeals. Unlike previous studies, however, we adopt an analytic approach that distinguishes among the various stages in the agenda-setting process: the litigant's decision to seek review, the judge's decision to seek a poll on the petition, and the circuit majority's decision to grant a full-court rehearing. Our approach thus offers both a richer analytic perspective on the agenda-

setting process and a firmer basis for drawing causal inferences than those adopted in previous studies.

### **The Determinants of En Banc Review**

At the Supreme Court level the process of agenda setting seems best characterized as a mixture of legal, strategic, and attitudinal considerations (Caldeira et. al. 1999; Epstein and Knight 1998; Segal and Spaeth 2002). Clearly, Supreme Court justices pursue policy preferences in granting certiorari, but most of the petitions are denied without close consideration based largely on the legal and substantive merits of the case. We assert -- and the literature suggests -- that the decision to grant en banc review is similarly one that involves both legal and ideological considerations. Indeed, we suspect that given a limited agenda space legal and ideological considerations combine to determine the likelihood of en banc review (Ginsberg and Falk 1991, 1023).

#### *Ideological Factors*

Evidence that en bancs have been used to correct panel decisions that depart from the ideological preferences of the circuit majority is mixed (Banks 1997; George 1998; Zarone 2000; but see Solimine 1988), and even the suggestion of such usage has stirred controversy (Schwartz 1988; Wermiel 1988; George 1998; Banks 1999; Note 1989; Oliphant 1991; Solimine 1988; Zarone 2000). In marked contrast the role of policy preferences in agenda setting at the Supreme Court is well established (Caldeira et al. 1999; Segal and Spaeth 2002; Epstein and Knight, 1998; Cameron, Segal and Songer 2000). Perhaps the most theoretically advanced study of attitudes in certiorari decision-making is provided by Cameron, Segal and Songer (2000), who develop and test a signaling model of the Supreme Court's certiorari decisions. Here, we extend the logic of their model to the analogous situation of a court of appeals auditing the decisions of its panels.

To the extent that litigants and/or their attorneys are aware of the influence of attitudes on the decisions of judges (Songer et al. 1995), we assume that their decisions regarding petitions for en banc rehearing will also be influenced by ideological considerations. Following Cameron et al. (2000,107), we hypothesize:

Hypothesis #1: *Ceteris paribus*, the likelihood that litigants will petition for en banc rehearing of a panel decision, and that judges will seek a poll and grant en banc review, increases when panel *decisions* are contrary to the ideological preferences of the circuit majority.

Hypothesis #2: The influence of the *ideological distance* between the three-judge panel and the circuit majority on the likelihood that litigants will petition for en banc rehearing of a panel decision, and that judges will seek a poll and grant en banc review will vary as a function of the relative ideological positions of the panel, the circuit, and the decision.

The first of these expectations is straightforward: all else equal, the attitudinal perspective suggests that circuit majorities will be more likely to review decisions with which they disagree. In addition, a key implication of Cameron et al's model is that "the higher court's behavior depends on the lower court's preferences *relative* to the higher court" (2000, 108, emphasis in original). Consider, for example, a circuit with an ideologically conservative majority. Cameron et al's model suggests that when the panel's *decision* is consistent with that majority (what we term a *majority decision*), the probability of circuit review will be zero (cf. Cameron et al. 2000, Hypothesis 1). Moreover, in such circumstances we should not expect the ideological distance between the panel members and the circuit majority to affect the likelihood of en banc; so long as the panel's *decision* comports with the majority's preferences, neither the direction nor the

extent to which the panel's ideology departs from the circuit majority enhances or detracts from the panel's claim that its decision reflects majority circuit preferences.

A very different dynamic holds when the panel's decision runs counter to the preferences of the circuit majority (what we term a *minority decision*). Under this condition we expect that the effects of panel-circuit ideological distance on the likelihood of review will vary according to the ideological position of the panel vis-à-vis the circuit majority. Specifically, for panels we term "*majority panels*" -- that is, panels whose judges are more conservative than a conservative circuit, or more liberal than a liberal one -- we expect that the probability of review will decrease as the panel's distance from the circuit majority increases. Conversely, for "*minority panels*" -- panels whose judges are more liberal than a conservative circuit, or vice-versa -- we expect that the probability of review will increase as the panel's distance from the circuit majority increases. Put somewhat differently, we expect that while a liberal decision rendered by a very liberal panel would be highly likely to receive en banc review by a conservative circuit, the same decision would be highly *unlikely* to be subjected to review if it were made by a panel of very conservative jurists.

As Cameron et al. (2000) imply, this view can be justified from an informational perspective: if the circuit is imperfectly informed about the content of any particular decision, informational shortcuts such as the identity of the judges on the panel and the direction of the ruling provide insight into the potential need for circuit oversight. Again assuming a conservative circuit majority, a liberal panel decision is an ambiguous signal to the circuit majority; it may or may not mean that the panel has departed from the majority preferences of the circuit.<sup>5</sup> The ideological makeup of the panel increases the clarity and credibility of the outcome signal: as panels become more liberal relative to the circuit majority, the credibility of

the claim that a liberal decision reflects the preferences of the (conservative) circuit majority becomes less tenable and the likelihood of en banc review more likely. Conversely, as the panel in question grows more conservative relative to the circuit majority, the credibility of the claim that the less conservative (i.e., more liberal) circuit majority would also have reached a liberal decision in the case becomes more credible, and en banc review correspondingly less likely.

A related issue is the potential role of dissent in the en banc process. Ginsberg and Falk suggest that dissents from decisions made by three-judge panels provide information to non-panelists that "the losing argument was capable of persuading at least one judge" (1991, 1047). Alternatively, George (1999, 247) submits that dissent serves as an indicator of a violation of the "relational contract" by which a panel acts on behalf of the entire circuit. In this hierarchical view, dissent serves as a signal that the panel majority might be violating circuit norms. Indeed, George finds the presence of dissent to be the most powerful predictor of en banc review. In either view, however, the implication for en bancs is clear: dissent works to raise the probability of post-decision review. Thus:

Hypothesis #3: The likelihood that litigants will petition for en banc rehearing of a panel decision, and that judges will seek a poll and grant en banc review, increases with the presence of a *dissent* from the three-judge panel's decision.

Yet another potential role for dissent occurs in the context of "whistleblowing." Cross and Tiller (1998) found that panels made up of three judges whose personal preferences are at odds with circuit precedent are more likely to rule consistently with those preferences than are panels which include a single judge with preferences in line with the circuit majority. They attributed this to a "whistleblower" effect: the potential for such a minority panel member to act as an alarm to warn the circuit majority of any ideological departures from the majority view. To

the extent that this behavior increases the likelihood of en banc review, Cross and Tiller argue that it works to prevent the panel majority from rendering a decision inconsistent with the circuit's preferences.

Cross and Tiller's account of "whistleblowing" suggests a more general expectation regarding en banc review: a rehearing en banc is more likely where a panel has decided a case contrary to the preferences of the circuit majority and the third member of the panel has dissented. Thus, we hypothesize an interactive relationship between the ideological direction of a panel decision and the presence of dissent, regardless of whether the dissenter is a member of the circuit majority or minority:

Hypothesis #4: The likelihood that litigants will petition for en banc rehearing of a panel decision, and that judges will seek a poll and grant en banc review, increases when panel decisions that are contrary to the ideological preferences of the circuit majority are accompanied by dissent.

Here it is important to note a key distinction between Hypotheses 3 and 4. Specifically, the former suggests that dissent will always serve as a signal for en banc and will therefore be consistently and positively related to it. The latter suggests an interactive relationship; dissent may well increase the odds of en banc review, but it will do so to an even greater extent in cases decided contrary to the circuit majority's preferences.

### *Legal Factors*

Circuit courts are authorized to hold en banc hearings by Rule 35 of the Federal Rules of Appellate Procedure. This provision clearly instructs that rehearings en banc are not to be favored, but an exception may be made "when consideration by the full court is necessary to secure or maintain uniformity of its decisions." Rule 35 also provides a second exception: "when

the proceedings involve a question of exceptional importance." This standard, however, may be so broad that it provides little guidance to those litigants seeking en banc rehearing and almost no constraint on the judges' exercise of discretion. Operationally, a majoritarian principle prevails: important cases are those that a majority of the circuit's judges vote to rehear en banc (Bennett and Pembroke 1986; Solomine 1988, 51; Ginsberg and Falk 1991, 1022). Nevertheless, Rule 35 recognizes the presence of two broad conditions justifying the granting of an en banc rehearing: the presence of legal *uncertainty* and the *importance* of the issues raised by the case. As forward-looking, rational actors we expect that litigants will be more likely to seek en banc rehearing where these conditions are present and they consider a grant of rehearing more likely (Songer et al. 1995).<sup>6</sup>

Indicators of legal uncertainty. A primary indicator of legal uncertainty is embodied in the first exception noted in Rule 35, intra-circuit conflicts. Such conflicts might arise contemporaneously between two panels dealing with similar cases or from a panel departing from a rule established by a previous circuit panel. Either situation suggests the following:

Hypothesis #5: Cases involving *conflicts between panels* over the applicable legal rule will be more likely to generate requests from losing litigants for en banc review, and judges will be more likely to seek a poll and to grant en banc review in such cases.

While evidence to date provides no support for hypothesis #5 (George 1999; Note 1989), the explicit inclusion of this factor in Rule 35 supports the value of reassessing the hypothesis using our disaggregated approach.

A second case trait involving uncertainty occurs when other circuits have employed alternative legal rules to resolve a similar case. There is evidence that the presence of inter-circuit conflict increases the likelihood of Supreme Court review (Ulmer 1984; Caldeira et. al.

1999). We similarly suggest that the presence of such conflict will increase the probability of a circuit granting en banc consideration of the case. Thus,

Hypothesis #6: Where the appropriate legal rule in a case is in *dispute across circuits*, litigants will be more likely to seek en banc review, and the judges of a circuit will be more likely to seek a poll and to grant en banc review in such cases.

A third indication of the presence of legal uncertainty occurs in cases of first impression. These typically involve the interpretation of a legal provision not previously litigated in the circuit or the extension of an existing circuit rule or Supreme Court decision to a different set of case facts. By definition, a panel in a case of first impression creates the law of the circuit with regard to the point in question. Consequently,

Hypothesis #7: Cases making a *first statement of circuit law* will induce a greater propensity to petition for an en banc rehearing and a greater willingness among judges to seek a poll and to grant en banc review.

As discussed above, a fourth indicator of legal uncertainty is the presence of separate opinions, particularly dissent on the panel. Beyond its significance in "whistleblowing," the presence of dissent indicates a level of uncertainty concerning the applicable legal rule in a case. To the extent that well-trained legal scholars reasoning in good faith can come to different views on the appropriate disposition of a case, non-ideologically motivated dissent may indicate to other members of the circuit that there is disagreement over the legally correct position (Ginsberg and Falk 1991, 1047). Similar reasoning applies to concurring opinions, the presence of which may suggest a preference for alternative legal means to resolve the case. Consequently,

Hypothesis #8: The presence of a *concurring opinion* at the panel level will increase the likelihood of a litigant petitioning for a rehearing en banc and will increase the probability that the judges will seek a poll and grant en banc review.

A fifth indicator is the presence of conflict between the panel and the district court or administrative agency that initially heard the case. As is true for the presence of dissent, conflict in outcomes between court levels suggests legal uncertainty. Available evidence supports the importance of such conflict in the construction of discretionary judicial agendas for both the Supreme Court (Caldeira et al. 1999) and the courts of appeals (George 1999). Therefore:

Hypothesis #9: Where a panel *reverses* the decision of the lower court or agency, litigants will be more likely to seek en banc review, and judges will be more likely to seek a poll and to grant en banc review.

#### Indicators of Case Importance.

A constitutional challenge may enhance the perceived importance of a dispute. Such cases involve the exercise of judicial review and raise the potential for conflict between the court and democratic institutions of government. Panel decisions that have declared an ordinance or statute unconstitutional would seem to be of particular importance; but even where the court upholds the law, the decision constitutes an act of policy making. Thus, we expect:

Hypothesis #10: Litigant requests for en banc rehearing will be more likely in cases involving *constitutional challenges*, particularly where the panel strikes the act as *unconstitutional*. Similarly, judges will be more likely to seek a poll and to grant en banc review under such conditions.

Conversely, one indicator of the lack of importance of a case is if the panel disposed of it with a per curiam opinion. The use of per curiam opinions typically reflects a panel's judgment

that the decision in question is not sufficiently complex to require, nor of sufficient importance to justify, an extensive exposition (Peterson et al. 1992). Thus, the use of per curiam opinions may provide an indication to the litigant that the legal issues involved are unlikely to be perceived as worthy of en banc review by the judges of the circuit. Accordingly:

Hypothesis #11: Cases decided by a panel *per curiam* will prompt lower rates of litigant suggestions for rehearing en banc and a lower incidence of judges seeking a poll and voting to grant en banc review.

Similarly, we expect diversity cases to have a lower likelihood of en banc review. In such cases outcomes typically rest on the application of state law to conflicts between citizens of different states rather than invoking the appellate court's primary responsibility of interpreting federal law and making it uniform across the circuit. For these reasons diversity cases seeking certiorari from the U.S. Supreme Court are typically categorized as unworthy of review (Perry 1991, 224-225), and court of appeals opinions are sprinkled with comments consistent with this position. For example, Judge Alvin Rubin noted in *Sturgeon v. Strachan Shipping* (698 F.2d 798, 1983) "...we ought rarely, if ever...grant en banc rehearing of a diversity case." Therefore

Hypothesis #12: Litigants will be less likely to petition for en banc review in *diversity* cases and judges will be less likely to seek a poll and to grant en banc review in such cases.

Finally, within the Fifth Circuit there are two substantive areas that are both prominent and important: death penalty appeals and admiralty law. The Fifth Circuit encompasses three states that employ the death penalty and use it with frequency, Texas, Mississippi, and Louisiana. Death penalty cases generate a significant volume of appeals, and losing death row defendants have a powerful incentive to seek en banc rehearing. Furthermore, given the consequences

associated with these cases judges may be more willing to consider and to grant en banc rehearing.

The Fifth Circuit includes New Orleans, Houston, and a number of other major harbors along the Gulf of Mexico. Moreover, the Mississippi River is an important source of commercial maritime activity, and the Gulf is a major site of fishing and oil production. Decisions of the Fifth Circuit have an enormous economic impact on these commercial interests. Furthermore, the circuit has been a recognized leader in the development of maritime law. Consequently,

Hypothesis #13: Panel decisions involving the application of the *death penalty*, as well as those in the areas of *maritime/admiralty* law, will tend to generate high levels of litigant requests for en banc review, and judges will be more likely to seek a poll and to grant en banc rehearing in these cases.

### **Data and Operationalization**

Our analysis focuses on the en banc process in the Fifth Circuit Court of Appeals from 1981 to 1991. This is the first decade of the "new" Fifth Circuit that was created by the splitting of the "old" Fifth and the creation of the new Eleventh Circuit (Barrow and Walker 1988). We selected the Fifth Circuit because its record-keeping on petitions for rehearing en banc and their disposition is more transparent than is the case in other circuits.<sup>7</sup> Importantly, during this period the Fifth Circuit experienced a change in partisan balance, moving from a Democratic to a Republican judge majority. The study period also encompasses the decade in which judges appointed by Reagan and Bush came to constitute majorities in several circuits and controversy first emerged regarding the ideological use of the en banc (Schwartz 1988; Wermiel 1988). There is little reason to assume that the factors influencing the decisions of litigants to seek and

of judges to grant en banc rehearing in the Fifth differ from those in other circuits. The formal processes used are comparable, and the frequency of en banc rehearsings in the Fifth suggests that it is not an outlier.<sup>8</sup>

Assessing the various hypotheses requires data on four groups of cases: (1) those where the litigant(s) did not seek en banc review ("no petition" cases); (2) cases where the litigants sought review but were denied without a poll of the judges ("denied" cases); (3) cases where the litigants sought review and a judge requested a poll of the circuit but the petition failed to achieve a majority ("polled" cases); and (4) cases where litigants sought review, a judge sought a poll, and a majority of the judges supported rehearing ("granted" or "en banc" cases). To draw our sample of "no petition" cases, we turn to the United States Court of Appeals Database (Songer 2002).<sup>9</sup> Those data include a random sample of 330 Fifth Circuit cases decided from 1980 through 1991. Each case was cross-checked with the *Federal Reporter* and Lexis-Nexis searches; any case for which an en banc review had been sought or granted was excluded. Cases decided by the panel summarily without an opinion were also omitted. As a result of this cleaning and crosschecking, our data include 252 "no petition" cases.

The Fifth Circuit provides information in tabular form on the disposition of petitions for which en banc review has been sought. Normally these tabled cases represent petitions that were rejected without an opinion and are designated as having been denied without a poll or with a poll of the circuit judges. Cases in the "denied" group were initially identified from these tables. A total of 1123 cases appeared in the tables as denied without a poll during the study time period. To obtain petitions that were denied with an opinion, we conducted a Lexis-Nexis search using variants of the queries "petition for rehearing en banc" and "suggestion for rehearing en banc." Each entry identified by the query was examined to determine if it involved a petition for

en banc review in a case not already included in the tables. Our data thus include a total of 410 "denied" cases; of these, 267 were randomly sampled from the tabled denials and 143 were identified through a Lexis-Nexis search. Our data also include 46 "polled" cases, all of which were identified using the Lexis-Nexis search procedure.

The identification of en banc cases required a different approach. A Lexis-Nexis query consisting of the names of four circuit judges was employed to generate a list of cases. Each of these cases was then examined to see if it was decided en banc. The query was run again with a different combination of judges' names and the resulting list of cases checked for non-duplicative en banc cases. This procedure was repeated with different combinations of judges until no new en banc cases were generated. After removing en banc cases without a panel decision, 115 "en banc" cases were included in the study.

All cases in the data were decided with a panel opinion during the period from 1980 through 1991. In every instance, these cases were subsequently coded using the protocols employed by the Court of Appeals Database (Songer 2002) where similar variables (e.g. case outcome) were measured. In the search for "polled" and "en banc" cases we identified 29 cases that advanced to a poll on the motion of the court (*sua sponte*) rather than at the request of a litigant. Such cases cannot be petitioned and by definition automatically receive a poll of the circuit. Accordingly, these cases are only included in our analysis of "grants"; in addition, we include in that analysis a variable controlling for the presence (=1) or absence (=0) of such a *sua sponte* request.

As noted above, previous studies have been limited to comparisons between cases that have been granted en banc review and those that have not. Our data permit us to make that same comparison, but also allow us to examine separately the three critical stages in the process: the

decision of the litigant to petition for en banc review, the decision of at least one judge to call for a poll of the circuit, and the decision of a majority of the circuit's judges to grant en banc. To this end, we code cases for which a *petition* for en banc was not filed as "0" and those of cases for which a petition was sought (regardless of the outcome of that request) as "1". Similarly, for those cases in which a petition was filed, we code whether (= 1) or not (= 0) there was a *poll* of the circuit; likewise, for cases in which a poll took place, we code whether (= 1) or not (= 0) en banc review was *granted*. Of the 542 cases in our data in which a petition was filed, 132 (24.4 percent) were polled; of those, 89 (67.4 percent) were granted an en banc rehearing.

To measure the ideological preferences of the judges, we adopt the approach of Giles, Hettinger, and Peppers (2001) (hereinafter GHP). These scores are based on the Poole's (1998) common space scores for Senators and Presidents. They take the value of the appointing President's score in the absence of senatorial courtesy and the score of the senator of the judge's home state when senatorial courtesy is operative. They vary from -1.00 for the most liberal judges to 1.00 for the most conservative.

We measure panel ideology as the mean GHP score of the judges serving on a given panel.<sup>10</sup> Where there was a dissenting vote, only the GHP scores of the two judges in the majority were used to calculate the mean. Similarly, the ideological position of the circuit majority was operationalized as the mean GHP score of the judges in active service on the circuit. This measure was calculated for each of the twenty-two natural courts that occurred during the study period, and range from .025 to .402 across the natural courts. The ideological distance between each panel and the circuit majority was then operationalized as the absolute value of the difference between the panel mean and the mean for the appropriate natural court. Because our expectations about the effect of distance vary with both the nature of the panel and

the decision, we include two variables for distance: one for *majority panels* (which is equal to the panel-circuit distance when the panel is a "majority" panel, as described above, and 0 otherwise) and one for *minority panels*.

Whether or not a panel decision is in accord with the preferences of the circuit majority is central to Hypotheses 1, 2, and 4. Employing the coding used in the Court of Appeals database, we coded each panel decision as liberal, conservative, or mixed; decisions that could not be assigned an ideological direction were excluded from the analysis. To classify the decisions as consistent or inconsistent with majority preferences required that we identify the point on the scale of GHP scores at which the circuit shifted its ideological majority. In studies that rely on the party of the appointing president to measure judicial ideology, this point is usually assumed to be when judges appointed by presidents of a particular party become the majority on a circuit. Taking a cue from this approach, we regressed the proportion of the Fifth circuit's judges in a natural court appointed by a Democratic President on the mean GHP score of the natural court. This yields:

$$\textit{Fraction Democratic}_i = 0.761 - 1.513 \times \textit{GHP}_i + u_i$$

This regression yielded an R-squared of 0.98 and a RMSE of 0.02, and suggests that during the study period a Fifth Circuit that is evenly split in terms of partisan appointments corresponds to a GHP circuit score of .173. Using this result and the ideological direction of the cases, we constructed a circuit *minority decision* variable. This variable was coded "1" -- indicating a panel decision inconsistent with the preferences of the circuit majority -- if the panel decision was liberal and the mean circuit GHP score was greater than .173, or if the panel decision was conservative and the mean circuit GHP score was less than .173. It was coded "0" -- indicating a panel decision consistent with the circuit majority -- if the panel decision was liberal and the

mean GHP score for the circuit was less than .173 or the panel decision was conservative and the mean circuit GHP score was greater than .173. Panel decisions coded as "mixed" were coded "0" on the minority decision variable.<sup>11</sup> Of the 823 cases in our data, 98 were of an indeterminate ideological direction; we exclude those cases from our analyses. We also include interaction terms between our two panel-circuit distance variables and the *minority decision* variable with the expectation that the direct effects of both distance variables (i.e. the effects of distance for majority decisions) will be zero but that their interactions will be negative and positive for *majority* and *minority distance*, respectively.

Turning to our measures of uncertainty, dissent was coded "1" if a dissent from the panel decision was registered and "0" otherwise. Similarly, we coded a concurrence as "1" if the panel decision included a concurring opinion and "0" if it did not. In assessing the presence of legal uncertainty, we relied on explicit statements made by the panel judges in the majority, concurring or dissenting opinions; no effort was made to assess objectively the judges' claims to the presence of uncertainty. Thus, if a judge asserted the presence of an intra- or inter-circuit conflict and/or an issue of first impression it was coded as "1" and "0" otherwise. The treatment of the lower court decision by the panel was coded as "0" if the panel affirmed the previous decision or "1" if the panel reversed it, either in whole or in part. The presence of a constitutional challenge to a statute or ordinance was scored "1" if present in a case and "0" otherwise. Likewise, a successful constitutional challenge (that is, a declaration of unconstitutionality) was scored "1" and its absence as "0". Cases were coded "1" if the opinion was per curiam and "0" otherwise. Finally, each case was coded "1" if it involved the death penalty, admiralty or diversity jurisdiction and "0" if it did not. Summary statistics for these

variables, as well as bivariate correlations with each of our three main dependent variables, are presented in Table 1.

(Table 1 about here)

## **Results and Analysis**

At the outset, it is important to note that our sampling strategy raises some challenges to the estimation of our variables' effects. For example, of the 698 non-*sua sponte* cases in our data, 476 (68.1 percent) were petitioned; however, our sampling strategy, in which we include all cases that are addressed vis-a-vis en banc by the circuit but only a random sample of those not, means that this statistic is not representative of the fraction of cases petitioned in the population. Similarly, the fraction of granted cases, as a percentage of all cases in the data (103 of 725, or 14.2 percent) significantly overstates the true percentage of cases granted en banc. Accordingly, for the models of both *Grants (All Cases)* and *Petitions*, we adopt the prior correction approach set out by King and Zeng (2001, Eq. 7) both in our model estimates and in the calculation of our predicted probabilities, basing our estimate of the total number of cases in the population on data from the appendix in Songer (2002).<sup>12</sup> Since each of the four comparisons is dichotomous, the hypothesized effects of the independent variables are assessed using logit models with robust standard errors.<sup>13</sup>

### *Granted and Non-Granted Cases*

As we noted above, all previous work on en banc decision making has simply compared cases granted en banc to those not granted. For comparison purposes, we adopt this approach in column one of Table 2; our response variable there is coded "1" in cases that were granted en banc review and "0" otherwise, irrespective of how that denial took place.

Our results using this approach mirror those of earlier analysts (e.g., George 1999) who have generally found substantially stronger effects for case-related factors than for those related to the judges on the circuit. While the effects of ideological distance are correctly signed for panels issuing minority decisions, negative for majority panels and positive for minority panels, neither effect is statistically significant. The effect of ideological distance when both the panel and its decision are consistent with the majority's preferences is large and approaches statistical significance ( $p = 0.10$ , two-tailed), suggesting that contrary to our hypothesis circuits may audit outlying panels even when those panels and their decisions are consistent with the ideological tenor of the circuit majority. Similarly, while dissent proves to have a strong and significant influence on the likelihood of en banc -- increasing the probability of such a grant by nearly a factor of eight -- we find no evidence of the hypothesized whistleblower effect.

(Table 2 about here)

The results in column one of Table 2 provide much stronger support for the legal variables. Every measure of legal uncertainty is appropriately signed and statistically significant, and their joint significance is high as well (Wald  $\chi^2(5) = 44.6$ ,  $p < .0001$ ). Clearly, panel decisions that are granted en banc review involve greater legal uncertainty than do cases not receiving such review. The results for legal importance are less consistent with expectations. Both their joint significance (Wald  $\chi^2(6) = 25.0$ ,  $p = .0003$ ) and their individual influences are not as strong as those of the uncertainty-related factors. Of the legal importance variables, only the presence of a declaration of unconstitutionality substantially affects the likelihood of en banc review in the hypothesized direction.

### *Disaggregated Analyses*

While it is heartening that the results reported in column one are consistent with previous research, they also suffer from the same limitations that affect that work. The results provide evidence of how cases granted en banc differ in the aggregate from those that were not reconsidered en banc. However, since the analytic approach reduces the en banc process to a simple "grant/deny" response, it cannot determine if those differences arose from the decisions of litigants, judges or both. To address that question, we turn now to an analysis of each of the three key stages of the en banc decision process.

The Litigant's Decision to Petition for Rehearing En Banc. Petitions for en banc review represent the initial stage of the process and the only one in the direct control of the losing litigants. Column two of Table 2 presents the results of our model for litigant petitions, where cases containing such a petition are coded "1" and others coded "0". Results from this analysis provide a number of clear contrasts from the aggregated model in column one. These differences are most strongly reflected in the findings for our ideological influences and in those for the legal uncertainty variables.

We hypothesized that the ideological distance of the panel from the circuit majority would be unrelated to the probability of a litigant petitioning for en banc when the panel decision was consistent with the preferences of the circuit majority. To the contrary, the results in column 2 indicate that for cases with outcomes consistent with the majority increasing distance between a majority panel and the circuit increases the probability of a petition, though the effect is imprecisely estimated ( $p = 0.14$ , two-tailed). Conversely, increasing the distance between a minority panel and the circuit in such cases actually decreases the chance of a petition ( $p = 0.06$ , two-tailed). More concretely, this means that the probability that a litigant chooses to petition

for rehearing of (say) a conservative decision in a conservative circuit declines as the panel that made the decision grows more liberal. The size of this effect is also substantively significant; an increase in distance of 0.10 (or about one standard deviation) corresponds to a decrease of roughly 24 percent in the odds of a petition being filed.

Our results provide partial support for our hypotheses when the panel decision goes against the prevailing circuit majority. Contrary to our expectations of a negative effect in such cases, increasing the distance between the circuit and a majority panel increases the probability of a petition, though that effect is not statistically differentiable from the majority-decision case. However, the effect of ideological distance for minority panels that make minority decisions is consistent with our hypothesis. In such cases, the probability of a petition rises precipitously with increases in panel-circuit distance: an increase in distance of 0.10, for example, increases the odds of a petition by roughly 82 percent.

This latter effect is illustrated graphically in Figure 1, which plots the predicted probabilities of an en banc petition in a case decided by a minority panel across a range of values for ideological distance, with other variables held at their medians. In Figure 1, the solid-circled line indicates predictions for a decision consistent with the circuit majority's preferences, while the hollow-circled line tracks the predictions for a minority decision. At low values of distance - that is, when the panel and the circuit as a whole are highly similar ideologically-- the probabilities are both low and essentially identical for the two types of cases. As distance increases, however, the probability of a petition grows markedly for those cases in which the minority panel's decision went against the circuit majority's views and declines slightly in those cases in which the minority panel produced a decision consistent with the majority's views.

Litigants, then, appear to consider carefully the ideological position of their case relative to the circuit before making decisions regarding en banc requests. Moreover, this ideological influence is obscured in models that fail to distinguish between litigant petitions and other aspects of the en banc process. This is consistent with the consensus among legal academics. George, for example, notes that "(C)onventional wisdom among appellate lawyers is that a panel's composition is ... a significant determinant of whether the full court will grant rehearing en banc" (1999, 271). Interestingly, however, the locus of this influence has until now been misplaced; while George and others suggest that panel composition affects the behavior of the judges, our findings instead point to its influence on the actions of the litigants.

(Figure 1 about here)

On the other hand, the influence of legal factors, particularly those related to case uncertainty, can be seen to have a significantly lesser effect on litigants' decisions than they did on aggregate en banc outcomes. While intercircuit conflict and the presence of a reversal still lead to higher odds of such a petition, the same cannot be said of intracircuit conflicts, cases of first impression, and decisions issued with a concurring opinion. Likewise, those legal factors related to case importance also generally exhibit little effect on litigants' decision to petition for a rehearing en banc, with one important exception: cases involving the death penalty. Such cases are more than two and one half times more likely to be petitioned than are non-death penalty cases, a result that almost certainly reflects the desire of such litigants (and their attorneys) to exhaust all possible avenues of appeal in their attempts to have their convictions or sentences overturned.

Taken together, our findings with respect to litigants' en banc petitions are, in many respects, unsurprising. To the extent that litigants are primarily if not exclusively concerned with

winning the case at hand, matters relating to resolving conflicting interpretations of doctrine and related "judicial" concerns ought necessarily to have less influence on their behavior. At the same time, these intuitive findings underscore the necessity of considering in isolation the various components of the en banc decision in order to understand fully the outcomes of the process.

Judges' Decisions to Request a Poll. Column three of Table 2 reports the results of a logit analysis of the judges' decisions to request such a poll. In contrast to litigant petition behavior, the choice by circuit judges to request or not to request a poll of the circuit is driven largely by factors related to the case itself, rather than the strategic environment. Note that in contrast to the model of litigant decisions, we find no significant evidence of strategic decision making on the part of the judges. The estimates for the interactions of minority decisions and panel-circuit distance, while correctly signed, are both substantially smaller than their standard errors, and a test for the combined significance of the five strategic variables fails to reject the null of no joint effects (Wald  $\chi^2(5) = 6.42, p = .27$ ).<sup>14</sup> Similarly, we again find no evidence of whistleblower behavior. While dissent again acts as a signal to judges as to the potential viability of a case for en banc review, that signal is no more likely to have an impact in a decision that runs counter to the majority's preferences than in one consistent with them.<sup>15</sup>

But the most substantial differences between the petition and poll results occur with respect to the legal variables, particularly those relating to legal uncertainty. While only two of those five covariates exerted a substantial influence on litigants appeal choices, all five play an important role in driving the judges' decisions to request a poll. Cases which instigate or continue a conflict among circuits, for example, are more than two times more likely to receive a positive poll request than those which do not; the corresponding figure for cases causing

intracircuit conflicts is a more than eightfold increase. The same holds true for cases of first impression, those giving rise to concurring opinions, and lower court reversals: all see substantially higher likelihoods of poll requests. And while, for the petition model, the combined effect of these five variables was statistically significant (Wald  $\chi^2(5) = 28.2, p < .001$ ), their joint influence in the model of polls is even greater (Wald  $\chi^2(5) = 54.3, p < .001$ ). In fact, these five variables represent the most significant joint set of influences on judges' decisions to request an en banc poll.

Our findings with respect to the variables measuring case significance, while less stark, nonetheless also reveal important distinctions between the decision calculi of litigants and judges. With respect to the judges' polls, the factor of key importance, by a wide margin, is the presence of a declaration of unconstitutionality. The odds ratio of cases containing such a declaration is nearly 56, indicating that the presence of that lone characteristic increases the chances of review more than fifty-fold. Equally interesting, neither of the two case importance factors most influential in the petition decision -- the panel's disposition of the case per curiam and the presence of a death penalty appeal -- has any substantial influence on the judges' decisions to request a poll in the case. With respect to the former, it is apparently litigants, not judges, who pre-screen per curiam cases out of the pool of potential en bancs. The latter finding is even more intuitive, since it suggests that while litigants place great significance on death penalty appeals, judges do not. Considered in the aggregate, then, our findings with respect to polls underscore those for petitions: that litigants and judges see the en banc process very differently, and that taking account of those differences is vital to a valid understanding of the federal appellate process.

The Circuit's Decision to Grant En Banc Review. Petitions receiving a request for a poll are then voted on by the active members of the circuit. As we note above, polled cases have a high probability of being granted en banc review; in our Fifth Circuit data, the observed probability of a grant among cases polled is over 60 percent. This stage of the process is, in the end, what determines whether a case will be reheard en banc. At the same time, our findings suggest that a good deal of the decision making takes place before the final vote occurs. Our analysis of the 144 Fifth Circuit cases in which a full poll was taken during our study period is informative as much for what it does not tell us as what it does. As illustrated in column four of Table 2, of all the variables' effects in the model, only one -- the indicators for *sua sponte* cases -- is signed as expected and statistically differentiable from zero. The joint significance of the model as a whole is also low (Wald  $\chi^2(19) = 30.0, p = .05$ ), and the sizes of the coefficients are generally small relative to those in the previous models, suggesting that few of the factors that influence the earlier stages of the process are important in the actual vote to grant en banc review. This suggests that the influential factors in the previous stages may be sufficient to stimulate at least one judge to call attention to the case by requesting a poll, but are typically insufficient, on their own, to convince a majority to grant review.

The lack of strong predictors in this final stage of the en banc decision is, we think, one of the most important findings of our study, for at least two reasons. First, were judges going to behave in an ideological or sophisticated fashion, their final votes on en banc review would seem to be the optimal place to do so. The absence of ideological or strategic effects at the final stage of the process, then, is the strongest evidence to date of the judges' legally-oriented approach to en banc review. Second, nearly every previous empirical examination of en bancs has cast the analysis in terms of judges' votes to grant or deny a full court review. In fact, our results indicate

that the final vote to grant or deny a full-court rehearing exhibits relatively little in the way of systematic variation. Those factors long believed to have important effects on the incidence of en banc review -- including panel dissent -- actually operate much earlier in the process. This, in turn, suggests that the "winnowing" of cases for en banc review occurs primarily in the decisions of the litigants and individual circuit judges regarding petitions and polls, long before court's final vote.<sup>16</sup>

### **Summary and Discussion**

The en banc procedure provides an important mechanism used by the courts of appeals to modify the law of the circuit, correct errant panels, impose consistency in the application of federal law, and settle especially important legal disputes. Yet we know relatively little about the en banc process. Previous studies have simply compared cases granted en banc consideration to the general run of cases decided by the courts of appeals. We contend that analyses that fail to disaggregate the en banc decision and consider only the binary grant/deny outcome will at best miss important differences in the influences of key factors across those various stages, and at worst will yield findings which are incorrect and misleading.

The present study has adopted an alternative approach, one that focuses not only on the outcome of the agenda-setting process but also examines individually the component decisions that construct the en banc agenda. Our disaggregated analysis suggests that litigants and judges structure their decisions according to very different sets of goals and priorities. Attorneys, as we might expect, focus on the interests of their clients and their odds of ultimately prevailing. As a consequence it is not surprising that attorneys' decisions to petition for en banc review are often conditioned on the expected probability of winning the case if it is reconsidered by the entire court. In calculating the probability of victory, attorneys pay close attention to the ideological

position of the panel vis-à-vis that of the circuit majority. They also receive encouragement from judges who have endorsed their position either at the district court level or in dissent from the panel decision. Additionally, lawyers consider what is at stake for their clients. At the extreme, this is represented by the almost inevitable decision of losing parties in death penalty cases to petition for a rehearing en banc. In the end, then, our data are consistent with the classic role of the attorney acting as advocate for the client.

In contrast, judges appear to focus more on the state of the law. Where the law is uncertain or inconsistent (as exemplified by intra- and intercircuit conflicts, issues of first impression, differences between the district judge and the appellate panel, and the presence of dissenting/concurring opinions), court of appeals judges are willing to request a vote on the petition for en banc review. In addition, judges are more likely to support a poll in the most legally significant cases -- that is, when the case involves the use of judicial review. Thus, our data show a clear relationship between the reasons why the en banc procedure was established and the behavior of judges on the courts of appeals, but little evidence that ideological factors play a significant role. Our results, then, are broadly consistent with Baum's contention that "legal goals have far greater operative effect in the lower courts than in the Supreme Court (1997, 88)."

More generally, we believe our study also highlights important aspects of the study of agendas. Agenda setting is a key element of every aspect of the political process. Every actor's choices are, necessarily, constrained to some extent by those made earlier in the policymaking process. At the same time, empirical work on agenda setting all too often focuses on discrete outcomes, rather than on processes. Had we simply examined the binary grant/deny decision, for example, our study would have likely concluded that ideological factors play no role in the en

banc process and that legal factors were dominant. In doing so, we would have both missed the importance of panel composition to litigants and at the same time attributed such significance to variables measuring uncertainty in the law. Likewise, had we focused only at the final stage of the process when judges select cases for en banc review from among those granted a poll, we would have wrongly concluded that the decision to grant en banc was driven solely by idiosyncratic, non-systematic factors. Our study thus underscores the point that, in a complex, multistage agenda process, different actors often have widely varying goals and motivations for their actions. The implications are clear: "unpacking" political agenda-setting processes is key to describing their operation accurately.

## Endnote

<sup>1</sup> *Annual Report of the Administrative Office of the United States Courts*, various years, Table S-

<sup>2</sup> The Ninth Circuit uses a special "mini-en banc" procedure that sets the number of judges on rehearing at fifteen. This number was increased from eleven as of January 2006.

<sup>3</sup> Note that a circuit court may grant en banc review without a petition from a litigant (*sua sponte*), and in exceptional cases may grant en banc status without a panel decision. We exclude the latter from our analysis and discuss *sua sponte* cases below.

<sup>4</sup> For a discussion of variation among the circuits on this point, see Ginsburg and Falk (1991).

<sup>5</sup> Note that the logic is the same given a liberal circuit majority. Only the directionality changes: for a liberal circuit, liberal panel claims to reflect the majority become more credible (and conservative panels less credible) with increases in ideological distance from the circuit majority.

<sup>6</sup> Some obvious factors may influence the litigants' decision to seek an en banc rehearing that have no effect on judges' support for en bancs. For example it is reasonable that the financial effects of a loss influence the litigant's decision but do not affect the judge's.

<sup>7</sup> In particular, the Fifth circuit lists each petition for rehearing en banc and its disposition in the Federal Reports and on Lexis-Nexis. With the exception of the 11th circuit, no other Court of Appeals has consistently adhered to this practice.

<sup>8</sup> During the period of study, the circuits varied in the rate of en banc review from a low of approximately one en banc for every 1,000 panel decisions in the Second Circuit to a high of approximately 10 per 1,000 in the Eighth Circuit. The Fifth Circuit -- with 6 en banc hearings per 1,000 -- did not differ significantly from the all-circuit average of 5 per 1,000 panel terminations.

<sup>9</sup> These data are available at <http://www.as.uky.edu/polisci/ulmerproject/appctdata.htm>.

<sup>10</sup> While the model we are implicitly employing is a median voter model, we have opted to use the mean as our measure of central tendency. Since the vast majority of panel decisions are unanimous -- and thus a product of compromise -- the "policy" embodied in the opinions is also most likely a compromise among the three sitting judges, and is accordingly better reflected by the mean than the median. Moreover, where dissent does occur, the mean of the two majority judges is identical to the median.

<sup>11</sup> Recoding "mixed" decisions as inconsistent with circuit preferences yielded results which were, if anything, even stronger than those presented below; those results are available on request from the authors.

<sup>12</sup> Note that we adopt standard approaches for the *Polls* and *Grants* models, since the data in question were not sampled on the basis of the outcomes of interest.

<sup>13</sup> Many of our hypotheses assume that litigants shape their decisions based on their expectations that the judges will favor rehearing some types of cases more than others. The same is true for many of our hypotheses about the decisions of judges to call for polls. To address this issue, we follow Heckman (1979) and replicated the analysis in Table 2 with the inclusion of a variable for the inverse Mills' ratio generated from the predicted probabilities from the immediately preceding stage. This selection variable was not significant in the equation for the judges' call for polls on en banc petitions or in the equation for the judges' decision to grant en banc, indicating that, after controlling for the covariates in our model, there is no evidence of selection bias. Moreover, the pattern of coefficients across the equations in these auxiliary analyses is consistent with the pattern in Table 2. These alternative analyses are available upon request from the authors.

<sup>14</sup> Note that the lack of significance of the strategic variable is not a result of its operation at the petition stage. As indicated in footnote 13, our findings at the poll and grant stages are stable after the inclusion of a variable to correct for potential selection effects. Thus, while minority decisions rendered by panels far from the ideological mean of the circuit are disproportionately represented in the pool of cases from which judges select cases to be polled (given the petition results), these traits do not increase the likelihood that the judges select those cases for polls.

<sup>15</sup> Of course, these null findings may reflect strategic decision by panel judges to avoid en banc review by altering outcomes and opinions. We cannot address this possibility with the data in hand.

<sup>16</sup> The failure of systematic factors to discriminate cases granted en banc from among the relatively small pool of “polled” cases is analogous to the problem of “complexification” identified by Collier and Mahoney (1996) in studies that focus on extreme cases of the dependent variable, in that the systematic factors have done their work in selecting the cases into the rarefied choice set.

## References

- Banks, Christopher P. 1999. *Judicial Politics in the D.C. Circuit*. Baltimore, MD: Johns Hopkins University Press.
- Banks, Christopher P. 1997. "The Politics of En Banc Review in the 'Mini-Supreme Court.'" *Journal of Law and Politics* 13 (Spring): 377-414.
- Barrow, Deborah J. and Thomas G. Walker. 1988. *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*. New Haven, CT: Yale University Press.
- Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.
- Baumgartner, Frank R., and Bryan D. Jones. 1993. *Agendas and Instability in American Politics*. Chicago: University of Chicago Press.
- Bendor, Jonathan, and Terry M. Moe. 1986. "Agenda Control, Committee Capture and the Dynamics of Institutional Politics." *American Political Science Review* 80 (December): 1187-1207.
- Bennett, Steven, and Christine Pembroke. 1986. "'Mini' In Banc Proceedings: A Survey of Circuit Practices." *Cleveland State Law Review* 34: 531-65.
- Caldeira, Gregory A., and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82 (December): 1109-1127.
- Caldeira, Gregory A., John R. Wright, and Christopher J.W. Zorn. 1999. "Strategic Voting and Gatekeeping in the Supreme Court." *Journal of Law, Economics and Organization* 15(October): 549-572.

- Cameron, Charles, M., Jeffrey A. Segal, and Donald Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions." *American Political Science Review* 94(March): 101-116.
- Cohen, Jeffrey E. 1995. "Presidential Rhetoric and the Public Agenda." *American Journal of Political Science* 39 (February): 87-107.
- Collier, David, and James Mahoney. 1996. "Insights and Pitfalls: Selection Bias in Qualitative Research." *World Politics* 49 (October): 56-91.
- Cross, Frank B., and Emerson H. Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals." *Yale Law Journal* 107 (May): 2155-2176.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, D.C.: CQ Press.
- George, Tracey E. 1998. "Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals." *Ohio State Law Journal* 58: 1635-1696.
- George, Tracey E. 1999. "The Dynamics and Determinants of the Decision to Grant En Banc." *Washington Law Review* 74 (April): 213-274.
- Giles, Micheal W., Virginia A. Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54(September): 623-641.
- Ginsburg, Douglas H., and Donald Falk. 1991. "The Court En Banc: 1981-1990." *George Washington Law Review* 59 (June): 1008-1091.
- Hammond, Thomas H. 1986. "Agenda Control, Organizational Structure, and Bureaucratic Politics." *American Journal of Political Science* 30 (May): 379-420.

- Heckman, James J. 1979. "Sample Selection Bias as a Specification Error." *Econometrica* 47 (January): 153-62.
- King, Gary and Langche Zeng. 2001. "Logistic Regression in Rare Events Data." *Political Analysis* 9(Spring): 137-163.
- Mouw, Calvin J., and Michael B. MacKuen. 1992. "The Strategic Agenda in Legislative Politics." *American Political Science Review* 86 (March): 87-105.
- Note. 1989. "The Politics of En Banc Review." *Harvard Law Review* 102 (February): 864-884.
- Oliphant, Robert E. 1991. "En Banc Polarization in the Eighth Circuit Court of Appeals." *William Mitchell Law Review* 17 (Summer): 701-751.
- Perry, H. W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.
- Peterson, Steven, Stephen L. Wasby, James Schubert, and Glendon Schubert. 1992. "The Per Curiam Opinion: Its Nature and Functions." *Judicature* 76(June-July): 29-38.
- Poole, Keith T. 1998. "Recovering a Basic Space From a Set of Issue Scales." *American Journal of Political Science* 42(July): 954-993.
- Schwartz, Herman. 1988. *Packing the Courts: The Conservative Campaign to Rewrite the Constitution*. New York: Scribner.
- Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York: Cambridge University Press.
- Solimine, Michael E. 1988. "Ideology and En Banc Review." *North Carolina Law Review* 67 (November): 29-76.
- Songer, Donald R. 2002. *The United States Courts of Appeals Data Base, 1925-1996*.

- Songer, Donald R., Charles M. Cameron, and Jeffrey A. Segal. 1995. "An Empirical Test of the Rational Actor Theory of Litigation." *Journal of Politics* 57(November):1119-1129.
- Ulmer, S. Sidney. 1984. "The Supreme Court's Certiorari Decision: Conflict as a Predictive Variable." *American Political Science Review* 78 (December): 901-911.
- Wermiel, Stephen. 1988. "Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming to Mold Law." *Wall Street Journal* March 22: 70.
- Wood, B. Dan, and Jeffrey S. Peake. 1998. "The Dynamics of Foreign Policy Agenda Setting." *American Political Science Review* 92(March): 173-184.
- Zarone, Phil. 2000. "Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings." *The Journal of Appellate Practice and Process* 2 (Winter): 157-189.

**Table 1**  
Summary Statistics

Variable	Mean	Std. Dev.	Minimum	Maximum	Correlations		
					Petition	Poll	Grant
<i>Outcome Variables</i>							
Petition Indicator ( <i>N</i> = 698)	0.682	0.466	0	1	-	-	-
Poll Indicator ( <i>N</i> = 476)	0.246	0.431	0	1	-	-	-
En Banc Granted ( <i>N</i> = 144)	0.715	0.453	0	1	-	-	-
<i>Independent Variables</i>							
Minority Decision	0.363	0.481	0	1	0.08*	0.12**	0.16
Distance: Majority Panel	0.057	0.070	0	0.285	0.10*	-0.05	0.01
Distance: Minority Panel	0.072	0.110	0	0.436	-0.04	0.06	0.06
Dissent	0.149	0.356	0	1	0.22**	0.39**	0.11
Sua Sponte Case	0.037	0.189	0	1	-	-	0.22**
Intercircuit Conflict	0.108	0.310	0	1	0.14**	0.16**	0.15
Intracircuit Conflict	0.047	0.211	0	1	0.10**	0.29**	0.01
Case of First Impression	0.057	0.231	0	1	0.06	0.19**	-0.12
Concurrence	0.057	0.231	0	1	0.04	0.23**	0.10
Panel Reversal	0.441	0.497	0	1	0.19**	0.16**	-0.08
Constitutional Challenge	0.054	0.226	0	1	-0.02	0.05	-0.07
Declaration of Unconstitutionality	0.015	0.122	0	1	0.06	0.17**	-0.05
Per Curiam Opinion	0.132	0.339	0	1	-0.13**	0.001	0.01
Diversity Case	0.106	0.308	0	1	-0.01	-0.01	-0.20*
Admiralty Case	0.084	0.278	0	1	0.09*	0.05	-0.10
Death Penalty Case	0.048	0.214	0	1	0.03	0.03	-0.12
<i>N</i>					698	476	144

Note: *N* = 725 unless otherwise noted. One asterisk indicates  $p < 0.05$ , two indicate  $p < 0.01$  (two-tailed). See text for details.

**Table 2**

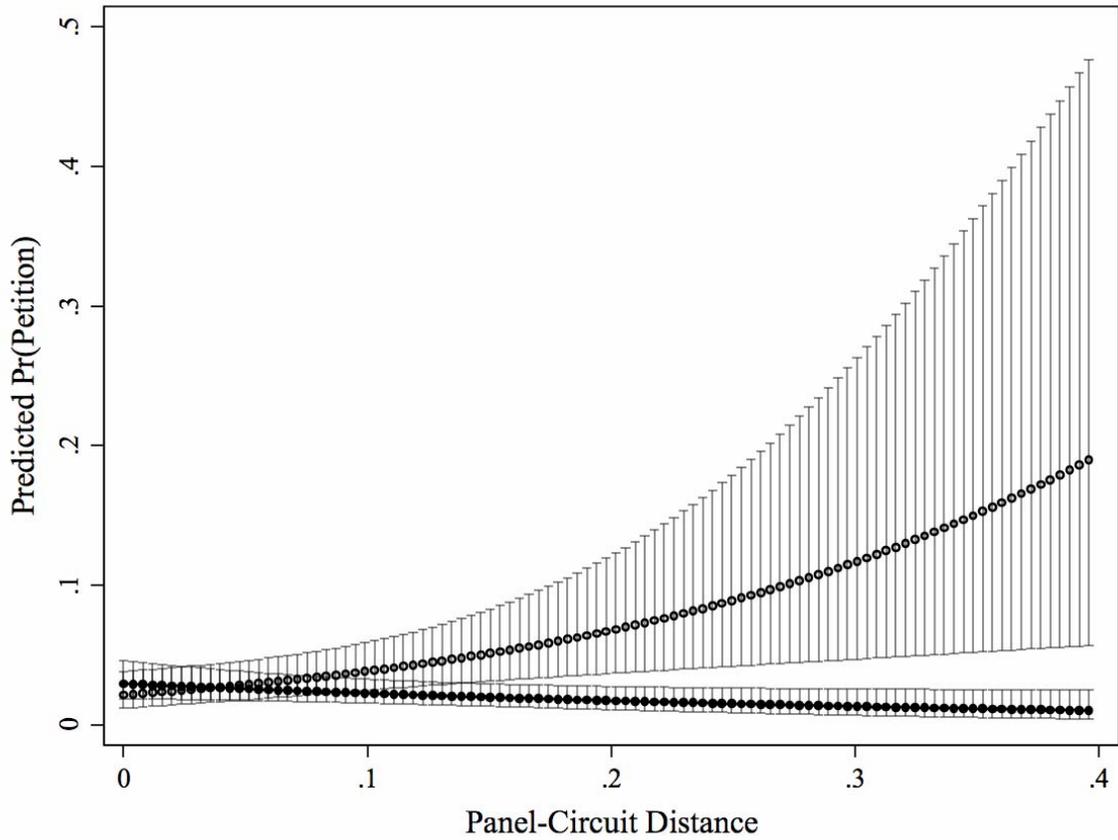
## Logit Models of Fifth Circuit En Banc Decisions, 1981-1991

Variable	Expectation	Grants (All Cases)	Conditional Models		
			Petitions	Polls	Grants
(Constant)	—	-4.93 (0.47)	-3.50 (0.24)	-3.47 (0.48)	0.97 (0.77)
Minority Decision	> 0	0.64 (0.59)	-0.32 (0.34)	0.61 (0.58)	0.01 (0.87)
Distance: Majority Panel	= 0	4.27 (2.59)	2.80 (1.89)	1.97 (2.58)	-0.42 (4.49)
Distance: Minority Panel	= 0	-0.51 (2.00)	-2.72 (1.41)	0.44 (2.12)	-1.88 (3.03)
Distance: Majority Panel × Minority Decision	< 0	-2.29 (4.97)	2.54 (3.50)	-3.50 (5.42)	2.97 (8.06)
Distance: Minority Panel × Minority Decision	> 0	3.19 (3.15)	8.69** (2.54)	1.70 (3.04)	3.11 (4.56)
Dissent	> 0	2.07** (0.41)	2.32** (0.52)	2.08** (0.42)	0.31 (0.61)
Dissent × Minority Decision	= 0 or > 0†	0.06 (0.57)	-0.80 (0.79)	-0.29 (0.60)	1.18 (0.93)
Sua Sponte Case	> 0	3.80** (0.82)	—	—	1.89* (0.97)
Intercircuit Conflict	> 0	1.07** (0.33)	1.07** (0.45)	0.76* (0.33)	0.49 (0.60)
Intracircuit Conflict	> 0	0.90* (0.44)	0.21 (0.70)	2.15** (0.62)	-0.24 (0.54)
Case of First Impression	> 0	1.29** (0.45)	0.60 (0.40)	1.94** (0.47)	-0.21 (0.59)
Concurrence	> 0	1.83** (0.42)	0.33 (0.42)	2.10** (0.51)	0.49 (0.63)
Panel Reversal	> 0	0.65* (0.29)	0.82** (0.20)	1.11** (0.30)	-0.64 (0.46)
Constitutional Challenge	> 0	-2.83 (0.70)	-0.26 (0.46)	-1.15 (1.14)	-1.71 (1.20)
Declaration of Unconstitutionality	> 0	4.20** (0.91)	0.42 (1.29)	4.02** (1.48)	0.95 (1.31)
Per Curiam Opinion	< 0	0.42 (0.43)	-0.43* (0.25)	0.65 (0.44)	0.47 (0.64)
Diversity Case	< 0	-0.33 (0.54)	0.01 (0.31)	0.21 (0.42)	-0.96 (0.80)
Admiralty Case	> 0	-0.43 (0.62)	0.48 (0.42)	0.28 (0.49)	-0.92 (0.62)
Death Penalty Case	> 0	-0.28 (0.61)	0.99** (0.41)	0.78 (0.60)	-1.20 (0.73)
<i>N</i>		725	698	476	144

Note: Cell entries are coefficient estimates; models for Grants (All Cases) and Petitions are rare-events logit models with weighting corrections, while those for Polls and Grants are standard logits. Standard errors are in parentheses. One asterisk indicates  $p < .05$ ; two indicate  $p < .01$  (one-tailed). See text for details. †Legal approaches suggest that this estimate should be zero; strategic/"whistleblower" theories predict that it will be positive.

**Figure 1**

Predicted Probabilities of a Petition Given a Minority Panel, by Panel-Circuit Distance



Note: The solid-circle line indicates predicted probabilities for decisions consistent with the circuit majority; the hollow-circle line is for circuit minority decisions. Both assume a panel majority that is ideologically different from that of the circuit as a whole. Bars indicate estimated 95 percent confidence intervals. See text for details.