

**CONGRESS AND THE POLITICAL EXPANSION OF
THE UNITED STATES DISTRICT COURTS***

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ABSTRACT

Expanding the number of U.S. district judgeships is often justified as a response to expanding caseloads. Increasing judgeships during unified government, however, allows Congress and the President to engage in political (patronage and ideological) control of the federal district courts. This paper examines empirically the relative importance of caseload pressure and political motives for Congress to expand the number of federal district judgeships. We demonstrate that politics dominates the timing of judgeship expansion in the U.S. District Courts. We also show that both politics and caseload affect the actual size of those timed expansions. In particular, we find that before 1970, Congress seemed to have strong political motivations for the size of an expansion. After 1970, Congress became much more attentive to caseload considerations.

1. INTRODUCTION

The legislative and executive branches of government hold considerable power over the federal judiciary, whether it be through budget restrictions,¹ appointment powers,² or legislative overrides.³ Recently, scholars have considered whether the creation of judgeships is also a product of partisan efforts to control the judiciary rather than a public-spirited attempt to satisfy the growing caseload pressures on courts. There is now some evidence, both at the appellate and Supreme Court levels, that partisan politics do influence the timing and size of federal judicial expansions by Congress.⁴ One finding of a recent study by de Figueiredo and Tiller found that the timing of congressional decisions to expand the judiciary was a function of unified government (partisan alignment among the legislative and executive branches of government).⁵ More specifically, they found that the creation of judgeships was more likely to occur under periods of partisan alignment among the sitting President, House, and Senate (along with the expected appointing President and confirming Senate, if appointments were to straddle election cycles) than when divided government existed. The logic underpinning that study was that if politics mattered in judicial expansion decisions, the enacting House and Senate would be more inclined to pass expansion legislation when they knew the President and confirming Senate would appoint and confirm like-minded partisans. There is good reason to believe that such partisan court packing efforts by Congress and the President would pay off in terms of policy outcomes (ideological control). There are numerous studies showing that Democratic appointees produce more liberal decisions and Republican appointees produce more conservative decisions.⁶

It is not clear, however, that the same forces driving circuit and Supreme Court expansion efforts would affect decisions about district court expansion. First, caseload may play a more important role in district court expansion than in appellate court expansion for electoral reasons. District courts interface most directly with constituents. If constituents cannot obtain a timely trial on their initial claims, they may exert more pressure on their legislators to provide more judges and courts to hear cases. Moreover, because only a fraction of cases heard in the district courts are appealed to the circuit and Supreme courts, legislators may feel less constituent pressure to provide new judges on appellate levels than they would for district courts. Second, the partisan policy benefits resulting from court packing may be greater for appellate and Supreme Court decision making than for district courts. District courts fall within the lower rung of a judicial hierarchy and are generally constrained by the higher level, broader-reaching circuit and Supreme courts. This means that legislators might be more committed to partisan control at these higher-level courts than would be for district courts. Accordingly, caseload pressure should have a comparatively larger effect on district court expansion decisions than appellate court expansion decisions, where policy concerns are more concentrated.

In addition to the policy reasons for expansion, patronage may play a role. Due to the local nature of the courts and potential for larger numbers of judgeships, expansion of the district courts offer legislators considerably more opportunities for patronage appointments than would expansion slots available at the circuit court and Supreme Court level. There is also some reason to believe that legislators might actually have greater incentives to expand district courts than circuit courts during unified government. Partisan alignment among the House, Senate and President helps to ensure that the

legislators will be able to make the patronage choices as Presidents generally draw from the recommendations of same party legislators in the state acquiring a new judgeship. We thus have competing rationales for expansion: caseload pressure versus policy-patronage concerns.

2. CASELOAD VS. POLITICS: SOME EVIDENCE

Congress has passed legislation changing the size of the federal district courts more than 150 times since 1789. The district bench has expanded steadily from 13 judges in 1789 to more than 650 today. As noted above, the main contenders for explaining this federal judgeship growth are (1) constituent pressure from growing caseloads (resulting perhaps from legislative measures granting new actionable rights to citizens or a growing citizenry more generally) and (2) partisan politics (resulting from congressional desires for partisan policy control of the judiciary or from patronage opportunities for legislators). Consider total caseload pressure first.⁷ That the number of cases filed in federal district courts (caseload) and the number of federal district judgeships have both been increasing over time suggests a relationship between caseload pressure and more judgeships. Indeed, as Figure 1 shows, other than during Prohibition (1919-1933), the trends in caseload and judgeship growth appear to track each other quite well. This might suggest that Congress is responsive to the increasing caseloads facing the district courts, adding judgeships when and in the amount needed to maintain a smooth running judiciary.

[insert Figure 1]

However, if we examine caseload per judge, the story is not so clear.⁸ While Figure 1 shows an upward trend in both the number of judgeships and cases filed in the federal district courts, Figure 2 reveals that the actual caseload per judge, although increasing, has fluctuated greatly, from as little as 228 to as many 515 cases per judge (excluding the Prohibition period).⁹ We would not expect this level of fluctuation if Congress were efficiently maintaining the judiciary with judgeships.¹⁰

[insert Figure 2]

Another telling piece of evidence is that official requests from the Judicial Conference of the United States for more judgeships -- requests supposedly based upon maintaining an efficiently operating judiciary when considering, among other factors, caseload -- have been given inconsistent treatment by Congress.¹¹ See Table 1. Since the landmark 1922 Federal Judiciary Act, judgeship increases have been called for by the Judicial Conference on more than 70 occasions.¹² Congress, however, has authorized increases in judgeships only 20 times between 1923 and 1992. Moreover, the number, type (i.e., permanent or temporary), and location of judgeships created on those occasions often varied from the requests of the Judicial Conference.¹³

[insert Table 1]

Now consider politics more directly. If politics matter, we would expect Congress to be more likely to expand the number of district court judgeships (and be responsive to the recommendations of the Judicial Conference) when the enacting House, Senate and President were in partisan alignment (unified government) than when not (divided government). The logic here is that the House, having no formal control over nominations and confirmations, will be most concerned about increasing the number of judgeships because it retains no veto right over eventual nominees. Once it agrees to the creation of new judgeships, the House must accept the candidates nominated and confirmed by the President and Senate. If the House has ideological and patronage concerns about who gets placed on the bench, then it has little incentive to pass expansion legislation unless it knows that like-minded judges or valued supporters will be nominated and confirmed. When the Senate and President are of the same political party as the House, the House can rest assured that the “right” judges will end up on the bench. Consequently, expansion is more likely to occur during periods of unified than divided government.¹⁴

There is evidence to support the political expansion hypothesis. Consider Table 2 below. Between 1875 and 1993, 39 of 59 congresses authorized expansion of the federal district courts.¹⁵ Of these 39 expansions, 28 occurred during the 34 periods of unified government; only 11 occurred during the 25 periods of divided government. We conducted a Chi-square (χ^2) test, which allows us to reject the hypothesis that expansion is independent of political alignment at the 95 percent level of confidence. In addition, 387 (65%) new judgeships were authorized by unified governments during this time period, while only 206 (35%) during nonaligned governments.

[insert Table 2]

We also considered the relationship of unified government to requests from the Judicial Conference. From the inception of the Judicial Conference in 1922 through 1993, when government was unified, Congress authorized 80% of the Conference's requests, as compared to but 31% under divided government.¹⁶

While this preliminary evidence suggests politics play a role in district court expansion decisions of Congress, we still are left with the question “how much” does it matter in comparison with caseload pressure. It may be that while partisan alignment significantly affects both the timing and size of the district court expansions, caseload plays an even more dominant role. Or, it may be that partisan alignment creates the opportunity for judicial expansion, but the size of that expansion is determined primarily by caseload pressure. For a better understanding of these relationships, we turn to other empirical techniques.

3. ECONOMETRIC ANALYSIS

A. Method

To measure the effect of both politics (partisan alignment of the branches) and caseload on district court expansion decisions, we use a two-stage Heckman model.¹⁷ In the first stage probit equation, we examine what affects the *timing* of district court

expansion. In the second stage OLS equation, we examine the determinants of the *size* of an expansion.¹⁸ Including the inverse Mills ratio in the OLS equation allows us to control for the cross-correlation effects between first stage (timing of expansion) and second stage (size of expansion) errors, yielding unbiased parameter estimates in the second stage.

B. The Timing of Judicial Expansion

i. The Data

The dependent variable in the probit timing model is JUDICIAL EXPANSION which is equal to one (1) if there is an increase in judgeships during the congressional term, and zero (0) if there is no increase. The first independent variable of interest is CASELOAD PER JUDGE which measures the average annual caseload per judge (in thousands) during the previous two-year congressional period. If caseload is the primary determinant of the timing of expansion, then we would expect the coefficient on this variable to be positive and significant.

The second variable of interest is UNIFIED GOVERNMENT. This dummy variable is equal to one (1) if the House, Senate, and President, are held by the same political party (unified government), and equal to zero (0) if one or more of these political institutions is held by an opposing party (divided government). This is the same as the political alignment variable in the previous study. A positive coefficient on this variable would indicate a political motive to expand, consistent with the partisanship-patronage explanation.

We also include five control variables. The first two control variables are designed to remove time trends from the data. `TIME SINCE LAST EXPANSION` is a count variable that counts off the number of congressional periods since the last expansion. It controls for the accumulation of demand for judges since the last expansion. `TREND`, which counts the passage of time, controls for the unobserved variables that would change regularly over time, such as technology, population, and the like. Specification tests indicate that these two variables also remove time trends in the data that would otherwise cause incorrect estimation of parameters.¹⁹

The third control variable is `BUDGET GROWTH`, which measures the percentage growth of the nondefense, noninterest, portion of the federal budget in the last time period.²⁰ As the United States federal government has more money, one might expect a higher propensity for Congress to allocate new judgeships. The fourth control variable is `PROHIBITION` which controls for any direct judgeship expansion effects during Prohibition and is equal to one (1) during Prohibition and zero (0) otherwise.²¹ During Prohibition, the number of criminal cases in the district courts soared almost 500%, primarily due to litigation regarding the illegal production, consumption, and transportation of spirits. Between 1933 and 1934, the last year of prohibition and the first year of legalization of alcohol, the number of criminal cases filed in the district courts plummeted from over 80,000 to about 33,000.

A final control variable, `NEW GOVERNMENT`, is a dummy variable which indicates the first congressional term of a unified government for a given political party. Studies by McNollgast and de Figueiredo and Tiller show that initial periods of unified government are more likely to see an expansion in the appellate courts.²² If this variable

affects the timing of new judgeships, NEW GOVERNMENT should have a positive and significant coefficient.²³

ii. Specification and Results

We run two regressions to examine the effects of caseload pressure and politics on the timing of district court expansion decisions. In the first, Timing Model 1, we examine a base model including only the caseload factors and the control variables. In Timing Model 2, we include UNIFIED GOVERNMENT as a proxy for partisan-patronage politics. Table 3 reports the results. A log-likelihood ratio test allowed us to reject the hypothesis that both models have the same explanatory power at the 99% level of confidence; Timing Model 2 performs significantly better than Timing Model 1. A positive coefficient on the variable indicates a higher probability of an increase in the number of judgeships. The standard errors are listed in parenthesis below the variables. All significance tests are two-sided asymptotic t-tests that are consistent in the presence of AR(1) autocorrelation and heteroskedasticity.²⁴

[insert Table 3]

In Timing Model 1, only the parameter estimates on the CONSTANT and the two time dependent variables, TIME SINCE LAST EXPANSION and TREND are significant at the 90% level. Moreover the positive coefficient on TIME SINCE LAST EXPANSION and the negative coefficient on TREND indicate together that as time has progressed, Congress

waits longer between decisions to expand. That is, with each new Congress, there is a lower probability of an expansion; but as the time between expansion increases, Congress is more likely to authorize an expansion, all other things equal.

Caseload pressure appears to offer little in the way of explaining the timing of district court expansion. In Timing Model 2, the coefficient on CASELOAD PER JUDGE remains insignificant, allowing us to reject the hypothesis that judicial caseload has an effect on the timing of district court expansion. The coefficient on the UNIFIED GOVERNMENT variable, however, is positive and significant as hypothesized by the partisan-patronage explanation. Indeed, unified government increases the probability of an expansion by 39 percentage points (from 55% probability to 94%) from the mean values of the variables when compared to divided government, controlling for other factors.

The coefficients on the CONSTANT, TIME SINCE LAST EXPANSION, and TREND variables remain significant in Timing Model 2 as they were in Timing Model 1. The significance of the parameter of the TREND variable suggests that growth in population, expansion of technology, and other annual effects can have an impact on the timing of expansions of the federal district courts. The statistically significant parameter estimate of TIME SINCE LAST EXPANSION suggests that there is some pent-up demand for judgeships as time passes, pent-up demand that is not explained by increasing caseload. The coefficient on BUDGET GROWTH is not statistically significant, suggesting that the government expands the judiciary without much concern for a federal budget constraint. The same is true for PROHIBITION. Finally, the coefficient on NEW GOVERNMENT is close to zero in Timing Model 2, and not statistically significant. This would indicate that

Congress does not expand the district court, with higher probability, in its first term of unified government than in later terms of unified government.

C. The Size Model

i. The Data

In this second stage, we examine the size of a judicial expansion -- that is, how many judgeships are added during an expansion. The partisanship-patronage rationale would expect larger increases during unified government expansions than during divided government expansions. The caseload hypothesis would expect the increases to be tied to judicial workload. The dependent variable is NEW JUDGESHIPS which is defined as the number of new judgeships created in each Congress from 1875 to 1993, given that there was an expansion ($n = 39$). As in the timing models, the two primary independent variables of interest are CASELOAD and UNIFIED GOVERNMENT. CASELOAD measures the change in cases filed since the last expansion (in thousands). If caseload pressure drives the size of an expansion, we would expect the coefficient on this variable to be positive and significant. UNIFIED GOVERNMENT is defined as before. If the partisanship-patronage explanation is correct, the coefficient on this variable should be positive and significant.

We introduce three control variables. The first, BENCH ALIGNMENT, controls for the political profile of the current district courts by measuring the percentage of the sitting bench that belongs to the party of the controlling president during that congressional term. If the current ideological make-up of the bench affects the size of an expansion, then

we might see a statistically significant coefficient on this variable. The second control variable is NEW GOVERNMENT. It could be that the first period in a new government's tenure will be the time of the largest expansion because of the need to redirect judicial ideology. If so, we should expect a positive and significant coefficient on the NEW GOVERNMENT variable. A final control variable is MILLS, which is the inverse Mills ratio described earlier.

ii. Specification and Results

Table 4 provides the results of the selection-corrected OLS estimation procedure. All standard errors, in parentheses below the estimated coefficients, are heteroskedastic-consistent estimates.²⁵ All t-statistics are reported for the two-tailed test. Both models in this section have been examined for multicollinearity and autocorrelation, and neither appears problematic.²⁶ Size Model 1, which explains 25% of the variance in the data, is the baseline model and includes the variables using all 39 observations of expansion. The coefficient on CASELOAD is positive and significant at the 90% level of confidence. The coefficient suggests that every 365 cases results in an additional judge. All other parameter estimates, including UNIFIED GOVERNMENT are insignificant.

[insert Table 4]

If we were to stop with Size Model 1, we might conclude that the timing of judicial expansion was determined by political concerns while the actual number of judges added

was determined by the amount of caseload pressure that had built up over time. One concern that may arise, however, is that the steep rise in caseload beginning in about 1970 (see Figure 1) may have an effect on the stability of the coefficients. In order to examine the stability of the coefficients, we conducted a Chow prediction test on the sample, separating out the earlier years from the years of substantial caseload growth beginning in the 1970s.²⁷ The result of the test is that we cannot reject the hypothesis that a different model is operating before 1970 and after 1970.

Thus, we separate out the expansions before 1970 (n=35) and repeat the econometric specification. The results are reported in SIZE MODEL 2. The coefficient on CASELOAD is positive, but not significant. However, the coefficient on UNIFIED GOVERNMENT is positive and significant. It indicates that political alignment will result in 9.73 additional judgeships being created in each expansion in the period prior to 1970.²⁸ The coefficients on all other control variables are not significant.²⁹

D. Discussion

The timing of the district court judicial expansion appears closely tied to politics. Indeed, there is a 39 percentage point higher probability of an expansion in the district court during times of unified government than when divided government obtains. This result is consistent, though not the same magnitude, with the findings of de Figueiredo and Tiller, who have shown that in the appellate courts, caseload has no effect on the timing of expansion, and that unified government increases the probability of an expansion by 53 percentage points.³⁰

Real differences between the appellate courts and district courts seem to occur, however, in the size of an expansion -- that is, how many judges are added in an expansion. In their earlier study, de Figueiredo and Tiller showed that both caseload and political factors concurrently drive the size of an expansion in the appellate courts. This does not appear to be the case for federal district court expansion. Taken together, the results of Size Model 1 and Size Model 2 indicate that before 1970, Congress seemed to be most concerned about ideology or patronage, letting the size of the bench be determined primarily by these political factors. As caseload was relatively stable prior to 1970, it was easy for Congress to mete out ideological and patronage agendas through partisan expansion and appointments with little concern for caseload pressures on the district courts. By 1970, however, Congress had switched its focus from political concerns toward caseload pressures. With the dramatic rise in caseload occurring in the 1970s, it appears that Congress became more concerned about the efficient processing of cases rather than ideological or patronage gains. One source of this shift may be that between 1970 and 1992, there was only one four-year period (1977-1980 inclusive) where government was politically unified. Therefore, there have been few opportune moments for Congress to expand the judiciary for political reasons. Facing enormous caseload, Congress had to respond to the crisis in the district courts by adding more judgeships.

4. CONCLUSION

Expanding the number of judgeships during unified government allows Congress and the President to engage in patronage and policy control of the federal district courts.

During periods of divided government, an expansion could leave the House vulnerable since the President and Senate, who retain ex post power over the appointment and confirmation processes for the newly created judgeships, could install judges politically at odds with the House. Unified government ensures the House that like-minded judges will be appointed and confirmed by the President and Senate, all hailing from the same party that dominates the House. This political explanation for district court expansion conflicts with the view that only caseload pressures drive the expansion of the judiciary.

In this article, we demonstrated that politics affects the timing of an expansion in the U.S. district courts. This is consistent with earlier research on the expansions of the Supreme Court and appellate courts, where politics was found to drive the timing of expansion. However, both politics and caseload have affected the size of district court expansion. Before 1970, Congress seemed to have strong political motivations for how many judges would be added during an expansion. After 1970, Congress became much more attentive to caseload considerations. These results differ from earlier analysis performed on the circuit courts where it has been shown that politics and caseload determines the size of expansion over the entire time period.

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² Deborah Barrow, Gary Zuk and Gerald Gryski, The Federal Judiciary and Institutional Change (1996); Charles M. Cameron, Albert D. Cover, and Jeffery A. Segal, Senate Voting on Supreme Court Nominees: A Neoinstitutional Model, 84 Am. Pol. Sci. Rev. 525 (1990); Lee Epstein, Contemplating Courts (1995). Jeffery A. Segal, Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics, 49 J. of Pol. 998 (1987). There is also research showing that partisan political maneuvering takes place from the bench through strategic retirement by sitting judges. See James F. Spriggs and Paul Wahlbeck, Calling it Quits: Strategic Retirement on the Federal Courts of Appeals, 1983-1991, 48 Pol. Res. Q. 573 (1995).

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⁵ de Figueiredo and Tiller *supra* note 4.

⁶ Jilda M. Aliotta, Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme court Decisionmaking, 71 *Judicature*, 277 (1998); Vicki Schultz & Stephen Petterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 *U. Chi. L. Rev.* 1073 (1992); Joel B. Grossman, Social Backgrounds and Judicial Decisionmaking, 79 *Harv. L. Rev.* 1551 (1966); Frank B. Cross and Emerson H. Tiller, Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal, 107 *Yale L. J.* 2155 (1998); Epstein, Lee. *Contemplating Courts* (1995). See, however, See Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schawb, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 *J. Legal Stud.* 257 (1995) (arguing that the political aspects of judicial decision-making may not filter down to the mass of cases when one considers settlement aspects of litigation).

⁷ References to caseload as the main determinant of judicial expansion are plentiful in both the legal and social science literature. Former circuit judge Kenneth Starr, for example, has stated, "[t]he driving reason [for judgeship] expansion has been...the

expansion of caseload itself.” Kenneth Starr, *The Supreme Court and the Federal Judicial System*.” 42 *Case Wes. Res. L. Rev.* 1209, 1211 (1992).

⁸ Caseload per judgeship was determined by dividing the number of cases for a given year by the number of judgeships in that year. The number of cases filed in the federal district courts was drawn from Richard A. Posner, *The Federal Courts: Crisis and Reform* (1985) and the U.S. Census Bureau. In order to estimate the number of cases filed from 1875 to 1903, we used the *Annual Reports of U.S. Attorney General, Summary Tables* (1932). The number of civil cases pending in the district courts is available during this time period. From 1904 to 1913, the average number of total cases filed was 62% of the number of civil cases pending. Using this number, we interpolated backwards to obtain an estimate of the number of cases filed from 1875 to 1903.

⁹ Temporary increases in workload might not result in increases in permanent judgeships. For example, during Prohibition, Congress did not appreciably increase the size of the judiciary, perhaps because it anticipated repeal of the 18th Amendment. However, in general it may difficult for Congress to anticipate when a substantial workload increase is temporary.

¹⁰ The caseload per judgeship has increased approximately 85% from the year 1875 (228 cases/judgeship) to 1992 (421 cases/judgeship). There are a number of reasons for this overall increase. First, the support staff attached to each judge (e.g. law clerks, etc.) has increased over time. Second, technology and other productivity factors have been introduced during this time period, especially beginning in the 1960s. Third, more time is demanded of judges now than in the past. See, Richard A. Posner *supra* note 8.

¹¹ Presided over by the Chief Justice and attended by the chief judges of each circuit, the Judicial Conference collects and maintains information on judicial business in the federal courts and makes recommendations to Congress on the need for additional judgeships. See Peter G. Fish, *The Politics of Federal Judicial Administration* (1973); for discussion of the origin, evolution and role of the Conference in federal judicial administration.

¹² Since the mid-1960s, the Judicial Conference has determined requests through a careful and considered calculation based on caseload, case content, case delay, and other factors. While this may mitigate the opportunism by the judiciary in requesting judgeships, the methodology for requests does not exclude the possibility of strategic action by the Third Branch.

¹³ Bermant, Gordon Bermant, W. Schwarzer, E. Sussman and R. Wheeler, *Imposing a Moratorium on the Number of Federal Judges* (1993). President Jimmy Carter's judgeship bill, for example, authorized a record 152 new positions in total (at all levels of the judiciary), 22 more than requested by the Judicial Conference. The total number of judgeships authorized but not requested by the Conference, or requested by the Conference but not authorized, was 25. Another judgeship bill gave President George Bush 85 new positions at all levels of the judiciary. The disconnect between authorizations and requests in that case was 31. The bill pared 9 appellate and 12 district lines from the Conference's request, and added 10 seats to the district bench outside of that the Conference requested.

¹⁴ Despite a recent spate of scholarly works on divided government, the role of united and divided government on judicial growth has generally received little attention. But see David R. Mayhew, *Divided we Govern: Party Control, Lawmaking, and Investigations, 1946-1990* (1991); James A. Thurber, ed., *Divided Democracy* (1991); Kelly, Sean Q. Kelly, *Divided we Govern? A Reassessment*, 25 *Polity* 475 (1993); Barrow, Zuk and Gryski *supra* note 2; de Figueiredo and Tiller *supra* note 4; Jon R. Bond, *supra* note 4.

¹⁵ In order to test the model, we examined as the dependent variable whether or not there has been an expansion of the federal district courts. We defined an expansion as an increase in the number of permanent judgeships authorized by Congress during a two-year session. Our unit of observation is the two-year congressional session. Note that if a particular Congress passed more than one expansion, it still receives only one data point. The rationale for treating the data in this way is that the institutional alignment of the actors does not change within a congressional period. Limits on caseload data necessarily restricts our examination to the expansions that occurred between 1875 and 1993.

¹⁶ A correlation test indicates that this is statistically significant at the 95% level.

¹⁷ G. S. Maddala, *Limited-Dependent and Qualitative Variables in Econometrics* (1983). The Heckman model corrects for bias that may exist in testing for effects on both timing and size of expansion as the latter (size) is dependent in part on the former (timing).

¹⁸ Alternative methods were considered, including a count model and a tobit model. The Heckman model seems to be superior because it allows a separation of the size and timing effects. A discussion of these other methods can be found in John M. de

Figueiredo, *The Politics of the Court and the Strategy of the Firm*, Ph.D. Dissertation, University of California, Berkeley, Haas School of Business (1997).

¹⁹ Specification tests indicate that these variables are necessary because there are two time trends in the data. In the earlier study by de Figueiredo and Tiller *supra* 4, these same specification tests indicated that there was no need for a TREND variable, but there was a need for TIME SINCE LAST EXPANSION.

²⁰ Over 25% of the observations are negative during the time period examined.

²¹ A large number of temporary judgeships were authorized in 1922 to help with the increase in cases during Prohibition.

²² McNollgast *supra* note 4; de Figueiredo and Tiller *supra* note 4.

²³ McNollgast examine the first four years of the new regime, instead of the first two years, which we examine here. McNollgast, *supra* note 4. We follow our methodology because there is no guarantee that a newly unified government will remain in power for four years. For example, the first Eisenhower and Clinton administrations had unified government during their first two years, and divided government during their second two years. Our variable also codes every new unified government regime change. That is, if there is a unified Republican government, then a period of divided government, and a return to unified government, each initial period of unified government receives a (1) dummy, while all other periods received a (0). This is consistent throughout the data set.

²⁴ Given that this is a time-series probit, it would be reasonable to expect some form of autocorrelation may exist. To correct for this possibility, we use a method devised by R. de Figueiredo to correct the variance-covariance matrix of a probit by extending the

Newey-West variance-covariance transformation to the nonlinear case. This method produces consistent standard errors for a probit in the presence of a specified autocorrelation structure and heteroskedasticity. We posit AR(1) autocorrelation and correct the standard errors using this method. See de Figueiredo, Rui J. P., Jr. Political Uncertainty, Policy Insulation and Endogenous Budgetary Institutions: Why States Adopt the Line Item Veto. Manuscript. University of California, Berkeley (1997); Whitney K. Newey and Kenneth D. West, A Simple, Positive Semi-Definite Heteroskedasticity and Autocorrelation Consistent Covariance Matrix, 55(3) *Econometrica* 703-08 (1987). Tests indicate there is little multicollinearity between the independent variables.

²⁵ There is no Granger causality from judgeships to caseload. See McNollgast, *supra* note 4.

²⁶ A test for Breusch-Godfrey test autocorrelation of the error terms rejects the hypothesis of an AR(1), AR(2), and AR(3) process at the 95% level of confidence.

²⁷ See William H. Greene, *Econometric Analysis* (1992, pp. 211-214). Additional cutting points were examined for the sample. 1970 was selected because of its intuitive appeal (beginning of the substantial rise in caseload) and because the specification tests have indicated that this is the point where the difference in sum of squared residuals (adjusting for degrees of freedom) of the sub-samples is the greatest.

²⁸ We have run the statistical tests using Judicial Conference requests from 1922-1993. The Judicial Conference requests judgeships during every Congressional period, so it is not clear that the actual request affects timing of judicial appointments. In a regression with the Judicial Conference variable, we do get a positive and significant

coefficient on the size of requests. However, the coefficient is very unstable and the model fails most specification tests because there are only 21 observations of expansion during this time period.

²⁹ Note, however, that the coefficients on BENCH ALIGNMENT and NEW GOVERNMENT have the signs hypothesized, but have large standard errors. One reason for this insignificant result of BENCH ALIGNMENT may be the measurement of the variable (judge party affiliation). Merely looking at party affiliation, although a good measure for ideological leanings of legislators who must be re-elected each term, may be a very poor measure of judicial ideology, where individual judges are appointed for life. Another possible reason for these results is that judicial make-up of the bench does not matter. Only a better measure of ideology will be able to distinguish between these two explanations.

³⁰ de Figueiredo and Tiller *supra* note 4.

TABLES

TABLE 1

REQUESTS OF THE JUDICIAL CONFERENCE FOR DISTRICT COURT JUDGESHIPS AND SUBSEQUENT AUTHORIZATIONS BY CONGRESS, 1924-1992

YEAR	CONGRESS	REQUESTED	AUTHORIZED
1924	68	5	3
1926	69	10	8
1928	70	6	11
1930	71	5	8
1932	72	9	0
1934	73	4	0
1936	74	8	10
1938	75	12	18
1940	76	9	8
1942	77	4	2
1944	78	3	0
1946	79	4	3
1948	80	16	18
1950	81	10	2
1952	82	20	0
1954	83	30	27
1956	84	34	0
1958	85	40	1
1960	86	49	2
1962	87	59	62
1964	88	0	0
1966	89	31	37
1968	90	66	0
1970	91	67	60
1972	92	51	0
1974	93	1	0
1976	94	106	0
1978	95	107	117
1980	96	29	0
1982	97	51	0
1984	98	0	62
1986	99	55	0
1988	100	58	0
1990	101	75	74
1992	102	16	0

* Year of authorization often comes one time period after request.

TABLE 2

POLITICAL ALIGNMENTS AND JUDICIAL EXPANSIONS, 1875-1993
(59 two-year congressional terms)

	EXPANSION	NO EXPANSION	TOTAL PERIODS
Unified Government	28	6	34
Divided Government	11	14	25
Total Periods	39	20	59

TABLE 3

RESULTS OF PROBIT ANALYSIS FOR TIMING OF JUDICIAL EXPANSION OF
THE FEDERAL DISTRICT COURTS, 1875-1993

Dependent Variable: = 1 if judicial expansion, = 0 if no judicial expansion

INDEPENDENT VARIABLE	TIMING MODEL 1	TIMING MODEL 2
CONSTANT	2.662*** (1.078)	2.090* (1.087)
CASELOAD PER JUDGE	-1.873 (1.878)	-2.429 (1.968)
TIME SINCE LAST EXPANSION	0.687* (0.346)	1.164*** (.463)
TREND	-0.036*** (0.013)	-0.042*** (0.015)
BUDGET GROWTH	0.088 (0.152)	0.029 (0.158)
PROHIBITION	0.882 (0.912)	0.959 (0.958)
NEW GOVERNMENT	0.816 (0.720)	-0.053 (0.827)
UNIFIED GOVERNMENT		1.471*** (0.496)
Log-Likelihood	-30.31	-25.09
N	59	59

AR(1) and heteroskedastic consistent standard errors in parentheses

* significant at the 10% level

*** significant at 1% level.

TABLE 4

RESULTS OF A TWO-STAGE OLS ANALYSIS OF SIZE OF EXPANSION
OF THE FEDERAL DISTRICT COURT, 1875-1993

Dependent Variable: Number of New Judgeships

INDEPENDENT VARIABLE	SIZE MODEL 1 (1875-1993)	SIZE MODEL 2 (1875-1970)
CONSTANT	-10.474 (13.797)	-5.137 (7.543)
CASELOAD	0.365* (0.209)	0.053 (0.153)
UNIFIED GOVERNMENT	3.772 (10.651)	9.733** (4.322)
MILLS	12.910 (11.132)	16.387 (11.283)
BENCH ALIGNMENT	-6.388 (14.167)	-2.652 (7.335)
NEW GOVERNMENT	16.570 (11.216)	8.679 (7.858)
R-squared	.25	.24
N	39	35

Heteroskedastic-consistent standard errors in parentheses

* significant at the 10% level

** significant at 5% level