



Does the Chief Justice Make Partisan Appointments to Special Courts and Panels?

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The Chief Justice of the Supreme Court has the exclusive and independent power to appoint federal judges to various special courts and panels, including the Foreign Intelligence Surveillance Court (FISC), the court that oversees all domestic surveillance for national security, including domestic data collection by the National Security Agency (NSA). This article examines the propensity of Chief Justices to appoint co-partisan judges to these panels. Such appointments may serve to produce decisions and policies that align with the Chief Justice's preferences. I use computational simulations to model the appointment decisions made by Chief Justices. I find that there is less than a 1 percent chance that a neutral Chief Justice would appoint as many Republicans to the FISC as have been appointed in the last 36 years. I further show that the Chief Justice is not selecting appointees on other observable judicial characteristics, such as age, experience, gender, senior status, or caseload. These results have important implications for the creation of judicial institutions, the internal politics of the judiciary, legislative delegation, and the powers and oversight of the national security state.

So in fact one Chief Justice of the United States selects the seven men who will sit on this court and he can, in fact, influence the foreign intelligence operation of this Nation throughout his lifetime, whether the Chief Justice be an Abe Fortas or a Warren Burger. He can appoint people who have his predisposition and we in this Nation will be encumbered with that predisposition throughout the Chief Justice's lifetime.

—Representative Allen E. Ertel (D-PA)¹

I. INTRODUCTION

Over the past two years, media revelations of the extent of NSA surveillance and data collection have led to increased public interest in the structure and privacy safeguards of the national security programs in the United States. Central to these programs is the Foreign Intelligence Surveillance Court (FISC), the secretive judicial panel that issues warrants for domestic wiretaps and reviews the implementation of other surveillance

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¹Allen E. Ertel (PA), Conference Report on S. 156, Foreign Intelligence Surveillance Act of 1978, 124 Cong. Rec. at 36409 (Oct. 12, 1978).

programs and methods. Prior to the NSA leaks, the FISC received little media or academic attention and generally operated in secret, reporting only minimal statistics to Congress and releasing few public decisions. Since the leaks, the FISC has been criticized on two fronts. First, the FISC has been criticized for approving almost all the wiretaps and other requests for surveillance that have come before it.² Second, the method by which judges are appointed to the FISC has been criticized.³ The judges on the FISC are current federal district court judges who are appointed unilaterally to the FISC by the Chief Justice. A large majority of the FISC judges, like the current Chief Justice and his recent predecessors, are judges appointed by Republican presidents. These criticisms raise concerns about the ideology of the FISC panel and its protection of privacy rights given its critical role as the primary check on the NSA's domestic surveillance programs. For example, Republican panels may show more deference to the government in security matters and be less concerned with protecting the privacy rights of individuals (Ruger 2007). The institutional structure and composition of the FISC also raises important questions about judicial institutions, the internal politics of the judiciary, Congress's choice to delegate this appointment power to the Chief Justice, and the powers and oversight of the national security state.

Given that the Chief Justice serves for life (assuming "good behavior"), the ability to unilaterally appoint judges to special courts and panels is an important and significant power (Ruger 2004, 2006). Unlike most executive appointments, including all federal judicial appointments, the Chief Justice's appointments are not subject to the approval of the Senate or any other review process. Consequently, the Chief Justice is able to select judges (with some limited legal constraints) using any criteria he might choose, including, potentially, political party and ideology. Thus, the appointment power of the Chief Justice has significant implications for the fairness and neutrality of the judicial process when these panels are involved. Furthermore, if the Chief Justice is acting in a partisan manner when making appointments to these special panels, then we may be concerned with other aspects of judicial administration that Congress has delegated to the Chief Justice, including appointing the Director of the Federal Judicial Center and the members of the judicial committees who set the federal rules of judicial procedure (Ruger 2006, 2007; Resnik 2004).

There is a large literature in U.S. politics on the appointment of federal judges by the president (e.g., Goldman 1997; Moraski & Shipan 1999; Segal et al. 2000; Binder & Maltzman 2009), as well as on the behavior of federal judges when deciding cases (e.g., Dahl 1957; Epstein et al. 2013; Segal & Spaeth 1993; Bailey & Maltzman 2011). The

²Erika Eichelberger, *FISA Court Has Rejected .03 Percent of All Government Surveillance Requests*, Mother Jones (June 10, 2013). Available at: <http://www.motherjones.com/mojo/2013/06/fisa-court-nsa-spying-opinion-reject-request>.

³Ezra Klein, *Did You Know John Roberts is Also Chief Justice of the NSA's Surveillance State?* Wash. Post Wonkblog (July 5, 2013). Available at: <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/05/did-you-know-john-roberts-is-also-chief-justice-of-the-nsas-surveillance-state/>; Garrett Epps, *Chief Justice John Roberts Appointed Every Judge on the FISA Court*, Nat'l J. (Aug. 12, 2013). Available at: <http://www.nationaljournal.com/nationalsecurity/chief-justice-john-roberts-appointed-every-judge-on-the-fisa-court-20130812>.

literature on the internal politics of the judiciary within political science is more limited, and is primarily confined to studies of court structure. For example, Barrow and Walker (1988) examine the internal court politics of splitting the Fifth Circuit, and Bond (1980), de Figueiredo and Tiller (1996), and de Figueiredo et al. (2000) study the creation of new judgeships. There is a growing body of legal scholarship on judicial administration and the powers of the Chief Justice, but most of this work has been descriptive or theoretical (e.g., Ruger 2004, 2006; Pfander 2013; George & Yoon 2008; George & Williams 2013). Two notable exceptions are Ruger (2007), which provides the first empirical examination of Chief Justice Rehnquist's appointments to the FISA courts, and Chutkow (2014), which studies the Chief Justice's appointments to the Judicial Conference committees. Both articles find evidence of partisan appointments by the Chief Justice. In this article I build on these works to analyze the behavior of the Chief Justice as an executive making appointments rather than as a judge deciding cases, and provide an empirical framework for evaluating partisan behavior in administrative decisions.

In 2013, 10 of the 11 judges serving on the FISC were appointed to their federal judgeships by a Republican president, as was the Chief Justice. Based on this, many in the media claimed that Chief Justice Roberts selects judges for the FISC based on political party. Going back to the creation of the FISC, 39 of the 55 judges appointed from 1978 to 2013 have been Republicans, as have all three Chief Justices who have served in this time period. The large Republican majority is thus suggestive of partisan behavior. However, these simple statistics do not offer a persuasive case for partisanship for two reasons. First, these statistics are not compared to a baseline, a way to assess how many Republicans might be appointed by a genuinely nonpartisan Chief Justice. Second, these statistics ignore the changing composition of the judiciary over time and the legal constraints that the Chief Justice faces when making FISC appointments, which may force the FISC to be unrepresentative of the judiciary as a whole. Measuring partisanship in the appointment process is a difficult methodological problem because each appointment is dependent on the appointments that precede it, such that we only observe a single set of appointees, rather than 55 independent appointments.

This article assesses the claim that Chief Justices may act in a partisan manner when making appointments to the FISC and similar courts by using a sophisticated simulation-based model that takes into account the changing composition of the judiciary over time, the legal rules that constrain appointments, and the path-dependent nature of appointing a panel of judges when previous appointments can change the pool of eligible judges for future appointments.⁴ I use a simulation model to assess a variety of factors that the Chief Justice might consider when making appointments, including political party, age, experience, and workload. I also compare appointments to the FISC to appointments that the Chief Justice makes to two other panels, the

⁴Simulation models have been used in a wide variety of applications in political science, including voter behavior (Bendor et al. 2011), legislative leadership (Jessee & Malhotra 2010), party competition (Kollman et al. 1992, 1998), and judicial appointments (Uribe 2014). These models are useful for generating data from a theoretical framework as well as for analyzing situations where we observe only a single set of nonindependent actions, such as judicial nominations by the president in Uribe (2014).

Table 1: Special Courts and Panels

<i>Panel</i>		<i>Judges</i>	<i>Appointment Rules</i>
Federal Intelligence Surveillance Court (FISC)	1978–2001	7	Seven district court judges from seven different circuits. Seven-year terms; one-term limit. ^a
	2001–	11	Expanded in 2001. Eleven district court judges from seven different circuits; three judges must reside within 20 miles of Washington, DC. Seven-year terms; one-term limit. ^b
Federal Intelligence Surveillance Court of Review (FISCR)	1978–	3	Three district or circuit court judges from three different circuits. Seven-year terms; one-term limit. ^c
Judicial Panel on Multidistrict Litigation (JPML)	1968–	7	Seven district or circuit court judges from seven different circuits. No term limits. ^d

^a550 U.S.C. § 1803.

^b650 U.S.C. § 1803; 115 Stat. 283 § 208.

^c750 U.S.C. § 1803.

^d828 U.S.C. § 1407.

Foreign Intelligence Surveillance Court of Review (FISCR), which is the appeals court for the FISC, and the Judicial Panel on Multidistrict Litigation (JPML), which resolves jurisdiction questions for cases that cover multiple districts (Williams & George 2013; Lee et al. 2015). Ruger (2007) suggests that the FISCR should display similar levels of partisanship as the FISC, but the JPML should be less partisan, as its decisions are much more administrative and have less effect on policy. Table 1 describes the three panels I study in this article and provides the rules that govern the Chief Justice’s appointments.

II. SIMULATION APPROACH TO ASSESSING PARTISANSHIP

How can we measure partisanship in judicial panel appointments? This is a complicated problem due to a variety of institutional factors and constraints that the Chief Justice faces when making these appointments. Both the legal requirements and the composition of the pool of judges who can be appointed to the court are outside of the Chief Justice’s control, such that it is not necessarily possible for the Chief Justice to appoint whomever he wishes to the panel. As a result, some baseline level of partisan imbalance on these panels might be expected as a function of factors that are independent of the Chief Justice rather than due to his own preferences when making appointments. If the pool of possible appointees is overwhelmingly Republican, we are likely to observe a large number of Republican appointees, regardless of the Chief Justice’s partisan inclinations when making appointments. We need to establish a baseline for comparison, based on a model of how a nonpartisan judge would make appointments. By comparing the actual

appointments made to the panel to our baseline, we can assess the likelihood that the actual Chief Justices are appointing judges without regard to partisanship as well.

For example, suppose the Chief Justice must select a panel of two judges out of a pool of 10 judges. Furthermore, suppose that of these 10, eight are Democrats and two are Republicans. If the Chief Justice were to select his panel randomly, without concern for political party, there is only a 2.22 percent chance of selecting two Republicans to the panel, a 35.55 percent chance of selecting a Democrat and a Republican, and a 62.22 percent chance of selecting two Democrats. If we observe that the actual Chief Justice selected two Democrats to the panel, we would not suspect that the Chief Justice was partisan in his appointments because this is the most likely outcome we would observe from a nonpartisan Chief Justice as well. However, if we observed that the Chief Justice selected two Republicans, we might be somewhat suspicious of partisan behavior because this is by far the least likely outcome we would observe from a nonpartisan Chief Justice.

Calculating the baseline distribution of Democrats and Republicans appointed to judicial panels is more complex than this simple example, but the intuition is the same. We can compare the probability of appointing some particular distribution of Democrats and Republicans from a nonpartisan Chief Justice to the distribution we have actually observed from the real Chief Justices. If the real values are extraordinarily unlikely to be produced by our model of a nonpartisan Chief Justice, we can conclude that the Chief Justice is appointing judges in a partisan manner.

To build our baseline estimate of nonpartisan appointments, we need to take into account the pool of all eligible judges who could be appointed to these panels as well as all of the legal constraints that prevent the Chief Justice from appointing whomever he prefers.⁵ These constraints include geographic distribution rules that require that at least seven different judicial circuits be represented, a one-term limit that prevents judges from being reappointed to the court, and a later requirement that at least three of the judges serving at any time live within 20 miles of Washington, DC (see Table 1). Our estimate is complicated further by the time-series nature of these appointments. Rather than appoint the entire panel at once, appointments are made sequentially and the pool of eligible judges (as well as the appointment rules and constraints) changes over time. These constraints rule out a regression-based approach to assessing partisanship because each appointment to the panel is affected by all of the preceding appointments, such that the observations are not independent. For example, the original rules

⁵By using the entire set of eligible judges as the pool from which appointments can be made, I assume that all judges who can *legally* be appointed to the panel are also realistic appointments to the panel, in that they are interested in and willing to accept the assignment. Various personal and professional circumstances may preclude such appointments in practice. Three such factors are considered in the analysis: caseload, age, and senior status. There are other circumstances that may affect the pool composition as well, such as a preference to serve (or not to serve) on such a panel, and the ability to signal interest in such positions (observable to the Chief Justice but not to the public). While such circumstances could potentially alter the composition of the pool of eligible judges, there is no theoretical reason to believe that these factors would induce partisan bias in the results. The one exception would be a partisan appointment norm, such that more Republican judges express interest in such panels than Democratic judges when there is a Republican Chief Justice. Although such a norm would indeed affect the results of the simulation, it would strongly confirm the finding that the Chief Justice makes appointments to the FISC in a partisan manner.

for the FISC composition were that the court consist of seven district court judges from seven different circuits. If a judge from a district court within the First Circuit was appointed at time t , the eligible pool of judges for subsequent appointments is restricted to exclude all other district court judges in the First Circuit until that first judge's term ends. In this way, prior appointments have downstream effects on future appointments. Since a regression model is not valid in this case, I utilize a simulation model to establish our baseline of nonpartisan panel appointments.

How would a nonpartisan Chief Justice select judges for the FISC and other panels? While the Chief Justice must follow the legal rules for the composition of the courts, he is otherwise free to select eligible judges using any criteria he chooses, such as judicial experience or the judge's district court caseload. However, in the absence of any information about how the Chief Justice makes this selection, our prior belief is simply that the Chief Justice makes each appointment by randomly selecting a judge from the pool of eligible judges whose appointment would fulfill the legal constraints.⁶ While three different Chief Justices, Warren Burger, William Rehnquist, and John Roberts, have served on the Supreme Court since the creation of the FISC in 1978, I treat them all here as a unitary Chief Justice and do not distinguish between their respective appointments. As all three were appointed by Republican presidents (and all three served in the administrations of Republican presidents at some point prior to their Supreme Court appointments), for the purposes of this analysis we can consider them to be a single Republican Chief Justice.⁷

Briefly, the simulation model works in three stages (see Appendix C for a complete description of the simulations). The model takes as inputs the pool of all judges who are eligible to be appointed to the panel at any point in our time period, and a schedule of appointments, with start and end dates, of each appointment that will be made to the panel.⁸ Beginning with the first appointment, and then iterating sequentially through the full set of appointments, the pool of eligible judges on the day that the appointment

⁶Unlike when the president makes a nomination for a federal judgeship, the Chief Justice does not make a public announcement or statement about his selection, and these appointees receive little or no media attention. Further, the Chief Justice does not publicly articulate the decision process or criteria he uses when making appointments. As a result, we cannot justify any prior assumptions about the Chief Justice's preferences for judicial panel appointees. The conference committee report on FISA (1978) reported that Congress expected the Chief Justice to "consult with the chief judges of the judicial circuits in making designations of judges," but this is not part of the text of the law and there is no public evidence of consultations by the Chief Justice regarding FISC appointments. See Report No. 95-1720, *The Foreign Intelligence Surveillance Act of 1978* at 27 (Oct. 5, 1978).

⁷Appendix A presents separate analyses of each Chief Justice's appointments. The results are generally in line with the combined analysis, but, due to the reduced sample size, are not statistically significant at conventional levels for Rehnquist and Burger. For Chief Justice Roberts, however, the results are nearly as strong as for the combined sample.

⁸The appointment schedule is based on the real appointments made to the FISC by the Chief Justices. Each appointment corresponds to the actual time served by a real FISC judge, even if the judge resigned his seat before the end of his term. This appointment schedule is used to ensure that the pool of judges eligible for each appointment perfectly matches the pool of judges available to the actual Chief Justice when making the real appointments. See Appendix C for more information on the appointment schedule.

begins is calculated. This is the set of all judges appointed to a U.S. district court before the date of appointment to the FISC who have not permanently retired or been promoted from their district court seat to a higher court as of the FISC appointment date, and who have not previously served on the FISC. This includes judges of all experience levels, including those who have elected senior status.⁹ Second, the model randomly picks one judge from this set to add to the panel, and checks that the addition of this judge satisfies all the different legal rules, including circuit distribution requirements and the number of judges living near Washington, DC. If these rules are not met, the selected judge is discarded and a new judge is picked until the rules are satisfied. Given a newly completed panel, in the third stage the next judge to leave the panel (based on the appointment end date) is removed from the panel, and the process is repeated with the next appointment. The end result is a set of 55 judges appointed in sequence to the panel, one for each of the actual appointments made to the FISC. The simulation model is run for thousands of iterations, such that we can ultimately create a distribution of simulation results to assess the likelihood of observing any one particular result. In addition to simulating appointments to the FISC, I also run the model on appointments to the FISCR and the JPML.

The simulations are dependent on two key data sources. First, the appointment schedules for the actual appointments made to the FISC, FISCR, and JPML are based on the list of appointments to these panels. For the FISC and FISCR, the complete lists of appointments, including the appointed judges and the dates of their service on the panels, were provided to me by the panel administration. For the JPML, the list of appointments is provided online by the panel.¹⁰ I restricted the set of appointees in this study to those made prior to January 1, 2014, in order to focus only on appointments made before the Snowden leaks increased media and public attention on the NSA and FISA courts.¹¹

The second data source is the *Biographical Directory of Federal Judges, 1789–Present*, compiled and maintained by the Federal Judicial Center.¹² This database provides demographic information for every federal judge and data on every judicial

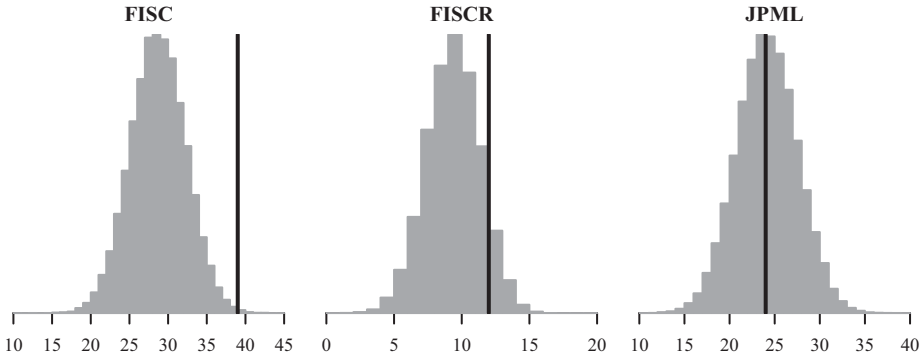
⁹Twenty-seven percent of all judges appointed to the FISC and 41 percent of all judges appointed to the FISCR elected senior status prior to their appointments. As a result, I include both active and senior judges in the pool of eligible judges; to exclude senior judges would bias the results.

¹⁰See <http://www.jpml.uscourts.gov/sites/jpml/files/Panel%20Judges%20Roster-4-16-2014.pdf>.

¹¹Given the media attention paid to the FISA courts after the Snowden leaks, and the aforementioned claims of partisanship, it is possible that the Chief Justice might alter his appointment behavior. Consequently, I restrict the appointments to those made in 2013 and earlier, before the appointment decisions received significant public scrutiny. The final FISC appointment included was in May 2013, the final FISCR appointment in August 2013, and the final JPML appointment in October 2016 (excluding these final appointments does not significantly change the results). As of May 2015, there have been only three additional appointments to the FISC (one to the FISCR and two to the JPML). As a result, if the Chief Justice's appointment behavior has changed, the sample is too small to draw any useful inferences.

¹²History of the Federal Judiciary, available at: <http://www.fjc.gov>. Website of the Federal Judicial Center, Washington, DC.

Figure 1: Simulation results for percentage Republicans appointed.



NOTES: Distributions calculated from 50,000 iterations of the model. The vertical line marks the observed value in the real panels.

appointment. I used this database to define the pool of eligible judges at each appointment date and the characteristics of these judges. The one missing piece of information in the database is the political party of each judge. I use the party of the president who appointed the judge to his or her current position as a proxy for the judge's political party, a common assumption in the judicial politics literature (e.g., Ruger 2007; Carp et al. 2011; Epstein & Segal 2005; Zuk et al. 1993).

III. RESULTS

Each iteration of the simulation model of FISC appointments produces a set of 55 judges appointed to the panel. To measure partisan balance, I compare the distribution of the number of Republicans appointed to each simulated panel to the number of Republicans appointed to the actual panel by the real Chief Justices. Figure 1 and Table 2 present the partisanship of the actual and simulated appointees to all three panels. The top half of the table reports the actual appointees. Seventy-one percent of all appointees to the FISC and FISCRC have been Republicans, and 50 percent of the appointees to the JPML have been Republicans. The bottom half of the table reports the average number of Republicans appointed to each panel from 50,000 iterations of the simulation model. For the FISC and FISCRC, the average simulation produced a panel with 53 percent and 58 percent Republican judges, respectively, much lower rates than the actual panels. For the JPML, the average simulation produced a panel that was 51 percent Republican, essentially the same as the observed rate. The final row in the table reports the percentile of the actual number of Republican appointees in the distribution of simulated results. For the FISC, the actual number of Republicans observed falls above the 99th percentile. In other words, of the 50,000 simulations of FISC appointments by a nonpartisan Chief Justice, only 210 of the simulations (0.42 percent) produced a panel that included 39 or more Republicans. The top panel of Figure 1

Table 2: Simulation Results—Republican Judges Appointed

	<i>FISC</i>	<i>FISCR</i>	<i>JPML</i>
Total judges appointed	55	17	48
Actual Republicans appointed	39	12	24
Actual Republicans appointed (%)	0.709	0.706	0.500
Mean simulated Republicans	29.209	9.872	24.643
Mean simulated Republicans (%)	0.531	0.581	0.513
<i>SD</i> simulated Republicans (%)	0.065	0.117	0.070
Actual Republicans percentile	0.996	0.792	0.368

NOTES: Simulation results for 50,000 iterations of the model for each of the panels. The second and third rows report the actual number and percentage of Republicans appointed, and the fourth and fifth rows report the average of these values from the simulations. The sixth row reports the standard deviation of the percentage of Republicans appointed, and the bottom row reports the percentile of the actual number of Republicans in the simulated distribution.

plots this distribution. Given that this result is extremely unlikely to occur by chance, we can reject the hypothesis that the Chief Justice is randomly selecting judges for this panel.¹³ For the *FISCR*, the actual Republicans observed falls in the 79th percentile, and for the *JPML* in the 37th percentile.¹⁴ In both cases, the actual number of Republicans observed occurs frequently in the simulations, and we cannot reject the hypothesis that the Chief Justice is selecting appointees randomly. However, for the *FISCR*, the simulations produce weak evidence of partisanship, and part of our low level of confidence in the result is that the smaller size of the panel results in far fewer appointments.

A. Evaluating the Random Appointment Model

As neither the party of the Chief Justice nor the composition of the pool of judges that could be appointed is randomly assigned, we cannot be sure that the Chief Justice is appointing judges to the *FISC* in a partisan manner despite the extremely unlikely number of Republicans who have been appointed. If he is not deliberately appointing Republicans, however, the Chief Justice would need to make appointments based on some factor that correlates with being a Republican in order to appoint judges in a nonpartisan manner while achieving the same partisan imbalance that we observe in practice. For example, suppose that the Chief Justice has a preference for more experienced judges on the *FISA* court, and that the pool of experienced judges has many more Republicans than Democrats. In this case, it would be possible for the appointments of a nonpartisan Chief Justice to appear highly partisan, simply due to the composition of the experienced and eligible judges pool. To address this concern, I consider a set of

¹³The observed percentage of Republicans is 2.73 standard deviations above the simulated mean.

¹⁴Unlike the *FISC* and *FISCR*, the *JPML* was created in 1968, and the first seven appointments were made by Chief Justice Earl Warren. Although Warren was a Republican and appointed to the court by a Republican president, he is considered a liberal and ideologically very different from the Republican Chief Justices who followed him. While Warren's appointments are included in the analysis, excluding Warren's seven appointments (five Democrats and two Republicans) does not substantially alter the results.

alternative and observable preferences that the Chief Justice might consider. I assess six possible factors on which the Chief Justice could possibly select judges that might produce the apparently partisan result without partisan intent: caseload in the district court, senior status, judicial experience, previous experience as a U.S. Attorney (or employed by a U.S. Attorney), age at appointment, and gender. In each case, I find that these preferences would not explain the partisan imbalance of the FISA court.¹⁵

Figure 2 presents the simulated distributions of these demographic factors for the FISC. In each panel, the gray bars plot the distribution of values in the simulation results, and the vertical line marks the actual value from the real FISC appointments. The top panel presents the Republicans appointed, the second average caseload, the third the number of judges with senior status, the fourth age at appointment, the fifth years of judicial experience, the sixth the number of judges with previous experience in a U.S. Attorney's office, and the seventh the number of men appointed. In all cases except the first (Republican), the actual value falls near the center of the distribution. Table 3 lists the actual value, simulation mean, and simulation percentile for all these measures for each of the three judicial panels. The Chief Justice is not selecting for less busy judges, for more experienced judges, for older judges or those who have reduced their caseload by taking senior status, or discriminating on gender. As a result, we cannot reject the null hypothesis for any of these additional factors that the Chief Justice is selecting judges randomly rather than selecting on one of these measures. The actual observed values on all of these demographic factors fall within the center 80 percent of the simulated distributions, with one exception: the number of judges with previous experience in a U.S. Attorney's office. Could a preference for judges with such experience explain the partisan result identified above?

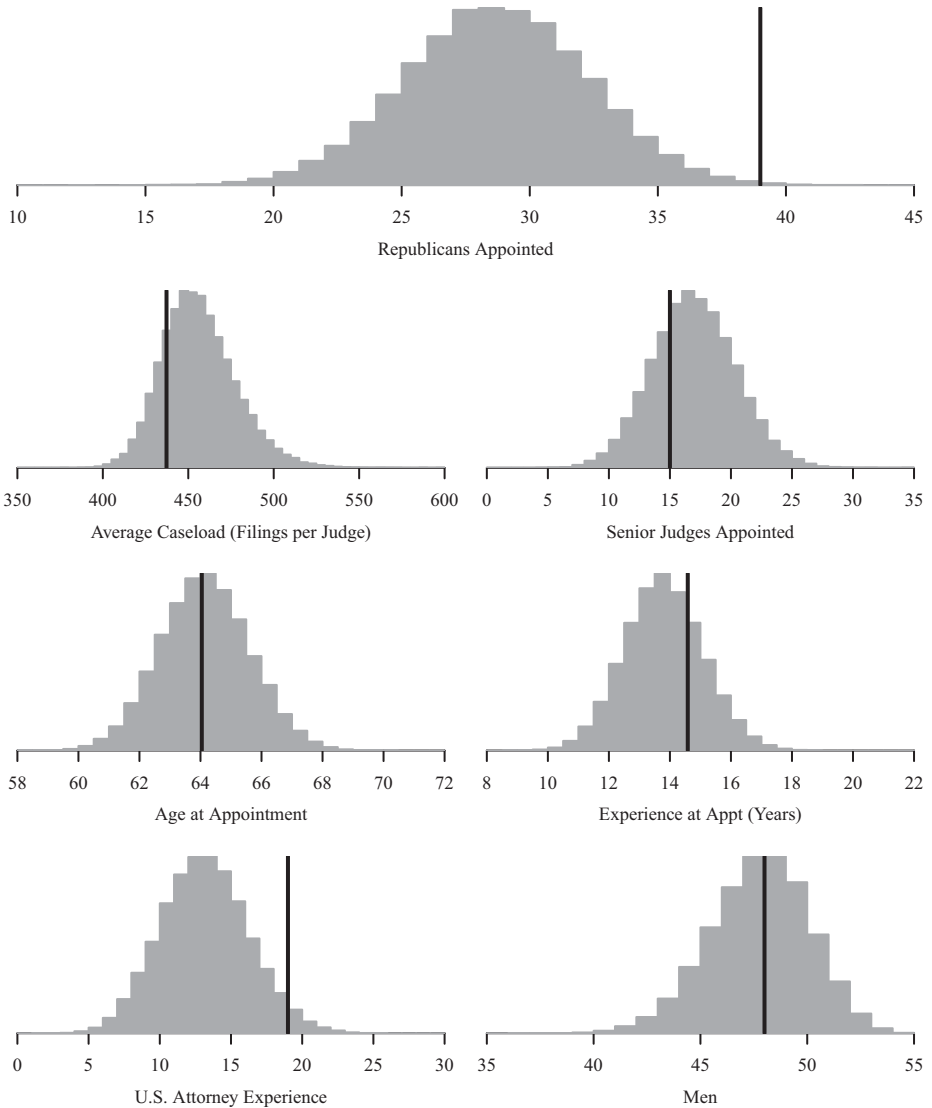
B. Does Previous Experience in a U.S. Attorney's Office Explain Partisanship?

Nineteen of the 55 judges appointed to the FISC had some previous experience working in a U.S. Attorney's office, either as a U.S. Attorney or Assistant U.S. Attorney. Suppose that the Chief Justice prefers judges with this experience for the FISC. This alternative hypothesis for how the Chief Justice selects appointees may be equally (or more) concerning than the Chief Justice selecting on partisanship. In this case, the Chief Justice would be appointing the judges who might be the most sympathetic to prosecutorial power to a position designed to curtail overreach.¹⁶ The simulations above suggest that the Chief Justice is more likely to appoint judges with U.S. Attorney experience than is expected from a neutral Chief Justice. However, this preference does not explain the partisanship result because there is not a significant relationship between U.S. Attorney experience and political party.

¹⁵See Appendix C for definitions of these variables and data sources.

¹⁶Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. Times (July 25, 2013). Available at: <http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html>.

Figure 2: FISC simulation results for partisanship and other observable characteristics.



NOTES: Distributions calculated from 50,000 iterations of the model. The vertical line marks the observed value in the real FISC panel.

Of the 1,992 district court judges who are eligible for FISC appointment at some point from 1978 to 2013, 971 are Democrats and 1,021 are Republicans. Twenty-three percent of the Democrats and 25 percent of the Republicans have some U.S. Attorney’s office experience. As a result, selecting on U.S. Attorney experience without regard to

Table 3: Simulation Results for Partisanship and Other Observable Characteristics

<i>Panel</i>	<i>Characteristic</i>	<i>Actual Value</i>	<i>Simulation Mean</i>	<i>Simulation 95% CI</i>	<i>Percentile</i>
FISC	Republicans (%)	0.709	0.531	(0.4, 0.655)	0.996
	Caseload	437.3	456.2	(418.4, 503.7)	0.186
	Senior judge (%)	0.273	0.318	(0.2, 0.436)	0.192
	Age (years)	64	64.1	(61.3, 67)	0.476
	Judicial exp. (years)	14.6	13.8	(11.3, 16.4)	0.731
	U.S. Attorney exp. (%)	0.345	0.249	(0.145, 0.364)	0.938
	Male (%)	0.873	0.877	(0.782, 0.945)	0.358
FISCR	Republicans (%)	0.706	0.581	(0.353, 0.824)	0.792
	Senior judge (%)	0.412	0.329	(0.118, 0.529)	0.690
	Age (years)	67.4	65.7	(60.6, 70.7)	0.753
	Judicial exp. (years)	14.8	13.8	(9.6, 18.2)	0.672
	U.S. Attorney exp. (%)	0.118	0.16	(0, 0.353)	0.209
	Male (%)	1	0.881	(0.706, 1)	0.892
	JPML	Republicans (%)	0.5	0.513	(0.375, 0.646)
	Senior judge (%)	0.292	0.304	(0.188, 0.438)	0.372
	Age (years)	64.7	64.4	(61.3, 67.4)	0.591
	Judicial exp. (years)	15.3	13.6	(11, 16.3)	0.893
	U.S. Attorney exp. (%)	0.229	0.219	(0.104, 0.333)	0.508
	Male (%)	0.875	0.895	(0.813, 0.979)	0.230

NOTES: Simulation results from 50,000 iterations of the model for each of the panels.

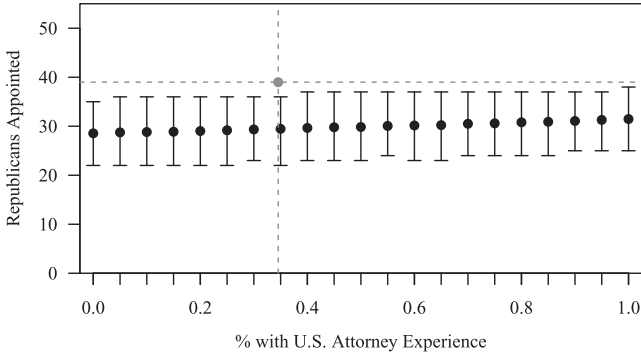
political party should not produce a significant partisan disparity in the panel composition. We can confirm this result with a variation of the simulation model that takes into account a preference for specific judicial characteristics when making appointments. Rather than select an eligible judge randomly to fill each vacancy, this model first chooses between two pools of eligible judges, those with U.S. Attorney experience and those without, with probability of choosing the experience pool based on a preference for U.S. Attorney experience.¹⁷ Figure 3 presents the results of the simulations, for different levels of preference for U.S. Attorney experience from 0 (no judges with U.S. Attorney experience) to 1 (all judges have U.S. Attorney experience). For all weighted preferences for U.S. Attorney experience, including the observed preference of 36 percent, the actual number of Republicans appointed falls above the 95 percent confidence interval. As a result, we can conclude that the Chief Justices' preference for judges with U.S. Attorney experience is a complement to their preference for Republican judges, rather than an alternate explanation.

C. Causality and Other Explanations

The tests above confirm that the Chief Justice is not selecting on the basis of district court caseload, judicial experience, U.S. Attorney's office experience, or other nonpartisan factors when appointing judges to the FISC and other panels. It is possible that

¹⁷See Appendix C for information on how the weighted simulations are constructed.

Figure 3: Plot of simulated number of Republicans appointed to the FISC using simulations with a weighted preference for previous U.S. Attorney experience.



NOTES: The horizontal axis provides the model weight in favor of selecting judges with U.S. Attorney experience. For all weights from 0 percent to 100 percent in favor of judges with U.S. Attorney experience, the actual number of Republicans appointed (the dashed horizontal line at 39) lies beyond the 95 percent confidence interval for the number of Republicans appointed. The dashed vertical line marks the actual percentage of judges with U.S. Attorney experience appointed to the FISC, and the point at the intersection of the dashed lines marks the observed value for party and experience in the actual FISC panel. The point estimates and confidence intervals are based on 5,000 iterations of the weighted simulation model for each weight value (see Appendix C.6).

there exists some omitted variable that I cannot consider here that correlates with political party and therefore explains the apparent partisanship that we observe. However, the Chief Justice does not make any public statement or justification when appointing judges to these panels, such that any omitted variable cannot be readily identified. As a result, we do not have any other criteria to assess. Ruger (2007) suggests that Fourth Amendment jurisprudence is important, but this is highly correlated with political party, and given the connection between ideology and partisanship, not independent of a partisan selection process. Selecting on Fourth Amendment jurisprudence may be just as concerning for the unbiased review of surveillance warrants as pure partisanship. Consequently, given that the evidence strongly supports the partisan hypothesis, and the importance of political party in predicting so much of political behavior, whether voting in Congress or on the courts, it is reasonable to conclude that the Chief Justice is partisan when appointing judges to the FISC.

IV. CONCLUSIONS

After accounting for many observable factors, the Chief Justice appears to have a strong preference for appointing co-partisan judges to the FISC. The evidence is more mixed for the FISC. One possibility for this result is simply that the sample size for the FISC is much smaller than for the FISC, such that we cannot rule out a more extreme result as easily. A second possibility is that the FISC is much less important than the FISC, as very few decisions are appealed. The FISC approves almost all requested wiretaps and

only denied wiretaps, decisions that go against the executive branch, can be appealed. Consequently, while the FISC is technically the higher court, it is less important because it hears very few cases, and only those that go against the executive. For the JPML, I find no evidence of partisanship, which aligns with the assumption that as an administrative rather than policy-making body, partisanship is unlikely to affect the decisions of the judges on the JPML.

The finding of partisanship in FISC appointments is normatively troubling for several reasons. First, the unchecked power of the Chief Justice in making these appointments, together with his own lifetime appointment to the Supreme Court, make him one of the most powerful figures in the national security state.¹⁸ Unlike the other major figures in national security policy, including the president, the secretaries of Homeland Security and Defense, and the directors of the FBI and CIA, the Chief Justice has a lifetime appointment and is unchecked by elections, Senate confirmation, or significant congressional oversight.¹⁹ Second, appointments to the FISC and other panels are just a few of the Chief Justice's many administrative responsibilities, but the partisanship observed in this case suggests that the Chief Justice may choose to act in a partisan manner in other aspects of judicial administration, such as appointing the committees of judges who review and revise the Federal Rules of Procedure. If the Chief Justice is concerned about this appearance of partisanship, the solution is easy and obvious: the Chief Justice could release a simple statement explaining the qualifications of his appointees and the basis for his choices, just as the president does when appointing judges. If there are nonpartisan factors behind his appointments, such statements would go a long way toward alleviating charges of partisanship and increasing public confidence in the FISA court as a neutral entity. Third, partisan appointments violate the preference of Congress to insulate the FISC from party politics. The Chief Justice was chosen by Congress to make the FISC appointments in order to insulate the panel from the politics of executive nominations and Senate confirmation. Rather than accomplish this goal, by choosing judges in a partisan manner, the Chief Justice has made the FISC a political body.²⁰

Finally, assessing political behavior in a series of related decisions is a challenging problem for political scientists, and the simulation model developed here may be useful in answering other questions. For example, many studies have examined the committee

¹⁸Ezra Klein, *Did You Know John Roberts is Also Chief Justice of the NSA's Surveillance State?* Wash. Post Wonkblog (July 5, 2013). Available at: <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/05/did-you-know-john-roberts-is-also-chief-justice-of-the-nsa-surveillance-state/>.

¹⁹While impeachment and removal of the Chief Justice is possible, this has never been done or seriously attempted, and is extraordinarily unlikely given that partisan FISC appointments are not illegal.

²⁰Congress paid relatively little attention to the role of the Chief Justice when debating the Foreign Intelligence Surveillance Act of 1978. One notable exception was Rep. Allen E. Ertel (D-PA), whose speech is quoted at the beginning of this article. Ertel introduced an amendment, which passed the House but was reversed by the conference committee, to have all wiretap requests go to district court judges rather than create a special court to handle requests.

assignment process in Congress to consider whether members of these committees are preference outliers compared to the chamber as a whole (e.g., Krehbiel 1990; Londregan & Snyder 1994). One obstacle in these studies is that the availability of committee seats at the start of each Congress is not random, but a function of the last election results, congressional rules, and other institutional factors. A simulation approach similar to the model used here could help us separate the effects of these institutional constraints from the preferences of the legislators for committee seats and of the party leaders for making the appointments. This approach may also be useful for analyzing the allocation of resources in the federal budget process, in presidential campaigns, or within Congress and organizations, as well as in other cases where previous commitments bind future actions.

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APPENDICES

Appendix A: Analysis of Appointments by Chief Justice

Three different Chief Justices, Warren Burger, William Rehnquist, and John Roberts, have served on the Supreme Court since the creation of the FISC in 1978.²¹ In the primary analysis I treat them as a unitary Chief Justice and do not distinguish between their respective appointments. In this appendix, I present a brief analysis of the appointments by each individual Chief Justice. The primary finding of the article, that the Chief Justices as a whole favor Republicans in their FISC appointments, is found in this analysis as well. However, the strength of the finding is reduced when assessing each Chief

²¹The JPML was created in 1968 while Earl Warren served as Chief Justice. I include his appointments for the JPML analysis as well.

Table A1: Simulation Results for Republicans Appointed by Panel and Chief Justice

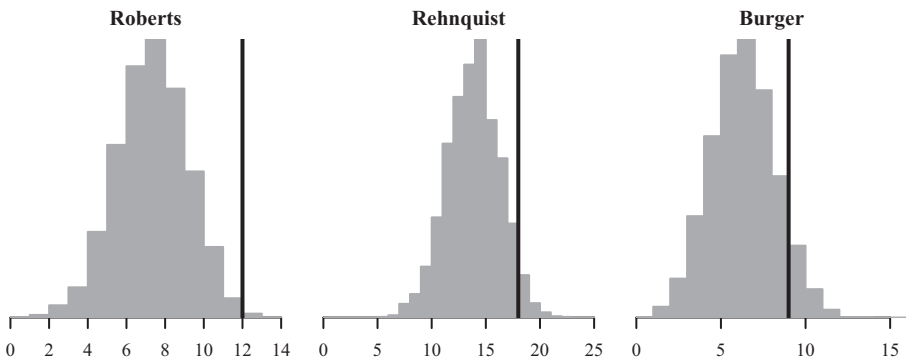
Panel	Chief Justice	Judges Appt.	Repub. Appt.	% Repub.	Sim. Mean	Sim. SD	Sim. 95% CI	Percentile
FISC	Roberts	14	12	0.857	0.559	0.132	(0.286, 0.786)	0.982
	Rehnquist	26	18	0.692	0.552	0.093	(0.385, 0.731)	0.903
	Burger	15	9	0.6	0.454	0.127	(0.2, 0.733)	0.815
FISCR	Roberts	3	1	0.333	0.593	0.278	(0, 1)	0.063
	Rehnquist	9	8	0.889	0.61	0.159	(0.333, 0.889)	0.929
	Burger	5	3	0.6	0.512	0.217	(0.2, 1)	0.474
JPML	Roberts	12	3	0.25	0.58	0.143	(0.333, 0.833)	0.004
	Rehnquist	18	15	0.833	0.567	0.116	(0.333, 0.778)	0.982
	Burger	11	4	0.364	0.475	0.15	(0.182, 0.727)	0.145
	Warren	7	2	0.286	0.286	0.17	(0, 0.571)	0.363

NOTES: Simulation results from 5,000 iterations of the model for each Chief Justice and panel.

Justice individually, as the number of appointments is much smaller, and therefore the probability of observing an extreme result due to randomness is higher. In this analysis I divide the simulation results across the Chief Justices based on the appointment schedule, and compare the simulation results for the relevant appointments to the characteristics of the actual judges appointed by each Chief Justice.

Table A1 presents the partisan analysis by panel and Chief Justice. For the FISC, only Chief Justice Roberts’s appointments are found to be partisan at a statistically significant level. However, all three Chief Justices have appointments that are substantively more Republican than predicted by the simulations. Figure B1 plots the simulated distribution of Republicans appointed by each Chief Justice to the FISC and marks the actual number of Republicans appointed. For the other panels, there is no consistent evidence of partisanship across the panels, but Chief Justice Rehnquist appears to have favored

Figure A1: FISC simulation results for the number of Republicans by appointing Chief Justice.



NOTES: Distributions calculated from 5,000 iterations of the model for each Chief Justice. Vertical line marks the observed value in the real FISC panel.

Table A2: Simulation Results by Chief Justice

Panel	Characteristic	Roberts			Rehnquist			Burger			Warren		
		Actual Value	Sim. Mean	Sim. %	Actual Value	Sim. Mean	Sim. %	Actual Value	Sim. Mean	Sim. %	Actual Value	Sim. Mean	Sim. %
FISC	Republicans (%)	0.857	0.559	0.982	0.692	0.552	0.903	0.6	0.454	0.815	—	—	—
	Caseload	463.3	505.6	0.3	435.7	447.9	0.3	415.7	432	0.3	—	—	—
	Senior judge (%)	0.214	0.362	0.069	0.269	0.326	0.205	0.333	0.25	0.68	—	—	—
	Age (years)	64.3	66.7	0.2	63.8	63.8	0.5	64.2	62.1	0.8	—	—	—
	Judicial exp. (years)	15.4	16.3	0.4	13.3	13.7	0.4	16	11.6	0.999	—	—	—
	U.S. Attorney exp. (%)	0.071	0.101	0.2	0.077	0.082	0.341	0.067	0.057	0.408	—	—	—
	Male (%)	0.643	0.801	0.038	0.923	0.877	0.638	1	0.956	0.495	—	—	—
	Republicans (%)	0.333	0.593	0.063	0.889	0.61	0.929	0.6	0.512	0.474	—	—	—
	Senior judge (%)	0.333	0.387	0.235	0.444	0.323	0.678	0.4	0.3	0.527	—	—	—
	Age (years)	69.3	69.4	0.5	67.8	64.8	0.8	65.4	64.9	0.6	—	—	—
FISCR	Judicial exp. (years)	17.4	18.1	0.5	16.1	13.5	0.8	10.7	11.8	0.4	—	—	—
	U.S. Attorney exp. (%)	0.333	0.127	0.661	0.111	0.134	0.268	0.4	0.104	0.914	—	—	—
	Male (%)	1	0.772	0.543	1	0.87	0.721	1	0.961	0.181	—	—	—
	Republicans (%)	0.25	0.58	0.004	0.833	0.567	0.982	0.364	0.475	0.145	0.286	0.286	0.363
	Senior judge (%)	0.167	0.381	0.026	0.556	0.325	0.968	0.182	0.251	0.194	0	0.191	0
	Age (years)	65.7	67.6	0.3	65.4	63.9	0.7	64.1	62.4	0.7	62	62.7	0.4
	Judicial exp. (years)	15.5	17	0.3	16.9	13.5	0.9	14.4	11.4	0.9	12.2	10.9	0.7
	U.S. Attorney exp. (%)	0.083	0.088	0.329	0.111	0.082	0.554	0	0.065	0	0	0.066	0
	Male (%)	0.667	0.795	0.079	0.889	0.878	0.377	1	0.964	0.335	1	0.994	0.04
	JPML												

Notes: Simulation results from 5,000 iterations of the model for each Chief Justice and panel.

Republicans in his appointments to the FISC and JPML. Table A2 presents the complete results for all included judicial characteristics by panel and Chief Justice.

Given the results in Table A1, one potential concern is that the overall results presented in Table 2 are driven by Chief Justice Roberts’s appointments alone, rather than those of Chief Justices Burger and Rehnquist as well. This is not the case; the lack of statistical significance for Burger and Rehnquist is due to sample size, not substantially different patterns in partisan appointments. When the appointments of Burger and Rehnquist are pooled together (leaving out Roberts), the results are much stronger. Together, Burger and Rehnquist appointed 41 judges to the FISC, of whom 27 were Republicans. The simulations predict an average of 21.3 Republicans appointed for these two Chief Justices together, and 27 Republicans falls above the 95th percentile of the distribution (0.955). Overall, Roberts may appear to be slightly more partisan in his appointments than Burger and Rehnquist, but these differences are not statistically significant.

Appendix B: Alternative Specifications

One of the key complications in simulating panel appointments are the statutory restrictions that require judges from many different circuits to be represented on the panel, as well as the FISC requirement (since 2001) that three judges live within 20 miles of

Table B1: Alternate Simulation Specifications

<i>Panel</i>	<i>Specification</i>	<i>Rules</i>
FISC	Main	1978–2001: seven district court judges, seven circuits represented. 2001–2013: 11 district court judges, seven circuits represented, three within 20 miles of Washington, DC. Members of the DC, Maryland, and Eastern District of Virginia courts are coded as living near DC.
FISC	No circuit limits	1978–2001: seven district court judges, no circuit restrictions. 2001–2013: 11 district court judges, no circuit restrictions, no DC requirement.
FISC	No DC requirement	1978–2001: seven district court judges, seven circuits represented. 2001–2013: 11 district court judges, seven circuits represented, no DC requirement.
FISCR	Main	Three judges, three circuits represented. Appointment pool limited to circuit court judges.
FISCR	No circuit limits	Three judges, no circuit restrictions. Appointment pool limited to circuit court judges.
FISCR	All judges	Three judges, three circuits represented. Appointment pool includes all district and circuit court judges.
JPML	Main	Seven judges, seven circuits represented. Appointment pool includes all district and circuit court judges.
JPML	No circuit limits	Seven judges, no circuit restrictions. Appointment pool includes all district and circuit court judges.

Table B2: Simulation Results for Alternate Specifications

Panel	Characteristic	Actual Value	Main Specification		No Circuit Limits		No DC Req.		All Judges	
			Sim. Mean	Sim. %	Sim. Mean	Sim. %	Sim. Pct.	Sim. Mean	Sim. %	Sim. Mean
FISC	Republicans (%)	0.709	0.531	0.996	0.54	0.992	0.537	0.995	—	—
	Caseload	437.3	456.2	0.186	474.2	0.048	470.4	0.055	—	—
	Senior judge (%)	0.273	0.318	0.192	0.323	0.174	0.322	0.179	—	—
	Age (years)	64	64.1	0.476	64.2	0.462	64.2	0.467	—	—
	Judicial exp. (years)	14.6	13.8	0.731	13.9	0.719	13.9	0.717	—	—
	U.S. Attorney exp. (%)	0.345	0.249	0.938	0.232	0.967	0.232	0.967	—	—
FISCR	Male (%)	0.873	0.877	0.358	0.879	0.341	0.878	0.351	—	—
	Republicans (%)	0.706	0.581	0.792	0.574	0.809	—	—	0.547	0.866
	Senior judge (%)	0.412	0.329	0.69	0.334	0.668	—	—	0.321	0.717
	Age (years)	67.4	65.7	0.753	65.7	0.74	—	—	64.4	0.868
	Judicial exp. (years)	14.8	13.8	0.672	13.8	0.661	—	—	13.7	0.687
	U.S. Attorney exp. (%)	0.118	0.16	0.209	0.16	0.212	—	—	0.215	0.089
JPML	Male (%)	1	0.881	0.892	0.88	0.896	—	—	0.885	0.882
	Republicans (%)	0.5	0.513	0.368	0.513	0.373	—	—	—	—
	Senior judge (%)	0.292	0.304	0.372	0.309	0.343	—	—	—	—
	Age (years)	64.7	64.4	0.591	64.4	0.586	—	—	—	—
	Judicial exp. (years)	15.3	13.6	0.893	13.6	0.891	—	—	—	—
	U.S. Attorney exp. (%)	0.229	0.219	0.508	0.217	0.524	—	—	—	—
Male (%)	0.875	0.895	0.23	0.892	0.252	—	—	—	—	

NOTES: SIMULATION RESULTS FROM 5,000 ITERATIONS OF THE MODEL FOR EACH SPECIFICATION.

Figure B1: Plot of simulated number of Republicans appointed to the FISC by minimum number of years of judicial experience.



NOTES: The horizontal axis provides the minimum number of years of judicial experience required for judges to be included in the pool of eligible judges at the date of each appointment. For all required years of experience from 0 to 10, the actual number of Republicans appointed (the dashed horizontal line at 39) lies beyond the 95 percent confidence interval for the number of Republicans appointed. The dashed vertical line marks the actual minimum experience observed for a judge appointed to the FISC, and the point at the intersection of the dashed lines marks the observed value for party and experience in the actual FISC panel. The point estimates and confidence intervals are based on 5,000 iterations of the simulation model for each minimum experience value.

Washington, DC. In this appendix I test the sensitivity of the simulation results to these rules and find that they do not substantially affect the results.

Table B1 lists the alternative specifications that I test. In the *No Circuit Limits* specifications, I remove the circuit representation requirements, as well as the DC location requirement for the FISC. For the FISC I also consider an alternate specification, *No DC Requirement*, which eliminates the DC rule but leaves the circuit representation rule in place. This specification confirms that the results are not a product of the DC requirement, which is implemented using an imprecise measure of which judges live within 20 miles of Washington, DC. Finally, for the FISCRC, I expand the judicial pool to include all judges, both district and circuit. This precisely matches the legal rules for this court, but does not match the actual practice of the Chief Justices of mainly appointing circuit court judges to this panel. Table B2 reports the results of these simulations for 5,000 iterations of each specification. For all the alternative specifications, the results, including the simulated percentile of Republicans appointed, are substantially the same as the main specifications. The only major difference is in the distribution of caseload for the FISC, where the simulated average caseload is substantially higher than the observed caseload of appointed judges. This difference is due to the rule requiring at least three judges living near Washington, DC, which was added in 2001. The District Court for the District of Columbia has a substantially lower caseload than the average district court. Since 2001, the DC district court has a caseload of 40–50 percent of the average district court. If the caseloads of judges serving on the DC district court are excluded from the caseload calculation (for both the actual and simulated panels), then the actual average calculation is near the middle of the simulated distribution.

One other alternative specification to consider is that the Chief Justice might restrict his appointments to judges with some minimum level of judicial experience. Although the simulation results for average experience are very similar to the observed values, it is possible that there is some minimum requirement, such that a judge should not be considered part of the eligible pool on the day she is sworn in. In practice, most judges appointed to the FISC, FISCR, and JPML have significant experience, but there does not appear to be a strict requirement or preference for judges with substantial experience. On the FISC, the least experienced judge at the time of appointment was John D. Bates, who was appointed after just four years on the District Court for the District of Columbia. On the FISCR, A. Leon Higginbotham was appointed with just over 1.5 years on the Third Circuit, but had previously served as a district court judge for 13 years. Similarly, Murray Gurfein was appointed to the JPML with just four years of experience on the Second Circuit, but had three additional years of experience in district court. Thus, it appears that judges with extremely low levels of experience are unlikely to be appointed.

To address this possibility, I employ a modified version of the simulation model that restricts the pool of eligible judges to a minimum number of years of judicial experience. Using this model, we can assess the impact of any experience requirement on the number of Republicans appointed by a neutral Chief Justice. Figure A1 presents the results of this analysis. For all minimum experience cutoffs from 0 years (the same as the base model) to 10 years (far more than observed in the actual appointments), the simulations show that the observed number of Republicans lies above the 95 percent confidence interval.

C. Simulation Model Details

The simulation model has the same structure for all three panels, but the appointment rules that must be satisfied differ for each panel. This appendix defines the model inputs, algorithm, and outputs, as well as the data used to measure the demographics of the simulated panels.

1. Inputs

1. *Schedule of Appointments*: A sequential list of actual appointments made to the panel, sorted by start date and then end date. These appointments exactly match the real set of appointments, such that if an actual judge resigned his/her seat on the panel before his/her term expired, the end date of the appointments schedule would have the same early end date. This is particularly important for the JPML, where the term length is not defined and judges serve until they retire or choose to leave the panel. I use this exact schedule of appointments, rather than assuming that all judges serve their full terms, in order to exactly match the real decisions that the Chief Justices had to make. By using the same schedule, the pool of judges that can be appointed for any given appointment is exactly the same as the pool of judges that the Chief Justice had available to him at the time of the actual appointment. The schedule of appointments for each panel is based on data provided by the panel.

2. *Federal Judges Pool*: A table of all district and circuit judges who served between 1968 and 2013, with their circuit, district, and start and end dates of their terms. Judges who served on a district court and then were promoted to a circuit court are included twice, once for each appointment. The judicial pool data are based on the Federal Judicial Center's *Biographical Directory of Federal Judges, 1789–Present*.
3. *Appointment Rules*: A set of rules defining legal panels. This includes the number of judges as well as geographical restrictions that require a certain number of circuits to be represented or require a set number of judges to live near Washington, DC. See Table 1 for the legally required rules, and Table B1 for some robustness checks that weaken these rules.

2. Algorithm

For each iteration of the model, a new panel is simulated as follows:

1. Determine the pool of judges eligible for appointment:
 - For FISC, this is all district court judges.
 - For FISC, the legal requirement is all district and circuit judges. In practice, however, most FISC judges have been circuit court judges. For the main specification, I restrict the pool of eligible judges to the circuit courts. In Appendix B I test an alternative specification with both types of judges in the pool.
 - For JPML, this is all district and circuit court judges.
2. Select the appointment rules:
 - For FISC, the rules change in October 2001. Before this date, the court has seven members, who must be from seven different circuits. After this, the court has 11 members, who must be from seven different circuits, and three members who live within 20 miles of Washington, DC. As judges' home addresses are not publicly available, I cannot perfectly identify the set of judges who meet this last criteria. Instead, I use membership in the District Courts for the District of Columbia, the District of Maryland, or the Eastern District of Virginia as a proxy for living near DC.
 - For FISC, the rules specify three judges representing three different circuits.
 - For JPML, the rules specify seven judges representing seven different circuits.
3. At the start, the panel is empty. To fill the panel:
 - a. Subset the pool of judges to include only those who started their judicial service on or prior to the date of the first appointment, and who ended their service after this date.²²
 - b. Randomly pick a panel of n judges, where n is the size of the panel at the start date.

²²Justice Burger appointed the first member of the FISC on January 1, 1979. He did not make the remaining six appointments until May 19, 1979. For the creation of the initial panel, I use May 19, 1979 as the start date for all seven appointments.

- c. Verify that the panel meets the appointment rules.
 - d. If the panel meets the rules, continue. If not, repeat Step 3b.²³
4. After the panel is initially filled, iterate through the remaining appointments:
- a. Sort the current panel members by appointment end date. Remove the judge with the earliest end date.
 - b. Subset the pool of judges to include only those who started their judicial service on or prior to the date of the next appointment, ended their service after this date, and have not previously served on the panel.
 - c. Randomly choose one judge from this pool.
 - d. Verify that when this new judge is added to the remaining members of the panel, the appointment rules are met.
 - e. If the panel with the new appointment meets the rules, add this selected judge to the panel and continue to the next appointment. If not, repeat Step 4c.

3. Outputs

For each iteration of the model, the output is a list of judges appointed to the panel with the dates of their appointment. This output is then combined with demographic data on the judges to create the simulation distributions for each parameter of interest.

4. Data Sources for Demographic Distributions

1. *Republican*: The party of the president who appointed the judge to the district or circuit court. Source: Federal Judicial Center.
2. *Caseload*: Measured as *filings per judge*. District court only. Sources: Shughart and Karahan (2009) for 1978–2002, and collected from *Federal Court Management Statistics* for 2003–2013.²⁴
3. *Judicial Experience*: The judge’s number of years of experience on his or her current court at the time of appointment to the panel. Source: Federal Judicial Center.
4. *U.S. Attorney Experience*: A binary indicator of if the judge had previous employment with a U.S. Attorney’s office. Based on the phrase “U.S. Attorney” in the employment field of the FJC database. Source: Federal Judicial Center.
5. *Senior Judge*: A binary indicator of if the judge had elected senior status prior to appointment to the panel. Source: Federal Judicial Center.
6. *Age*: The judge’s age (in years) at the time of appointment to the panel. Source: Federal Judicial Center.
7. *Male*: A binary indicator of the judge’s gender. Source: Federal Judicial Center.

²³This procedure is equivalent to choosing one judge to start the panel, and then adding additional judges sequentially, verifying after each addition that the panel meets the appointment rules.

²⁴See <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx>.

5. Simulation Parameters

I ran 50,000 iterations of the simulation model for each of the three panels. For the robustness checks in Appendix B, I ran 5,000 iterations for each specification. For all the specifications, the model results stabilized in less than 1,000 iterations.

6. Weighted Simulations

One alternative explanation for the appearance of partisanship in FISC appointments is that the Chief Justices prefer to appoint judges with previous experience in a U.S. Attorney's office. To test for the possibility, I used a variation of the simulation model that allows for weighting between different groups of eligible judges when making appointments.

The model follows the same approach as described in Appendix C.2, with two significant changes. In Step 1, two different pools of eligible judges are identified, those with and without U.S. Attorney experience. In Step 3, for each individual appointment, the model randomly chooses between the two pools with probability $w \in [0, 1]$ and then an eligible judge is randomly selected from the chosen pool. If the judge does not fit the appointment rules (Steps 3c and 4d), the process is repeated with a new random choice between the two pools, and then a new judge is chosen from the selected pool. As a result, for a panel selected with weight w , the average panel has wN judges with U.S. Attorney experience, where N is the size of the panel.

I use this model to estimate the expected number of Republicans appointed to the FISC for different theoretical preferences for judges with U.S. Attorney experience, ranging from $w = 0$ (no judges with U.S. Attorney experience) to $w = 1$ (all judges have U.S. Attorney experience). For each value of w (in increments of 0.05), I ran 5,000 iterations of the model.