DEFENDERS OF CIVIL LIBERTIES OR CHAMPIONS OF NATIONAL SECURITY? THE FEDERAL COURTS AND U.S. FOREIGN POLICY

By

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ABSTRACT

DEFENDERS OF CIVIL LIBERTIES OR CHAMPIONS OF NATIONAL SECURITY?
THE FEDERAL COURTS AND U.S. FOREIGN POLICY

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Kirk Andrew Randazzo

The terrorist attacks of September 11, 2001, and subsequent actions by the Bush administration, have reminded us that the federal courts often are required to resolve questions of individual rights in lieu of foreign policy or national security concerns. Unfortunately, the majority of U.S. foreign policy studies focus on interactions between the executive and legislative branches of government during the conduct of foreign affairs. Consequently, in an effort to concentrate on the President, Congress, or agencies such as the CIA or Department of State, these examinations neglect the roles played by the judiciary. By focusing on judicial involvement in the development of U.S. foreign policy the chapters of this dissertation therefore contribute to several literatures. First, the analyses augment studies of U.S. foreign policy by focusing on a historically neglected branch. Second, the examinations contribute to the literature on judicial politics by comparing structural differences among the three levels of the federal court system. Throughout the entire project, two main themes emerge: what roles have the federal courts assumed in resolving foreign policy disputes, and does the structure of the judicial system exert a substantial influence on judicial decision making in foreign policy cases? Using a unique dataset of cases from 1946-2000, I discover several conclusions. First, the answer about whether judges are defenders of civil liberties or champions of national security is resolved in favor of the latter. Based on separate empirical models one can

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reasonably conclude that federal judges are champions of national security; though liberal judges are more likely to support civil liberties than conservatives. Second, the empirical results demonstrate that the hierarchical structure of the federal judiciary exerts a significant constraint upon the Courts of Appeals, but not upon the District Courts. Finally, a qualitative analysis of post-September 11th cases indicates these results are consistent in the contemporary judicial system, although more analyses are needed to confirm this conclusion.

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INTRODUCTION

In 1982, Honduran national Juan Ramon Matta-Ballesteros joined a Mexican marijuana and cocaine trafficking enterprise, and eventually began grossing over $5 million a week from successful ventures in the United States. Within two years the U.S. Drug Enforcement Administration (DEA) made several significant arrests, resulting in substantial losses of revenue for the Mexican enterprise. As a response to these arrests, the Mexican cartel kidnapped, tortured and killed DEA Special Agent Enrique Camarena in 1985. Physical evidence at the crime scene connected Matta-Ballesteros to this killing; however, the DEA twice failed to extradite him to the United States for trial. Near dawn, on April 5, 1988, U.S. Marshals – aided by Honduran Special Troops – forcibly abducted Matta-Ballesteros from his home and within twenty-four hours incarcerated him in a federal penitentiary located in Marion, Illinois. During his trial in federal district court, Matta-Ballesteros contended that while being transported to the United States, the marshals repeatedly beat him and applied a stun gun to various parts of his body including his feet and genitals. The district court dismissed these contentions and Matta-Ballesteros was convicted and sentenced for the murder of Agent Camarena.

On appeal to the Ninth Circuit Court of Appeals, Matta-Ballesteros argued the district court improperly exercised its jurisdiction. This argument was premised on the extradition treaty between Honduras and the United States (under which the DEA could not secure his extradition), and the shocking nature of his abduction and mistreatment by U.S. Marshals. Speaking on behalf of a unanimous panel for the Ninth Circuit, Judge Cecil Poole concluded, "where the terms of an extradition treaty do not specifically

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prohibit the forcible abduction foreign nationals, the treaty does not divest federal courts of jurisdiction over the foreign national."[1] Additionally, Judge Poole stated that while the circumstances surrounding Matta-Ballesteros' abduction and treatment were disturbing, the actions of the U.S. Marshals "violated no recognized constitutional or statutory rights" and therefore the appellate panel had no basis upon which to overturn the decision of the district court.[2]

It is perhaps difficult to determine if Matta-Ballesteros was brought to justice for the murder of Agent Camarena, or if he was the victim of an overzealous U.S. government. However, it is important to realize that the federal courts often determine the extent to which the government may permissibly intrude upon individual civil liberties. The terrorist attacks of September 11, 2001, and subsequent actions by the Bush administration, have reminded us that the federal courts often are required to resolve questions of individual rights in lieu of foreign policy or national security concerns.

Unfortunately, the majority of U.S. foreign policy studies focus on interactions between the executive and legislative branches of government during the conduct of foreign affairs. They examine the politics of a decision-making process, designed to confront the numerous challenges encountered from the participation of a government in an interdependent, international system. Thus, scholars focus primarily on those actors within the United States who proactively determine foreign relations policy.

Consequently, in an effort to concentrate on the President, Congress, or agencies such as the CIA or Department of State, these examinations neglect the roles played by the judiciary. While the political branches of government most directly determine policy

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[1] *United States v. Matta-Ballesteros* 71 F.3d 754 (1995).
[2] Ibid.

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outcomes, the contributions of the judiciary are no less significant. Many foreign policy questions involve constitutional interpretations regarding the authority vested in the executive and legislative branches. Since the courts possess the authority to interpret the Constitution, judicial decisions often define the parameters and boundaries within which the political branches must operate. Despite this substantial impact on foreign policy decision-making, little scholarship exists on judicial influences in the conduct of foreign affairs.

Three significant limitations have hindered our understanding of how the judiciary operates in the foreign relations scheme. First, within the small body of literature examining courts and foreign policy, a majority of these studies utilize qualitative techniques to assess historical relationships between the three branches of the federal government. These studies examine whether the Supreme Court defers to either the President or Congress in the formulation and conduct of U.S. foreign policy. While these doctrinal analyses provide detailed descriptions of specific case histories, they do not offer theoretical contributions to judicial behavior. Some studies utilize separation-of-powers (SOP) models to provide explanations for interbranch interactions. However, these models often are not employed when examining judicial resolution of foreign relations disputes. Therefore, it is difficult to determine the extent to which SOP theories provide analytic leverage to foreign policy litigation. Consequently, a richer set of theoretical expectations is needed to understand judicial behavior in foreign affairs.

Second, the constitutional authority imposed upon the judiciary extends beyond balancing disputes between the political branches of government. Courts are responsible for protecting the civil liberties of citizens within the United States. Nowhere is this

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responsibility more important than when judges resolve disputes between the rights of individuals and the authority of the federal government to engage in foreign affairs or protect national security. A dearth of empirical analyses exists which systematically explore patterns of judicial behavior under these circumstances.

Finally, most studies focus exclusively on the United States Supreme Court. The Federal Courts of Appeals and District Courts receive virtually no attention. With the Supreme Court gaining more control over its docket, thereby reducing the number of cases it hears, the decisions of the lower federal courts become more significant because the possibility of review is reduced. Consequently, the Courts of Appeals and District Courts provide additional constraints on the political branches of government. Therefore, an examination of all levels of the federal judiciary is essential in understanding how the courts resolve foreign policy disputes.

This dissertation therefore contributes to the literature on U.S. foreign policy by focusing on a historically neglected branch. Additionally, the dissertation contributes to the literature on judicial decision making by comparing structural differences among the three levels of the federal court system. Throughout the entire project, certain questions and themes will be addressed. First, what roles have the federal courts assumed in resolving foreign policy disputes since World War II; are they defenders of civil liberties or champions of national security? Second, does the structure of the U.S. court system exert a substantial influence on judicial decision making in foreign policy cases?

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FEDERAL COURTS AND U.S. FOREIGN POLICY

Historically, the courts were fundamental participants in the formulation of U.S. foreign policy. During the early nineteenth century the judiciary adjudicated several disputes between the political branches of government over the boundaries of foreign affairs decision making. In *Bas v. Tingy* (1800), the Supreme Court ruled that only Congress is able to declare either an "imperfect" (limited) war or a "perfect" (general) war. In *Talbot v. Seeman* (1801), the Court determined that all powers of war are constitutionally vested in Congress. In *Little v. Barreme* (1804), Chief Justice Marshall held that President Adam's instructions to seize hostile ships were in conflict with Congress and therefore illegal. In 1806, the question whether a president may initiate hostilities arose in the case *United States v. Smith.* Justice Paterson concluded, "it is the exclusive province of Congress to change a state of peace into a state of war." Finally, in the *Prize Cases* (1863) the Supreme Court ruled that the President, in his capacity as commander-in-chief, possesses the power to repel sudden attacks against the United States. These early cases demonstrated the judiciary's assertiveness in defining constitutional parameters within which the political branches of government operated.

While the courts were active participants in foreign affairs during the early nineteenth century, the next century witnessed an exercise of judicial restraint in these disputes. Increasingly, the courts utilized certain threshold issues such as the political question and act of state doctrines to limit their involvement in areas of foreign policy (Goldsmith 1999). Consequently, the President successfully expanded his constitutional authority. Cases in which the Supreme Court rendered a decision on the merits, such as *United States v. Curtiss-Wright Export Co.* (1936) or *Korematsu v. United States* (1944),

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reinforced executive dominance in foreign affairs. Therefore, what most individuals take for granted regarding foreign relations is the product of a long historical development in which the courts played a vital role (Rosati 1999, 352).

Unfortunately, due to the apparent deference given by the courts to the political branches of government – especially the executive – scholars altered the theoretical lenses through which they analyzed the judiciary. Rather than examining the courts as an equal branch, the majority of postwar studies utilizing court cases to examine foreign policy view the judiciary as subservient to either the President or Congress. In 1966, Aaron Wildavsky published his famous "Two Presidencies Thesis," arguing that the President exerts a tremendous influence on the shaping and implementation of foreign policy. While scholars ultimately criticized Wildavsky's thesis (LeLoup and Shull 1979; Cohen 1982; Edwards 1986; Fleisher et al. 2000), its publication prompted additional research of court cases. Subsequent studies examining court cases conclude that the President reigns supreme in foreign policy (Perlmutter 1974; Keagle 1985; Cronin and Genovese 1998; LeLoup and Shull 1999). Countering these arguments are analyses of court cases concluding that the Congress possesses ultimate authority in the conduct of foreign policy (Henkin 1972; Schlesinger 1989; Fisher 1995; Harris 1995; Korn 1996). However, noticeably lacking is a systematic examination of the judiciary's role in foreign policy. Silverstein argues while the courts play the least visible role in foreign policy, their decisions often shape the national debate over constitutional interpretation in this area and influence the behavior of the other branches of government (1997, 6-7). Therefore, an empirical examination of the courts' influence on foreign policy – as the

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third component of the U.S. governmental triumvirate – is essential to understand where they fit within the foreign affairs puzzle.

Constitutional law theories on governmental authority and separation of powers are useful in assessing how judicial actions impact United States foreign policy. It should be noted that these theories differ from political science separation of powers models. Where the latter assess how institutional preferences and strategic calculations affect institutional behavior, the former focus on jurisdictional disputes of political and legal authority. According to these theories, the Constitution empowers the federal government and structures the distribution of powers, including those related to foreign affairs (Diament 1998, 912-913). The interdependent structure of constitutional authority creates an "invitation to struggle" among three separate branches of government, with each vying to expand its sphere of influence (Corwin 1957, 171). According to Spitzer (1993), the realm of foreign affairs has been central in shaping intergovernmental relations. As the President and Congress expand their constitutional capabilities, individual civil liberties are often sacrificed. The Nixon Watergate scandal and the McCarthy congressional hearings provide two examples of abuses of power by the political branches in the name of national security. However, as the Constitution dictates, the courts are responsible for protecting the rights of citizens within the United States. This creates a paradox for the courts when called upon to resolve foreign policy disputes:

> The courts have no authority to conduct U.S. foreign relations. They are, however, authorized to adjudicate all cases or controversies properly before them in accordance with applicable law. Their function is essential to the maintenance of the separation of powers among the branches and the protection of individual rights. Since no other branch has the authority to exercise the judicial power, practices that permit the Executive [or Legislature] to exercise unilateral decision-making authority in particular court cases may be inconsistent with the constitutional plan. On its face,

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> the Constitution does not exclude or limit the courts' authority in cases or controversies touching on foreign relations. Furthermore, matters with foreign relations implications may involve the legal rights and duties of individuals or the states under federal law, clearly within the courts' authority. Judicial deference or abstention in such cases may compromise the authority of the federal courts (Charney 1989, 807).

If the executive or legislative branch exercises unilateral decision-making in foreign relations and infringes upon individual rights, are the courts abdicating their constitutional authority by deferring to those branches? According to Judge Arlin Adams, "among the more perplexing dilemmas faced by a democratic society is that of securing its territorial and institutional integrity, while at the same time, preserving intact the core liberties essential to its existence as an association of truly free individuals" (*United States v. Butenko* 1974). A systematic analysis of foreign policy cases is necessary to examine how the courts resolve the paradox described by Professor Charney and Judge Adams.

Are the courts defenders of civil liberties or champions of national security? The Restatement (Third) of Foreign Relations Law of the United States (1986), Section 721 states "the provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations." According to this component of the American legal system, the conduct of foreign affairs should not violate the civil liberties of U.S. citizens. However, as Dorsen (1989, 1997) argues, "foreign affairs, and its close relation, national security, have usually been graveyards for civil liberties. This is true even though governmental authority in the foreign sphere is not exempt from the liberty-bearing provisions of the Constitution."

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Organization of Dissertation

To examine judicial influences in U.S. foreign relations, the dissertation is organized into the following chapters. Chapter Two focuses on the theoretical foundations surrounding judicial decision-making in foreign affairs and potential constraints judges encounter that are imposed through a hierarchical judicial structure. Chapter Three conducts an initial empirical analysis of the federal judiciary. Each level of the judiciary is analyzed separately to determine isolated influences on judges' decisions. Chapter Four focuses on the hierarchical relationship between the U.S. Courts of Appeals and the Supreme Court. Chapter Five explores a similar relationship between the Federal District Courts and the Courts of Appeals. Finally, Chapter Six offers concluding remarks and speculates how the September 11th attacks may have changed the nature of foreign policy concerns with the federal judiciary.

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CHAPTER ONE: THEORETICAL FOUNDATIONS

To understand the impact of constitutional interpretation in foreign policy requires a clear understanding of the role played by the judiciary.[3]

Assessing the impact of the federal judiciary on U.S. foreign policy is not an easy task. Initially, one must ascertain the nature of foreign policy. A precise definition of this concept is not altogether clear; experts disagree about the fundamental aspects of foreign affairs. Some definitions focus exclusively on the nature of military power whereas others include aspects of "soft power," such as economic, political and cultural superiority. Once a useful definition is obtained, one must then identify the relevant theoretical lenses from which to analyze judicial influences. To do so adequately requires an understanding of several different literatures: international relations/foreign policy theories, constitutional/legal theories, and theories of judicial politics (including individual behavioral and institutional theories). It is then necessary to draw relevant components from each of these literatures into a single, cohesive theoretical framework. Addressing these potentially daunting tasks is the therefore the focus of this chapter. As I explore the broad insights of each theoretical literature, my goal is to raise several questions that will assist in formulating specific hypotheses for later chapters.

DEFINITIONS OF U.S. FOREIGN POLICY

During the height of the Cold War defining U.S. foreign policy was a relatively simple task. While the majority of scholars and interested individuals may have offered

[3] Silverstein 1997, 21.

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different terms, the fundamental core definition would have involved military power and the preservation of our 'national interests.' Additionally, the core definition would focus on the nation-state as a unitary actor, and its relations with other states in an international system.

A strong consensus existed within the United States surrounding foreign policy and, consequently, this created a unique environment with few legal or political challenges to the foreign policy apparatus (Fry, Taylor and Wood 1994, 13), sometimes referred to as the military/industrial complex. However, the Vietnam War destroyed this consensus by "eroding the confidence" most individuals had in governmental authority (Sinclair 1993, 210). This, in turn, led to increasing challenges surrounding the concept of 'foreign' versus 'domestic' politics.

Contemporary definitions of foreign policy are becoming increasingly vague and more inclusive. As Wittkopf and Jones (1999, 5) note,

> Today globalization – which may be defined as 'the intensification of economic, political, social, and cultural relations across borders' – has radically altered the context of American foreign policy, as the spread of democracy and market economies has contributed to the homogenization of economic, social and cultural forces worldwide. In turn, the distinction long drawn between foreign and domestic politics has become increasingly arbitrary and dubious, and the geopolitical distinctions among states on borders and territory are increasingly suspect.

Thus, increases in global interactions have altered the international landscape upon which traditional definitions of foreign affairs were drawn. Increasingly interdependent relationships among states mark the new international system. Consequently, it is the increase in interdependency that influences contemporary definitions of foreign policy; blurring the distinction between 'domestic' and 'foreign' politics (Hermann and Hermann

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1989; and Ripley and Lindsay 1993). Discussions of American 'power' often now refer to economic stability, cultural exports, and political beliefs in addition to military supremacy (Wittkopf and Jones 1999).

Adding to the complexity of producing a clear foreign policy definition is the increase in the number of actors contributing to the foreign policy arena, each vying to expand its sphere of influence. Fry, Taylor and Wood (1994) state,

> It should be clear by now that there is not a foreign policy of the United States – there are instead foreign policies, each pursued by some foreign policy agency, bureau, or department. And it is not uncommon for these policies to be contradictory. In addition to the traditional foreign policy processes and institutions of the federal government, there are foreign policies of U.S.-based multinational corporations, foreign policies of state and even local governments, and foreign policies of a variety of interests groups... This process is played out on both the domestic and the global stage in a very competitive environment.

An accurate definition of U.S. foreign policy, therefore, should account for the policies of these (and other) actors because they will pursue different agendas (Ripley and Lindsay 1993), often under the rubric of the United States' 'national interest.' However, creating a definition based on the policies of various actors introduces several levels of complexity within empirical models; levels which become difficult to operationalize and measure. Therefore, a simpler definition – which still accounts for an increased number of foreign policy issues (beyond military disputes), not necessarily an increased number of actors – is required.

The traditional view of foreign affairs places the U.S. Department of State as the primary agency for developing foreign policy (Fry, Taylor and Wood 1994, 39). As such, a definition of foreign policy subsequently involves any issue for which the State Department could influence or develop policy: diplomatic relations with other nations,

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economic issues with foreign nationals, states or international corporations, immigration, international law, military relations, etc. Thus, a definition of foreign policy must assume that those issues can "be seen along a continuum from [the] most purely foreign to the most intimately linked with domestic issues" (Henehan 2000, 55). My conceptualization of foreign policy follows this continuum, thereby allowing for a wider range of issues to be linked to the foreign arena. I define foreign policy as any issue for which the State Department may take action. This definition does not imply that the State Department must actively participate for the issue to be classified as foreign policy, thereby allowing other actors to engage in the foreign policy sphere. Additionally, the definition is deliberately vague regarding the types of issues classified, thereby allowing the continuum of issues (according to Henehan) to be included in the categorization. Thus, foreign policy issues include examples such as disputes with the military, immigration and citizenship issues, disputes between the United States and foreign governments, citizens or foreign corporations. These disputes can occur within the territorial boundaries of the United States or abroad. Given the conceptual difficulties identified in this section, I believe this more inclusive definition is necessary to capture the myriad manifestations of foreign policy issues.

INTERNATIONAL RELATIONS/FOREIGN POLICY THEORIES

Theories of international relations and foreign policy have tended to gravitate within two distinct groups: realism and liberalism. Each theory offers a lens with which to examine judicial influences in foreign affairs. This section explores both theories and develops broad expectations based on their predictions.

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On initial inspection, one is not led to believe the theories of realism in international relations offer much analytical leverage for studying judicial behavior in foreign affairs. The realist paradigm focuses on the actions of the state as the unit of analysis, and consequently, internal political struggles are excluded from realist analyses (Morgenthau 1972; Waltz 1988). As Holsti (1995, 37) acknowledges, "because the central problems for states are starkly defined by the nature of the international system, their actions are primarily a response to external rather than domestic politic forces." Thus, a scholar employing the realist paradigm would assume potential judicial influences irrelevant since the 'state' operates in response to other 'states' and not in response to internal stimuli.

However, theories of realism do offer a single insight for my analysis. If, according to realist principles, the state is considered the highest authority then those internal components which realism assumes irrelevant should work to ensure the survival of the state. Stated another way, governmental institutions will "come together" when the state faces a challenge from another nation. From a judicial politics perspective, the courts should therefore defer to governmental authority when the 'state' responds to an external (i.e., foreign) stimulus. Certainly, one would expect the magnitude of the external stimulus to affect judicial behavior; judges would view the authority of the government to combat terrorist attacks within the United States differently than the government's authority to regulate international commerce. Regardless of this potential difference, the realist paradigm leads one to believe that judges would initially favor the government's position in foreign affairs litigation.

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In contrast to the realist paradigm in international relations are neo-liberal theories which focus on the internal operations of nation-states as a major influence. "Rather than assuming with the realists that the state can be conceptualized as a 'black box' – that the domestic political processes are both hard to comprehend and generally superfluous for explaining its external behavior – decision-making analysts believe one must take these internal processes into account" (Holsti 1995, 47). Thus, liberal theories of international relations contend that individuals within the state, and the internal dynamics of institutional norms, substantially impact the conduct and formulation of foreign affairs (Holsti 1968; Allison 1969). The fundamental core principles of liberalism in international relations recognize the importance of domestic politics in the formulation and conduct of foreign relations. These principles emphasize understanding internal dynamics as an influence on foreign policy. Consequently, liberal theories accept a role for the judiciary in developing foreign policy, and encourage researchers to examine the institutional and political dynamics of the courts when analyzing their influence on the decision-making process. However, liberal theories provide little guidance in predicting or understanding the internal dynamics of the judiciary. Therefore, one must explore a different literature to discern expected patterns of judicial behavior in foreign affairs litigation.

In sum, theories of international relations are useful in ascertaining broad patterns of behavior for the judiciary. The realist paradigm leads to the conclusion that judges will be sensitive to governmental authority in cases where the development of foreign policy is a response to an external stimulus. The neo-liberal challenge to realism asserts that foreign affairs decisions are the result of internal dynamic processes, which may be

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constrained by various institutional and political pressures. However, while international relations theories assist in identifying broad patterns of behavior, they are not helpful in generating a coherent theory for judicial involvement in foreign affairs.

CONSTITUTIONAL/LEGAL THEORIES

In this section I explore the contributions that constitutional and legal theories provide for an analysis of judicial behavior in foreign affairs litigation. These theories provide support for the argument that a systematic examination of judicial influence is essential. However, questions remain pertaining to offered insights about expected behaviors of judges when confronted with questions of foreign policy and civil liberties.

In 1975, Judge Skelly Wright warned that although the attempt to "infringe liberty in the name of national security and order may be motivated by the highest of ideals, the judiciary must remain vigilantly prepared to fulfill its own responsibility to channel [foreign policy] action within constitutional bounds" (*Zweibon v. Mitchell* quoted in Frank 1989, 767). However, questions remain as to whether the judiciary is vigilantly prepared to accept this responsibility, and under what constitutional provisions judges are empowered to pursue this responsibility.

The United States Constitution divides foreign relations authority between the legislative and executive branches of government, with a significant sharing of these responsibilities. For example, the power to engage in a military operation is authorized in both Article I – granting Congress the authority to declare war and to raise and establish the military – and Article II – authorizing the President to lead the military as Commander-in-Chief. Similarly, the authority to negotiate agreements internationally is

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given to the President initially, with the advice and consent of the Senate. Thus, the overlapping of authority creates an "invitation to struggle" (Corwin 1957), whereby the separate branches of government diligently pursue additional powers. Since the Constitution does not explicitly distinguish between domestic and foreign affairs (Peterson 1994), the judiciary often is involved in settling questions of foreign policy powers (Fry, Taylor and Wood 1994, 17). Genovese (2001, 10) illustrates this struggle when he mentions, "the skeleton-like provisions of Article II [in foreign affairs] have left the words open to definition and redefinition by courts…."

Therefore, while the courts may not actively formulate the foreign policies of the United States nor engage in relations with foreign entities, many judicial actions directly and indirectly affect these areas. For example, federal courts can apply (or deny application of) a U.S. statute extraterritorially, interpret an international or bilateral treaty, or adjudicate the validity of a foreign act of state (Goldsmith 1999, 1398). Additionally, since issues with foreign policy implications often involve the legal rights and duties of individuals, states or businesses under federal law, the resolution of these disputes may constrain foreign relations (Charney 1989, 807). Consequently, the judiciary has been crucial in deciding the parameters and boundaries of legitimate behavior (Rosati 1999, 352).

Unfortunately, while the Constitution provides authority for judicial intervention and while legal institutions are critical for preserving the values essential to civilized states (Damrosch 1991), many contemporary judges are reluctant to review the merits of foreign policy disputes. Smith (2002) acknowledges a "tension between the contemporary judiciary's commitment to the protecting of constitutional rights and the

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judiciary's persistent tendency to defer to the executive branch, [especially] in times of national crisis." Judges seem unwilling to challenge governmental authority when confronted with questions of foreign policy. Often this unwillingness occurs through the utilization of various threshold requirements, such as the political question of act of state doctrine, actions which further support an apparent, unlimited deference to the government (Dorsen 1989, 843). However, while the political question doctrine often is relied upon to dismiss foreign policy cases, other cases with significant foreign relations implications are adjudicated on the merits – often without discussion of the political question doctrine – leading some scholars to conclude that the judiciary's treatment of foreign affairs suffers from "jurisprudential chaos" (Goldsmith 1999, 1403).

How are judges supposed to resolve this apparent confusion? On the one hand, there is a strong tendency to defer to governmental authority. This proclivity is premised on the belief that courts lack competence to make foreign relations judgments (Goldsmith 1999, 1418). On the other hand, several notable legal scholars – including Supreme Court Justices – argue for the judiciary to remain vigilant in the preservation of civil liberties. At a speech delivered to the Law School of Hebrew University, Justice William Brennan declared, "the struggle to establish civil liberties against the backdrop of security threats, while difficult, promises to build bulwarks of liberty that can endure the fears and frenzy of sudden danger – bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those values that make the fight worthwhile." Consequently, from a theoretical perspective, the constitutional and legal literatures do not provide extensive insights into judicial behavior in foreign affairs. At best, one can expect strong judicial deference to governmental authority. However, with advocates such as Justice Brennan

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promoting increased judicial participation in foreign relations litigation, it is possible that judges will challenge the notion of governmental deference. In order to determine which judges may be inclined to 'defend civil liberties' and under what conditions those judges will not feel constrained (either through institutional pressures or the policy preferences of other actors) to rule in favor of governmental interests, one must turn to the literature of judicial politics.

THEORIES OF JUDICIAL POLITICS

Theories of judicial politics focus on the individual behavior of judges, often in relation to institutional, political or legal constraints. As such, these theories are useful for analyzing judicial resolution of foreign policy disputes, an area where these various constraints often converge. This section first explores theories of individual behavior, focusing on the impact of attitudinal and strategic influences on judges. I then discuss institutional constraints on judges, particularly those on the lower federal courts, focusing especially on the hierarchical relationship among the three tiers of the federal judiciary.

The most prominent theory of judicial behavior argues that judges cast votes according to their personal policy preferences (Segal and Spaeth 1993, 2002). When explaining the fundamental tenets of the "attitudinal model" Segal and Spaeth comment on certain institutional features that facilitate the application of this theory to the Supreme Court. Specifically, the justices are free to vote their sincere preferences through a combination of three institutional facets: discretionary control over the docket, lack of higher political ambition, and the existence of no higher judicial authority (1993, 70-72). However, the authors do not empirically test these assertions in the lower courts.

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Subsequent analyses have provided initial evidence that institutional features constrain individual behavior of judges in the federal district courts (Rowland 1991; Mather 1995) or state supreme courts (Brace and Hall 1990). Yet, questions remain regarding the precise relationship of these constraints to judicial outcomes. For example, if judges are motivated by policy concerns as the attitudinal model suggests, then researchers need to identify the extent to which all levels of the federal judiciary make policy. Jacob (1965, 1991) argues that trial courts are not policy-making institutions because the judges typically confine their decisions to norm enforcing declarations. Contradicting this argument, Mather (1991) and Rowland (1991) contend trial courts can either restrict or expand policy through their decisions and that their ability to frame legal issues extends beyond norm enforcement thereby impacting judicial policy. Given this debate, it is apparent that more research is needed to better understand the extent to which the attitudinal model (and specifically its institutional assumptions) applies all levels of the federal judiciary.

If the tenets of the attitudinal model remain consistent, regardless of institutional characteristics, then one should expect judges at all levels to render decisions according to their personal policy preferences. That is, liberal judges should be more inclined to favor a pro-individual position when reviewing a civil liberties claim. Conversely, conservative judges should be more likely to rule in favor of governmental interests in foreign affairs.

Related to the attitudinal model is the notion that judges engage in strategic behavior. This theory recognizes that judges possess personal policy preferences, but also acknowledges that many courts are collegial (the federal district court being an exception

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most times) and that judges must weigh their preferences against the preferences of their colleagues (Murphy 1964, Epstein and Knight 1998). Most of the empirical research in this area has focused on internal dynamics within the U.S. Supreme Court (Maltzman and Wahlbeck 1996a, 1996b; Maltzman, Spriggs and Wahlbeck 2000). However, as Baum (1997, 115) acknowledges, we know little about the strategic influences among courts in relation to their institutional characteristics.

One important institutional feature of the federal judiciary is its hierarchical structure. Cases initially appear in the District Courts for trial, are then appealed to the Circuit Courts of Appeals for review and, in rare instances, are reviewed by the Supreme Court. Due to this vertical structure and to the legal concept of *stare decisis*, decisions rendered by higher tribunals are considered binding precedent by lower courts. Several scholars have examined lower court treatment of legal precedents and concluded that inferior judges generally adhere to Supreme Court pronouncements of law (Gruhl 1980; Johnson 1987; Songer and Sheehan 1990). Additionally, lower court judges tend to follow ideological trends from these higher tribunals (Baum 1980; Songer 1987; Songer, Segal and Cameron 1994). According to Baum, the reason for compliance by lower court judges is that while those judges seek to set doctrine near their personal ideal points, they realize that doing so increases the chance of being reversed by a higher court. Therefore, judges "must balance their preferences against the preferences of [the higher] court and sometimes take positions that diverge from their own preferences in order to avoid reversals that would move policy even further from those preferences" (1997, 115).

In order to understand the influence of this hierarchical relationship, scholars have turned to principal-agent theory. The fundamental premise behind this theoretical

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construct (see Brehm and Gates 1997 for a more detailed explanation) is that the principal seeks to produce results according to his personal preferences. However, due to a lack of resources the principal cannot review every aspect of a particular policy arena. Therefore, the principal "delegates some rights... to an agent who is bound by a (formal or informal) contract to represent the principal's interests..." (Eggertsson 1990, 40). The tension within this relationship arises because the agent also seeks to produce results according to his personal preferences, which may not be similar to those of the principal. The difficulty for the principal involves establishing substantial controls, inducements or other enforcement mechanisms to ensure that the agent does not deviate from the principal's preferences (Shepsle and Bonchek 1997). Yet, because a principal cannot develop perfect enforcement mechanisms and due to information asymmetries between the principal and the agent, it is always possible for the agent to "shirk."

Consequently, principals are required to monitor the agent to determine whether the latter is being faithful to the former's preferences. Since principals possess limited resources (a reason for entering the principal-agent relationship) they must make choices about which aspects will be examined. "A moral hazard, according to the principal-agent literature, arises when the principal measures compliance by a single proxy or indicator, thereby lessening [his] effort in monitoring" (Benesh 2002, 8). Reliance on this single proxy, however, may allow potential shirking to exist in other areas not measured by the indicator. Conversely, principals can rely on adverse selection mechanisms to ensure compliance. This occurs when the principal hires an agent based on a single identifiable trait or characteristic which the principal believes ensures that the agent's preferences

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match his own. However, by relying on a single indicator during the hiring phase, principals may ignore other signals, which better correlate to expected behavior.

Adapting this model to the federal judiciary is relatively straightforward. As Songer, Segal and Cameron (1994) note, the Supreme Court is the principal with the lower federal courts serving as agents. If the lower judges served as faithful agents, then one should expect consistent compliance because judges would "obediently follow the policy dictates set down by the Supreme Court" (p. 675). However, because the Supreme Court reviews so few decisions (the equivalent of little monitoring), lower court judges encounter numerous opportunities to shirk. Therefore, a question exists about whether lower court judges view the "fear of reversal" as a legitimate threat.

Empirical examinations of this question traditionally have focused on compliance with higher court decisions by the "agent" (Songer, Segal and Cameron 1994; Songer, Cameron and Segal 1995; Benesh 2002). However, because these models focus on whether lower courts are significantly affected by previous Court doctrine, controlling for various case facts, they do not account for new areas of the law where the doctrine is not clear. Thus, these findings are "entirely consistent with the possibility that lower court judges adhere faithfully to higher court precedents – and so appear responsive in the bulk of their cases – but ignore their superiors entirely when deciding new questions" (Klein 2002, 7).

Therefore, an alternative test of the principal-agent model is whether lower court judges anticipate the decisions of higher tribunals, and adjust their behavior accordingly. Klein (2002, 107) acknowledges, "Supreme Court precedents will rarely offer clear guidance to judges debating new legal rules. When they do not, [lower court] judges

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might attempt to anticipate the Supreme Court, but they also might not, choosing instead to rely on their own preferences."[4] One of the main reasons for this anticipation is that lower court judges do not know whether a Supreme Court precedent will hold in the future, since the Court occasionally deviates from its own doctrines. Consequently, adherence to precedent may not induce lower judges to deviate from their own personal preferences.

> Because the Supreme Court might change the applicable rule at any time, shaping the indefinite future is essentially out of the appellate court's hands, and its concern with fashioning a potentially timeless rule is somewhat reduced. This effect is even more pronounced for a district court. Its rules will apply to a smaller universe of cases because no court other than itself will be bound to follow them in the future (Caminker 1994, 13).

Caminker's analysis continues to explore qualitatively the extent to which lower court judges anticipate responses from higher courts. He concludes that prediction (what he terms as "the proxy model") occurs quite frequently. If this conclusion is accurate then, according to theoretical predictions from principal-agent theory, we should expect lower court judges to change their voting behavior when they anticipate a negative response (i.e., reversal) by a higher court.

In sum, theories of judicial politics posit that policy-oriented judges will render decisions according to the personal preferences. However, since the federal judiciary is organized in a hierarchical structure, the ability of judges to exercise their preferences may encounter institutional constraints. This is especially true for lower court judges who recognize that their decisions may be reviewed on appeal by a higher tribunal. Using the tenets of principal-agent theory, one would expect lower court judges to be "forward-

[4] Klein's anecdotal evidence (i.e., interviews with appellate judges) provides inconclusive support about whether judges engage in anticipatory behavior. This is explored further in Chapter Three.

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thinking" and anticipate responses from their superiors. Consequently, as the likelihood of a negative response increases (i.e., as the fear of reversal increases), lower court judges will strategically alter their behavior accordingly.

CONCLUSIONS

As I mention at the beginning of this chapter, assessing the impact of the federal judiciary on U.S. foreign policy is not an easy task. To do so adequately requires an understanding of several different literatures: international relations/foreign policy theories, constitutional/legal theories, and theories of judicial politics (including individual behavioral and institutional theories). Based on a juxtaposition of these theories, three general conclusions of judicial behavior are identified.

First, as a general rule, courts should possess an initial inclination to defer to governmental authority when adjudicating foreign policy disputes. This proposition is most supported by the international relations theory of realism. Similarly, however, this initial proclivity is also supported by constitutional and legal theories, which demonstrate a judicial bias in favor of the Executive branch. Even some judicial politics analyses support this contention, demonstrating that courts – especially the lower courts – often rule in favor of the federal government (Wheeler et. al. 1987; Songer and Sheehan 1992). This initial deference should be even more pronounced if the federal government faces a challenge to its national security (Cheh 1984).

Second, while the judiciary may possess an initial tendency to rule in favor of governmental interests, questions remain pertaining to influences leading judges to rule in favor of civil liberties claims. Judicial politics theories contend that policy-oriented

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judges will render decisions according to their personal preferences. Therefore, one can expect more liberal judges to support civil liberties challenges, and more conservative judges to rule in favor of governmental interests.

Finally, since judges do not render decision in isolation from other institutional influences, as neo-liberal theories of international relations illustrate, one must account for these potential constraints. One of the most important institutional characteristics of the federal judiciary is its hierarchical structure. While several scholars have empirically demonstrated the usefulness of principal-agent theory in explaining lower court compliance, a systematic analysis of anticipatory behavior by these courts is needed to determine whether inferior judges base their decisions on the expected behavior of their superiors.

In exploring these broad theoretical propositions, in Chapter Two I first conduct analyses of the federal courts in isolation. The focus of this chapter is to generate baseline predictions for the District Courts, Courts of Appeals and the Supreme Court. In Chapter Three, I then systematically explore the hierarchical relationship between the Supreme Court and the Courts of Appeals. Finally, in Chapter Four I apply the principal-agent model to the relationship between the Courts of Appeals and the District Courts.

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CHAPTER TWO: INDIVIDUAL EXAMINATIONS

The great object of my fear is the Federal Judiciary. That body, like gravity, ever acting with noiseless foot, and in alarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the governments into the jaws of that which feeds them.[5]

Alexander Hamilton, in *Federalist* No. 78, labeled the judiciary as the "least dangerous branch" in the federal government. However, since the adoption of the U.S. Constitution, the judicial branch has evolved into the most powerful legal institution the world has known; much to the apparent dismay of Thomas Jefferson (as the quote above indicates). Unfortunately, when scholars examine this evolution they focus almost exclusively on the development of the Supreme Court, ignoring the contributions of the lower federal courts. With the Supreme Court having more control over its docket, and thereby free to reduce the number of cases it reviews, the decisions of the lower courts become more significant if the possibility of review is reduced. As Moe and Howell (1999) acknowledge,

> All challenges to [governmental authority] will start out, and most will end, in the lower federal courts – and judges at these courts will have somewhat different incentives. They will not be as concerned about the prestige or integrity of the court system as a whole, and, as numerous as these judges are, they cannot be expected – just as legislators cannot – to take concerted action to protect their institutional interests.

In many instances, the lower courts become the *de facto* court of last resort. Therefore, excluding the lower federal courts from an examination of the judiciary increases the

[5] Thomas Jefferson to Spencer Roane (1821); quoted in *Dombrowski v. Pfister* 227 F. Supp. 556 (1964).

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likelihood that a researcher's conclusions are institution-centric (i.e., Supreme Court biased).

This chapter explores judicial influences in foreign policy litigation across all three levels of the federal judiciary. While later chapters focus on hierarchical constraints between levels, the primary focus of this chapter is identifying significant stimuli for each level in isolation from the structural hierarchy. That is, each level is analyzed separately to determine potential influences, under the assumption that the institutional structure does not constrain behavior (an assumption that is unfounded potentially, but necessary to determine baseline behavior). The following sections of this chapter explore anecdotal evidence pertaining to the nature of judicial responsibilities in foreign affairs litigation, further develop theoretical expectations, specify the research design and analytic methods employed and empirically evaluate influences on judicial behavior.

ANECDOTAL EVIDENCE

The quote by Moe and Howell, listed in the previous section, indicates that federal judges may possess different attitudes and incentives depending on their level within the judicial system. This notion is further supported by Burbank and Friedman (2002, 11) when they claim, "failure to examine lower federal courts ignores the possibility that those institutions possess different incentives for decision-making than the Supreme Court." However, anecdotal evidence – including quotations from judicial opinions and a small number of empirical examinations – tends to offer contradictory conclusions about the possibility of institutional differences influencing behavioral patterns in foreign policy adjudication.

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The extent to which judicial opinions offer insights into institutional differences among federal judges' attitudes is questionable. A brief examination of opinion language leads to the conclusion that federal judges, regardless of their institutional position, weigh heavily the rights of individuals versus the authority of the government to engage in foreign relations. For example, Judge Murphy of the Northern District Court for California stated, "those who founded this nation placed upon the judiciary the grave responsibility of safeguarding constitutional rights regardless of from what quarter comes the attack."[6] Similarly, in the case *U.S. v. Molina-Chacon*, Judge Platt of the Eastern District Court for New York admonished, "Of course, U.S. courts must guard against those situations where overzealous United States law enforcement personnel attempt to... circumvent constitutional safeguards."[7] These opinions indicate that District Court judges are cognizant of their responsibility to ensure individual liberties. However, these judges also are cognizant of the government's authority to formulate U.S. foreign policy. Judge Zilly of the Western District Court for Washington warns, "court(s) must be particularly careful not to substitute [their] own judgment as to what is 'desirable' or [their] own evaluation of what the executive branch may have intended by a given policy."[8]

Similar sentiments are identified in the opinions of appeals court judges. Several cases demonstrate these judges balance their responsibility as 'defender of civil liberties' versus the government's ability to dictate policy. Judge Murnaghan of the Fourth Circuit writes, "History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts... would impermissibly compromise the independence of the judiciary and open

[6] *Parker v. Lester* 98 F. Supp. 300 (1951).
[7] 627 F. Supp. 1253 (1986).
[8] *Cammermeyer v. Aspin* 850 F. Supp. 910 (1994).

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the door to possible abuse."[9] Likewise, the case *U.S. v. U.S. District Court* brings a statement from Judge Edwards of the Sixth Circuit Court of Appeals, "It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land."[10] While these cases initially lead to the conclusion that the Courts of Appeals may be more sensitive to civil liberties concerns, other cases admonish appellate judges to refrain from intruding upon the government's (especially the Executive's) authority to develop foreign policy. Judge Cummings of the Seventh Circuit Court of Appeals captures this judicial balancing role when he states,

> While the courts will scrutinize executive and legislative action in several substantive areas touching on foreign relations, the standard of review in those cases is nonetheless a very deferential one. For example, an area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action.[11]

The language from these Courts of Appeals' opinions reflects the language issued in the aforementioned District Courts' opinions. It is therefore apparent that judges presiding in the lower federal courts view their responsibilities in a similar fashion. The opinions consistently stress an initial deference to the policymaking branches of government, especially in foreign affairs, while at the same time monitoring potential infringements of constitutional liberties. It is therefore necessary to examine opinions from the U.S. Supreme Court to determine if the justices possess different views about their roles and responsibilities, as alluded to by Burbank and Friedman (2002).

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[9] *In re Washington Post Co.* 807 F. 2d. 383 (1986).
[10] 444 F. 2d 651 (1971).
[11] *Flynn v. Schultz* 748 F. 2d. 1186 (1984).

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Various decisions handed down by the Supreme Court indicate the justices maintain analogous views of their responsibilities. For example, Chief Justice Warren claimed, "When [government's] exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated."[12] The same year Warren handed down his decision, Justice Black rendered an opinion in which he concluded, "Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones."[13] However, the Supreme Court has also rendered decisions urging judicial restraint in foreign affairs litigation. In the case *Harisiades v. Shaughnessy*, the Court stated that matters relating "to the conduct of foreign relations... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[14]

The cases cited from the District, Appeals and Supreme Court(s) provide somewhat contradictory, anecdotal evidence about potential influences on judicial role perceptions. On the one hand, it is apparent that judges from all three levels believe the courts possess a responsibility to protect individual rights from governmental intrusion, even in the realm of foreign relations. This responsibility, however, is to be approached with initial deference to the government and sensitivity to its authority for formulating foreign policy. On the other hand, the Supreme Court, on occasion, has recognized that certain foreign relations matters are beyond judicial review. Therefore, since the

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[12] *United States v. Robel* 389 U.S. 258 (1967).
[13] *Afroyim v. Rusk* 387 U.S. 253 (1967).
[14] 342 U.S. 580 (1952).

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anecdotal evidence is inconclusive, an examination of previous empirical analyses is required.

Unfortunately, few analyses focusing on judicial involvement in foreign policy litigation exist. One notable study, conducted by Ducat and Dudley (1989) analyzes federal district courts and the adjudication of cases involving presidential power. They note the "few constraints the courts have imposed upon the executive in peacetime all but vanish in times of war and national emergency" (p. 99). This conclusion supports the opinion language urging governmental deference discussed above. In two studies focused on executive powers and the Supreme Court, King and Meernik (1998, 1999) discover that the justices generally side in favor of the national government. However, "when executive powers conflict with civil liberties, the Supreme Court tends to take the side of individual rights." While these studies are not directly comparable, since Ducat and Dudley did not test for civil liberties conflicts similar to the King and Meernik analyses, they indirectly support Burbank and Friedman's (2002) contention about institutional influences on judicial behavior.[15] While both lower court judges and Supreme Court justices possess initial proclivities favoring the federal government, it is unclear whether both groups respond similarly to civil liberties challenges. The empirical analysis in this chapter conducts this examination (and also includes the Courts of Appeals) to determine whether specific stimuli exert similar influences across the federal judiciary.

[15] The Courts of Appeals are deliberately excluded from this comparison because no previous research has examined this level in relation to foreign affairs litigation.

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THEORETICAL EXPECTATIONS

In Chapter One, I presented a broad outline of the general expectations offered by theories of international relations, constitutional law, and judicial politics. In this chapter, I specifically explore behavioral manifestations based on these general expectations. Since the focus of this chapter is an individual-level examination (i.e., each level of the federal judiciary in isolation), I exclude potential constraints exerted by the hierarchical structure. Those constraints are the focus of Chapters Three and Four.

A common element to international relations (particularly the neo-liberal theories), constitutional law, and judicial politics theories is that internal dynamics substantially impact individual behavior. One of the most important facets for the judiciary involves application of the attitudinal model. Scholars relying on the attitudinal model operate under the assumption that appellate judges are policy maximizers, and as such will render decisions based on their personal policy preferences (Segal and Spaeth 1993, 2002). However, measuring personal preferences is often difficult. The majority of research developing quantitative measures is focused on the preferences of Supreme Court justices (Segal and Cover 1989; Martin and Quinn 2002).[16] Comparable development of quantitative measures for lower court judges is scarce. Therefore, to measure the preferences of lower court judges, scholars rely on partisan affiliations of either the judges themselves or of their appointing presidents.[17] However, an underlying assumption of the partisan surrogate is that this measure focuses mainly on preferences pertaining to domestic issues. One must question whether attitudes toward foreign affairs elicit similar partisan responses as attitudes towards domestic policy issues. Holsti and

[16] See Epstein and Mershon (1996) and Epstein et. al., (1998) for discussion about measurement issues on the Supreme Court.
[17] See Pinello (1999) for a detailed discussion of partisan affiliation in the lower federal courts.

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Rosenau (1986; 1988) rely on survey evidence of American elites to examine this question. They discover a strong and consistent relationship between domestic and foreign policy attitudes, which correlate with partisan affiliations and ideological beliefs. Assuming that judges possess similar attitudes as other elites within the United States, I therefore hypothesize that partisan affiliations will be significantly related to the disposition of foreign policy cases. Democratic judges will be more inclined to render decisions in favor of civil liberties, and Republican judges will be more likely to rule in favor of foreign policy interests.[18] Since the Courts of Appeals and the Supreme Court are collegial tribunals, this hypothesis applies to their aggregate preferences.

A second aspect of the federal courts involves their adjudicatory responsibilities. Since the District Courts initially decide disputes, they are responsible for determining questions of fact and law. The Courts of Appeals and the Supreme Court are subsequently responsible for reviewing these initial decisions – with the Courts of Appeals also responsible for reviewing administrative agency decisions and the Supreme Court able to review decisions from state courts.[19] Since the Courts of Appeals possess mandatory jurisdiction over District Courts, while the Supreme Court exercises discretionary control over its docket, for a large majority of cases the appeals courts serve as the court of last resort. According to Songer (1991), "as the number of litigated cases grows both quantitatively and in complexity, while the number of cases reviewed by the Supreme Court remains static, the role of the courts of appeals as the final authoritative policymaker in the interpretation of many areas of federal law expands apace." Therefore, it is important to determine how the appellate levels exercise their error correction

[18] These directions reflect traditional liberal and conservative decisions in foreign affairs.
[19] It should also be noted that the Supreme Court possesses original jurisdiction (which is rarely excercised) in a small number of disputes, mostly between states and in cases involving foreign diplomats.

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responsibilities in relation to District Court decisions. Stated another way, does a systematic difference exist between the appeals courts and the Supreme Court in terms of their handling of lower court decisions? Previous research on these appellate error correction responsibilities indicates that judges on the Courts of Appeals are more likely to affirm District Court decisions (Davis and Songer 1988; Songer and Sheehan 1992). In contrast, an examination of reversal rates in the U.S. Supreme Court indicates that this judicial body is more prone to reverse lower court decisions than affirm (Epstein et. al., 1996). Therefore, if the District Courts rule in favor of civil liberties claims over the interests of the federal government, I hypothesize that the Courts of Appeals will adhere to these rulings and render a similar decision, or vice versa. Conversely, the Supreme Court will be more likely to reverse an appeals court decision (this is especially true if the appeals courts and the District Courts issue contradictory rulings, thereby causing dissensus within the judicial system as Perry (1991) discovers).

A final institutional aspect of the federal courts involves caseload considerations. According to the principles of the judicial system in the United States, litigants are entitled to their 'day in court' and also to one appeal. As such, the federal District Courts and the Courts of Appeals, since they possess mandatory jurisdiction, serve as the reviewing entities for most disputes. Unfortunately for these judges, this often translates into increased caseloads as more litigants turn to the courts for relief. As lower courts experience increasing caseloads in a given year (in contrast to the Supreme Court whose annual caseloads have remained relatively static), it is plausible that the judges will work diligently to process all the cases on the docket. Failure to clear all the cases results in additional backlogs into the next year, which further increases that year's caseload. Since

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time is a finite commodity, judges may be inclined to finish drafting opinions as quickly as possible. However, foreign policy cases may present unique issues and conflicts toward which judges are unfamiliar; issues which often focus on the foundational principles and theories of democratic governance. According to legal scholars foreign affairs often involve constitutional issues related to the distribution of federal government powers (Diament 1998, 912-913). The interdependent structure of constitutional authority creates an "invitation to struggle" among three separate branches of government, with each vying to expand its sphere of influence (Corwin 1957, 171), with the expansion often occurring to the detriment of civil liberties (Dorsen 1989). To render a decision against federal interests increases the likelihood of appeal by the government, which in turn increases the potential for review by higher courts. Consequently, judges will need to take more time to ensure the legal principles upon which the decision is grounded are sound, and the language written to minimize this potential. Initially, lower court judges may therefore be inclined to rule in favor of foreign policy interests so as to quickly dispose of an opinion. Thus, I hypothesize that increased caseloads will pressure judges to quickly dispose of cases, which in turn increases the likelihood of a decision in favor of foreign relations authorities.

Certain legal issues, raised by litigants, also are expected to impact judicial decision making in foreign affairs. Previous studies indicate that the presence of a specific constitutional challenge increases the likelihood that courts will rule against the interests of the federal government (Burgess 1992; King and Meernik 1998, 1999). While judges initially may be hesitant to rule against the government in foreign policy cases, if individuals identify a specific constitutional violation, I hypothesize the likelihood of

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judicial opposition to foreign affairs initiatives increases. Additionally, the presence of a claim citing international law or treaty obligations may affect judicial behavior. A limited number of studies demonstrate that American courts are becoming increasingly more sensitive to claims of international law violations (Forsythe 1990; Rogoff 1996; and Scheffer 1996). Norms of international law or provisions within bilateral or multilateral treaties often attempt to explicitly identify individual rights against which governments cannot intrude. While many courts in the U.S. are hesitant to cite international law as precedent (especially in opposition to the federal government), these studies indicate that judges may rely on international legal principles to extend individual protections. Therefore, I hypothesize the presence of an international law or treaty claim will increase the likelihood of federal courts rendering decisions in favor of civil liberties.

A final set of legal or case variables are needed to control for potential effects of issues, not necessarily raised by litigants. First, several studies comment on the deference given by judges to the federal government when threshold issues (especially a political question or act of state doctrine issue) are present (Halberstam 1985; Charney 1989; Franck 1992; Rehnquist 1998; Bland 1999; Barron 2000). These analyses indicate federal courts often employ threshold issues in order to refrain from addressing the merits of cases that challenge federal authority to engage in foreign affairs. Similarly, if the government raises a national security defense, courts are unlikely to rule against foreign relations (Cheh 1984; Dorsen 1997). Therefore, if judges are asked to resolve either a threshold issue or a defense of national security, I hypothesize that they will be more likely to rule in deference to foreign policy interests. Finally, scholars note that some judges are sensitive to specific case issues (Songer 1987; Songer, Sheehan and Haire

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2000; Zorn 2002). I therefore include a variable to control for criminal cases since many of these issues, especially on appeal, are frivolous. When federal judges, at any level, confront these frivolous challenges to foreign policy initiatives it is difficult for them to support criminal defendants. Consequently, I hypothesize that the federal courts will be more likely to rule in favor of foreign policy interests when confronted with a criminal case.

Research Design and Methods

Data for this analysis come from an original sample of federal court decisions involving foreign affairs and civil liberties, from 1946-2000. While the cutoff points in the timeline are somewhat arbitrary, a rationale exists for this choice. The sequence begins in 1946, a year in which the United States transitioned from World War II and to the Cold War (as one of two international superpowers), and reorganized some of its bureaucratic agencies accordingly – most notably the foreign policy and intelligence gathering agencies. Additionally, with the creation of the United Nations the international system entered into a new era with nations becoming increasingly interdependent. To include cases before 1946 risks analyzing qualitatively different issues; issues arising before World War II – when the United States possessed a different perception of its international responsibilities – and also from the war itself. Similarly, the time sequence ends at the year 2000 so as to not include cases arising under a new presidential regime (George W. Bush) and, more importantly, issues following the September 11, 2001, terrorist attacks. Chapter Five explores in more detail how U.S. foreign policy issues may have changed after September 11, and raises questions for future research.

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Cases for this analysis were identified using a Lexis-Nexis keyword search. I retrieved numerous cases for each federal judicial level using the following issues as keywords: foreign policy, foreign affairs, national security, national defense, war powers, military, immigration, international law, treaties, ambassadors, and diplomacy. Initially, I identified approximately 10,000 cases each for the District Courts and the Courts of Appeals, and 400 cases for the Supreme Court. Further scrutiny (i.e., eliminating observable economic cases and retaining potential civil liberties cases) reduced this number to approximately 2900 District Court cases, 2700 Courts of Appeals cases, and exactly 116 Supreme Court decisions involving a civil liberties violation in combination with the various foreign relations issues.[20] As I state at the beginning of this dissertation, the primary focus of this research is to examine how federal judges balance claims of civil liberties against foreign policy issues. Therefore, I exclude cases that do not possess a civil liberties claim, though a foreign policy issue is present. Similarly, I exclude civil liberties cases that are not combined with a foreign policy issue. I define civil liberties as the fundamental freedoms from which individuals are protected against governmental intrusion (Epstein and Walker 1998; Domino 2003). Examples of civil liberties include First Amendment protections of free speech and press, Fourth, Fifth and Sixth Amendment protections for individuals subjected to the criminal justice system, and other rights or protections (such as access to an open government). Random samples for the lower federal courts were drawn subsequently from these remaining cases, with the universe of Supreme Court decisions included. Decisions for each judicial level were

[20] It is important to note that this number reflects decisions with published opinions. A cursory examination of unpublished decisions contained with the Lexis-Nexis database reveal that these decisions often involve trivial, mundane issues, and do not contain detailed opinions, nor are they considered precedent by the appellate courts. For these reasons, they are excluded from the analysis. However, it is necessary to note that the conclusions are generalizable only to published decisions.

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coded according to litigant characteristics, legal issues, final disposition, and judge characteristics.[21]

The dependent variable for this analysis is whether the federal courts voted in favor of foreign policy interests (coded as '0') or against foreign policy interests (coded as '1'). It is important to note that the federal government does not have to be a litigant to a particular case in order to express a foreign policy interest in the outcome. For example, one case involved a Freedom of Information Act (FOIA) claim against Lockheed Martin for the details of certain defense contracts, alleged to be public information. In this instance, a ruling in favor of the FOIA claim would be coded as against the interests of foreign relations, whereas a ruling in favor of Lockheed Martin to keep the records secret would be coded in favor of foreign affairs. Since the dependent variable is dichotomous, linear regression models are insufficient (Maddala 1983; Aldrich and Nelson 1984; Eliason 1993; Long 1997). I therefore rely on maximum likelihood techniques to specify appropriate multivariate models.

As I mentioned earlier in this chapter, measuring the personal preferences of judges (especially lower court judges) is extremely difficult.[22] Consequently, I rely on the partisan affiliation of a judge's appointing president to serve as proxy for preferences. Initially judges appointed by Republican presidents are coded '0' and those appointed by Democratic presidents are coded '1'. However, since the unit of analysis is aggregated to the court level, individual preference measures are combined. This combination is captured through the independent variable *Court Partisanship*, which is defined as the proportion of judges appointed by Democratic presidents. Since the majority of District

[21] See Appendix 1 for the coding rules employed during data collection.
[22] See Randazzo and Sheehan (2001) for a more detailed description of the difficulties inherent in empirically measuring personal preferences of appellate judges.

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Court decisions are delivered by a single judge, values for this variable will be either '0' for a Republican appointment or '1' for Democrat. However, in those instances in which the District Court sits as a three judge panel, and for the Courts of Appeals and the Supreme Court, the values for *Court Partisanship* will range from '0' to '1' with most entries falling proportionately within those extremes. As indicated previously, I hypothesize that Democratic judges will be more likely to rule against foreign policy interests (i.e., to rule in favor of civil liberties). Therefore, I expect a positive relationship to exist between *Court Partisanship* and the dependent variable; as the proportion of Democratic judges on a court increases, the likelihood of a decision favoring civil liberties claims will increase.

The variable *Lower Court Directionality* measures the case disposition by the district court or federal agency conducting the trial. The variable is coded '1' if the lower court (or agency) ruled in favor of foreign affairs interests, '2' if the court rendered a mixed decision (both for and against governmental interests), and '3' if the court ruled against federal government interests. Theoretical expectations indicate the Courts of Appeals will be more likely to affirm a District Court (or administrative agency) ruling and the Supreme Court more likely to reverse the lower court ruling. Therefore, I anticipate a positive relationship to exist for the Courts of Appeals and a negative relationship to exist for the Supreme Court.

The effects of caseload constraints are captured in the variable *Workload*. This variable is measured using annual per capita caseload statistics, and comes from a variety of sources. Caseload statistics for the Supreme Court 1946-1995 Terms are recorded in *The Supreme Court Compendium* (Epstein et. al. 1996). Statistics for the 1996-2000

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Terms were calculated directly from *The Original Supreme Court Database*, compiled by Harold J. Spaeth.[23] Stefanie Lindquist, at the University of Georgia, provided per capita caseload statistics for the Courts of Appeals. Unfortunately, I have yet to obtain data on the District Courts.[24] Therefore, these statistics are calculated using the appeals court data. Each circuit's annual caseload is initially divided among the number of states per circuit. Per capita estimates are subsequently calculated based on the number of District Court judgeships per state. As I mentioned above, increases in per capita caseload should constrain judges from rendering decisions against the government's foreign policy interests. Therefore, a negative relationship should exist between the variable *Workload* and the dependent variable.

The complexity of specific cases could be the result of certain challenges or issues. Five dummy variables measure legal issues that might appear within a case. *Constitutional Challenge* tracks whether a litigant alleges a specific constitutional violation (i.e., a violation of the Fifth Amendment's Due Process Clause). I hypothesize that judges may be sensitive to constitutional challenges, and consequently, will be more likely to rule in favor of civil liberties claims. The variable *International Law or Treaty* measures the presence of an issue related to international law or treaties signed by the United States (both bilateral, such as extradition treaties with specific countries and multilateral, such as the Geneva Convention). These treaties, or other facets of international law, often define specific rights afforded to individuals that governments should not trespass. I hypothesize that the presence of a claim focused on a violation of a

[23] Data archived at the Michigan State University Program for Law and Judicial Politics www.polisci.msu.edu/pljp.
[24] Several attempts to contact the Administrative Office of the U.S. Courts (the data clearinghouse for the federal judiciary) has not proved beneficial.

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specific treaty or norm of international law will persuade federal judges to rule in favor of individuals (i.e., against the interests of the federal government). A positive relationship should exist between the variables *Constitutional Challenge* and *International Law or Treaty* and the dependent variable.

The final three legal issue variables are hypothesized to be negatively related to the dependent variable. The dummy variable *Threshold Issue* measures the presence of a threshold issue such as the political question or act of state doctrine. As hypothesized, the presence of a threshold issue should be negatively related to the likelihood of the courts ruling in support of civil liberties claims (i.e., judges will be more likely to rule in favor of federal government interests). The dummy variable *National Security Defense* controls for the presence of a specific national security defense, raised by the federal government. If the government claims an issue of national security, I hypothesize that the judges will be more likely to rule in favor of the government. Finally, *Criminal Case* measures whether the courts are reviewing criminal petitions related to foreign affairs.[25] I hypothesize that judges will be more likely to rule in favor of foreign policy interests when resolving criminal appeals.

Empirical Results

The descriptive statistics presented in Table 2-1 provide preliminary evidence concerning the relationships between the independent variables and District Court decisions favoring either foreign policy interests or civil liberties claims. Upon initial examination it is apparent that judges presiding on the District Courts issue rulings more

[25] Examples include military appeals for criminal convictions, convictions for espionage or treason, drug related offenses (importation or arrests on the high seas) or convictions for violations of business (i.e., violations of the Trading with the Enemy Act).

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often in favor of foreign affairs than in support of civil liberties. Table 2-1 indicates these judges render 65.6% of their decisions in favor of the government's foreign relations authority and 34.4% in support of individual claims of civil liberties violations.

Table 2-1: District Court Descriptive Statistics

	For Foreign Policy Interests	For Civil Liberties Claims
Court Partisanship		
Republican	70.7% (53)	29.3% (22)
Democrat	59.5% (75)	40.5% (51)
Per Capita Workload[26]		
One Standard Deviation Below	73.9% (17)	26.1% (6)
Near Mean	62.1% (77)	37.9% (47)
One Standard Deviation Above	69.1% (47)	30.9% (21)
Constitutional Challenge		
No	60.6% (66)	39.4% (43)
Yes	70.8% (75)	29.2% (31)
International Law or Treaty		
No	60.9% (103)	39.1% (66)
Yes	82.6% (38)	17.4% (8)
Threshold Issue		
No	67.7% (111)	32.3% (53)
Yes	58.8% (30)	41.2% (21)
National Security Defense		
No	64.3% (119)	35.7% (66)
Yes	73.3% (22)	26.7% (8)
Criminal Case		
No	62.4% (103)	37.6% (62)
Yes	76.0% (38)	24.0% (12)
Total (n = 215)	65.6% (141)	34.4% (74)

(number of observations listed in parentheses)

The preliminary results listed in Table 2-1 reveal interesting patterns for some of the independent variables. First, the data indicate that judges appointed by Democratic presidents are approximately 10% more likely to rule in favor of civil liberties claims

[26] Mean = 38.720 and standard deviation = 14.058

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than their Republican colleagues. However, these same judges are also approximately 20% more likely to render a decision supporting foreign policy interests. Second, increases in per capita workload do not possess an identifiable pattern of influence on District Court behavior. Third, the presence of a constitutional challenge does not seem to influence the likelihood of a civil liberties vote. In fact, District Court judges are more likely to support foreign policy interests when presented with a constitutional dispute (70.8%) than they are to rule in favor of civil liberties (29.2%). A similar pattern exists for the presence of an international law or treaty claim. District Court judges are more likely to render a decision favoring foreign affairs (82.6%) when interpreting an international legal provision than they are to support civil liberties (17.4%). Fifth, the presence of a threshold issue does not seem to influence District Court judges; they overwhelmingly vote in favor of foreign policy interests in the cases they adjudicate. Sixth, when District Court judges are presented with a national security defense, the likelihood of ruling in favor of foreign policy interests increases almost by 50%. Finally, the data in Table 2-1 indicates district judges are 50% more likely to support foreign affairs when resolving a criminal dispute.

Table 2-2 provides preliminary evidence concerning behavioral influences on judges of the Courts of Appeals. Similar to their District Court brethren, an initial examination reveals that appellate judges render a majority of their decisions in favor of foreign policy concerns (62.2%) rather than in support of civil liberties claims (37.8%). Thus, the data initially demonstrate that the lower federal judges (District and Appeals Courts) most often defer to governmental authority in foreign relations.

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Table 2-2: Courts of Appeals Descriptive Statistics

	For Foreign Policy Interests	For Civil Liberties Claims
Court Partisanship[27]		
One Standard Deviation Below	80.5% (33)	19.5% (8)
Near Mean	58.5% (93)	41.5% (66)
One Standard Deviation Above	56.7% (17)	43.3% (13)
Lower Court Directionality		
For Foreign Policy Interests	72.9% (121)	27.1% (45)
Mixed Decision	19.2% (5)	80.8% (21)
For Civil Liberties Claims	44.7% (17)	55.3% (21)
Per Capita Workload[28]		
One Standard Deviation Below	53.6% (15)	46.4%(13)
Near Mean	59.3% (86)	40.7% (59)
One Standard Deviation Above	73.7% (42)	26.3% (15)
Constitutional Challenge		
No	58.6% (95)	41.4% (67)
Yes	70.6% (48)	29.4% (20)
International Law or Treaty		
No	61.4% (113)	38.6% (71)
Yes	65.2% (30)	34.8% (16)
Threshold Issue		
No	59.6% (99)	40.4% (67)
Yes	68.8% (44)	31.2% (20)
National Security Defense		
No	61.0% (128)	39.0% (82)
Yes	75.0% (15)	25.0% (5)
Criminal Case		
No	56.6% (86)	43.4% (66)
Yes	73.1% (57)	26.9% (21)
Total (n = 230)	62.2% (143)	37.8% (87)

(number of observations listed in parentheses)

The descriptive statistics presented in Table 2-2 do not offer many insights into behavioral influences on Courts of Appeals judges. Regarding ideological influences, it is difficult to determine the extent to which personal partisan proclivities affect appellate judges. Since panels of judges review the majority of appeals, an aggregate partisanship

[27] Mean = .470 and standard deviation = .310
[28] Mean = 41.411 and standard deviation = 18.643

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score is employed. Table 2-2 shows that the mean partisanship score equals .470, indicating that Courts of Appeals panels are slightly conservative. When panels are relatively balanced (i.e., near the partisan mean), the judges rule in favor of foreign policy interests 58.5% of the time, compared to 41.5% for civil liberties decisions. As panels become dominated by more Republican judges (one standard deviation below the mean), the likelihood of a ruling supporting foreign affairs increases to approximately 80%. However, as panels become controlled by more Democratic judges (one standard deviation above the mean), the likelihood of a decision favoring civil liberties only increases by approximately 2%.

The preliminary evidence indicates that the appellate judges are partially influenced by the directionality of a lower court decision. When the District Courts or federal agency rule in favor of foreign policy interests, the Courts of Appeals will affirm approximately 73% of those decisions (i.e., will also render a decision in favor of foreign affairs). Similarly, when the lower courts rule in favor of civil liberties, the appellate judges are 55% likely to affirm the decision and rule in favor of civil liberties. When District Courts render a mixed decision, the appellate panels overwhelmingly rule in favor of civil liberties (approximately 80%).

The data represented in Table 2-2 do not reveal an identifiable pattern of influence for per capita workload. Additionally, the presence of a constitutional challenge does not seem to affect appellate decision-making. These judges are more likely (70.6%) to rule in favor of foreign policy interests than civil liberties claims (29.4%) when asked to adjudicate constitutional questions. In a similar fashion, the presence of provisions

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from international law or multilateral treaties does not seem to affect the likelihood of decisions favoring civil liberties.

Conversely, the presence of either a threshold issue, national security defense or criminal appeal increases the likelihood of the Courts of Appeals rendering decisions in support of foreign policy interests. When appellate judges encounter threshold issues they are approximately twice as likely to rule in favor of foreign affairs. When they resolve a specific defense of national security, appellate judges are almost three-times as likely to support governmental foreign relations authority. Finally, if asked to adjudicate criminal appeals, these judges are almost three-times as likely to render decisions favoring foreign policy interests.

Descriptive statistics for the Supreme Court are included in Table 2-3. These data indicate that the High Court is more sensitive to civil liberties claims than the lower federal courts. The justices rendered 44% of their decisions in support of individual rights, compared to 34.4% for the District Courts and 37.8% for the Courts of Appeals. However, while the Supreme Court may be more sensitive to civil liberties claims, the justices remain deferential to governmental foreign relations authority; ruling in support of foreign policy interests in 56% of their decisions.

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Table 2-3: Supreme Court Descriptive Statistics

	For Foreign Policy Interests	For Civil Liberties Claims
Court Partisanship[29]		
One Standard Deviation Below	100.0% (9)	0.0% (0)
Near Mean	60.5% (46)	39.5% (30)
One Standard Deviation Above	32.3% (10)	67.7% (21)
Lower Court Directionality		
For Foreign Policy Interests	45.8% (22)	54.2% (26)
Mixed Decision	36.4% (4)	63.6% (7)
For Civil Liberties Claims	68.4% (39)	31.6% (18)
Per Capita Workload[30]		
One Standard Deviation Below	68.2% (15)	31.8%(7)
Near Mean	53.7% (36)	46.3% (31)
One Standard Deviation Above	51.9% (14)	48.1% (13)
Constitutional Challenge		
No	63.3% (31)	36.7% (18)
Yes	50.7% (34)	49.3% (33)
International Law or Treaty		
No	56.1% (60)	43.9% (47)
Yes	55.6% (5)	44.4% (4)
Threshold Issue		
No	56.4% (53)	43.6% (41)
Yes	54.5% (12)	45.5% (10)
National Security Defense		
No	56.0% (61)	44.0% (48)
Yes	57.1% (4)	42.9% (3)
Criminal Case		
No	57.8% (59)	42.2% (43)
Yes	42.9% (6)	57.1% (8)
Total (n = 116)	56.0% (65)	44.0% (51)

(number of observations listed in parentheses)

According to the preliminary evidence in Table 2-3, it is apparent that Supreme Court justices are highly influenced by their ideological preferences. The partisan mean for the Court is .307 indicating a conservative predisposition for the justices. As the Court becomes more dominated by Republican appointees (i.e., one standard deviation below

[29] Mean = .307 and standard deviation = .131
[30] Mean = 17.519 and standard deviation = 5.762

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the partisan mean), its decisions exclusively favor foreign policy interests. In contrast, as the Court becomes dominated by more Democratic appointees (i.e., one standard deviation above the partisan mean), the likelihood of decisions favoring civil liberties claims doubles. The remaining data presented in Table 2-3 do not indicate identifiable patterns of influence for the Supreme Court. Consequently, it seems as if the justices are motivated solely by their personal ideological preferences to the exclusion of other influences.

While the preliminary evidence presented in these three tables offers general insights into potential behavioral influences, a more rigorous analysis is needed. Therefore, to examine systematically the empirical influences of the independent variables, I conducted separate probit analyses for the District Courts, Courts of Appeals and the Supreme Court. The results of these analyses are reported in Table 2-4. Each of the models performs well, possessing a 34.8, 49.0, and 43.0 percent reduction of error for the District Courts, Courts of Appeals and Supreme Court, respectively.[31] Also, upon initial examination of these results it is apparent that the federal courts render decisions more often in favor of foreign policy interests than in support of civil liberties; supporting the conclusions revealed by the descriptive statistics. The numbers reported in the null models indicate that District Courts render 34.4% of their decisions in favor of civil liberties, with the Courts of Appeals ruling 37.8% and the Supreme Court 44.0% of the time in favor of civil liberties. However, to determine specific influences on judicial behavior one must examination the impact of individual variables.

[31] The reduction of error statistic is calculated using the formula provided in Hagle and Mitchell (1992)

$$\text{ROE (\%)} = 100 \times \left[\frac{\%\ \textit{correctly predicted} - \%\ \textit{in null category}}{100\% - \%\ \textit{in null category}} \right]$$

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Table 2-4: Probit Analysis

	Coefficients (Robust Standard Errors) **Change in Predicted Probabilities**		
	Model 1 District Courts	**Model 2 Appeals Courts**	**Model 3 Supreme Court**
Court Partisanship	.390* (.225) **.070**	.851*** (.299) **.103**	4.803*** (1.170) **.237**
Lower Court Directionality	N/A	.484*** (.125) **.140**	-.069 (.148) **-.023**
Workload	.001 (.007) **.003**	-.005 (.005) **-.028**	.034 (.023) **.069**
Constitutional Challenge	-.164 (.212) **-.064**	-.164 (.212) **-.066**	.327 (.266) **.124**
International Law/Treaty	-.179 (.334) **-.058**	-.075 (.224) **-.027**	.779 (.499) **.287**
Threshold Issue	.031 (.247) **.008**	-.241 (.209) **-.094**	.073 (.312) **.023**
National Security Defense	-.668** (.327) **-.238**	-.658* (.371) **-.229**	-.148 (.467) **-.034**
Criminal Case	-.528** (.252) **-.195**	-.260 (.202) **-.099**	.142 (.398) **.052**
Constant	-.302 (.374)	-.978 (.359)	-2.377 (.775)
N	165	215	116
Log Likelihood	-102.428	-125.260	-66.535
χ^2	9.200	26.570	26.960
Probability > χ^2	.239	.001	.001
Pseudo R^2	.058	.124	.164
Null Model	34.4%	37.8%	44.0%
% Correctly Predicted	57.2%	68.3%	68.1%
% Reduction of Error	34.8%	49.0%	43.0%

* p < .10 ** p < .05 *** p < .01

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The first model examines influences on the federal District Courts. According to Table 2-4, the variables *Court Partisanship*, *National Security Defense*, and *Criminal Case* exert statistically significant influences in the expected direction. I hypothesized that the first variable would be related positively to the likelihood of judges ruling in favor of civil liberties, while the latter two variables would be negatively related. These hypotheses are confirmed by the empirical results, although the influence for *Court Partisanship* barely achieves statistical significance. Unfortunately, the variables *Workload*, *Constitutional Challenge*, *International Law/Treaty*, and *Threshold Issue* do not significantly affect judicial behavior.

To determine the magnitude of impact for the significant variables, I calculated predicted probabilities for each variable according to algorithms developed by Tomz, Wittenberg and King (2003). Predicted probabilities allow researchers to measure magnitudes of impact for a single variable, while holding the other variables constant either at their means for continuous variables or at zero for dichotomous variables. Evaluating predicted probabilities provides more meaningful conceptual estimates (King, Tomz and Wittenberg 2000) than simply reporting probit coefficients. Examining the predicted probabilities for *Court Partisanship* therefore reveals that District Court judges appointed by Democratic presidents are 7% more likely to rule in favor of civil liberties than their Republican colleagues. If District Court judges encounter a *National Security Defense*, however, they are 23.8% more likely to rule in favor of foreign policy interests. Similarly, if these judges adjudicate a criminal case related to foreign relations, they are 19.5% more likely to support governmental authority in this realm.

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The second empirical model evaluates the Courts of Appeals. According to the results listed in Table 2-4, the variables *Court Partisanship*, *Lower Court Directionality*, and *National Security Defense* exert statistically significant influences (though the variable *National Security Defense* barely achieves significance). I hypothesized the first two variables would be related positively to the dependent variable while the latter would possess a negative relationship. These hypotheses are supported empirically, while the expected influences of the variables *Workload*, *Constitutional Challenge*, *International Law/Treaty*, or *Threshold Issue* do not achieve statistical significance. The predicted probabilities for *Court Partisanship* indicate that Appeals Court panels dominated by Democratic judges are 10.3% more likely to rule in favor of civil liberties than are panels controlled by Republican judges. Additionally, if the District Courts (or federal agency) initially ruled in favor of civil liberties, the Appeals Courts are 14.0% more likely to affirm this ruling and render a decision favoring civil liberties. Finally, Table 2-4 reveals when appellate judges confront a *National Security Defense*, they are 22.9% more likely to support foreign policy concerns.

The final empirical model examines influences on the Supreme Court. According to Table 2-4 only one variable achieves statistical significance: *Court Partisanship*. The predicted probabilities demonstrate that as more justices appointed by Democratic presidents assume the Bench, their decisions are 23.7% more likely to support civil liberties claims than when the High Court is controlled by Republican appointed justices. The hypotheses for the remaining variables are not supported by the empirical evidence displayed in Table 2-4.

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CONCLUSIONS

Are the federal courts defenders of civil liberty or champions of national security? This chapter employs empirical analyses to assess patterns of individual behavior among the federal courts, under the assumption that the hierarchical structure of the judiciary does not exert a significant influence. Based on separate probit models one can reasonably conclude that federal judges are champions of national security. The lower federal courts seldom rule in favor of civil liberties claims (34.4% for the District Courts and 37.8% for the Appeals Courts). The Supreme Court is more sensitive to individual challenges, supporting these claims in 44.0% of their decisions. However, it is apparent that the justices more often defer to governmental authority in foreign relations.

While the federal judiciary is prone to support foreign policy interests, it is important to understand the conditions under which these judges will rule in favor of civil liberties claims. An important influence is the ideological preferences of judges. The empirical results indicate that more liberal judges – as measured by partisan affiliations of the appointing president – are more likely to render decisions in favor of civil liberties. This result holds for each level of the federal judiciary, although the results are more pronounced in the Supreme Court, less so for the Appeals Courts, and the weakest for District Courts. Hence, the empirical data support an extension of the attitudinal model into the realm of foreign relations. As Holsti and Rosenau (1986, 1988) discovered for other elites, attitudes on domestic issues closely correlate to attitudes on foreign issues.

A second important influence involves the presence of a national security defense. As the realist paradigm in international relations indicates, the 'state' responds to external threats in a defensive fashion. Applying this theoretical expectation to the federal

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judiciary, judges will defer to the government if the latter believes a threat to national security exists. The empirical data suggest that lower court judges are significantly affected by these situations. However, Supreme Court justices do not respond in a similar fashion. One possible explanation for this difference involves the time between an incident and judicial review. Since the District Courts and the Appeals Courts often adjudicate disputes within close temporal proximity to the event, it is possible that they are extremely sensitive to national security claims. In contrast, the Supreme Court may not grant *certiorari* to a dispute until years after the incident occurred. As such, a claim of national security may not carry the same immediacy or urgency to the justices as it does to their lower court brethren.

These conclusions are based on the assumption that the institutional structure of the federal judiciary does not exert a significant influence on the behavior of individual judges. As I mentioned at the beginning of this chapter, that assumption may not be tenable. Previous research indicates that institutional structures affect both compliance rates for lower court judges (Gruhl 1980; Johnson 1987; Songer and Sheehan 1990), and their behavioral patterns (Baum 1980; Songer 1987). However, questions remain as to whether the institutional structure of the federal judiciary influences anticipatory behavior of the judges (Caminker 1994; Klein 2002). Stated another way, do lower court judges anticipate the actions of their superiors when adjudicating disputes? Will District Court judges condition their decision-making on expected reactions by Courts of Appeals judges? Similar, do the appellate judges estimate how the Supreme Court justices will react to a particular decision? Chapters Three and Four conduct empirical analyses of

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anticipatory behavior – through the utilization of strategic choice probit models – to resolve these questions.

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CHAPTER THREE: THE HIERARCHY OF JUSTICE AND THE COURTS OF APPEALS

To the extent law is the primary deciding factor in cases, we have a familiar hierarchical legal system. But to the extent lower courts are trying to guess the preferences of higher courts, and higher courts are reviewing based on ideology and outcome, then law is not the chief determinant of outcomes; rather it is ideology and reversal rates.[32]

In Chapter One, I mentioned that an important institutional feature of the federal judiciary is its hierarchical structure. Cases initially appear in the District Courts for trial, are then appealed to the Circuit Courts of Appeals for review and, in rare instances, are reviewed by the Supreme Court. Due to this vertical structure and to the legal concept of *stare decisis*, decisions rendered by higher tribunals are considered binding precedent by lower courts. Thus, as Burbank and Friedman (2002) note above, to the extent that the principle of *stare decisis* holds (i.e., to the extent law is the primary deciding factor), we have a familiar hierarchical system. However, the attitudinal model posits (and subsequent empirical studies demonstrate) that judges render decisions according to their personal preferences (Segal and Spaeth 1993, 2002). Rather than reliance on the law or principles of *stare decisis*, the predominant influence of judicial outcomes becomes individual ideological concerns. Does this reliance on ideology mean lower court judges try to guess the preferences of judges on higher courts, as Burbank and Friedman hint? If so, how does this impact the familiar hierarchical legal system?

[32] Burbank and Friedman (2002, 31).

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Unfortunately, few empirical analyses concentrate on answering these important questions. This chapter focuses on the impact of the hierarchical judicial structure in the realm of foreign policy litigation. Specifically, I examine the relationship between judges on the appellate judiciary. Do judges on the Courts of Appeals guess the preferences of Supreme Court justices when rendering decisions in foreign affairs? Additionally, does this anticipatory behavior significantly impact or constrain the ability of these judges to maximize their personal policy preferences? To address these questions, I first briefly discuss the history of the federal judiciary's institutional structure (with an emphasis to the development of the Courts of Appeals). Then I examine theories of judicial compliance and hierarchical relationships – focusing especially on principal-agent theory – and derive a formal game to illustrate expected patterns of behavior. Finally, I empirically test the influence of hierarchical constraints using a relatively recent set of statistical models on strategic choice.

HISTORICAL DEVELOPMENT OF THE FEDERAL JUDICIARY

The establishment of the United States government, under the Articles of Confederation, did not coincide with the establishment of an identifiable judicial branch. Virtually all governmental functions were handled by a single-chamber legislature. As the Founding Fathers gathered to replace the Articles of Confederation, the debate over the necessity of a separate judicial entity fostered disagreement. Two proposals were offered pertaining to a judicial branch. The first, commonly referred to as the Virginia Plan, called for the establishment of a single supreme court and a number of inferior federal courts. Opponents to this plan, concerned over a potentially powerful and

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centralized judiciary, presented the New Jersey Plan. This proposal would have created a single supreme court with the jurisdiction to hear appeals from state courts – where all trials would commence (Carp and Stidham 2001, 25). Similar to other aspects in the development of the U.S. Constitution, a compromise occurred among the delegates, which led to the drafting of Article III: "The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

When the Constitution was ratified, Congress immediately worked to establish the initial judicial structure of the federal government. With the passage of the Judiciary Act in 1789, Congress created a three-tiered judicial structure. The Supreme Court consisted of a Chief Justice and five associate justices. Three circuit courts were established, each staffed by a district court judge and two Supreme Court justices. Finally, thirteen district courts were created, one for each ratifying state (plus a court each for Maine and Kentucky). In addition to creating a formal judicial structure, the Act established the jurisdictional relationships among the three tiers. The district courts served as minor trial courts and the circuit courts presided over more important civil and criminal trials, as well as handling diversity disputes (between citizens of two different states). The Supreme Court possessed original jurisdiction in a limited number of areas, and appellate jurisdiction from the circuit courts, district courts and state courts (Murphy, Pritchett and Epstein 2002).

As the United States developed throughout the Nineteenth century the inadequacy of this initial system became readily apparent. In 1891, Congress passed the Evarts Act, which created the circuit courts of appeals. These new courts were responsible for

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reviewing most of the appeals from the federal district courts. Ironically though, the Evarts Act did not abolish the old circuit courts. Consequently, for the next twenty years the federal judicial system included four tiers, two of which were trial tribunals: district courts and circuit courts; and two of which possessed appellate jurisdiction: circuit courts of appeals and the Supreme Court. In 1911, Congress passed additional legislation dissolving the old circuit courts and in 1948, the remaining intermediate appellate tribunals officially became known as the Courts of Appeals. The modern appeals courts are organized in eleven circuits, each possessing jurisdiction over a specific geographic region. A twelfth circuit reviews cases from Washington, DC (including many federal agencies) and a thirteenth circuit – the Federal Circuit created in 1982 – possesses specific subject-matter jurisdiction.[33]

Since its inception in 1891, the U.S. Courts of Appeals has occupied a "pivotal position as the vital center of the federal judicial system"(Howard 1977). Songer (1991) states, "as the number of litigated cases grows both quantitatively and in complexity, while the number of cases reviewed by the Supreme Court remains static, the role of the courts of appeals as the final authoritative policymaker in the interpretation of many areas of federal law expands apace." According to the Administrative Office of the U.S. Courts, the annual caseload of the appeals courts has increased substantially each year with the total number of cases reviewed in 1990 reaching approximately 38,000 (Songer, Sheehan and Haire 2000, 15-16). Therefore, for a large majority of cases, the U.S. Courts of Appeals serve as the court of last resort, since "fewer than one-half of 1% of appeals courts decisions are reviewed by the Supreme Court" (Songer 1991). Consequently, this

[33] The Federal Circuit was created through consolidation of the Court of Claims and the Court of Customs and Patent Appeals.

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pivotal position provides the appeals courts with several opportunities to review questions pertaining to the structure, authority, and conduct of the federal government. However, the Supreme Court remains the highest judicial authority within the United States and may exercise its appellate jurisdiction whenever it believes a grant of *certiorari* is necessary – either to review a decision from the Courts of Appeals or another lower court. Does this potential exercise of appellate jurisdiction by the Supreme Court serve as a significant constraint to the Appeals Courts? To address this question, I turn to an examination of the theoretical expectations inherent in structural hierarchies.

THEORIES OF JUDICIAL COMPLIANCE AND STRUCTURAL HIERARCHIES

The institutional structure of the federal judiciary facilitates an application of the legal concept of *stare decisis*. Under this principal, courts located in the lower echelons of the hierarchy apply binding precedents – handed down by higher tribunals – to resolve current disputes. As Canon and Johnson (1999, 30) state, "all courts lower in the hierarchy must attempt to apply the policy to relevant cases, interpreting the policy as necessary to fit the circumstances at hand." Several scholars have examined lower court treatment of legal precedents and concluded that inferior judges generally adhere to Supreme Court pronouncements of law (Gruhl 1980; Johnson 1987; Songer and Sheehan 1990; Benesh and Reddick 2002). Additionally, lower court judges tend to follow ideological trends from these higher tribunals (Baum 1980; Songer 1987). According to Baum, the reason for compliance by lower court judges is that while those judges seek to set doctrine near their personal ideal points, they realize that doing so increases the chance of being reversed by a higher court. Therefore, judges "must balance their

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preferences against the preferences of [the higher] court and sometimes take positions that diverge from their own preferences in order to avoid reversals that would move policy even further from those preferences" (1997, 115).

In order to understand the influence of this hierarchical relationship, scholars have turned to principal-agent theory. The fundamental premise behind this theoretical construct (see Brehm and Gates 1997 for a more detailed explanation) is that the principal seeks to produce results according to his personal preferences. However, due to a lack of resources the principal cannot review every aspect of a particular policy arena. Therefore, the principal "delegates some rights… to an agent who is bound by a (formal or informal) contract to represent the principal's interests…" (Eggertsson 1990, 40). The tension within this relationship arises because the agent also seeks to produce results according to his personal preferences, which may not be similar to those of the principal. The difficulty for the principal involves establishing substantial controls, inducements or other enforcement mechanisms to ensure that the agent does not deviate from the principal's preferences (Shepsle and Bonchek 1997). Yet, because a principal cannot develop perfect enforcement mechanisms and due to information asymmetries between the principal and the agent, it is always possible for the agent to "shirk."

Consequently, principals are required to monitor the agent to determine whether the latter is being faithful to the former's preferences. Since principals possess limited resources (a reason for entering the principal-agent relationship) they must make choices about which aspects will be examined. "A moral hazard, according to the principal-agent literature, arises when the principal measures compliance by a single proxy or indicator, thereby lessening [his] effort in monitoring" (Benesh 2002, 8). Reliance on this single

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proxy, however, may allow potential shirking to exist in other areas not measured by the indicator. Conversely, principals can rely on adverse selection mechanisms to ensure compliance. This occurs when the principal hires an agent based on a single identifiable trait or characteristic which the principal believes ensures that the agent's preferences match his own. However, by relying on a single indicator during the hiring phase, principals may ignore other signals, which better correlate to expected behavior.

Empirical examinations of the principal-agent model, within the judiciary, traditionally focused on the impact of Supreme Court decisions on lower courts.[34] Songer, Segal and Cameron (1994) were among the first scholars to rely on this theory to examine the degree of congruence and responsiveness between the Supreme Court and the Courts of Appeals. Using data on search and seizure cases, in which they isolate specific case facts, the authors demonstrate convincingly that "judges on the courts of appeals appear to be relatively faithful agents of their principal, the Supreme Court" (1994, 690). One of the primary components of this faithfulness involves the increased probability of losing litigants appealing a decision which deviates from the preferences of Supreme Court justices. However, they do note a substantial difference between liberal and conservative judges (panels) at the appellate court level. "These findings suggest that appeals court judges are substantially constrained by the preferences of their principal, but the complexity and tremendous variety of the fact situations presented on appeal frequently provide them with room to maneuver" (1994, 692-693).

Following this significant analysis, other scholars have employed principal agency theory to model relationships between the Supreme Court and lower courts. For

[34] One must remember that the judicial hierarchy is not equivalent to other bureaucratic organizations, since the Supreme Court does not possess authority over traditional sanctioning mechanisms, such as appointment, removal, promotion or salary for inferior judges (Fiss 1983).

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example, Benesh (2002) concentrates her analysis on the relationship between the Supreme Court and the Courts of Appeals. Relying on an original dataset of confession cases, she discovers that appellate judges comply with Supreme Court pronouncements because of the moral authority exerted by the High Court (2002, 129). Extending this research framework to state supreme courts, Martinek (2000) discovers evidence demonstrating the relevance of the principal-agent model in search and seizure cases; and Benesh and Martinek (2002) provide evidence of its usefulness in state supreme court confession cases. Thus, it is becoming readily apparent that principal agency theory is a useful device for examining the impact of Supreme Court decisions on lower court behavior.

However, because these models focus on whether lower courts are significantly affected by previous Court doctrine, controlling for various case facts, they do not account for new areas of the law where the doctrine is not clear. Thus, these findings are "entirely consistent with the possibility that lower court judges adhere faithfully to higher court precedents – and so appear responsive in the bulk of their cases – but ignore their superiors entirely when deciding new questions" (Klein 2002, 7). When new questions of law arise, how do the tenets of principal agency theory apply? The previous empirical evaluations of the principal-agent model hint at a form of anticipatory behavior, though this is never directly tested. As Songer, Segal and Cameron claim, "if an appeals court anticipates that it will be sanctioned in the form of a reversal, the anticipated response will keep the court in check" (1994, 693). However, since they do not directly test this claim empirically, the statement is merely speculative and implicitly suggests that lower court judges anticipate possible responses from their superiors. In situations where a

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negative response is likely (i.e., fear of reversal), judges alter their behavior accordingly. To determine the logic behind this fear of reversal and possible anticipatory behavior I develop a formal model.

FORMAL MODEL OF APPEALS COURT DECISION MAKING

Reliance on formal modeling for judicial behavior has increased over recent years. Scholars use formal models to help explain voting behavior in the U.S. Supreme Court (Stearns 2000), interactions between the Supreme Court and other branches of government (Segal 1997; Shipan 1997; Vanberg 2001) and between the Supreme Court and lower courts (McNollgast 1995; Cameron, Segal and Songer 2000). "The principal advantage of formal modeling is the clarity and rigor afforded through deductive analysis. For game theoretic analysis this means identifying equilibrium conditions not predicting specific outcomes of a particular case" (Gates and Humes 1997, 7). Thus, one may explicitly state precise assumptions about expected behavior and mathematically derive general patterns of behavior (i.e., best responses) of individuals within a strategic environment. Following in this tradition, I present a formal model that helps explain why judges on the Courts of Appeals may feel constrained by the actions of the Supreme Court.[35]

[35] Note that this model is a simplification of reality and therefore focuses on a narrow set of potential influences on judicial behavior.

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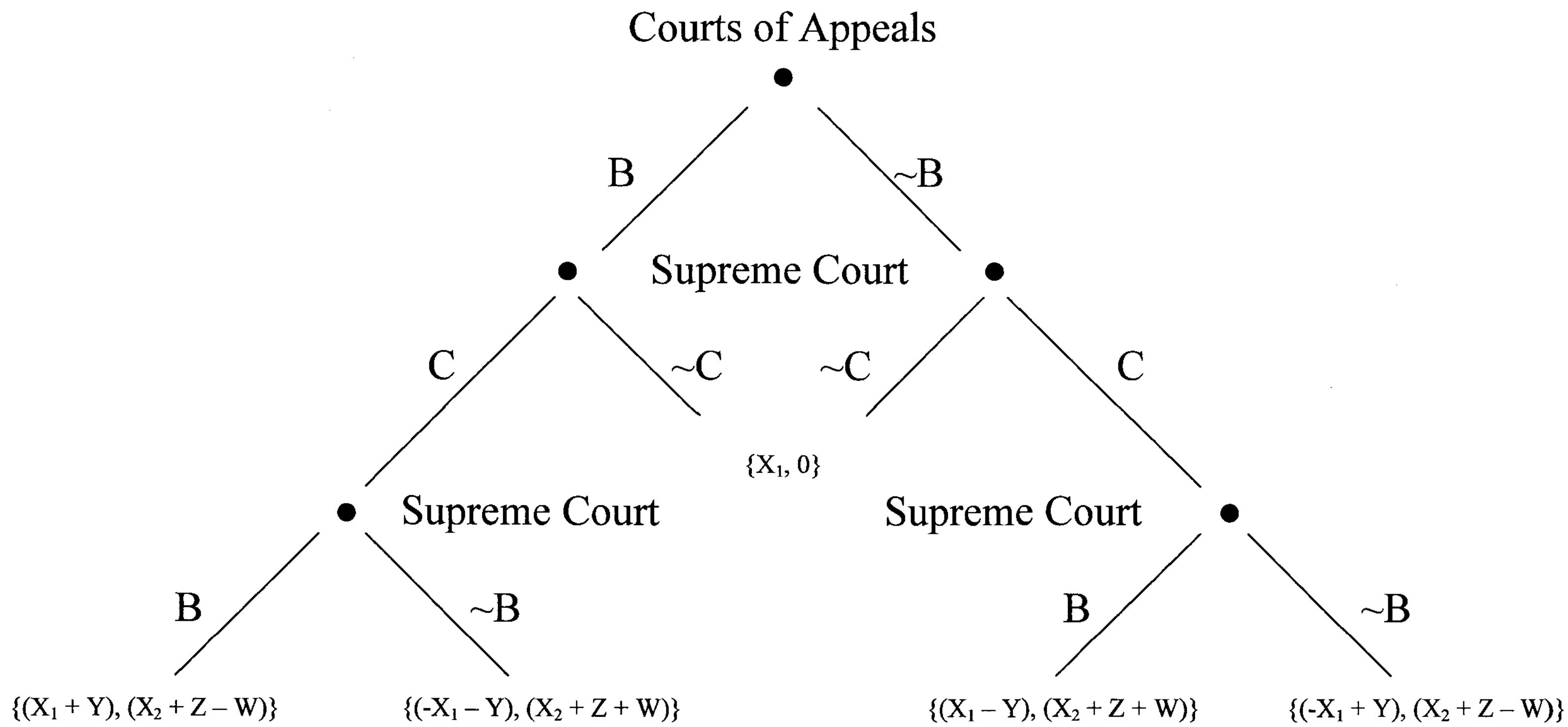
Figure 3-1: Decision Sequence with Complete Information



Immediately, one can see in Figure 3-1 the sequential nature of the federal appellate process. Decisions on foreign policy issues (or any other issue) are first reviewed by the Courts of Appeals.[36] The judges on the appellate panel can choose between ruling in favor of civil liberties (denoted B for this game) or they can support foreign policy interests (denoted ~B). Once the Courts of Appeals rule on a case, the Supreme Court can decide whether to grant *certiorari* (C) or deny review (~C).[37] If the Supreme Court denies *certiorari* (or if no appeal emerges after the appellate panel decision), the game ends. However, if the Court grants *certiorari*, then the justices can vote on the merits, either for civil liberties (B) or foreign policy interests (~B).[38]

In order to derive equilibrium behavior, one must specify assumptions about payoffs for the players. These payoffs assist in calculating the expected utilities, which are necessary to determine the specific strategies players adopt. As Figure 3-1 illustrates, judges on the Courts of Appeals are motivated by two primary concerns. The first involves the policy outcome of a decision. For illustration purposes, let us assume that the Courts of Appeals prefer to rule in favor of civil liberties and the Supreme Court prefers a ruling supporting foreign policy interests.[39] Since the Courts of Appeals are actors within

[36] In reality, decisions are first adjudicated in the federal district courts. Chapter Four therefore models this phenomenon directly.

[37] The author acknowledges that a losing litigant must first appeal the decision to the Supreme Court and petition for a writ of *certiorari* (i.e., the Supreme Court does not automatically review decisions from the Courts of Appeals). As Songer, Cameron, and Segal (1995) demonstrate, rational litigants will petition for *certiorari* if they believe the appellate panel rendered a decision beyond the preferences of Supreme Court justices. However, for the purposes of this model a non-appeal to the Supreme Court is treated the same as a denial of *certiorari*. This assumption is tenable since, in both cases, the legal policy is drafted by the Courts of Appeals and application of precedent only extends to the geographic boundaries of the specific Circuit.

[38] Though the model includes only two choices for both levels of the judiciary, in reality judges possess a range of policy options beyond these choices.

[39] Opposite patterns of behavior will occur if one assumes the Appeals Courts favor foreign policy and the Supreme Court favors civil liberties. If the Appeals Courts prefer similar policy outcomes as the Supreme Court, then these judges will rule according to their preferences without fear of reversal (regardless of the ideological direction of those preferences).

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the federal judicial system, the judges receive a policy benefit X_1 for each decision they render. I assume that the judges are policy maximizers, and as such prefer to render decisions according to their personal ideological preferences (this is the standard assumption for the attitudinal model).[40] Therefore, if the Appeals Courts prefer decisions favoring civil liberties, they receive a positive X_1 for each decision reflecting this preference and a negative X_1 for decisions favoring foreign policy.[41] However, these judges realize that the Supreme Court can review their decisions and either affirm or reverse their rulings. If the Court decides to review a decision, the Courts of Appeals judges are subjected to a reputation effect Y. If the decision is affirmed by the Supreme Court, then this reputation effect is added to the policy benefit (because the policy is extending to the entire country rather than remaining only within a particular circuit). However, if the Supreme Court reverses the decision, then the reputation effect is subtracted from the policy benefit (because the Supreme Court will extend an opposite policy to the entire nation). Finally, I make an explicit assumption about the preference ordering of Courts of Appeals judges. Initially I assume these judges prefer to rule according to their attitudinal preferences. Following the illustrative example, they prefer to rule in favor of civil liberties. Therefore, the appellate judges most prefer to rule in favor of civil liberties and have these decisions affirmed by the Supreme Court (thereby extending the policy beyond their circuit to the entire nation), followed by preferring to rule in favor of civil liberties with the Supreme Court not reviewing the decisions (thus,

---

[40] Baum (1997) notes other motivational factors beyond ideological preferences. These include adherence to precedent, desires to avoid reversal by the circuit *en banc*, avoidance of informal sanctions from peers, and constraints from other political elites. This model, by focusing primarily on attitudinal concerns, is therefore an oversimplification of potential influences.

[41] It is important to note that this term X_1 applies only to the decision by the Appeals Courts. Though the ultimate policy decision may favor foreign policy interests, X_1 will remain positive if the Appeals Courts voted in favor of civil liberties (though the reputation effect Y will be subtracted from this term $(X_1 - Y)$ consequently producing a smaller payoff).

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$(X_1 + Y) > (X_1)$). If the Appeals Courts face a choice between ruling according to their preferences and being overturned by the Supreme Court or ruling against their preferences but having the Supreme Court refrain from review, I assume the judges will prefer the latter to the former because the policy benefit will extend only within their circuit rather than the entire country (thus, $(-X_1) > (-X_1 - Y)$). If the Supreme Court grants *certiorari* to review an appellate decision favoring foreign policy, then I assume the judges prefer to have the decision overturned (although this brings a negative reputation effect to the Appeals Courts, it essentially extends their most preferred policy outcome to the nation). The least preferred alternative for the Courts of Appeals is to rule against their ideological preferences and have the Supreme Court affirm this decision, thereby extending the policy to the country (thus, $(X_1 - Y) > (-X_1 + Y)$). Comparing these various payoffs together reveals that Appeals Court judges prefer the following: $(X_1 + Y) > (X_1) > (-X_1) > (-X_1 - Y) > (-X_1 + Y)$.

Figure 3-1 also reveals the payoffs for the Supreme Court. First, I assume the justices are motivated by policy concerns, similar to the appellate judges. In this case, according to the illustrative example, the Supreme Court receives a policy benefit X_2 for decisions favoring foreign policy interests and a benefit $-X_2$ for decisions supporting civil liberties. Again, I assume that the justices are policy maximizers and, therefore, prefer to render decisions according to their ideological preferences. Second, in relation to this policy benefit is the notion that the Supreme Court cannot review all appellate decisions (for the reasons stated later). Therefore, the justices possess an incentive to hear those cases in which the Appeals Courts ruled against their most preferred outcome.[42] This

[42] Alternative conceptualizations to this incentive include resolving potential legal conflicts according to the justices preferences or demonstrating the power of the Supreme Court to inferior judges.

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additional attitudinal incentive W is added to the policy benefit X_2 if the Supreme Court reverses an appellate decision. Third, in order for the Supreme Court to review a decision it must grant *certiorari*. Doing so causes the Court to incur a monitoring cost Z (where $Z > 0$) since it simply cannot hear many appeals. This cost is subtracted from the policy benefit for each decision reviewed on the merits by the Supreme Court. Therefore, if the Supreme Court is going to incur the cost of granting *certiorari* it will most likely do so to reverse an appellate decision favoring civil liberties. Conversely, the Supreme Court will rarely grant *certiorari* to affirm an appellate decision; it will do so only if the Appeals Courts rule in favor of foreign policy interests and if the policy benefit from issuing its own decision outweighs the significant cost of granting review (i.e., $X_2 > Z$). Third, if the Court denies *certiorari* (or if the losing litigant does not appeal) then the justices receive a 0 payoff since they do not enjoy the benefit of rendering a decision, nor incur the costs of granting *certiorari*.[43] Finally, I make an explicit assumption about the preference ordering for the Supreme Court. I assume the justices most prefer to grant *certiorari* in order to rule in favor of foreign policy interests (thereby reversing a decision favoring civil liberties), and are indifferent (or possibly possess a weak preference) towards denying *certiorari* and granting review in order to affirm, and least prefer to rule against their ideological preferences (thus, $(X_2 + W - Z) > 0 \geq (X_2 - Z) > (-X_2 - Z)$).

To determine the expected utility of the Appeals Courts, let me restate the assumptions of the formal model in mathematical notation.

Definition of Player Choices:

Let p(B) = probability of decision favoring civil liberties

[43] The zero payoff occurs regardless of the ideological direction of the appellate decision since the Supreme Court does not explicitly render its own decision.

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Let $p(C)$ = probability of an appeal to Supreme Court and grant of *certiorari*

Definition of Player Payoffs:

Let X_1 = Courts of Appeals Benefit for civil liberties decision

Let Y = Courts of Appeals Reputation Effect

Let X_2 = Supreme Court Benefit for foreign policy decision

Let W = Supreme Court attitudinal incentive

Let Z = Supreme Court Cost of Review

Under a game of complete information, and using backwards induction, the expected utility of the Courts of Appeals choosing to vote in favor of civil liberties is conditioned on potential responses from the Supreme Court (i.e., conditioned on whether the Supreme Court grants *certiorari*). Thus, we initially examine the Appeals Courts expected utilities under the assumption that the Supreme Court grants *certiorari*,

$$EU_{Appeals}(B|C) = PR_{Supreme}(B|C) + PR_{Supreme}(\sim B|C) \quad [1]$$

Equation [1] stipulates that the expected utility for the Appeals Courts of choosing to support civil liberties is first calculated under the assumption that the Supreme Court will grant *certiorari*, and then the utility depends on the probability of the Supreme Court choosing to support civil liberties. If these conditions hold then,

$$EU_{Appeals}(B|C) = p(X_1 + Y) + (1 - p)(-X_1 - Y) \quad [2]$$

Equation [2] is a function of choices made by the Supreme Court (assuming a grant of *certiorari*) and the subsequent payoffs afforded to the Appeals Courts.[44] Determining

[44] Determining a grant *certiorari* involves an assumption that the policy benefit derived from a ruling on the merits outweighs the cost incur by review. As shown in the model it is more likely that this benefit will be larger than the cost of granting *certiorari* when the Supreme Court reverses an appeal (thus $X_2 + W$) than when the justices wish to affirm an appeal (X_2).

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whether the Supreme Court will rule in favor of civil liberties involves examining its respected payoffs between this vote, and a decision supporting foreign policy interests. Figure 3-1 indicates that the Supreme Court receives $(-X_2 - Z)$ if it affirms the Appeals Courts' decision in favor of civil liberties. However, if the Supreme Court reverses the lower decision then it receives $(X_2 + W - Z)$ as a payoff. Since the components X_2, Z, and W are positive, by definition, the Supreme Court possesses a dominant strategy to reverse civil liberties decisions after a grant of *certiorari* – as shown in Equation [3],

$$(X_2 + W - Z) > (-X_2 - Z) \qquad [3]$$

Consequently, the Supreme Court will choose to support foreign policy interests (~B) if it grants *certiorari* to a case in which the Appeals Court ruled in favor of civil liberties.[45] Thus, if the Supreme Court reviews the merits of an appeal the probability of the justices choosing ~B equals 1.00. Substituting this dominant strategy into Equation [2] we see that,

$$EU_{Appeals}\,(B|C) = p(X_1 + Y) + (1 - p)\,(-X_1 - Y) \text{ where } p = 0 \qquad [4]$$

Therefore,

$$EU_{Appeals}\,(B|C) = (-X_1 - Y) \qquad [5]$$

Comparing this expected utility to the utility for the Courts of Appeals given the Supreme Court denying *certiorari* (i.e., the Supreme Court chooses ~C), we see:

$$EU_{Appeals}\,(B|C) >< EU_{Appeals}\,(B|{\sim}C) \qquad [6]$$

$$(-X_1 - Y) < X_1 \qquad [7]$$

Equation [7] indicates that the Courts of Appeals derive a higher utility if the Supreme Court denies *certiorari*. This is due to the fact that a grant of *certiorari* leads to a

[45] It goes without saying that this model is an oversimplification of reality, since the Supreme Court does affirm a small number of cases after granting *certiorari*.

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dominant strategy of the Supreme Court reversing the appellate panel's decision. Therefore, by logical extension, if the Appeals Courts believe the Supreme Court may grant *certiorari* – with the intention of reversing a decision – the judges may rule against their most preferred outcomes.[46] This formal model reveals expected patterns of behavior, under the theoretical assumptions of the principal-agent model. It suggests that Appeals Court judges, if they behave rationally, will employ forward-thinking techniques to anticipate possible Supreme Court reactions to their decisions. That is, if the appellate judges believe the Supreme Court will grant *certiorari* to reverse their decision, the judges will consequently render a more strategic ruling to avoid the stigmatization of reversal, *ceteris paribus*.

Though the formal model – and elements of principal agency theory – offers this prediction few scholars have addressed whether lower court judges engage in anticipatory behavior. Those that have, provide mixed evidence as to whether this behavior is employed in a systematic manner. For example, Klein (2002) interviews several appellate judges and offers some anecdotal support for this notion. Two judges, in particular offer the following comments:

> One thing I have done that's very useful: If I have a real gray-area case, I go to history – look at the Supreme Court cases from the beginning. I watch the issue develop and try to decide what the Supreme Court would do in this case.
>
> Of course, we're bound by the Supreme Court, but sometimes there's a question of whether to adhere rigidly to the Supreme Court case or find elbow room to go, not contrary to what the Supreme Court has said, but in a way the Court might disagree with if it heard the same case. [Klein: Do you feel you should try to anticipate what the Supreme Court would do?] I like to try. Not all judges think that's proper (2002, 108).

[46] This conclusion depends heavily upon the values of each payoff variable (especially for the cost of granting *certiorari*).

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The comments from these two appellate judges indicate that they do anticipate how the Supreme Court would decide a case currently under adjudication. However, Klein's empirical analysis of anticipatory behavior discovers, "little evidence that anticipatory decision making occurs and essentially no evidence that it results from fear of reversal" (2002, 126). In contrast, Caminker's doctrinal analysis indicates that lower court judges embrace anticipatory behavior (what he terms the 'proxy model') in two specific instances: when they believe an older Supreme Court precedent is so eroded that the Court will overrule itself if an opportunity arose; and, when discerning state law (1994, 19-22).

It is difficult to assess the conclusions of these analyses because neither one directly tested strategic behavior of Appeals Court judges. Caminker's qualitative analysis leads to the conclusion that anticipatory behavior is fairly common among lower court judges, but he does not provide a systematic analysis of this phenomenon. Klein's empirical evidence is more compelling – though it contradicts some of his anecdotal evidence. Yet, he acknowledges "the results should not be taken as conclusive" (2002, 126). His analysis, while offering valuable insights into the question of anticipatory behavior, does not explicitly model strategic interaction among the Appeals Courts and the Supreme Court. If the formal model depicted in Figure 3-1 provides any analytic leverage, it indicates that the proper form for evaluation is a strategic empirical model. Until recently, these models were too computationally intensive and complicated to use efficiently. However, the advent of certain methodological developments within the field of international relations – combined with increases in computational power – has

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generated a set of models which can assist in specifically determining whether lower court judges strategically anticipate responses from their colleagues on superior tribunals.

TESTING THE FORMAL MODEL

Empirically testing formal models is an extremely useful endeavor. It allows researchers to explicitly formulate theoretical predictions – in a simplistic manner – and, subsequently, examine how these predictions hold when applied to real-world data. However, in order to generate empirical tests, researchers must remain cognizant of the differences between formal models and the real world. As such, accurate tests of the formal model may require relaxing certain assumptions upon which the models rests. One such assumption involves the deterministic nature of prediction within formal theory. Rather than assuming the formal model is an accurate representation of a complete data generating process (DGP), Morton (1999, 129) recommends treating the model as a reflection of a partial DGP, thereby allowing the inclusion of a "random error term that is not part of the model, some additional restrictions implied by the estimation procedure, and some other unstructured hypothesis that are also unrelated to the formal model."

The inclusion of a random error component to a formal model modifies the point prediction aspect of the traditional Nash equilibrium concept. Instead, the players are assumed to operate under Quantal Response Equilibrium, where "best response functions become probabilistic (at least from the point of view of an outside observer) rather than deterministic. Better responses are more likely to be observed than worse responses" (McKelvey and Palfrey 1995, 1996). Thus, players' actions, over a series of repeated games, are calculated on average. Over time, the players are more likely to choose better

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strategies than worse strategies, but they do not always play the best strategy with probability one (McKelvey and Palfrey 1998). Though the formal model may be represented in terms of complete information, Quantal Response Equilibrium allows for players to possess limited amounts of private information, which introduces variation in the probability of Player 1 choosing strategy A. For the purposes of the formal model depicted in Figure 3-1, judges on the Courts of Appeals possess information pertaining to the costs incurred for the Supreme Court to grant *certiorari* (i.e., the costs are high enough to limit the number of cases reviewed by the Court). Additionally, the appellate judges may possess information pertaining to the Supreme Court's benefit for ruling on an issue (i.e., conservative justices will prefer to rule in favor of foreign policy interests), and its desire to reverse lower court rulings. However, the Supreme Court justices retain some private information about each of these components. Likewise, the appellate judges will possess private information regarding their policy preferences and their fear of reversal. This private information allows for variation within the formal model's predicted responses, thereby facilitating empirical tests of these theoretical expectations.

With the inclusion of random variation, resulting from actors' private information, one can design a statistical model to evaluate empirically the impact of various exogenous and endogenous factors on the probability of predicted outcomes. However, it is essential that researchers employ correct statistical specifications when analyzing formal models, especially when the theory indicates the importance of strategic interdependence among the actors (as principal agency theory indicates). As Signorino observes:

> [I]f game theory has taught us anything, it is that the likely outcome of such situations can be greatly affected by the sequence of players' moves,

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> the choices and information available to them, and the incentives they face. In short, in strategic interaction, *structure matters*. Because of this emphasis on causal explanation and strategic interaction, we would expect that the statistical methods used to analyze [judicial] theories also account for the structure of the strategic interdependence. Such is not the case (1999, 279).

Unfortunately, previous empirical analyses of principal-agent models in the judiciary do not account for strategic interdependence among the actors. Instead, the authors utilize traditional maximum likelihood techniques (such as logit and probit models) to examine influences on a single actor. For example, Songer, Segal and Cameron (1994) rely on a series of logit models to determine influences on appellate judges at various stages (i.e., corresponding to the decision nodes illustrated in Figure 3-1). Subsequent analyses by other scholars follow a similar methodology to address their various theoretical questions (Martinek 2000; Benesh 2002; Benesh and Martinek 2002; and Klein 2002). While I do not seek to criticize these previous analyses – especially since the initial examination employed a unique theoretical and methodological design for its time – recent advances in statistical methods offer more efficient techniques that are capable of modeling strategic interdependence.

In a series of working papers and published articles, Signorino (1999a, 1999b, 2000, 2001; and Signorino and Yilmaz 2000) argues the merits of incorporating strategic discrete choice models into analyses of interdependence. Traditional maximum likelihood techniques are limited to a single actor confronted with a single discrete choice (often binary). Relying on logit or probit models to estimate strategic formal models ignores two essential structural components: multiple (often sequential) decisions and multiple actors. Therefore, "logit and probit [models] induce a distributional misspecification. Even when

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that is negligible, the estimates of the effects of regressors – especially for the conditioning variables – are likely to be biased and inconsistent" (Signorino and Yilmaz 2000, 3-4). The consequences of this distributional misspecification are similar to omitted variable bias, which affect the estimates and leads to inaccurate conclusions.

To alleviate part of the functional form specification issue, scholars have turned to selection models. These models allow researchers to capture the sequential decision-making process in their empirical estimations, thereby eliminating one source of bias introduced in the traditional maximum likelihood models (Heckman 1979). Essentially, strategic models are selection models "because the actors select themselves and others into 'subsamples' based on their choices" (Signorino 2001, 3). However, whereas traditional selection models are useful at modeling sequential decisions, strategic choice models extend the analysis by also allowing for the incorporation of multiple actors within a sequential decision calculus.[47]

The theoretical foundations for strategic choice models utilize outcome predictions from formal models (with an appropriate random error component, given in the Quantal Response Equilibrium) to calculate players' expected utilities. Computing this calculation, however, requires a slight respecification of those expected utilities. This is illustrated in Figure 3-2.[48]

[47] Signorino acknowledges that strategic choice models are deficient relative to traditional selection models in the assumption that errors or private information are independent. The strategic choice model does not capture correlation in the disturbances associated with each player's decision. "Substantively, this implies that [players] learn nothing about each other's incentives when viewing their own private information" (2001, 14).
[48] This respecification of expected utilities illustrates the precise mathematical equations which are estimated by the strategic choice probit model.

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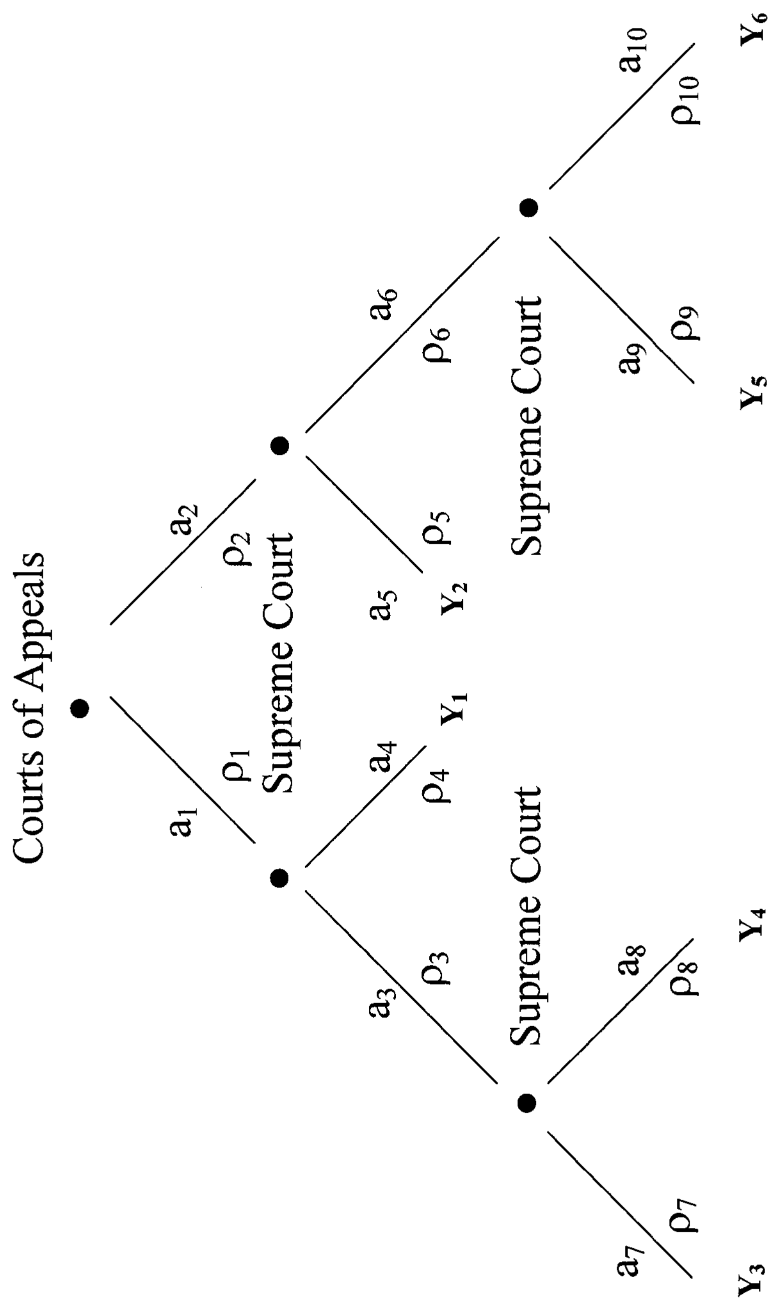

Figure 3-2: Decision Sequence under Strategic Choice Model

The decision sequence depicted in Figure 3-2 is identical to the sequence discussed in Figure 3-1. The difference lies in replacing the notation for actions and payoffs and including notations denoting the probabilities of a player selecting a particular action.

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Therefore, the following definitions apply to Figure 3-2:

Definition of Player Choices:

Let a_1 = Courts of Appeals (C) choosing to decide in favor of civil liberties

Let a_2 = C choosing to support foreign policy interests

Let a_3 = Supreme Court (S) choosing to grant *certiorari*

Let a_4 = S choosing to deny *certiorari* (or case not appealed)

Let a_5 = S choosing to deny *certiorari* (or case not appealed)

Let a_6 = S choosing to grant *certiorari*

Let a_7 = S choosing to decide in favor of civil liberties

Let a_8 = S choosing to support foreign policy interests

Let a_9 = S choosing to decide in favor of civil liberties

Let a_{10} = S choosing to support foreign policy interests

Definition of Player Outcomes (and Payoffs):

Y_1 = C receives X_1 and S receives 0

Y_2 = C receives $-X_1$ and S receives 0

Y_3 = C receives $(X_1 + Y)$ and S receives $(-X_2 - Z)$

Y_4 = C receives $(X_1 - Y)$ and S receives $(X_2 + W - Z)$

Y_5 = C receives $(-X_1 - Y)$ and S receives $(-X_2 + W - Z)$

Y_6 = C receives $(-X_1 + Y)$ and S receives $(X_2 - Z)$

It is important to note that choices a_1, a_7, and a_9 correspond to a player choosing B (in Figure 3-1), a_2, a_8, and a_{10} correspond to a player choosing ~B (in Figure 3-1), choices a_3

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and a_6 correspond to choosing C (in Figure 3-1) and, finally, choices a_4 and a_5 correspond to choosing ~C in Figure 3-1. Additionally, the outcomes Y_1 to Y_6 are the observable outcomes (i.e., decisions of the courts) that correspond to each player's payoffs. Finally, the values ρ_1 to ρ_{10} correspond to the probability that a player chooses a specific action (i.e., ρ_1 is the probability of the Courts of Appeals choosing a_1, ρ_2 is the probability of the Courts of Appeals choosing a_2, and so on).

To calculate expected utilities I assume that each decision maker's outcome preferences are private information. This is the assumption built into the Quantal Response Equilibrium (QRE) explained earlier. The analyst and other players know (or assume) only the distribution of these outcome preferences. Thus, while the observed utility of an outcome Y_k for Player i is $U_i^*(Y_k)$, the player also possesses private information (which is not revealed) changing the utility to $U_i(Y_k) + \pi_{ik}$. We assume that, on average, $U_i^*(Y_k) = U_i(Y_k) + \pi_{ik}$. Thus, players operating in QRE will be more likely to choose best responses (i.e., actions that provide the most utility) than worst responses. As Signorino (2000, 23) describes, "the [private] information about payoffs forces agents to make probability assessments about actions by other agents and expected utility calculations for taking actions." Within the principal-agent framework for judicial decision-making, this means that Appeals Court judges must estimate the probability of the Supreme Court taking a specific action, based upon a calculation of the justices' aggregate utility for choosing this alternative.

The probability of an outcome is the probability of players choosing corresponding paths that lead to the outcome. Assuming that the payoff disturbances are independent, the joint probability of an outcome is simply the product of the action

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choice probabilities along that path. For example, the probability of outcome Y_6 (in Figure 3-2) is equivalent to the joint probability of the Appeals Court choosing a_2, the Supreme Court choosing a_6 and the Supreme Court choosing a_{10}. If we let p_j be the probability that action a_j is chosen at the corresponding decision node, then $p_{Y6} = (p_{a2})(p_{a6})(p_{a10})$. If we assume the private information component π is independently and identically distributed as a standard Normal cumulative distribution, denoted Φ, then we can "work up the game tree" and derive conditional choice probabilities for all outcomes. The probabilities of actions a_{10} and a_9 are:

$$\rho_{10} = \Pr\,[U_S^*(Y_6) > U_S^*(Y_5)] \quad [8]$$

$$= \Pr\,[U_S(Y_6) + \pi_{S6} > U_S(Y_5) + \pi_{S5}] \quad [9]$$

$$= \Phi\left[\frac{U_S(Y_6) - U_S(Y_5)}{\sqrt{\sigma^2_{\pi S6} + \sigma^2_{\pi S5}}}\right] \quad [10]$$

and $\rho_9 = 1 - \rho_{10}$. Similarly, the probabilities of actions a_7 and a_8 are:

$$\rho_7 = \Pr\,[U_S^*(Y_3) > U_S^*(Y_4)] \quad [11]$$

$$= \Pr\,[U_S(Y_3) + \pi_{S3} > U_S(Y_4) + \pi_{S4}] \quad [12]$$

$$= \Phi\left[\frac{U_S(Y_3) - U_S(Y_4)}{\sqrt{\sigma^2_{\pi S3} + \sigma^2_{\pi S4}}}\right] \quad [13]$$

with $\rho_8 = 1 - \rho_7$.

Assessing the probabilities of actions a_3, a_4, a_5 and a_6 proceed in a similar fashion. However, one must also include the calculations in Equations [10] or [13], since the Supreme Court will grant *certiorari* conditional on its utility to rule in favor of civil

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liberties or foreign policy.[49] Since the primary question for this analysis is whether the Courts of Appeals anticipate Supreme Court responses when rendering their decisions, I do not derive the choice probabilities for the *certiorari* stage. Focusing instead on the probabilities of the Appeals Courts (C) choosing a_1 or a_2 involves specifically modeling C's uncertainty regarding the decisions made by S (the Supreme Court). C will therefore base his expected utility for action a_2 on the probability assessment of S taking actions a_5 or a_6, but in calculating this assessment, C must also assess the probability of S taking action a_9 or a_{10} subsequent to choosing a_6. Thus,

$$\rho_2 = \Pr\,[U_C^*(a_2) > U_C^*(a_1)] \qquad [14]$$

$$= \Pr\,[\rho_5 U_C^*(Y_2) + \rho_6 U_C^*(a_6) > \rho_4 U_C^*(Y_1) + \rho_3 U_C^*(a_3)] \qquad [15]$$

$$= \Pr\,[\rho_5(U_C(Y_2) + \pi_{C5}) + \rho_6[\rho_{10}(U_S(Y_6) + \pi_{S6}) + \rho_9(U_S(Y_9) + \pi_{S9}] >$$

$$\rho_4(U_C(Y_1) + \pi_{C4}) + \rho_3[\rho_8(U_S(Y_4) + \pi_{S4}) + \rho_7(U_S(Y_3) + \pi_{S7}] \qquad [16]$$

which equals

$$\Phi\left[\frac{[\rho_5 U_C(Y_2) + \rho_6[\rho_{10} U_S(Y_6) + \rho_9 U_S(Y_3)]] - [\rho_4 U_C(Y_1) + \rho_3[\rho_8 U_S(Y_4) + \rho_7 U_S(Y_3)]]}{\sqrt{\rho^2{}_5\sigma^2\pi_{C5} + \rho^2{}_6(\rho^2{}_{10}\sigma^2\pi_{S10} + \rho^2{}_9\sigma^2\pi_{S9}) + \rho^2{}_4\sigma^2\pi_{C4} + \rho^2{}_3(\rho^2{}_8\sigma^2\pi_{S8} + \rho^2{}_7\sigma^2\pi_{S7})}}\right]$$

and $\rho_1 = 1 - \rho_2$.

While this last equation seems technically complicated, its substantive interpretation is fairly simple and is similar to the interpretation of expected utilities calculated for Figure 3-1. The values in the numerator correspond to the probability of the Appeals Courts choosing an action (in this case choosing a_2, a vote in favor of foreign

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[49] See Perry (1991) and Caldeira, Wright and Zorn (1999) for a discussion of Supreme Court strategic behavior during the *certiorari* decision.

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policy interests) based on their expected utility, but also conditioned on the probability of the Supreme Court choosing, first, whether to grant or deny *certiorari*, and then, (if *certiorari* is granted) choosing to support civil liberties or foreign policy interests. The values in the denominator correspond to the probability of a player's private information affecting his choices, combined with a variance term from the Normal distribution. Finally, the choice probabilities are assumed to follow the Normal cumulative distribution. This last assumption allows for the translation of the formal model into a statistical model (Leblang 2001, 14). Since the outcome probabilities and expected utilities are functions of a set of explanatory variables and their corresponding parameters, it is possible to calculate maximum likelihood estimates of the coefficients using a strategic choice probit model.

RESEARCH DESIGN AND METHODS

Data for this analysis initially are taken from the random sample (N = 230) of Courts of Appeals decisions, 1946-2000, described in Chapter Two. Unfortunately, this initial random sample only produced three cases that were subsequently appealed to the Supreme Court, with only one of the appeals receiving a grant of *certiorari*. In order to analyze strategic influences, a sample of cases from both the Appeals Courts and the Supreme Court is needed. Therefore, in order to increase the number of cases decided by the Supreme Court, I incorporate that data (as explained in Chapter Two). Examining those Supreme Court cases reveals seventy-two (72) decisions appealed from the Courts of Appeals. These seventy-two cases are therefore included in this analysis. However, in order to determine how the Appeals Courts decided these seventy-two cases, I

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subsequently code the appellate decisions and include those cases in the total number of cases. Thus, in addition to the initial Appeals Court sample (230), another 72 appellate cases and 72 Supreme Court cases are included, bringing the total number of cases for this analysis to 374.

In the strategic choice probit model there are essentially three dependent variables. The first and last dependent variables are whether the Appeals Courts or the Supreme Court vote in favor of foreign policy interests (coded '0') or civil liberties claims (coded '1'). As I stated in Chapter Two, it is important to note that the federal government does not have to be a litigant to a particular case in order to express a foreign policy interest in the outcome. The second dependent variable in the strategic choice probit model is whether the Supreme Court grants *certiorari* (coded '1') or denies (coded '0') a request (or does not receive an appeal). Since the dependent variables are conditioned on the choice probabilities of the two actors, traditional maximum likelihood techniques (including multinomial logit and selection models) are inappropriate (Signorino 1999a, 1999b, 2000, 2001; and Signorino and Yilmaz 2000). I therefore rely on a strategic choice probit model.[50]

Similar to the empirical analysis in Chapter Two, I rely on the partisan affiliation of a judge's appointing president to serve as proxy for ideological preferences. Initially judges appointed by Republican presidents are coded '0' and those appointed by Democratic presidents are coded '1'. However, since the unit of analysis is aggregated to the court level, individual preference measures are combined. This combination is captured through the independent variable *Court Partisanship*, which is defined as the

[50] The strategic choice probit model is estimated using STRAT, a statistical software package designed by Signorino. For more information on STRAT, visit www.rochester.edu/College/PSC/signorino/.

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proportion of judges appointed by Democratic presidents. As I discovered in Chapter Two, Democratic judges are more likely to rule in favor of civil liberties than their Republican colleagues. However, the hypothesis generated from Figures 3-1 and 3-2 indicates that Appeals Court judges will rule against their most preferred outcome if they believe the Supreme Court will grant *certiorari* and reverse the decision. Consequently, if appellate judges anticipate Supreme Court responses (according to principal agency theory), then I expect the relationship between *Court Partisanship* and the dependent variable either to be non-significant or negative – in contrast to the positive expectation demonstrated in Chapter Two. This variable, therefore, becomes the primary focus of this chapter. If the principal agent model leads to anticipatory behavior by Appeals Court judges, then they will mask their ideological preferences if they believe the Supreme Court will grant *certiorari* to reverse their decision.

In addition to the ideological variable of interest, the model includes several control variables (with similar theoretical expectations as the models in Chapter Two). First, the variable *Lower Court Directionality* measures the case disposition by the district court or federal agency conducting the trial. The variable is coded '1' if the lower court (or agency) ruled in favor of foreign affairs interests, '2' if the court rendered a mixed decision (both for and against governmental interests), and '3' if the court ruled against federal government interests. Theoretical expectations indicate the Courts of Appeals will be more likely to affirm a District Court (or administrative agency) ruling and the Supreme Court more likely to reverse the lower court ruling. Second, *Constitutional Challenge* tracks whether a litigant alleges a specific constitutional violation (i.e., a violation of the Fifth Amendment's Due Process Clause). I hypothesize

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that judges may be sensitive to constitutional challenges, and consequently, will be more likely to rule in favor of civil liberties claims. Third, the dummy variable *Threshold Issue* measures the presence of a threshold issue such as the political question or act of state doctrine. As hypothesized, the presence of a threshold issue should be negatively related to the likelihood of the courts ruling in support of civil liberties claims (i.e., judges will be more likely to rule in favor of federal government interests). Finally, the dummy variable *National Security Defense* controls for the presence of a specific national security defense, raised by the federal government. If the government claims an issue of national security, I hypothesize that the judges will be more likely to rule in favor of the government. I also include a new variable, not used in Chapter Two, to measure the degree of dissensus between the Courts of Appeals and the District Courts (or administrative agencies). Since the strategic choice model incorporates the Supreme Court's decision to grant *certiorari*, the variable *Lower Court Dissensus* controls for potential influences during this stage of the decision-making process. Several scholars note the frequency with which the Court grants *certiorari* if a disagreement exists among the lower courts (Brenner 1979; Brenner and Krol 1989; Perry 1991; Boucher and Segal 1995; and Caldeira, Wright and Zorn 1999). This dummy variable is coded '1' if the Courts of Appeals reversed (i.e., disagreed) with the lower court and '0' otherwise. If lower court dissensus exists, I hypothesize that the Supreme Court will be more likely to grant *certiorari* to review and correct the disagreement.

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EMPIRICAL RESULTS

Table 3-1 provides the empirical results of the strategic choice model. For comparative purposes, the results of the Appeals Courts' traditional probit model from Table 2-4 are included. In general, the traditional probit model performs remarkably well, correctly predicting 68.3% of the overall variance, which translates into a 49.0% reduction of error over the null model.[51]

If one were to examine the coefficients in the traditional probit model, the results would lead to the conclusion that several characteristics significantly affect the likelihood of appellate judges ruling in favor of civil liberties. First, the variable *Court Partisanship* is significant and in the expected direction. Examining the predicted probabilities of this variable supports the inference that panels dominated by Democratic judges are 10.3% more likely to support civil liberties claims than panels dominated by Republicans. Second, the variable *Lower Court Directionality* indicates the Appeals Courts are significantly more likely to affirm lower court decisions. If the lower court rules in favor of civil liberties, appellate judges are 14.0% more likely to support this decision and rule in a similar fashion (and vice versa). Finally, the traditional probit model indicates the Courts of Appeals are 22.9% more likely to rule in favor of foreign policy interests if a *National Security Defense* is presented.

[51] The reduction of error statistic is calculated using the formula provided in Hagle and Mitchell (1992)

$$\text{ROE (\%)} = 100 \text{ x} \left[\frac{\%\, correctly\ predicted - \%\, in\ null\ category}{100\% - \%\, in\ null\ category} \right]$$

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Table 3-1: Strategic Analysis of Appeals Courts Decisions

	Probit Model		Strategic Choice Model	
	Coefficient (Robust Std. Err.)	Predicted Probability	Coefficient (Std. Error)	Predicted Probability
Courts of Appeals (merits)				
Court Partisanship	.851*** (.299)	.103	2.477 (2.603)	.001
Lower Court Directionality	.484*** (.125)	.140	.252** (.132)	.084
Workload	-.005 (.005)	-.028		
Constitutional Challenge	-.164 (.212)	-.066		
International Law/Treaty	-.075 (.224)	-.027		
Threshold Issue	-.241 (.209)	-.094		
National Security Defense	-.658* (.371)	-.229	.651 (1.865)	.000
Criminal Case	-.260 (.202)	-.099		
Constant	-.978		-1.906	
Supreme Court (*certiorari*)				
Lower Court Directionality			.201** (.100)	.112
Lower Court Dissensus			.186 (.112)	.021
Constant			-1.365	
Supreme Court (merits)				
Court Partisanship			.619** (.333)	.156
Constitutional Challenge			.457 (.353)	.013
Constant			-1.655	
N	215		359	
Null Model	37.8%		56.9%	
Correctly Predicted	68.3%		62.9%	
Reduction of Error	49.0%		13.9%	

* $p < .10$ ** $p < .05$ *** $p < .01$

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While these results reinforce the conventional wisdom about decision making in the appellate tribunals, the more interesting story involves the Appeals Courts and potential strategic constraints imposed by the hierarchical structure of the federal judiciary. An examination of the last two columns in Table 3-1 reveals the coefficients from the strategic choice probit model. Before I discuss the individual coefficients, let me restate some aspects underlying the strategic choice probit model. First, the model can be conceptualized as a combination between a multinomial probit model and a system of simultaneous equations. The model is multinomial insofar as one can estimate the likelihood of multiple actors choosing different paths (i.e., a_1 or a_2) without specifying a particular preference order for the choices. The model is simultaneous in that actions taken later in the sequence (by other players) affect the likelihood of choices at the beginning of the sequence. Second, similar to simultaneous equations models, one cannot include the same regressors in each equation; otherwise the model is unidentified and cannot be estimated. Therefore, some of the variables included in the traditional probit model are excluded in the strategic choice probit model to ensure identification of the model. Finally, since the strategic choice probit model incorporates the decisions of multiple actors the model is divided into three sections: the Appeals Courts' decisions on the merits, the Supreme Court's *certiorari* decision, and the Supreme Court's decisions on the merits. These three sections are estimated simultaneously and therefore the values of coefficients in a section are calculated according to their influence on the dependent variable and conditioned on the influence of regressors in other sections.

According to Table 3-1, the strategic choice model performs well, overall, correctly predicting 62.9% of the variance. This equates to a 13.9% reduction of error

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over the null model. While this reduction is smaller than the traditional probit model, one should be cautious about directly comparing these goodness-of-fit estimates. Since the strategic choice probit model estimates multiple dependent variables (and influences across multiple actors) its goodness-of-fit statistics will rarely outperform a model that only focuses on a single aspect. Therefore, since the strategic choice model offers a 13.9% reduction of error over the null model, we can safely conclude that the model performs well and subsequently turn to examine individual coefficients.

If we examine the section pertaining to the Courts of Appeals we notice several points. First, the effects of the variable *Court Partisanship* become non-significant when the appellate courts are placed within a hierarchical structure. Based on the predictions of the formal model, I hypothesized that the principal-agent relationship would significantly constrain Appeals Court judges from rendering decisions according to their personal ideological preferences (as measured by the partisan affiliation of the appointing president). The empirical results in Table 3-1 support this contention. Second, the variable *Lower Court Directionality* continues to exert a significant influence, with appellate panels 8% more likely to rule in favor of civil liberties if the District Court rendered a similar decision. Finally, the variable *National Security Defense* loses statistical significance in the strategic choice model. This result is not surprising given that this variable barely achieved significance in the traditional probit model.

These results lead to questions about why partisan influences disappear in the strategic context. One possible answer involves the Supreme Court's potential grant of *certiorari*, an aspect not explicitly modeled in a traditional probit analysis. An examination of the strategic choice model indicates that the Supreme Court is 11.2%

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more likely to grant *certiorari* to those appellate decisions which favor civil liberties (i.e., the variable *Lower Court Directionality,* for the Supreme Court, is significant and positive in the Grant of *Certiorari* decision node). Since the traditional probit model indicates that panels dominated by Democratic judges are more likely to rule in favor of civil liberties, this result indicates that their decisions are significantly more likely to be reviewed by the Supreme Court. In the language of principal agency theory, agents who cast liberal decisions are more likely to be monitored and reviewed by the principal (especially since the principal becomes increasingly conservative from 1946-2000). Consequently, the results in Table 3-1 suggest that if the Appeals Courts anticipate review by the Supreme Court, the appellate judges engage in strategic behavior and render decisions along non-ideological lines. Stated another way, judges on the Courts of Appeals are constrained by anticipated responses (i.e., fear of reversal) from rendering decisions according to their ideological preferences.

While these results provide empirical support for the theoretical expectations derived from the principal agent model, some words of caution are prudent. The first caveat pertains to the nature of the selected sample. While the initial Appeals Courts sample consisted of 230 randomly selected cases, only 3 were appealed to the Supreme Court; and of those 3 appeals, only 1 was granted *certiorari.* Therefore, I included an additional 72 cases from the Supreme Court universe that had been appealed to the Court from the appellate level. Consequently, the strategic choice model examined 374 cases (302 cases from the Appeals Courts and 72 from the Supreme Court). This equates to a 23.8% *certiorari* grant rate by the Supreme Court, which is clearly higher than the "fewer than one-half of 1%" ratio discovered by Songer (1991). Thus, it is possible the

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conclusions generated by Table 3-1 are an artifact of an inflated Supreme Court review rate. To correct for this discrepancy, I randomly re-sampled (with replacement) the Appeals Courts decisions and reanalyzed the data. Unfortunately, the strategic choice probit model would not converge. Since I could not empirically examine potential strategic interdependence under a more realistic monitoring rate, I remain skeptical about the influences of this relationship. Therefore, while I provide empirical support for anticipatory behavior, I cannot conclusively determine whether the Appeals Courts anticipate Supreme Court responses and subsequently feel constrained by the actions of the justices.

The second caveat pertains to the strategic choice model designed by Signorino. While the model provides an innovative method for examining strategic interaction – an innovation not supplied by any other statistical method – it does possess certain disadvantages. For example, since the model incorporates interdependent influences – similar to simultaneous equations models – among multiple actors, it is highly sensitive to misspecification. It is therefore impossible to include the same independent variables as regressors for each actor; doing so results in an unidentified model. Signorino (2001b, 13) acknowledges, "STRAT does not constrain you to specify regressors in such a way that the model is guaranteed to be identified, nor does it perform any sort of error checking at this point for identification.... No general results yet exist for determining when parameters will be identified in these models." Consequently, one is required to simplify the model in order to ensure parameter identification, which can be atheoretical. This respecification limits one's ability to directly compare the coefficients within the

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strategic choice model to those within a traditional probit model. While inferences can be made, the conclusive generalizability of those inferences is limited.

CONCLUSIONS

I began this chapter with a statement from Burbank and Friedman (2002) that questioned whether the familiar hierarchical legal system would change if the primary deciding factor in cases shifted from the law to ideology and reversal rates. Specifically, I ask do judges on the Courts of Appeals guess the preferences of their Supreme Court colleagues, and does this anticipatory behavior exert a significant constraint on their ability to maximize their personal policy preferences?

To examine these questions initially, I develop a formal model derived from the tenets of principal agency theory (as modified to conform to the federal judiciary). Under complete information, this model provides support for the notion that appellate judges prefer to render decisions without interference from the Supreme Court. If the Supreme Court grants *certiorari*, the justices are more likely to reverse the appellate decision thereby imposing a negative reputation effect on Appeals Court judges. Therefore, strategic appellate judges will render non-ideological decisions (or mask their ideological preferences) if they believe the Supreme Court will grant *certiorari* to reverse an ideological decision.

Testing this theoretical expectation involves relying on a strategic choice probit model. Although certain caveats limit the generalizability of the results, strategic choice methods allow researchers to explicitly model strategic interdependence among multiple actors – an advantage not gained in other methods. The empirical results indicate that

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Appeals Court judges do anticipate responses from the Supreme Court, and adjust their behavior according to this perceived constraint. While appellate panels dominated by Democratic judges tend to rule in favor of civil liberties, if they anticipate a grant of *certiorari* by the Supreme they will mask these ideological preferences. The consequence of non-anticipation is a significant likelihood of Supreme Court review for those decisions which support civil liberties (probably because the federal government is more likely to appeal an unfavorable decision to the Supreme Court than are non-governmental litigants). Thus, the hierarchical structure of the federal judiciary exerts a significant constraint on the ability of judges on the Courts of Appeals from rendering decisions according to their ideological preferences.

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CHAPTER FOUR: THE HIERARCHY OF JUSTICE AND THE DISTRICT COURTS

The District Court gives more scope to a judge's initiative and discretion...His conduct of a trial may fashion and sustain the moral principles of the community. More even than the rules of constitutional, statutory, and common law he applies, his character and personal distinction, open to daily inspection in his courtroom, constitute the guarantees of due process.[52]

In Chapter Two I present an individual analysis of influences on District Court judges and discover their decisions are impacted by ideological concerns – similar to the Appeals Courts and the Supreme Court – and institutional constraints, which are not significant in the higher tribunals. In Chapter Three I provide empirical support for the notion of anticipatory behavior by Appeals Court judges. If these judges believe the Supreme Court will review an appeal (and possibly reverse the decision), they will engage in strategic behavior that constrains ideological decisions. This phenomenon occurs even though the Supreme Court possesses discretionary jurisdiction and rarely grants *certiorari*.

In this chapter I explore anticipatory behavior – and the principal agent model – in the Federal District Courts. It proceeds under the premise that if principal agency theory operates at the Appeals Court level – and the empirical evidence in Chapter Three suggests this is valid – then it should be more pronounced in the District Courts. Since the Appeals Courts possess mandatory jurisdiction, a higher percentage of District Court

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[52] Wyzanski (1959).

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decisions will be reviewed. Consequently, District Court judges should feel more constrained by the Appeals Courts than appellate judges feel by the Supreme Court. However, as I explain later in this chapter, there are also several reasons why District Court judges will not be constrained by the Appeals Courts. This chapter empirically explores these theoretical inconsistencies and sheds light on an often overlooked and under-analyzed judicial entity: the Federal District Courts.

Are District Court judges constrained by the Appeals Courts, according to the tenets of principal agency theory? Do these judges anticipate responses by appellate panels and condition their decisions based on these expectations? To address these questions, I initially discuss the historical development of the District Courts. Then, I explore previous research pertaining to District judges as policy makers within a judicial hierarchy. Third, I develop a formal model to identify the theoretical applicability of the principal agent model and derive testable hypotheses. Finally, I empirically evaluate the formal model using a strategic choice statistical framework.

HISTORICAL DEVELOPMENT OF THE DISTRICT COURTS

As I mention in the previous chapter, according to Article III of the United States Constitution, "The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." After ratification of the Constitution, Congress immediately passed the Judiciary Act in 1789, establishing the initial structure for the federal judiciary. In addition to creating the Supreme Court and three circuit courts, the Judiciary Act created thirteen district courts – one for each ratifying state, plus a court each for Maine and

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Kentucky. This initial organizational scheme for district courts – honoring state geographic boundaries – remains in existence in the contemporary judicial structure. Thus, as Richardson and Vines observe, "the federal judiciary was state-contained, with the administrative and political structure of the states becoming the organizational structure of the federal courts" (1970, 21). Each court was presided over by a single judge, who resided within the district (i.e., within the state).

As the country continued to grow through the addition of more states, Congress followed by establishing additional district courts. Eventually, however, some states became large enough to support multiple districts within their geographic borders. Currently, there are ninety-four federal district courts, covering the fifty states, the District of Columbia and some U.S. territories. Twenty-six states possess single districts. The remaining states possess two or more districts, and three states (California, New York, and Texas) have four districts (Baum 1998, 27). To staff these increases, Congress has periodically passed legislation increasing the number of district court judges. The most recent statute, the Federal Judgeship Act of 1990, created seventy-four new positions, bringing the current total to 649. Each district court consequently possesses more than one judge, with the largest district having twenty-eight judgeships (Carp and Stidham 2001, 48). Consequently, "for the majority of cases, the district courts are the point of entry into the federal judicial system. Most cases go no further. Thus, these courts are the primary center of activity in the federal system" (Baum 1998, 27). Given the apparent importance of this judicial level, it is incumbent upon scholars to examine how district court judges resolve disputes. Focusing on this question involves

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determining the extent to which these judges make policy and the types of constraints experienced during the decision-making process.

POLICY MAKING IN A JUDICIAL HIERARCHY

Initially, scholars of the judiciary did not attribute policy-making functions to district court judges. Instead, they believed these judges engaged more in norm enforcement than policy making. "When they make policy, the [district] courts do not exercise more discretion than when they enforce community norms. The difference lies in the intended impact of the decision. Policy decisions are intended to be guideposts for future actions; norm-enforcement decisions are aimed at the particular case at hand" (Jacob 1984, 37). Since the decisions of district courts rarely affected individuals beyond the specific litigants they were not considered policy decisions.

However, several scholars disagree with this assertion. "The view that trial courts do not make policy rests on a narrow and outdated definition of policy-making – namely, the conscious establishment of a new rule or standard for handling problems" (Mather 1995, 173). Simply because district court decisions are directed toward 'the particular case at hand' does not exclude them from the policy realm. If this were accurate then many appellate decisions would also be categorized as 'norm enforcement' since they are also expressed to 'the particular case at hand.' As Rowland and Carp note, "trial courts are also policy-making institutions that allocate social values and privilege. When judges hear cases of first impression, they establish precedent, and in a common-law system this is the essence of policy formation" (1996, 3). Therefore, while the district courts may not issue broad decisions that make sweeping policy pronouncements, they still form policy

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through their rulings. This is especially pertinent when district courts rule on questions of fact, since these questions are virtually immune from appellate review. Thus, it is the "day to day power over [these] decisions rather than the ability to change dramatically the whole course of government" (Shapiro 1964, 41-42), that provides district judges with opportunities to make policy. However, the question remains as to whether these judges face additional constraints, imposed through the hierarchical system, that hinder their ability to formulate policy according to their personal preferences. Stated another way, are the District Courts agents of the Courts of Appeals, and does this relationship limit the capacity of district judges to issue ideological decisions?

In Chapter Three I explore a manifestation of principal agency theory between the Courts of Appeals and the Supreme Court. Building upon previous research demonstrating agent compliance with the principal's decisions, I provide empirical support for the notion that the agent anticipates the principal's potential response and conditions his actions accordingly. Through a simple extension of logic, there is every reason to believe that a similar (and potentially stronger) relationship exists between the District Courts and the Courts of Appeals. Since the appellate courts do not possess discretionary control over their dockets they must review all cases brought before them on appeal. The Supreme Court, in contrast, is able to selectively grant *certiorari* to a comparatively small number of cases. As one of the tenets of the principal agent model indicates, compliance by the agent to the principal's wishes is directly affected by the ability of the principal to monitor the agent's actions. The Supreme Court monitors a small number of decisions, and yet is able to constrain the Appeals Courts. Therefore,

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since the Appeals Courts monitor a higher percentage of District Court decisions it is logical to assume a stronger constraint will exist for the District Courts.

Unfortunately, while this logical extension of principal agency to the District Courts seems relatively straightforward, there are two theoretical reasons against the application of the principal agent model to the District Courts. First, the primary motivation behind an agent's adherence to the principal – whether one examines compliance or anticipatory behavior – is the agent's desire to avoid sanction. For the judiciary, this equates to a fear of reversal. In Chapter Two I note that the Supreme Court is prone to reverse the decisions of lower courts when it grants *certiorari* (Epstein, et. al. 1996). Though the High Court reviews few decisions, the inclination to reverse sends a signal to the Appeals Courts which exerts a significant constraint on their decisions.[53] However, the Appeals Courts do not send a similar signal to the District Courts. Instead, decisions are most likely to be affirmed on appeal; approximately 75% of appeals are affirmed by the Appeals Courts (Davis and Songer 1988; Songer and Sheehan 1992). District Court judges are aware of this tendency to affirm. As Judge Graven explains, "the people of this district either get justice here with me or they don't get it at all. I've had a number of cases appealed over the years, but I've never been overruled. And I've never had a case go to the Supreme Court…" (quoted in Rowland and Carp 1996, 1). If this quote by Judge Graven exemplifies the dominant belief across the District Courts, why would the judges fear reversal, and subsequently feel constrained by the Appeals Courts? Perhaps since a non-zero probability of reversal exists (a probability that is larger

[53] While I provide empirical evidence supporting this contention in Chapter Three, I remain skeptical as to whether the Appeals Courts are truly constrained in this manner – for the reasons explained in that chapter.

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than the non-zero probability of the Supreme Court granting *certiorari*) an application of the principal agent model to the District Courts is appropriate.

However, a second theoretical reason opposes this application. This reason involves the ability of District Court judges to estimate legitimately the preferences of the Appeals Courts. The discussion in Chapter Three, concerning anticipatory behavior by appellate judges, depends on the assumption that these judges can discern accurately (or at least reasonably estimate) the ideological preferences of Supreme Court justices. This is a plausible assumption, given the composition of the Supreme Court (i.e., all nine justices review cases and issue decisions). Therefore, it is reasonable to assume that Appeals Court judges may accurately estimate the preferences of the Court. However, this assumption becomes untenable when one applies it to District Court judges identifying the preferences of the Appeals Courts. Though appellate judges possess life tenure – similar to their Supreme Court colleagues – unless a circuit meets *en banc*, not all judges will review a case and render a decision. Instead, the majority of Appeals Courts decisions are rendered in three-judge panels. Since judges are assigned to panels through a random process, it is nearly impossible for a District Court judge to calculate which three appellate judges will review an appeal. Perhaps it is possible for District Courts to identify the aggregate ideological preference of a circuit. For example, scholars of the Appeals Courts "know" that the Fourth Circuit is extremely conservative and the Ninth Circuit extremely liberal. Therefore, chances are that a case appealed from a District Court in Virginia is likely to reach a conservative appellate panel, whereas a case from California is likely to reach a liberal panel. However, beyond these gross approximations of panel ideology, District Court judges cannot reasonably estimate the

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preferences of the reviewing panel. Consequently, they cannot condition their behavior on expected responses by the Appeals Courts because the preferences of the appellate panel are unknown.

In sum, while a simple logical extension of the principal agent model to the District Courts initially leads one to the conclusion that these courts should engage in anticipatory behavior similar to appellate judges, additional theoretical expectations limit an application of principal agency theory to the trial level. Given these apparent contradictions, it is prudent to develop a formal model which provides additional analytical leverage over testable hypotheses.

Formal Model of District Court Decision Making

As I mention in Chapter Three, reliance on formal modeling for judicial behavior has increased over recent years. "The principal advantage of formal modeling is the clarity and rigor afforded through deductive analysis. For game theoretic analysis this means identifying equilibrium conditions not predicting specific outcomes of a particular case" (Gates and Humes 1997, 7). Thus, one may explicitly state precise assumptions about expected behavior and mathematically derive general patterns of behavior (i.e., best responses) of individuals within a strategic environment. Following in this tradition, I present a formal model that helps explain the principal agent relationship between the District Courts and the Courts of Appeals.[54]

[54] Note that this model is a simplification of reality and therefore focuses on a narrow set of potential influences on judicial behavior.

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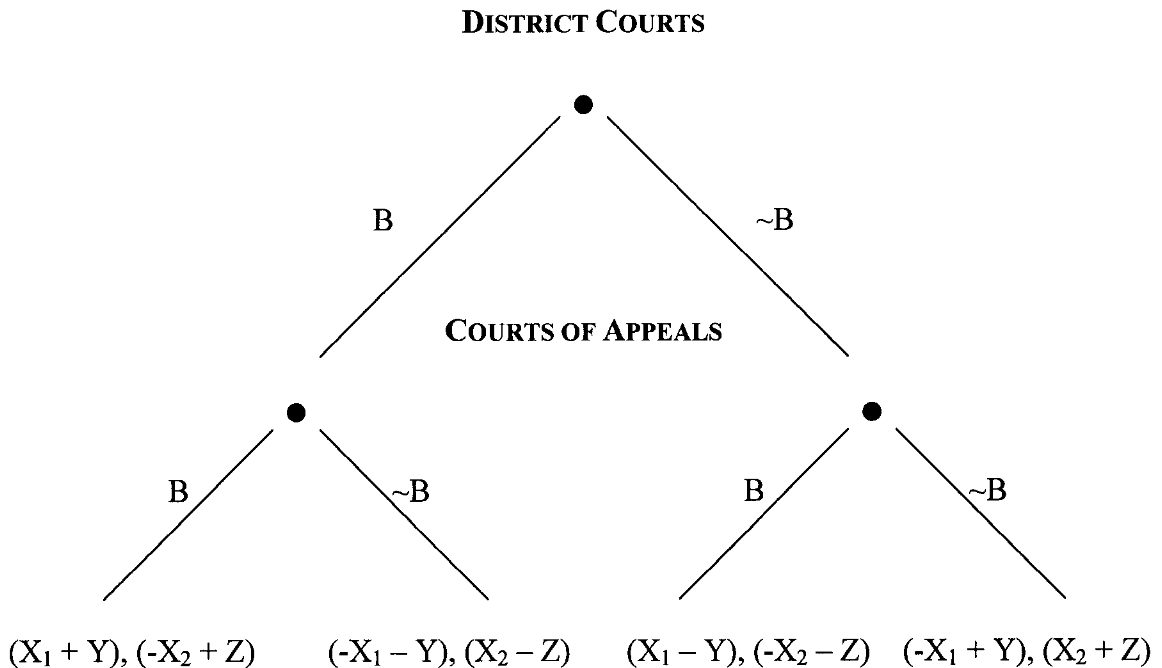
Figure 4-1: Decision Sequence with Complete Information



Note: The payoff matrix assumes that the District Courts prefer to vote in favor of civil liberties (B) and the Courts of Appeals prefer to vote in favor of foreign policy (~B).

Immediately, one can see in Figure 4-1 the sequential nature of the process. Decisions on foreign policy issues (or any other issue) are first heard in the District Courts for trial. The majority of litigation in the District Courts is presided over by a single judge. He can choose between ruling in favor of civil liberties (denoted B for this game) or he can support foreign policy interests (denoted ~B). Once the District Courts rule on a case, the Courts of Appeals encounter a similar choice: ruling in favor of civil

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liberties (B) or foreign policy interests (~B).[55] The sequence of choices differentiates this game from the one developed in Chapter Three. Specifically, we do not encounter the intermediate choice of granting *certiorari*. Since the Appeals Courts possess mandatory jurisdiction they must review all appeals. In reality "about twenty percent of district court decisions are appealed in any given year" (Rowland and Carp 1996, 8). However, examining why certain litigants choose to appeal (or not appeal) is beyond the scope of this dissertation. Since the Appeals Courts cannot selectively review appeals, I assume that every case tried in the District Courts is appealed to the Courts of Appeals for review.

In order to derive equilibrium behavior, one must specify assumptions about payoffs for the players. These payoffs assist in calculating the expected utilities, which are necessary to determine the specific strategies players adopt. As Figure 4-1 illustrates, judges on the District Courts are motivated by two primary concerns. The first involves the policy outcome of a decision. For illustration purposes, let us assume that the District Courts prefer to rule in favor of civil liberties and the Courts of Appeals prefer a ruling supporting foreign policy interests.[56] Since the District judges are actors within the federal judicial system, they receive a policy benefit X_1 for each decision they render. I assume that the judges are policy maximizers, and as such prefer to render decisions according to their personal ideological preferences (this is the standard assumption for the

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[55] Though the model includes only two choices for both levels of the judiciary, in reality judges possess a range of policy options beyond these choices.

[56] Opposite patterns of behavior will occur if one assumes the District Courts favor foreign policy and the Courts of Appeals favors civil liberties. If the District Courts prefer similar policy outcomes as the Courts of Appeals, then these judges will rule according to their preferences without fear of reversal (regardless of the ideological direction of those preferences).

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attitudinal model).[57] Therefore, if the District Courts prefer decisions favoring civil liberties, they receive a positive X_1 for each decision reflecting this preference and a negative X_1 for decisions favoring foreign policy.[58] However, these judges realize that the Appeals Courts can review their decisions and either affirm or reverse their rulings. When the Appeals Courts review a decision, the District Court judges are subjected to a reputation effect Y. If the decision is affirmed on appeal, then this reputation effect is added to the policy benefit $(X_1 + Y)$. However, if the Appeals Courts reverse the decision, then the reputation effect is subtracted from the policy benefit $(-X_1 - Y)$. Given this ordering, it is apparent that District Court judges prefer to have their decisions affirmed on appeal rather than overturned and do not prefer to rule against their preferences. Therefore, the preference ordering for District Courts is $(X_1 + Y) > (X_1 - Y) > (-X_1 - Y) > (-X_1 + Y)$.

Figure 4-1 also reveals the payoffs for the Appeals Courts. First, I assume the appellate judges are motivated by policy concerns, similar to the district judges. In this case, according to the illustrative example, the Appeals Courts receive a policy benefit X_2 for decisions favoring foreign policy interests and a benefit $-X_2$ for decisions supporting civil liberties. Again, I assume that the appellate judges are policy maximizers and, therefore, prefer to render decisions according to their ideological preferences. Second, unlike the Supreme Court which incurs a cost for granting *certiorari*, the Appeals Courts must review all appeals and therefore any cost for review is constant across all cases.

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[57] Baum (1997) describes other motivational factors for lower court judges, not the least of which is adherence to legal precedent. This model, by focusing primarily on attitudinal concerns, is therefore an oversimplification of potential influences.

[58] It is important to note that this term X_1 applies only to the decision by the District Courts. Though the ultimate policy decision may favor foreign policy interests, X_1 will remain positive if the District Courts voted in favor of civil liberties (though the reputation effect Y will be subtracted from this term $(X_1 - Y)$ consequently producing a smaller payoff).

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Consequently, this facet is excluded from the model. Third, though the appellate judges may prefer to render decisions according to their personal preferences, a growing body of literature demonstrates that these judges face additional constraints (such as legal precedent and possible review by the Supreme Court), which limit their ability to rule ideologically.[59] Thus, a constraint term (Z) is included in their payoff matrix. If the constraint term is greater than the policy benefit ($Z > X_2$) the Appeals Courts will rule against their preferences. If the constraint term is less than the policy benefit ($Z < X_2$) then the appellate judges will vote according to their preferences. In terms of the illustration explained earlier, Figure 4-1 operates under the assumption that the Appeals Courts prefer to vote in favor of foreign policy interests. Therefore, if the constraint is less than the policy benefit, we should expect to observe the appellate panel reversing a civil liberties decision by the District Courts. However, if the constraint exceeds the policy benefit, then the Appeals Courts will affirm the decision and vote in favor of civil liberties.

To determine the expected utility of the District Courts, let me restate the assumptions of the formal model in mathematical notation.

Definition of Player Choices:

Let $p(B)$ = probability of decision favoring civil liberties

Definition of Player Payoffs:

Let X_1 = District Courts Benefit for civil liberties decision

Let Y = District Courts Reputation Effect

Let X_2 = Courts of Appeals Benefit for foreign policy decision

[59] See Songer, Sheehan, and Haire (2000) for a discussion of these constraints and their influence on Appeals Court decision making.

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Let Z = Courts of Appeals Constraint Term

Under a game of complete information the District Courts will choose to vote in favor of civil liberties only if the expected utility for doing so outweighs the expected utility for voting in favor of foreign policy interests – conditioned on the responses from the Courts of Appeals. Thus,

$$EU_{District}(B) >< EU_{District}(\sim B) \quad [1]$$

$$PR_{Appeals}(B) + PR_{Appeals}(\sim B) >< PR_{Appeals}(B) + PR_{Appeals}(\sim B) \quad [2]$$

Equation [2] stipulates that the expected utility for the District Courts (i.e., their payoffs) are conditioned on the choices made by the Appeals Courts. Stated another way, the expected utility for the District Courts is dependent upon whether the Appeals Courts choose to support civil liberties or rule in favor of foreign policy interests. The District Courts will therefore weigh their options of choosing to vote in favor of civil liberties only if doing so outweighs the utility of voting for foreign policy interests. Entering the potential payoffs into Equation [2] we see that,

$$p(X_1 + Y) + (1 - p)(-X_1 - Y) >< p(X_1 - Y) + (1 - p)(-X_1 + Y) \quad [3]$$

Equation [3] is a function of choices made by the Appeals Courts and the subsequent payoffs afforded to the District Courts. Determining whether the Courts of Appeals will rule in favor of civil liberties involves examining their respected payoffs between this vote, and a decision supporting foreign policy interests. Figure 4-1 indicates that the Appeals Courts receives $(-X_2 + Z)$ if it affirms the District Courts' decision in favor of civil liberties. However, if the appeal is reversed then the Appeals Courts receive $(X_2 - Z)$ as a payoff. Therefore, determining the expected utility for the Courts of Appeals involve calculations for X_2 and Z. If $X_2 > Z$ the panel will reverse the District Court

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decision, and if the $X_2 < Z$ the panel will affirm the decision. While we cannot determine this calculation *a priori*, we do know from previous research that the Appeals Courts affirm approximately 75% of the decisions they review (Songer, Sheehan and Haire 2000). Therefore, the probability of affirmance is .75 and the probability of reversal is .25. Consequently, the Courts of Appeals will most likely choose to support civil liberties (B) when reviewing a decision by the District Courts to support civil liberties. Similarly, the Appeals Courts will most likely affirm a decision favoring foreign policy interests when reviewing a decision by the District Courts to support foreign affairs. Substituting these probabilities into Equation [3] we see that,

$$.75\,(X_1 + Y) + .25\,(-X_1 - Y) >< .25(X_1 - Y) + .75\,(-X_1 + Y) \qquad [4]$$

$$.75X_1 + .75Y - .25X_1 - .25Y >< .25X_1 - .25Y - .75X_1 + .75Y \qquad [5]$$

Grouping similar terms on each side of the inequality from Equation [5] we see,

$$.5X_1 + .5Y >< -.5X_1 + .5Y \qquad [6]$$

$$X_1 >< Y \qquad [7]$$

Equation [7] informs us that the basic decision for District Court judges is whether the policy decision outweighs a reputation effect. Since we assume that District Court judges are policy maximizers then it logically follows that these judges will forego potential reputation consideration and rule according to the personal policy preferences. Substituting this result into Equation [1] we are left with the conclusion that,

$$EU_{District}\,(B) > EU_{District}\,(\sim B) \qquad [8]$$

Equation [8] indicates that the District Courts derive a greater expected utility from rendering decisions according to their policy preferences without fear of reversal by the Courts of Appeals. This conclusion is different than the one generated by the formal

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model in Chapter Three; there the Courts of Appeals are motivated by a fear of reversal. It is therefore unclear whether the principal agent model is applicable to an examination of the relationship between the District and Appeals Courts. If the formal model depicted in Figure 4-1 provides any analytic leverage, it indicates that the proper form for evaluation is a strategic empirical model.

Empirically testing this formal model involves relaxing the deterministic assumption of the equilibrium behavior. As I explain in Chapter Three, rather than identifying Nash equilibria as absolute predictions one must assume that players operate under Quantal Response Equilibrium (QRE), where "best response functions become probabilistic (at least from the point of view of an outside observer) rather than deterministic. Better responses are more likely to be observed than worse responses" (McKelvey and Palfrey 1995, 1996). Thus, players' actions, over a series of repeated games, are calculated on average. Over time, the players are more likely to choose better strategies than worse strategies, but they do not always play the best strategy with probability one (McKelvey and Palfrey 1998). Though the formal model may be represented in terms of complete information, Quantal Response Equilibrium allows for players to possess limited amounts of private information, which introduces variation in the probability of Player 1 choosing strategy A. The relaxed assumption of the QRE also addresses my earlier concern about District Court judges not being able to accurately determine the preferences of randomly assigned appellate panels. While the District Courts may be able to identify the general ideological preference of the circuit, the Appeals Courts will retain private information about the preferences of the three judges assigned to the appellate panel. Likewise, the District Courts will possess private

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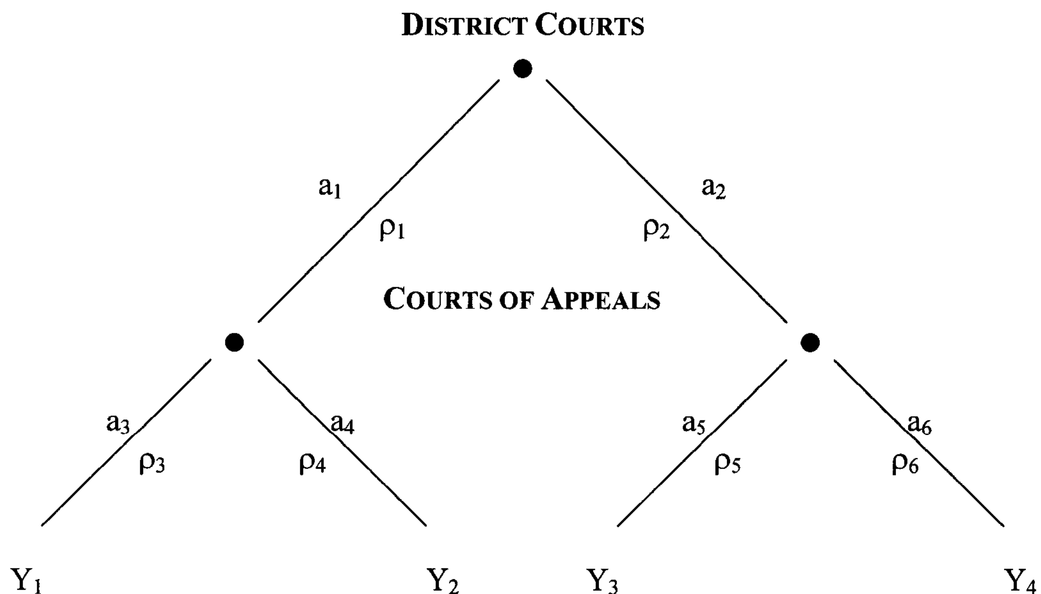
information regarding their policy preferences and their fear of reversal. This private information allows for variation within the formal model's predicted responses, thereby facilitating empirical tests of these theoretical expectations.

Relying on the same arguments expressed in Chapter Three, I employ a strategic choice probit model to evaluate empirically whether District Court judges condition their decisions on anticipated responses by the Appeals Courts. As I explain in the previous chapter, the theoretical foundations for strategic choice models utilize outcome predictions from formal models (with an appropriate random error component, given in the Quantal Response Equilibrium) to calculate players' expected utilities. Computing this calculation, however, requires a slight respecification of those expected utilities. This is illustrated in Figure 4-2.[60]

Figure 4-2: Decision Sequence under Strategic Choice Model



[60] This respecification of expected utilities illustrates the precise mathematical equations which are estimated by the strategic choice probit model.

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The decision sequence depicted in Figure 4-2 is identical to the sequence discussed in Figure 4-1. The difference lies in replacing the notation for actions and payoffs and including notations denoting the probabilities of a player selecting a particular action.

Therefore, the following definitions apply to Figure 4-2:

Definition of Player Choices:

Let a_1 = District Courts (D) choosing to decide in favor of civil liberties

Let a_2 = D choosing to support foreign policy interests

Let a_3 = Courts of Appeals (C) choosing to decide in favor of civil liberties

Let a_4 = C choosing to support foreign policy interests

Let a_5 = C choosing to decide in favor of civil liberties

Let a_6 = C choosing to support foreign policy interests

Definition of Player Outcomes (and Payoffs):

Y_1 = D receives $(X_1 + Y)$ and C receives $(X_2 + Z)$

Y_2 = D receives $(X_1 - Y)$ and C receives $(X_2 - Z)$

Y_3 = D receives $(X_1 - Y)$ and C receives $(X_2 - Z)$

Y_4 = D receives $(X_1 + Y)$ and C receives $(X_2 + Z)$

It is important to note that choices a_1, a_3, and a_5 correspond to a player choosing B (in Figure 4-1), a_2, a_4, and a_6 correspond to a player choosing ~B (in Figure 4-1). Additionally, the outcomes Y_1 to Y_4 are the observable outcomes (i.e., decisions of the

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courts) that correspond to each player's payoffs. Finally, the values ρ_1 to ρ_6 correspond to the probability that a player chooses a specific action (i.e., ρ_1 is the probability of the District Courts choosing a_1, ρ_2 is the probability of the District Courts choosing a_2, and so on).

To calculate expected utilities I assume that each decision maker's outcome preferences are private information. This is the assumption built into the Quantal Response Equilibrium (QRE) explained earlier. The analyst and other players know (or assume) only the distribution of these outcome preferences. Thus, while the observed utility of an outcome Y_k for Player i is $U_i^*(Y_k)$, the player also possesses private information (which is not revealed) changing the utility to $U_i(Y_k) + \pi_{ik}$. We assume that, on average, $U_i^*(Y_k) = U_i(Y_k) + \pi_{ik}$. Thus, players operating in QRE will be more likely to choose best responses (i.e., actions that provide the most utility) than worst responses. As Signorino (2000, 23) describes, "the [private] information about payoffs forces agents to make probability assessments about actions by other agents and expected utility calculations for taking actions." Within the principal-agent framework for judicial decision-making, this means that District Court judges must estimate the probability of the Appeals Courts taking a specific action, based upon a calculation of the judges' aggregate utility for choosing this alternative.

The probability of an outcome is the probability of players choosing corresponding paths that lead to the outcome. Assuming that the payoff disturbances are independent, the joint probability of an outcome is simply the product of the action choice probabilities along that path. For example, the probability of outcome Y_4 (in Figure 4-2) is equivalent to the joint probability of the District Courts choosing a_2 and the

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Appeals Courts choosing a_6. If we let p_j be the probability that action a_j is chosen at the corresponding decision node, then $p_{Y4} = (p_{a2})(p_{a6})$. If we assume the private information component π is independently and identically distributed as a standard Normal cumulative distribution, denoted Φ, then we can "work up the game tree" and derive conditional choice probabilities for all outcomes. The probabilities of actions a_6 and a_5 are:

$$\rho_6 = \Pr\left[U_C^*(Y_4) > U_C^*(Y_3)\right] \qquad [6]$$

$$= \Pr\left[U_C(Y_4) + \pi_{C4} > U_C(Y_3) + \pi_{C3}\right] \qquad [7]$$

$$= \Phi\left[\frac{U_C(Y_4) - U_C(Y_3)}{\sqrt{\sigma^2_{\pi C4} + \sigma^2_{\pi C3}}}\right] \qquad [8]$$

and $\rho_5 = 1 - \rho_6$. Similarly, the probabilities of actions a_3 and a_4 are:

$$\rho_3 = \Pr\left[U_C^*(Y_1) > U_C^*(Y_2)\right] \qquad [9]$$

$$= \Pr\left[U_C(Y_1) + \pi_{C1} > U_C(Y_2) + \pi_{C2}\right] \qquad [10]$$

$$= \Phi\left[\frac{U_C(Y_1) - U_C(Y_2)}{\sqrt{\sigma^2_{\pi C1} + \sigma^2_{\pi C2}}}\right] \qquad [11]$$

with $\rho_4 = 1 - \rho_3$.

Assessing the probabilities of actions a_1 and a_2 proceed in a similar fashion, but must also account for the probabilities of actions taken by the Appeals Courts. Focusing on the probability of the District Courts (D) choosing either of these alternatives (a_1 or a_2) involves specifically modeling D's uncertainty regarding the decisions made by C (the Appeals Courts). D will therefore base his expected utility for action a_2 on the probability assessment of C taking actions a_5 or a_6. Thus,

$$\rho_2 = \Pr\left[U_D^*(a_2) > U_D^*(a_1)\right] \qquad [12]$$

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$$= \Pr [\rho_5 U_D^*(Y_3) + \rho_6 U_D^*(Y_4) > \rho_3 U_D^*(Y_1) + \rho_4 U_D^*(Y_2)] \quad [13]$$

$$= \Pr [\rho_5(U_D(Y_3) + \pi_{D5}) + \rho_6 (U_D(Y_4) + \pi_{D6}) >$$

$$\rho_3(U_D(Y_1) + \pi_{D3}) + \rho_4 (U_D(Y_2) + \pi_{D4})] \quad [14]$$

$$= \Phi\left[\frac{[\rho_5 U_D(Y_3) + \rho_6 U_D(Y_4)] - [\rho_3 U_D(Y_1) + \rho_4 U_D(Y_2)]}{\sqrt{\rho^2{}_5\sigma^2\pi_{D5} + \rho^2{}_6\sigma^2\pi_{D6} + \rho^2{}_3\sigma^2\pi_{D3} + \rho^2{}_4\sigma^2\pi_{D4}}}\right] \quad [15]$$

and $\rho_1 = 1 - \rho_2$.

While Equation [15] seems technically complicated, its substantive interpretation is fairly simple and is similar to the interpretation of expected utilities calculated for Figure 4-1. The values in the numerator correspond to the probability of the District Courts choosing an action (in this case choosing a_2, a vote in favor of foreign policy interests) based on their expected utility, but also conditioned on the probability of the Appeals Courts choosing to support civil liberties or foreign policy interests. The values in the denominator correspond to the probability of a player's private information affecting his choices, combined with a variance term from the Normal distribution. Finally, the choice probabilities are assumed to follow the Normal cumulative distribution. This last assumption allows for the translation of the formal model into a statistical model (Leblang 2001, 14). Since the outcome probabilities and expected utilities are functions of a set of explanatory variables and their corresponding parameters, it is possible to calculate maximum likelihood estimates of the coefficients using a strategic choice probit model.

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Research Design and Methods

Data for this analysis are taken initially from the random sample (N = 215) of District Court cases, 1946-2000, described in Chapter Two. From that sample only 103 cases were reviewed by the Courts of Appeals with a published opinion.[61] These cases were subsequently coded at the appellate level, bringing the total number of cases in this sample to 206 (103 cases at the District Court level and 103 cases at the Appeals Court level).

In the strategic choice probit model there are essentially two dependent variables. The first dependent variable is whether the District Courts vote in favor of foreign policy interests (coded '0') or civil liberties claims (coded '1'). The second dependent variable is whether the Appeals Courts vote in a similar fashion ('0' for a vote favoring foreign policy interests and '1' for a decision supporting civil liberties). As I state in the two previous chapters, it is important to note that the federal government does not have to be a litigant to a particular case in order to express a foreign policy interest in the outcome. Since the dependent variables are conditioned on the choice probabilities of the two actors, traditional maximum likelihood techniques (including multinomial logit and selection models) are inappropriate (Signorino 1999a, 1999b, 2000, 2001; and Signorino and Yilmaz 2000). I therefore rely on a strategic choice probit model.[62]

Similar to the empirical analysis in Chapter Two, I rely on the partisan affiliation of a judge's appointing president to serve as proxy for ideological preferences. Initially judges appointed by Republican presidents are coded '0' and those appointed by

[61] Cases that were reviewed by the Appeals Courts without a published opinion, or were appealed directly to the Supreme Court are excluded from the sample.

[62] The strategic choice probit model is estimated using STRAT, a statistical software package designed by Signorino. For more information on STRAT, visit www.rochester.edu/College/PSC/signorino/.

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Democratic presidents are coded '1'. However, since the unit of analysis is aggregated to the court level for appellate panels, individual preference measures are combined for the Appeals Courts. This combination is captured through the independent variable *Court Partisanship*, which is defined as the proportion of judges appointed by Democratic presidents. As I discovered in Chapter Two, Democratic judges are more likely to rule in favor of civil liberties than their Republican colleagues. However, as I discover for the Appeals Courts in Chapter Three, if the tenets of principal agency theory hold, District Court judges will mask their ideological preferences when they believe their decision will be overturned on appeal. Consequently, if district judges anticipate appellate responses (according to principal agency theory), then I expect the relationship between *Court Partisanship* and the dependent variable either to be non-significant or negative – in contrast to the positive expectation demonstrated in Chapter Two.

In addition to the ideological variable of interest, the model includes several control variables (with similar theoretical expectations as the models in Chapter Two). In the equation for the District Courts, I first include the variable *Threshold Issue* which is a dummy variable that measures the presence of a threshold issue such as the political question or act of state doctrine. As hypothesized, the presence of a threshold issue should be negatively related to the likelihood of the courts ruling in support of civil liberties claims (i.e., judges will be more likely to rule in favor of federal government interests). Second, I include the dummy variable *National Security Defense* to control for the presence of a specific national security defense, raised by the federal government. If the government claims an issue of national security, I hypothesize that the judges will be more likely to rule in favor of the government. Finally, *Criminal Case* measures whether

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the courts are reviewing criminal petitions related to foreign affairs.[63] For the reasons stated in Chapter Two (i.e., high frequency of frivolous challenges), I hypothesize that judges will be more likely to rule in favor of foreign policy interests when resolving criminal appeals.

In the equation for the Courts of Appeals, in addition to the ideological variable of interest, I include the variable *Lower Court Directionality* to control for potential influences from the disposition of the case at trial. The variable is coded '1' if the lower court (or agency) ruled in favor of foreign affairs interests, '2' if the court rendered a mixed decision (both for and against governmental interests), and '3' if the court ruled against federal government interests. Theoretical expectations indicate the Courts of Appeals will be more likely to affirm a District Court ruling. Second, I include the variable *Constitutional Challenge* to track whether a litigant alleges a specific constitutional violation (i.e., a violation of the Fifth Amendment's Due Process Clause). I hypothesize that judges may be sensitive to constitutional challenges, and consequently, will be more likely to rule in favor of civil liberties claims. Finally, the variable *International Law or Treaty* measures the presence of an issue related to international law or treaties signed by the United States (both bilateral, such as extradition treaties with specific countries and multilateral, such as the Geneva Convention). I hypothesize that the presence of a claim focused on a violation of a specific treaty or norm of international law will persuade federal judges to rule in favor of individuals (i.e., against the interests of the federal government).

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[63] Examples include military appeals for criminal convictions, convictions for espionage or treason, drug related offenses (importation or arrests on the high seas) or convictions for violations of business (i.e., violations of the Trading with the Enemy Act).

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EMPIRICAL RESULTS

Table 4-1 provides the empirical results of the strategic choice model. For comparative purposes, the results of the District Courts' traditional probit model from Table 2-4 are included. A restatement of these results is probably warranted before I turn to discuss the other estimates. In general, the traditional probit model performs remarkably well, correctly predicting 57.2% of the overall variance, which translates into a 34.8% reduction of error over the null model.[64]

If one were to examine the coefficients in the traditional probit model, the results would lead to the conclusion that several characteristics significantly affect the likelihood of appellate judges ruling in favor of civil liberties. First, the variable *Court Partisanship* is significant and in the expected direction. Examining the predicted probabilities of this variable supports the inference that Democratic judges are 7.0% more likely to support civil liberties claims than Republicans. Second, the variable *National Security Defense* indicates that District Courts are 23.8% more likely to rule in favor of foreign policy interests if a specific claim of national security is raised by the government. Finally, the traditional probit model indicates that District Court judges are 19.5% more likely to rule in favor of foreign policy interests if they resolve a criminal case.

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[64] The reduction of error statistic is calculated using the formula provided in Hagle and Mitchell (1992)

$$\text{ROE (\%)} = 100 \times \left[\frac{\%\, correctly\ predicted - \%\, in\ null\ category}{100\% - \%\, in\ null\ category} \right]$$

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Table 4-1: Strategic Analysis of District Courts

	Probit Model		Strategic Choice Model	
	Coefficient (Robust Std. Err.)	Predicted Probability	Coefficient (Std. Error)	Predicted Probability
District Courts				
Court Partisanship	.390* (.225)	.070	.918** (.430)	.174
Workload	.001 (.007)	.003		
Constitutional Challenge	-.164 (.212)	-.064		
International Law/Treaty	-.179 (.334)	-.058		
Threshold Issue	.031 (.247)	.008	.436 (.289)	.011
National Security Defense	-.668** (.327)	-.238	-.521*** (.119)	.277
Criminal Case	-.528** (.252)	-.195	-.355* (.178)	.156
Constant	-.302 (.374)		-.313 (.211)	
Appeals Courts				
Court Partisanship			.941** (.420)	.188
Lower Court Directionality			.130* (.063)	.113
Constitutional Challenge			.772 (.526)	.052
International Law/Treaty			-.871 (.677)	.048
Threshold Issue				
National Security Defense				
Criminal Case				
Constant			1.249 (.336)	
N	165		206	
Null Model	34.4%		35.3%	
Correctly Predicted	57.2%		44.6%	
Reduction of Error	34.8%		14.4%	

* p < .10   ** p <.05   *** p < .01

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While these results reinforce the conventional wisdom about trial court decision making, the more interesting story involves the application of principal agency theory to the District Courts and the potential constraints imposed by a hierarchical structure. An examination of the last two columns in Table 4-1 reveals the coefficients from the strategic choice probit model. As I did in Chapter Three, before I discuss the individual coefficients, let me restate some aspects underlying the strategic choice probit model. First, the model can be conceptualized as a combination between a multinomial probit model and a system of simultaneous equations. The model is multinomial insofar as one can estimate the likelihood of multiple actors choosing different paths (i.e., a_1 or a_2) without specifying a particular preference order for the choices. The model is simultaneous in that actions taken later in the sequence (by other players) affect the likelihood of choices at the beginning of the sequence. Second, similar to simultaneous equations models, one cannot include the same regressors in each equation; otherwise the model is unidentified and cannot be estimated. Therefore, some of the variables included in the traditional probit model are excluded in the strategic choice probit model to ensure identification of the model. Finally, since the strategic choice probit model incorporates the decisions of multiple actors the model is divided into two sections: the District Courts' decisions on the merits and the Appeals Courts' decisions on the merits. These sections are estimated simultaneously and therefore the values of coefficients in a section are calculated according to their influence on the dependent variable and conditioned on the influence of regressors in other sections.

Overall, this model performs well, correctly predicting 44.6% of the variance for a 14.4% reduction of error over the null model. While this reduction is smaller than the

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traditional probit model, one should be cautious about directly comparing these goodness-of-fit estimates. Since the strategic choice probit model estimates multiple dependent variables (and influences across multiple actors) its goodness-of-fit statistics will rarely outperform a model that only focuses on a single aspect. Therefore, since the strategic choice model offers a 14.4% reduction of error over the null model, we can safely conclude that the model performs well and subsequently turn to examine individual coefficients.

If we examine the section pertaining to the District Courts we notice several points. First, the ideological variable *Court Partisanship* remains statistically significant and positive. As I mention earlier, if District Court judges anticipate responses on appeal and fear reversal, then I hypothesize this constraint would curtail their desire to rule ideologically. This is the pattern I discover in Chapter Three with regards to the Appeals Courts and their fear of reversal by the Supreme Court. However, according to Table 4-1, District Court judges continue to rule ideologically, even when evaluated in a strategic environment. An examination of the predicted probability indicates that Democratic judges are 17.4% more likely to rule in favor of civil liberties concerns than their Republican colleagues. Second, the control variables *National Security Defense* and *Criminal Case* continue to exert a significant influence on District Court behavior. Judges are 27.7% more likely to rule in favor of foreign policy interests when presented with a *National Security Defense* and 15.6% more likely when ruling on a *Criminal Case.*

These results lead to questions about why partisan influences remain significant to District Court judges in a hierarchical relationship when they vanish for judges on the Courts of Appeals. As I mention earlier in this chapter, there are two potential reasons

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against applying principal agency theory to the District Courts. The first reason involves the threat of sanction (considered a primary motivation for agents operating in a hierarchical structure). While the Courts of Appeals review substantially more cases than the Supreme Court, they are also more likely to affirm District Court decisions than the Supreme Court. Judge Graven's statement illustrates this phenomenon, "I've had a number of cases appealed over the years, but I've never been overruled. And I've never had a case go to the Supreme Court…" (quoted in Rowland and Carp 1996, 1). District Court judges may have a higher frequency of cases reviewed on appeal, however, the likelihood of being reversed is extremely low. This is different from Appeals Court judges whose frequency of review is small, but the likelihood of being reversed (if *certiorari* is granted) is relatively high. Consequently, the federal trial judges do not possess an incentive to anticipate the behavior of the Appeals Courts, nor adjust their actions accordingly.

The second reason against applying the tenets of principal agency theory to the District Courts involves the ability of these judges to estimate legitimately the preferences of the Appeals Courts. As I mention earlier in this chapter and in Chapter Three, the principal agent model is more conducive to examining anticipatory behavior by the Appeals Courts because one can reasonably assume that these judges can discern accurately (or at least reasonably estimate) the ideological preferences of Supreme Court justices. However, this assumption becomes untenable when one applies it to District Court judges identifying the preferences of the Appeals Courts. Since appellate judges are assigned to panels through a random process, it is nearly impossible for a District Court judge to calculate which three appellate judges will review an appeal.

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Consequently, these judges cannot condition their behavior on expected responses by the Appeals Courts because the preferences of the appellate panel are unknown.

CONCLUSIONS

In the previous chapter I provide initial empirical support for the notion that judges on the Courts of Appeals anticipate responses from the Supreme Court and constrain their ideological voting on cases if they believe the Supreme Court will grant *certiorari* and reverse a decision. This chapter, therefore, addresses the question as to whether similar behavior exists in the federal District Courts. Are District Court judges constrained by the Appeals Courts, according to the tenets of principal agency theory? Do these judges anticipate responses by appellate judges and condition their decisions based on these expectations?

To examine these questions initially, I develop a formal model derived from the tenets of principal agency theory (as modified to conform to the federal judiciary). Under complete information, this model provides support for the notion that district judges are not constrained by the actions of appellate panels. Since the majority of cases reviewed on appeal are affirmed, the District Courts are not motivated by a fear of reversal. Consequently, the formal model indicates that the federal trial judges remain relatively free to render ideological rulings without the threat of sanction on appeal.

Testing this theoretical expectation involves relying on a strategic choice probit model. Although I raise certain caveats in Chapter Three that limit the generalizability of the results (some of these caveats pertain to the model in this chapter), strategic choice methods allow researchers to explicitly model strategic interdependence among multiple

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actors – an advantage not gained in other statistical methods. The empirical results of the strategic choice model indicate the District Courts are not constrained by the anticipated behavior of the Appeals Courts. Whether one examines District Courts in isolation from other tribunals or within a hierarchical structure, conclusions regarding ideological voting remain consistent: Democratic judges are more likely to rule in favor of civil liberties than their Republican colleagues. Thus, the hierarchical structure of the federal judiciary does not appear to be a significant constraint to the District Courts as it seemingly is for the Courts of Appeals.

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CHAPTER FIVE: DEFENDERS OF CIVIL LIBERTIES OR CHAMPIONS OF NATIONAL SECURITY?

The perennial issue of the appropriate balance between civil liberties and the demands of national security has lost none of its poignancy; nor is it any easier today than it was in the past to determine how, where and when to draw the line between these two sets of interests.[65]

Three significant limitations have hindered our understanding of how the judiciary operates in the foreign relations scheme. First, within the small body of literature examining courts and foreign policy, a majority of these studies utilize qualitative techniques to assess historical relationships between the three branches of the federal government. These studies examine whether the Supreme Court defers to either the President or Congress in the formulation and conduct of U.S. foreign policy. Consequently, the Judiciary is viewed as a subservient branch of government rather than an equal component of the U.S. system.

Second, the constitutional authority imposed upon the judiciary extends beyond balancing disputes between the political branches of government. Courts are responsible for protecting the civil liberties of citizens within the United States. Arguably, this responsibility becomes difficult to fulfill when judges resolve disputes between the rights of individuals and the authority of the federal government to engage in foreign affairs or protect national security. A dearth of empirical analyses exists which systematically explore patterns of judicial behavior under these circumstances.

[65] Clarke and Neveleff (1984, 493).

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Finally, most studies focus exclusively on the United States Supreme Court. The Federal Courts of Appeals and District Courts receive virtually no attention. With the Supreme Court having more control over its docket, and thereby free to reduce the number of cases it hears, the decisions of the lower federal courts become more significant because the possibility of review is reduced. Consequently, the Courts of Appeals and District Courts provide additional constraints on the political branches of government. Therefore, an examination of all levels of the federal judiciary is essential in understanding how the courts resolve foreign policy disputes.

The chapters of this dissertation therefore contribute to several literatures. First, the analyses augment studies of U.S. foreign policy by focusing on a historically neglected branch. Second, the examinations contribute to the literature on judicial politics by comparing structural differences among the three levels of the federal court system. Throughout the entire project, two main themes emerge: what roles have the federal courts assumed in resolving foreign policy disputes, and does the structure of the judicial system exert a substantial influence on judicial decision making in foreign policy cases? This chapter highlights the major findings of the various analyses and speculates on the changes brought about since the terrorist attacks of September 11, 2001.

Analytical Contributions

As I mention in Chapter One, assessing the impact of the federal judiciary on U.S. foreign policy is not an easy task. To do so adequately requires an understanding of several different literatures: international relations/foreign policy theories, constitutional/legal theories, and theories of judicial politics (including individual

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behavioral and institutional theories). Based on a juxtaposition of these theories, I initially identify three theoretical expectations. First, courts should possess an initial inclination to defer to governmental authority when adjudicating foreign policy disputes. Second, while the judiciary may possess an initial tendency to rule in favor of governmental interests, liberal judges will be more likely to support civil liberties claims against the government. Finally, institutional influences resulting from the hierarchical judicial structure should significantly constrain the ability of lower court judges to render decisions according to their ideological preferences.

In order to assess the validity of these theoretical expectations, I conduct a series of empirical analyses. Initially, I examine each level of the federal judiciary in isolation; that is, under the assumption that the hierarchical structure of the judiciary does not exert a significant influence. The answer about whether judges are defenders of civil liberties or champions of national security is resolved in favor of the latter. Based on separate probit models one can reasonably conclude that federal judges are champions of national security. The lower federal courts seldom rule in favor of civil liberties claims (34.4% for the District Courts and 37.8% for the Appeals Courts). The Supreme Court is more sensitive to individual challenges, supporting these claims in 44.0% of their decisions. However, it is apparent that the justices more often defer to governmental authority in foreign relations. While the federal judiciary is prone to support foreign policy interests, it is important to understand the conditions under which these judges will rule in favor of civil liberties claims. An important influence is the ideological preferences of judges. The empirical results indicate that more liberal judges – as measured by partisan affiliations of the appointing president – are more likely to render decisions in favor of civil liberties.

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This result holds for each level of the federal judiciary, although the results are more pronounced in the Supreme Court, less so for the Appeals Courts, and the weakest for District Courts. Therefore, the first two theoretical expectations are confirmed through the individual empirical analyses: judges possess an initial inclination to rule in favor of foreign policy interests, however, liberal judges are more likely to support civil liberties claims than their conservative colleagues.

To assess whether the hierarchical system constrains judicial decision making, I first analyzed the Courts of Appeals. Do judges on the Courts of Appeals guess the preferences of Supreme Court justices when rendering decisions in foreign affairs, and does this anticipatory behavior significantly impact or constrain the ability of these judges to maximize their personal policy preferences? To examine these questions initially, I develop a formal model derived from the tenets of principal agency theory (as modified to conform to the federal judiciary). Under complete information, this model provides support for the notion that appellate judges prefer to render decisions without interference from the Supreme Court. If the Supreme Court grants *certiorari*, the justices are more likely to reverse the appellate decision thereby imposing a negative reputation effect on Appeals Court judges. Therefore, strategic appellate judges will render non-ideological decisions (or mask their ideological preferences) if they believe the Supreme Court will grant *certiorari* to reverse an ideological decision. Testing this theoretical expectation involves relying on a strategic choice probit model. Although certain caveats limit the generalizability of the results, strategic choice methods allow researchers to explicitly model strategic interdependence among multiple actors – an advantage not gained in other methods. The empirical results indicate that Appeals Court judges do

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anticipate responses from the Supreme Court, and adjust their behavior according to this perceived constraint. While appellate panels dominated by Democratic judges tend to rule in favor of civil liberties, if they anticipate a grant of *certiorari* by the Supreme they will mask these ideological preferences. The consequence of non-anticipation is a significant likelihood of Supreme Court review for those decisions which support civil liberties (probably because the federal government is more likely to appeal an unfavorable decision to the Supreme Court than are non-governmental litigants). Thus, the hierarchical structure of the federal judiciary exerts a significant constraint on the ability of judges on the Courts of Appeals from rendering decisions according to their ideological preferences.

Given this empirical support for anticipatory behavior by the Courts of Appeals, one might believe a similar phenomenon would exist for the District Courts. Since the appellate courts do not possess discretionary control over their dockets they must review all cases brought before them on appeal. The Supreme Court, in contrast, is able to selectively grant *certiorari* to a comparatively small number of cases. As one of the tenets of the principal agent model indicates, compliance by the agent to the principal's wishes is directly affected by the ability of the principal to monitor the agent's actions. The Supreme Court monitors a small number of decisions, and yet is able to constrain the Appeals Courts. Therefore, since the Appeals Courts monitor a higher percentage of District Court decisions it is logical to assume a stronger constraint will exist for the District Courts. However, the empirical results of the strategic choice model indicate the District Courts are not constrained by the anticipated behavior of the Appeals Courts. There are two potential reasons for this empirical difference. The first reason involves the

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threat of sanction (considered a primary motivation for agents operating in a hierarchical structure). While the Courts of Appeals review substantially more cases than the Supreme Court, they are also more likely to affirm District Court decisions than the Supreme Court. The second reason against applying the tenets of principal agency theory to the District Courts involves the ability of these judges to estimate legitimately the preferences of the Appeals Courts. Since appellate judges are assigned to panels through a random process, it is nearly impossible for a District Court judge to calculate which three appellate judges will review an appeal. Consequently, these judges cannot condition their behavior on expected responses by the Appeals Courts because the preferences of the appellate panel are unknown.

Civil Liberties Protection in a Post-September 11TH Environment

Within weeks of the September 11, 2001, attacks Congress passed the Patriot Act, designed to provide the federal government with the authority to combat terrorism. However, while the Act "may not have been designed to restrict American citizens' civil liberties, its unintended consequences threaten the fundamental constitutional rights of people who have absolutely no involvement with terrorism" (Whitehead and Aden 2002, 1083). Currently, the federal courts are reviewing cases involving aspects of the government's "war on terrorism." Three cases are especially noteworthy and are explored qualitatively in this section. The first two cases involve Courts of Appeals decisions regarding the government's ability to conduct secret deportation hearings for individuals suspected of aiding terrorist causes. The final case, recently disposed of by a Supreme

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Court decision, involves a government directive to detain permanent resident aliens during deportation proceedings regardless of whether they pose a flight risk.

On August 26, 2002, the Sixth Circuit Court of Appeals in Cincinnati rendered a decision in the case *Detroit Free Press v. Ashcroft*. This case involved the deportation hearing of Rabih Haddad, accused of operating an Islamic charity and funneling contributions to suspected terrorist organizations. Haddad's family, friends (including Congressman John Conyers), and the media sought to attend his hearing, but were informed that the proceedings were closed to the public and the press. Writing for a unanimous panel, Judge Damon Keith stated, "the public's interests are best served by open proceedings. A true democracy is one that operates on faith – faith that government officials are forthcoming and honest, and faith that informed citizens will arrive at logical conclusions. This is a vital reciprocity that America should not discard in these troubling times. Without question, the events of September 11, 2001, left an indelible mark on our nation, but we as a people are united in the wake of the destruction to demonstrate to the world that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy."[66] Following these statements, the panel affirmed the lower court decision and supported the civil liberties challenge to the government.

In contrast to this decision is a ruling by the Third Circuit in Philadelphia, decided on October 8, 2002. The case is a response by New Jersey newspapers to repeated denials by the immigration courts to docket information and access to deportation hearings. The immigration courts denials stemmed from a memorandum issued by Chief Immigration Judge Creppy directing courts to "close the hearings to the public and avoid discussing the cases or otherwise disclosing information about the cases to anyone outside the

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[66] *Detroit Free Press v. Ashcroft* 303 F.3d 681 (2002).

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Immigration Court."[67] According to the majority opinion, written by Judge Edward Becker, "this case arises in the wake of September 11, 2001, a day on which American life changed drastically and dramatically. The era that dawned on September 11th, and the war against terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches. Since the primary national policy must be self-preservation, it seems elementary that, to the extent open deportation hearings might impair national security, that security is implicated in the logic test."[68] The Third Circuit ruled in favor of foreign policy interests, concluding that the federal government had justified its request for secret deportation hearings, given the importance of preserving national security.

The final case, handed down by the Supreme Court on April 29, 2003, involves the mandatory detention of permanent aliens who do not pose a flight risk, but are undergoing deportation proceedings due to criminal convictions. The respondent, Hyung Joon Kim, entered the United States in 1984 and, at age six, became a lawful permanent resident alien. In 1996, Kim was convicted in California state court of first-degree burglary. Consequently, the Immigration and Naturalization Service (INS) initiated deportation proceedings, and detained him pending removal. The District Court agreed with Kim's assertion that mandatory detention without a determination of flight risk violated his due process rights. Subsequently, the Court of Appeals for the Ninth Circuit, affirmed this decision. Appeals courts in the Third, Fourth, and Tenth Circuits reached similar conclusions, finding a constitutional protection against mandatory detention.[69] On consolidated appeal, the Supreme Court reversed these decisions. Writing for a 5-4

[67] *North Jersey Media Group, Inc. v. Ashcroft* 2002 U.S. App. LEXIS 21032 (2002).
[68] Ibid.
[69] However, the Seventh Circuit rejected a similar constitutional challenge in *Parra v. Perryman* (1999).

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majority, Chief Justice Rehnquist stated, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[70] As such, and given the exercise of broad powers regarding immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens."[71] Therefore, the Supreme Court ruled in favor of foreign policy interests by allowing the detention of aliens during their deportation hearings.

While these three contradictory rulings indicate potential confusion within the courts as to their authority and responsibility in the post-September 11th environment, the decisions follow some of the theoretical patterns demonstrated above. One of the most substantial influences on judicial decision making in foreign affairs is the partisan composition of the court. The empirical evidence indicates panels dominated by Democratic judges are more likely to rule in favor of civil liberties. In *Detroit Free Press* judges appointed by Democratic presidents dominate the panel, whereas in *North Jersey Media Group*, and *Kim* Republican judges dominate the panel. These recent cases further support the theoretical expectations of ideological influences and civil liberties decisions.

The second substantial influence empirically supported earlier involves the directionality of the lower court's decision. Unfortunately, the pattern does not completely hold in the three post-September 11th cases. All three cases were disposed initially in federal district court with a pro-civil liberties decision. Based on theoretical expectations, the appeals courts should have affirmed all decisions. However, this only

[70] *Demore v. Kim* 123 S. Ct. 1708 (2003).
[71] Ibid.

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happened in *Detroit Free Press* and *Kim*. The Third Circuit, in *North Jersey Media Group*, reversed the district court ruling and issued a decision in favor of foreign affairs.

Finally, it is difficult to determine whether the appellate panels anticipated potential Supreme Court responses when they rendered decisions. However, we see in *Demore v. Kim* that the Supreme Court grants *certiorari* and overturns several consolidated Appeals Court decisions. Perhaps this action by the Court has sent a signal to the appellate judges that will significantly constrain future decisions. Further rulings by the lower courts and by the U.S. Supreme Court are needed to systematically determine the long-term effects of September 11, 2001, on judicial behavior. As Smith (2002) acknowledges, questions remain "about the hundreds of detainees in Cuba as well as the detainees in the United States, all of whom still live under the authority of the American legal system but not – for any practical purposes – within the coverage of the Constitution and its exalted protections for individuals' rights and liberties." Therefore, additional empirical examinations will be needed to monitor, understand, and explain the impact of September 11th on the federal judiciary.

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APPENDIX ONE: CODING RULES

BASIC INFORMATION

CASENUM Case identification number
DISTCITE District Court case citation (if applicable)
APPCITE Appeals Court case citation (if applicable)
SUPCITE Supreme Court case citation (if applicable)
CIRCUIT Judicial Circuit of Court reviewing case (for Supreme Court, code circuit where case originated) 12 = DC 13 = Military
YEAR Year of decision
INCDATE Date of incident being disputed
ORALDATE Date of oral argument
DECDATE Date of opinion
ORIGIN Original entity to dispose of the case

1 = federal district court or federal magistrate
2 = federal administrative agency (including commissions and review boards)
3 = military court (e.g., a court martial, include habeas corpus from military)
4 = state court (includes habeas corpus petitions after conviction in state court)
5 = other (e.g., Tax or Bankruptcy Court)
9 = not ascertained

DISTDISP District court treatment of case (if applicable)

1 = for plaintiff/prosecution
2 = for respondent/defendant
3 = for plaintiff/prosecution in part and respondent/defendant in part
4 = petition denied or dismissed
5 = certification to another court
9 = not ascertained

APPDISP Appeals court treatment of case (if applicable)

1 = affirmed
2 = reversed (include reversed, vacated, remanded or any combination)
3 = affirmed in part and reversed in part (or modified in any aspect)
4 = petition denied or appeal dismissed
5 = certification to another court
9 = not ascertained

SUPDISP Supreme Court treatment of case (if applicable)

1 = affirmed
2 = reversed (include reversed, vacated, remanded or any combination)
3 = affirmed in part and reversed in part (or modified in any aspect)

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4 = petition denied or appeal dismissed
9 = not ascertained

VOTE — Vote margin

LITIGANT INFORMATION

NUMAPPL	Total number of appellants/plaintiffs (99 if unable to ascertain)
APPL1ST	Numeric coding of the first listed appellant (use litigant code sheet)
APPL2ND	Numeric coding of second appellant (if different)
AMICIAPP	Number of amici on behalf of appellants/plaintiffs
AMAPP1ST	Numeric coding of first appellant amicus (use litigant code sheet)
AMAPP2ND	Numeric coding of second appellant/plaintiff amicus (if different)
NUMRESP	Total number of respondents/defendants (99 if unable to ascertain)
RESP1ST	Numeric coding of the first listed respondent (use litigant codes)
RESP2ND	Numeric coding of the second respondent (if different)
AMICIRES	Number of amici on behalf of respondents/defendants
AMRES1ST	Numeric coding of first respondent amicus (use litigant code sheet)
AMRES2ND	Numeric coding of second respondent amicus (if different)

LEGAL INFORMATION

CONST1 — Most frequently cited Constitutional provision (listed in headnotes)

Example: 001 = Article I of original Constitution
101 = 1st Amendment
114 = 14th Amendment

CONST2 — Second most frequently cited Constitutional provision

DECUNCON — Specific declaration by the court that a statute or administrative action is unconstitutional (do not code if the court merely mentions a procedural violation of the Constitution; for example, that the police conducted a search or seizure in violation of the 4th Amendment)

0 = request for declaration denied / statute or action deemed constitutional
1 = act of Congress declared unconstitutional
2 = interpretation/application of federal law unconstitutional
3 = administrative action or reg declared unconstitutional on its face
4 = interpretation/application of agency reg unconstitutional
5 = state constitution declared unconstitutional on its face
6 = interpretation/application of state constitution unconstitutional
7 = state (including substate) law or regulation unconstitutional on its face
8 = interpretation/application of state (or substate) law unconstitutional

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CONSTIT — Did an interpretation of the Constitution favor the appellant/plaintiff?
1 = no
2 = yes
9 = mixed

FEDLAW — Did an interpretation of federal law favor the appellant/plaintiff (excluding sentencing guidelines)?
1 = no
2 = yes
9 = mixed

PROCED — Did an interpretation of rules of procedure, judicial doctrine, or previous case law favor the appellant/plaintiff?
1 = no
2 = yes
9 = mixed

TREATY — Did an interpretation of an international treaty or bilateral agreement favor the appellant/plaintiff?
1 = no
2 = yes
9 = mixed

FORLAW — Did an interpretation of domestic laws from a foreign country favor the appellant/plaintiff?
1 = no
2 = yes
9 = mixed

THRESH1 — Numeric code of first threshold issue (if applicable)
1 = proper jurisdiction
2 = failure to state a claim
3 = standing
4 = mootness
5 = exhaustion of administrative remedies
6 = timeliness (includes statutes of limitation and late filing of fees)
7 = governmental immunity (includes act of state and FSIA claim)
8 = frivolousness
9 = political question
10 = other

RESTHR1 — Did the court resolve the first threshold issue in favor of the appellant/plaintiff?
1 = no
2 = yes

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9 = mixed

THRESH2 Numeric code of second threshold issue (if different)

RESTHR2 Did the court resolve the second threshold issue in favor of the appellant/plaintiff?

ISSUE INFORMATION

ISSUE1 Numeric code of most significant issue (use issue code sheet)

DIRECT1 Directionality of most significant issue

Criminal Cases (including espionage)

1 = for government
3 = for defendant
9 = mixed

Civil Rights/Liberties (including 1st Amendment and Due Process; excluding criminal issues)

1 = for government
3 = for individual claiming civil rights violation
9 = mixed

International Economic/Government Regulation/International Law

1 = for economic upperdog, governmental regulation, no environmental protection, for U.S. interest when against foreign entity, or extraditing U.S. national to U.S. or keeping in U.S.
3 = for economic underdog, against governmental regulation, environmental protection, for interests of foreign entity against the U.S., or extraditing U.S. national to foreign country or keeping in foreign country
9 = mixed

Immigration

1 = for governmental regulation or action
3 = for individual
9 = mixed

War Powers

1 = for governmental activity (legitimizing war, military or clandestine activity)
3 = against governmental activity
9 = mixed

Miscellaneous

1 = for U.S. government or assertion of federal power

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3 = against federal government
9 = mixed

ISSUE2	Numeric coding of second most significant issue
DIRECT2	Directionality of second issue
NATLSEC	Specific claim of national security or national defense

1 = security claim upheld by court
3 = security claim denied by court
9 = mixed

JUDGE INFORMATION

CODEJ1	Numeric coding of opinion author (from Songer database codes)
J1VOTE1	Directionality of first judge on the first issue (these values will match the corresponding issue directionality codes if the judge agrees (i.e. is in the majority) with the decision, dissenting judges will have a directionality code opposite the issue directionality, and judges concurring in part and dissenting in part will be coded as 9)
J1VOTE2	Directionality of first judge on second issue
CODEJ2	Numeric coding of second judge
J2VOTE1	Directionality of second judge on first issue
J2VOTE2	Directionality of second judge on second issue
CODEJ3	Numeric coding of third judge
J3VOTE1	Directionality of third judge on first issue
J3VOTE2	Directionality of third judge on second issue
CODEJ4	Numeric coding of fourth judge
J4VOTE1	Directionality of fourth judge on first issue
J4VOTE2	Directionality of fourth judge on second issue
CODEJ5	Numeric coding of fifth judge
J5VOTE1	Directionality of fifth judge on first issue
J5VOTE2	Directionality of fifth judge on second issue
CODEJ6	Numeric coding of sixth judge
J6VOTE1	Directionality of sixth judge on first issue
J6VOTE2	Directionality of sixth judge on second issue
CODEJ7	Numeric coding of seventh judge
J7VOTE1	Directionality of seventh judge on first issue
J7VOTE2	Directionality of seventh judge on second issue
CODEJ8	Numeric coding of eighth judge
J8VOTE1	Directionality of eighth judge on first issue

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J8VOTE2	Directionality of eighth judge on second issue
CODEJ9	Numeric coding of ninth judge
J9VOTE1	Directionality of ninth judge on first issue
J9VOTE2	Directionality of ninth judge on second issue

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APPENDIX TWO: LITIGANT CODES

General Category of Litigant (1st digit of codes)

1 = federal government
2 = foreign government
3 = state or local government
4 = private business
5 = private organization or association
6 = U.S. Citizen (including naturalized aliens)
7 = foreign citizen (including legal and illegal aliens)
8 = other
0 = not ascertained

Federal Government (general category 1)

If 1 is selected for the general category then the following codes should be used for the second digit:

1 = Executive Branch
2 = Legislative Branch
3 = Judicial Branch
4 = Specific Foreign Policy Agency
5 = Specific Domestic Policy Agency
6 = Miscellaneous Federal Government

If 1 is selected for the second digit (Executive Branch) then the following codes should be used for the 3rd and 4th digits:

01 = The President of the United States
02 = Office of the Presidency
03 = Department of Agriculture
04 = Department of Commerce
05 = Department of Defense (includes all branches of the military)
06 = Department of Education
07 = Department of Energy
08 = Department of Health, Education, and Welfare
09 = Department of Health and Human Services
10 = Department of Housing and Urban Development
11 = Department of Interior
12 = Department of Justice (does not include FBI; does include U.S. attorneys)
13 = Department of Labor (does not include OSHA)
14 = Post Office Department
15 = Department of State (includes U.S. diplomats)
16 = Department of Transportation (includes NTSB)
17 = Department of the Treasury (does not include Secret Service)
18 = Department of Veteran Affairs

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19 = other Executive Branch Department or individual
00 = executive branch not ascertained

If 2 is selected for the second digit (Legislative Branch) the following codes should be used for the 3rd and 4th digits:

01 = House of Representatives
02 = Senate
03 = Members from both houses of Congress
04 = Congressional foreign policy oversight committee (armed services, intelligence, foreign relations, etc)
05 = other Congressional committee (appropriations, judiciary, etc)
06 = officer of Congress or other Congressional related actor
00 = legislative branch not ascertained

If 3 is selected for the second digit (Judicial Branch) then the following codes should be used for the 3rd and 4th digits:

01 = Federal District Court (or judge)
02 = Federal Circuit Court of Appeals (or judge)
03 = Court of Claims (or judge)
04 = Tax Court (or judge)
05 = Bankruptcy Court (or judge)
06 = other court or judge
00 = judicial branch not ascertained

If 4 is selected for the second digit (Independent Foreign Policy Agency) then the following codes should be used for the 3rd and 4th digits:

01 = Central Intelligence Agency
02 = Federal Bureau of Investigation
03 = National Reconnaissance Office
04 = National Security Agency
05 = Nuclear Regulatory Commission
06 = Secret Service
07 = U.S. Agency for International Development
08 = U.S. Information Agency
09 = U.S. International Trade Commission
10 = U.S. Trade and Development Agency
11 = Immigration and Naturalization Service (INS, includes border patrol)
12 = Subversive Activities Board
13 = other foreign policy agency
00 = foreign policy agency not ascertained

If 5 is selected for the second digit (Independent Domestic Policy Agency) then the following codes should be used for the 3rd and 4th digits:

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01 = Defense Nuclear Facilities Safety Board
02 = Environmental Protection Agency
03 = Federal Communications Commission
04 = Federal Emergency Management Agency
05 = Federal Energy Agency (Federal Power Commission)
06 = Federal Law Enforcement (includes DEA, ATF, Marshalls, Corrections)
07 = Federal Maritime Authority (Fed Maritime Commission)
08 = Federal Reserve
09 = Federal Trade Commission
10 = Interstate Commerce Commission
11 = NASA
12 = other domestic policy agency
00 = domestic policy agency not ascertained

If 6 is selected for the second digit (Miscellaneous Federal Government) then the following codes should be used for the 3rd and 4th digits:

01 = DC in its corporate capacity
02 = legislative body for DC local government
03 = the United States in its corporate capacity (include criminal cases)
04 = unlisted federal corporation (TVA, FNMA (fannie mae))
00 = not ascertained

Foreign Government (general category 2)

If 2 is selected as the first digit then the following codes should be used for digits 2-4:

101 = foreign head of state (includes presidents and prime ministers)
102 = foreign ministers (cabinet level positions)
103 = foreign diplomats (ambassadors, envoys, etc)
104 = other foreign executive officials

201 = foreign legislative bodies (includes members of parliaments)

301 = foreign judicial entities (includes foreign national courts and judges)

401 = UN Secretary-General
402 = UN General Assembly (includes foreign ambassadors to the UN)
403 = UN regulatory agency (Security Council, ECOSOC, etc.)
404 = International Court of Justice
405 = International Criminal Court

501 = other regional organizations (OAS, EU, etc.)
502 = other regional judicial entities (such as the Court of European Justice)

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601 = miscellaneous international organization
000 = not ascertained

State or Local Government (general category 3)

If 3 is selected as the first digit then the following codes should be used for digits 2-4:

101 = executive (i.e., governor, mayor, county executive)
102 = executive agency (police department)
103 = other state or local executive official

201 = legislature (state legislature, city council, etc.)
202 = educational body (school board, college board of trustees)
203 = other state or local legislative entity or official

301 = court or judge
302 = prison official
303 = prosecuting attorney
304 = other state or local judicial entity or official

401 = service bureaucracy (fire dept, revenue board, human services, etc.)
402 = regulatory bureaucracy (transportation, market practices, zoning, etc.)
403 = other state or local bureaucracy

501 = state or local government in its corporate capacity
000 = state or local government not ascertained

Private Business (general category 4)

If 4 is selected as the first digit then the following codes should be used for the second digit:

1 = clearly local (individual or family owned)
2 = intermediate domestic (neither clearly local nor clearly national)
3 = clearly national (across the United States)
4 = intermediate foreign (neither clearly national nor clearly international)
5 = clearly international
0 = not ascertained

After the second digit has been determined the following codes should be used for digits 3-4:

01 = agriculture
02 = mining
03 = construction
04 = manufacturing

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05 = transportation and shipping
06 = trade – wholesale and retail
07 = financial (includes insurance, banks, credit unions, etc.)
08 = utilities (includes nuclear power plants)
09 = medical (includes hospitals and doctors)
10 = legal
11 = media
12 = education
13 = entertainment

00 = other or not ascertained

Private Organization or Association (general category 5)

If 5 is selected as the first digit then the following codes should be used for digits 2-4:

101 = business or trade association
102 = professional association other than law or medicine
103 = legal association
104 = medical association
105 = union
106 = other business organization

201 = civic, social, or fraternal organization
202 = political interest group (ACLU, PAC's, lobby groups)
203 = political party
204 = educational organization
205 = religious organization
206 = non-profit charitable organization
207 = other non-business organization

000 = not ascertained

U.S. Citizen (general category 6)

If 6 is selected as the first digit then the following codes should be used for the second digit:

1 = male (either indicated in opinion or assumed because of name)
2 = female (either indicated in opinion or assumed because of name)
9 = sex not ascertained

If 6 is selected as the first digit then the following codes should be used for the third digit:

1 = caucasian (either indicated in opinion or assumed because of name)
2 = black (either indicated in opinion or assumed because of name)

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3 = native american (either indicated in opinion or assumed because of name)
4 = asian (either indicated in opinion or assumed because of name)
5 = hispanic (either indicated in opinion or assumed because of name)
6 = arabic (either indicated in opinion or assumed because of name)
9 = race not ascertained

If 6 is selected as the first digit then the following codes should be used for the fourth digit:

1 = poor (specific indication in opinion, such as pro se petitioner)
2 = wealthy (specific indication in opinion)
3 = above poverty line but not clearly wealthy
9 = income not ascertained

Foreign Citizen (general category 7)

If 7 is selected as the first digit then the following codes should be used for the second digit:

1 = male (either indicated in opinion or assumed because of name)
2 = female (either indicated in opinion or assumed because of name)
9 = sex not ascertained

If 7 is selected as the first digit then the following codes should be used for the third digit:

1 = caucasian (either indicated in opinion or assumed because of name)
2 = black (either indicated in opinion or assumed because of name)
3 = native american (either indicated in opinion or assumed because of name)
4 = asian (either indicated in opinion or assumed because of name)
5 = hispanic (either indicated in opinion or assumed because of name)
6 = arabic (either indicated in opinion or assumed because of name)
9 = race not ascertained

If 7 is selected as the first digit then the following codes should be used for the fourth digit:

1 = poor (specific indication in opinion, such as pro se petitioner)
2 = wealthy (specific indication in opinion)
3 = above poverty line but not clearly wealthy
9 = income not ascertained

Other (general category 8)

If 8 is selected as the first digit then the following codes should be used for digits 2-4:

101 = trustee in bankruptcy – individual

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102 = trustee in bankruptcy – institution
103 = executor of estate – individual
104 = executor of estate – institution
105 = trustee of private trust – individual
106 = trustee of private trust – institution
107 = other fiduciary or trustee

201 = indian tribe
202 = multi-state agency

000 = litigant characteristics not ascertained

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APPENDIX THREE: ISSUE CODES

Issue codes are organized into 6 categories:

1. Criminal (including espionage)
2. Civil Rights and Liberties (including 1st Amendment and Due Process) for U.S. citizens
3. International Economic/Government Regulation/International Law
4. Immigration
5. War Powers
6. Miscellaneous

Criminal Issues

10 = violent crimes (murder, rape, assault)
11 = robbery, burglary, larceny
12 = narcotics, alcohol related crimes
13 = espionage/treason
14 = criminal violations of government regulations for business (including violations of the Trading with the Enemy Act)
15 = morals charges (gambling, prostitution, obscenity)
16 = white collar crimes (embezzlement, fraud, bribery)
17 = sabotage
18 = other (including prisoner petitions after sentencing)

Civil Rights and Liberties (including 1st Amendment and Due Process)

20 = race/gender discrimination (alleged by minority or female)
21 = reverse discrimination (alleged by caucasian or male)
22 = other discrimination claim
23 = freedom of speech, religion, press or association
24 = expression of political or social beliefs conflicting with regulation of physical activity (demonstrations, parades, canvassing, picketing)
25 = challenges to war and military (includes conscientious objection)
26 = travel restrictions on U.S. citizens
27 = Freedom of Information Act (or claims involving rights of access)
28 = denial of hearing or notice
29 = other 1st amendment or due process claims (including loss of U.S. citizenship)

International Economic/Government Regulation/International Law

30 = private commercial disputes (including private labor disputes)
31 = commercial regulation by government or government seizure of property
32 = government benefit programs (e.g., war risk insurance, veterans benefits, and gov't employment)
33 = environmental claims

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34 = disputes over multilateral or bilateral treaties (excluding UN declarations)
35 = disputes with United Nations (or other international organizations)
36 = disputes with foreign governments over issues of sovereignty or diplomatic immunity (includes restrictions of diplomatic activity)
37 = extradition of U.S. citizens from other countries (or to other countries)
38 = admiralty claims (include seamens' wage disputes, maritime contracts, charter contracts and tort claims)
39 = other international law (including indian law)

Immigration

40 = alien civil rights petitions
41 = deportation/extradition of aliens
42 = immigration laws (including immigration quotas)
43 = visas and travel restrictions of aliens
44 = other immigration issues

War Powers/Military

50 = opposition to war or military (which does not raise 1st Amendment challenges)
51 = opposition to clandestine activity (include civil suits over military action)
52 = selective service or draft issues (which do not include 1st Amendment challenges)
53 = nuclear, chemical, biological weapons (including regulation of plants or factories)
54 = other weapons or equipment utilized by military
55 = other military service
56 = other war powers issues

Miscellaneous

60 = federalism
61 = other issues

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