Defenders of Liberty or Champions of Security?

Federal Courts, the Hierarchy of Justice, and U.S. Foreign Policy

Kirk A. Randazzo

Defenders of Liberty
or
Champions of Security?

SUNY series in American Constitutionalism

Robert J. Spitzer, editor

Defenders of Liberty or Champions of Security?

Federal Courts, the Hierarchy of Justice, and U.S. Foreign Policy

Kirk A. Randazzo

SUNY PRESS

Published by State University of New York Press, Albany

Printed in the United States of America

For information, contact State University of New York Press, Albany, NY
www.sunypress.edu

Production by Robert Puchalik
Marketing by Michael Campochiaro

Library of Congress Cataloging-in-Publication Data

Randazzo, Kirk A.
Defenders of liberty or champions of security? : federal courts, the hierarchy of justice, and U.S. foreign policy / Kirk A. Randazzo.
p. cm. — (SUNY series in American constitutionalism)
Includes bibliographical references and index.
ISBN 978-1-4384-3047-8 (hardcover : alk. paper)
1. United States—Foreign relations—Law and legislation. 2. Political questions and judicial power—United States. I. Title.
KF4651.R365 2010
342.73'0412—dc22
2009022693

10 9 8 7 6 5 4 3 2 1

Contents

List of Figures

List of Tables

Acknowledgments

This project would not have been possible without the generous support and assistance from several individuals and sources. First, to Reginald S. Sheehan, I offer my most sincere gratitude. Without your insights, encouragement, and advice, this book would not have been written. Second, to Harold J. Spaeth, I thank you for providing valuable comments into the research and socialization into the profession. To Burt Monroe, Donald R. Songer, and Christopher E. Smith, I thank you for reading earlier drafts of this research and for commenting on areas of improvement.

Additionally, in writing this book I have received help from several individuals who have helped develop my thoughts and encouraged me to constantly reevaluate my perceptions: John Aldrich, Horace Bartilow, Chris Bonneau, Bradley Canon, Jamie Carson, Richard Fording, Matthew Gabel, Douglas Gibler, Mark Hurwitz, Arthur "Skip" Lupia, Mark Peffley, and Richard Waterman. I would also like to thank my colleagues in the Department of Political Science at the University of Kentucky and the Department of Political Science at the University of South Carolina for their support. It is important to note that portions of this research were supported by generous research grants from the University of Kentucky; and my thanks to Michael Fix for his work as a research assistant.

Finally, I would be completely remiss if I did not acknowledge those individuals who provide a constant source of personal inspiration. To my wife, Carol, I could never have finished this book without your love, faith, and support. To my children, Sam and Anna, thank you for the continuous smiles when I return home from long days in the office. And, thanks to my parents, Peter and Donna, and my in-laws, John and Ethel, for serving as excellent role models.

Though these individuals all contributed to the completion of this book, any errors or omissions are solely my responsibility.

Portions of this book have appeared in various journals, and I thank the editors for their gracious permission to reprint some of the text here. In particular, portions

of Chapters One and Two appear in "When Liberty and Security Collide: Foreign Policy Litigation and the Federal Judiciary"[1] and "Foreign Affairs Litigation in the U.S. Courts of Appeals: A Preliminary Analysis."[2] A portion of Chapters Three and Four appear in "Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts."[3]

Introduction

In the early 1980s, the U.S. Drug Enforcement Administration (DEA) began a concentrated effort to curb cocaine trafficking by Mexican drug cartels. By 1984, the DEA had made several significant arrests, resulting in substantial losses of revenue for the Mexican enterprise. In response, the Mexican cartel kidnapped, tortured, and killed DEA Special Agent Enrique Camarena in 1985. Evidence collected by the DEA connected several individuals to the crime, including Honduran national Juan Ramon Matta-Ballesteros and Mexican national Dr. Humberto Alvarez-Machain. The agency believed that Alvarez-Machain helped prolong Agent Camarena's life so that other members of the cartel (such as Ballesteros) could interrogate and torture him. After several unsuccessful attempts to extradite both individuals from their respective countries, the DEA developed plans for their abduction by force and transportation to the United States. To that end, the agency hired several individuals, including members of the Mexican Federal Judicial Police and the Honduran Special Forces, to kidnap Ballesteros from his home and Alvarez-Machain from his office.

During their trials in federal district court, both individuals contended that while being transported to the United States, the abductors repeatedly beat them; applied stun guns to various parts of their bodies, including their feet and genitals; and injected them with substances that caused dizziness. In the matter of Ballesteros, the district court dismissed these contentions and he was convicted and sentenced for the murder of Agent Camarena. In the matter of Alvarez-Machain, the district court ruled that the forcible abduction violated an extradition treaty between the United States and Mexico, and consequently, the federal courts did not possess jurisdiction over the defendant.

Both cases were appealed to the Ninth Circuit, where a panel of appellate judges affirmed each district court decision. In the matter of Alvarez-Machain, the judges based their decision on a Ninth Circuit precedent indicating that forcible abduction of a foreign citizen without the consent of his or her national government violated

certain extradition treaties. In the matter of Matta-Ballesteros, the appellate panel stated, "Where the terms of an extradition treaty do not specifically prohibit the forcible abduction of foreign nationals, the treaty does not divest federal courts of jurisdiction over the foreign national."[1] Though the judges expressed their concern over the circumstances surrounding Matta-Ballesteros's abduction and treatment, they concluded that U.S. officials had violated no constitutional or statutory rights.

Finally, after the Ninth Circuit's decision in favor of Alvarez-Machain, the federal government appealed to the U.S. Supreme Court for a writ of *certiorari*, which it ultimately received. Writing on behalf of a 6-3 majority, Chief Justice William Rehnquist overturned the Ninth Circuit's ruling. The reversal was based on the Court's precedent set in *Ker v. Illinois*, which stated that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"[2]

It is perhaps difficult to determine if both Alvarez-Machain and Matta-Ballesteros were brought to justice for the murder of Agent Camarena or if they were the victims of an overzealous and abusive U.S. government. Regardless, these cases exemplify the difficulties federal judges encounter when they determine the extent to which government officials—under the guise of foreign policy or national security—may permissibly intrude on civil liberties. Though the cases were adjudicated within the same judicial circuit, the lower court judges responded to different stimuli and preferences. Additionally, the grant of *certiorari* by the Supreme Court in the Alvarez-Machain case reminds us of the hierarchical structure of the federal judiciary and its potential influence on judicial behavior. Thus, the litigation of foreign policy cases within the United States presents unique challenges for federal judges, from competing preferences between security and liberty to influences from the judicial hierarchy.

These challenges take on a new significance in contemporary America. The terrorist attacks of September 11, 2001, and subsequent responses by the U.S. federal government have raised fundamental questions about civil liberties, in both domestic and international law. As a result, the U.S. judiciary, out of its responsibility for interpreting the Constitution, has assumed a crucial role in defining the boundaries of domestic and foreign policy and in balancing concerns about security with the protection of liberty. One need look no further than the two most recent Supreme Court cases involving detainees at the U.S. military base in Guantanamo Bay, Cuba, to witness the crucial importance of the judiciary. The first case, *Hamdi v. Rumsfeld* (2004), involved the detention of a U.S. citizen who was captured on the battlefield in Afghanistan. Though the U.S. government attempted to label Hamdi as an enemy combatant and detain him indefinitely, the Supreme Court intervened and ordered that Hamdi's status be litigated in a court of law. Writing on behalf of the majority, Justice Sandra Day O'Connor stated that "we have long made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[3] Additionally, in the most recent Supreme Court case involv-

ing Guantanamo Bay detainees (in this case, the chauffeur of Osama bin Laden), *Hamdan v. Rumsfeld* (2006), the Supreme Court rejected the federal government's attempt to adjudicate offenses in the war on terror before military tribunals. Writing for the Court, Justice John Paul Stevens stated, "Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment."[4]

These two recent cases remind us that how federal courts determine the appropriate balance between security and liberty, and thereby constrain the executive and legislative branches, is therefore of great importance to our understanding of contemporary American politics, U.S. foreign policy, and the behavior of the president and Congress. In short, adjudicating the potentially competing concerns over security versus liberty presents a substantially different challenge for judges than resolving purely domestic policy disputes, and scholars must account for these competing principles to better understand contemporary judicial decision-making processes.

Surprisingly, the majority of studies on U.S. foreign policy ignore this crucial role of the judiciary. The typical focus is on the behavior of the president, Congress, or executive agencies, such as the CIA or the U.S. Department of State. Yet, how and what these actors do in the conduct of foreign policy is constrained fundamentally by the federal courts. Furthermore, the few studies on the judiciary and foreign policy provide an extremely limited view of this topic. Within this extremely small body of literature a majority of the studies rely on qualitative techniques to assess historical relationships between the three branches of the federal government. Typically, they explore whether the Supreme Court defers to either the president or Congress in the formulation and conduct of U.S. foreign policy. But, while these doctrinal analyses provide detailed descriptions of specific case histories, they do not offer rich theoretical explanations for judicial behavior.

An additional limitation is that most studies focus exclusively on the U.S. Supreme Court; the federal courts of appeals and district courts receive virtually no attention. With the Supreme Court gaining almost complete control over its docket, thereby reducing the number of cases it hears, the decisions of the lower federal courts become substantially more significant. Consequently, the courts of appeals and district courts have emerged as powerful constraints on the political branches of government. Thus, an examination of all levels of the federal judiciary is essential to adequately understand how courts in the United States resolve foreign policy disputes.

A HISTORICAL LOOK AT THE 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 John Marshall held that President John Adams's instructions to seize hostile ships were in conflict with Congress and therefore illegal. 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 following 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) and *Korematsu v. United States* (1944), 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 specific decisions 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 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 third component of the U.S. governmental triumvirate—is essential to understanding where they fit in the foreign affairs puzzle.

Constitutional law theories on governmental authority and separation of powers are useful in assessing how judicial actions impact U.S. 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 security. However, as the Constitution dictates, the courts are responsible for protecting the rights of citizens in the United States. This creates a paradox for the courts when called on 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, 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 on 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 between security and liberty described by Professor Charney and Judge Adams.

THE SCOPE OF THE PROJECT

This book fills a significant gap in the literatures on judicial behavior and foreign policy. Using an original dataset of civil liberties challenges to foreign policy, and incorporating sophisticated techniques in formal and empirical modeling, I examine two main questions: (1) To what extent do federal judges defend liberty or champion security when adjudicating disputes? (2) To what extent does the hierarchical structure of the federal judiciary influence the decisions of lower court judges? The initial question focuses on how federal judges balance influences from competing preferences over security and liberty, and the latter examines whether lower court judges strategically anticipate the decisions of higher courts and constrain their behavior to avoid reversal.

My empirical analyses support several novel conclusions. First, it is readily apparent that federal judges are not defenders of liberty. One can reasonably conclude that federal judges champion foreign policy interests, though liberal judges are more likely to support civil liberties than conservatives. Though this finding confirms the conventional wisdom on judicial decision making—that judicial decisions are impacted by the ideological preferences of judges—the data demonstrate a second, more counterintuitive conclusion. According to the analyses, the influence of competing preferences (i.e., security versus liberty) is more pronounced in the lower federal courts and virtually nonexistent in the Supreme Court (where justices are influenced by the traditional, one-dimensional notion of ideology). These two findings are significant because the majority of analyses in the judicial behavior literature operate under the assumption that preferences influence all judicial decision making along a single liberal-conservative ideological dimension. My results demonstrate both the multidimensionality of preferential influences and the asymmetric impact of these influences on specific judges (i.e., differences across district and appellate judges and Supreme Court justices).

Third, the empirical results demonstrate that the hierarchical structure of the federal judiciary exerts significant constraints on the lower courts, but that these constraints are different for the courts of appeals and the district courts. While the evidence indicates judges on both lower levels strategically anticipate reactions from higher tribunals, the magnitude of constraint exerted by this anticipation differs as one moves from the district courts to the appellate courts. One explanation for this difference involves the Supreme Court's *certiorari* decisions—a unique institutional feature that allows the justices to review certain lower court decisions with specific ideological dispositions and potentially overturn those decisions. This feature allows the Supreme Court to threaten appellate judges with reversal more credibly

than appellate judges can threaten their district court colleagues. These results are significant because they are the first comparisons of hierarchical constraints across all levels of the federal judicial system.

Finally, both a quantitative analysis of lower court decisions and a qualitative analysis of the Supreme Court cases after September 11, 2001, indicate that these patterns change somewhat in the contemporary judicial environment. While the federal courts continue to remain deferential to governmental foreign policy interests, judges are becoming more ideologically polarized. Consequently, the influence of individual preferences is more prominent, which in turn mitigates the effects of security influences on judicial behavior. These findings are important because they help shed light on the potential challenges facing federal judges that are caused by the war on terror.

ORGANIZATION OF THE BOOK

Chapter One explores the theoretical foundations of the analysis, beginning with a historical examination of foreign policy litigation in the United States. Next, since many readers may not be familiar with the foreign policy literature, I offer a definition of foreign policy and then explore the literatures of international relations, constitutional law, and judicial politics to illustrate how foreign policy cases differ from domestic policy issues and how this difference affects judicial behavior. Specifically, the theoretical expectations focus on the influence of competing preferences over liberty and security that judges encounter when adjudicating foreign policy disputes.

Chapter Two begins with anecdotal evidence (from judges' opinions) about the balancing of preferences over liberty and security. I then discuss the operationalization and measurement of concepts discussed in the previous chapter and conduct empirical analyses on individual courts in the federal system. Using a unique dataset of foreign policy cases from 1946 to 2000, I estimate a series of empirical models: for the district courts, courts of appeals, and the Supreme Court. In general, I discover that federal judges are influenced more by preferences over security than by preferences over liberty. However, this influence decreases as a case reaches the Supreme Court, where the justices are motivated more by traditional ideological notions of liberty and individual rights.

Chapter Three focuses on the relationship between the courts of appeals and the Supreme Court. Borrowing from the literature on principal-agent theory, I examine whether appellate judges are motivated by a fear of reversal from the Supreme Court. I develop a formal model to explicitly state certain theoretical expectations and then empirically estimate the formal model using a set of recent, sophisticated techniques designed to explore specifically strategic choices. These techniques were developed in international relations to test formal models of strategic behavior on the part of states, and I demonstrate their usefulness in testing models of strategic

behavior on the part of judges. The empirical results from the strategic choice probit analysis demonstrate that appellate judges condition their decisions on an anticipated response from the Supreme Court, an aspect of strategic behavior that would not be discovered using traditional probit models.

Chapter Four extends the strategic analysis to examine the relationship between the federal district courts and the courts of appeals. As with the previous chapter, I develop a formal model to specify theoretical expectations and then empirically test the theory using a strategic choice probit model. The results indicate district judges strategically anticipate reactions on appeal, and constrain their personal ideological voting if they believe a reversal likely.

Finally, in Chapter Five I restate the general conclusions from the previous chapters and comment on the broader implications of this research. Additionally, I conduct a quantitative analysis of post-September 11 cases in the district and appeals courts to determine whether my empirical results in Chapter Two remain consistent in the current environment. I also conduct a qualitative analysis of the four recent Supreme Court cases involving enemy combatant status. The results indicate that the current environment and the war on terror have altered judicial behavior in foreign policy litigation.

1

Theoretical Foundations

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

—Gordon Silverstein, *Imbalance of Powers*

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: constitutional/legal theories, international relations/foreign policy theories, and theories of judicial politics (including individual behavioral and institutional theories). An element common to these literatures is that individuals are influenced by preferences, which may be constrained by external factors. However, the literatures differ as to which set of preferences is most influential. 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 empirical analysis in 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 offered different terms, the fundamental core definition involved military power and the preservation of national interests. Additionally, the core definition focused 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 on 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 1989; 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, 99) 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 interest 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' "national interest" of the United States. However, creating a definition based on the policies of various actors introduces several levels of complexity within empirical models, levels that 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, one definition of foreign policy subsequently might involve any issue for which the State Department could influence or develop policy: diplomatic relations with other nations, economic issues with foreign nationals, states, or international corporations, immigration, international law, military relations, and the like. Yet, a more accurate definition of foreign policy must assume that issues can "be seen along a continuum from [the] most purely foreign to the most intimately linked with domestic issues" (Henehan 2000, 55), regardless of the U.S. agency (such as the State Department) claiming jurisdiction. Therefore, international relations scholars increasingly are defining foreign policy as any issue involving relations between the government and individuals, groups, and nations outside its borders (Fry, Taylor, and Wood 1994; Bueno de Mesquita 2003). I follow this definition because it preserves the continuum stated above, allowing for a wider range of issues to be linked to the foreign arena. 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.

TYPES OF FOREIGN POLICY CASES ADJUDICATED IN FEDERAL COURTS

The definition of foreign policy articulated above naturally raises questions about the types of cases that might see adjudication in the federal judiciary, and, specifically the kinds of civil liberties challenges that may be raised. In this section, I provide examples of the various disputes encountered by federal judges at all levels of the judicial hierarchy. These examples, in addition to the discussion provided in the previous chapter regarding the recent Supreme Court cases involving detainees at Guantanamo Bay, Cuba, hopefully offer a greater understanding of the myriad legal issues confronting federal judges when they adjudicate these disputes.

Recall that the definition of foreign policy used in this book covers a broad set of issues along a continuum from those closely related to domestic policy to those issues traditionally viewed as involving foreign affairs. Examples of cases closer to the latter side of the continuum (i.e., traditional foreign affairs issues) include *Haig v. Agee* (1981),[1] in which a former CIA operative threatened to reveal the names of undercover agents in several foreign countries. In response, the individual's passport

was revoked by the U.S. secretary of state, leading to a lawsuit that claimed such actions were in violation of the First and Fifth Amendments of the U.S. Constitution. A second example comes from the case *Eisentrager v. Forrestal* (1949),[2] in which German nationals captured in China by the U.S. military were held indefinitely without access to basic legal protections. Their suit claimed that the military had no jurisdiction over their claims for writs of *habeas corpus*, and that the denial of these writs violated their individual liberties.

Examples of cases closer to the domestic policy end of the continuum include *United States v. Molina-Chacon* (1986),[3] in which several individuals were arrested in foreign countries, at the request of the United States, in relation to an international drug trafficking and money-laundering conspiracy. When Victoriano Molina-Chacon was extradited to the United States for trial, he moved to suppress any evidence obtained by foreign law enforcement officials due to specific violations of his individual liberties. A second example is the case *In re Washington Post* (1986),[4] in which the newspaper brought suit against a federal district court judge who had barred the public from attending the trial of a Ghanaian national who was accused of multiple counts of espionage against the United States. The civil liberties challenge involved open access to judicial proceedings, the transparency of democratic governments, and freedom of the press as protected by the First Amendment.

Hopefully, these examples make apparent that foreign policy disputes (regardless from which end of the continuum they emerge) differ from domestic issues (such as racial discrimination and economic regulation). In many domestic policy cases there are clearly identifiable questions of law, such as the frivolous appeals filed by convicted felons or the violation of governmental statutes regulating the labor market. Consequently, individual judicial preferences pertaining to the law are often well defined and identifiable. Conversely, disputes involving the conduct of foreign affairs often involve more complex legal issues, which present judges with competing principles and preferences over appropriate legal remedies. Therefore, it is necessary to borrow from several literatures to develop a theory that helps explain how appellate judges resolve these complex disputes.

CONSTITUTIONAL/LEGAL THEORIES

In this section I explore the contributions that constitutional and legal theories make to 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 Franck 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 U.S. 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 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, 171) 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 or 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, 2) acknowledges a "tension between the contemporary judiciary's commitment to the protecting of constitutional rights and the 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 or act of state doctrine, actions that further support an apparent unlimited deference to the government (Dorsen 1989, 843). However, while the political question doctrine often is relied on 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" (Brennan 1987). Consequently, from a theoretical perspective, the constitutional and legal literatures offer a baseline predictive hypothesis for judicial behavior:

> *H_1: Federal judges will tend to render decisions against civil liberties challenges in deference to foreign policy initiatives,* ceteris paribus.

Though deference to foreign policy may be the initial inclination of judges, with advocates such as Justice Brennan promoting increased judicial participation in foreign relations litigation, it is possible that judges will challenge the deferential position. In order to determine which judges may be inclined to defend liberty 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 additional literatures.

INTERNATIONAL RELATIONS/FOREIGN POLICY THEORIES

Theories of international relations and foreign policy have tended to gravitate within two distinct groups: liberalism and realism. 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.

Neo-liberal theories of international relations 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.

On initial inspection, one is not led to believe that 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 an important insight for my analysis. If, according to realist principles, the state is considered the highest authority, then those internal components that 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 security challenge. From a judicial politics perspective, the courts should therefore defer to governmental authority when the state responds to an issue of security for either its territory or its citizens. Certainly, one would expect the magnitude of the security threat 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 respond accordingly to security concerns, thereby initially favoring the government's position in foreign affairs litigation. Thus, based on the literature of international relations, a second testable hypothesis emerges:

> *H_2: When facing a security threat, federal judges will be less likely to support civil liberties challenges to foreign policy.*

In sum, theories of international relations are useful in ascertaining broad patterns of behavior for the judiciary. The neo-liberal challenge to realism asserts that foreign affairs decisions are the result of internal dynamic processes, which may be constrained by various institutional and political pressures. 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 a security issue.

However, while international relations theories assist in identifying broad patterns of behavior, one must turn to a final literature to develop additional details.

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.

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 to 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. This leads to a third testable hypothesis:

> *H_3: Liberal judges will be more likely to render decisions in favor of civil liberties, whereas conservative judges will be more likely to rule against civil liberties challenges.*

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 most times) and that judges must weigh their preferences against those 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 construct (see Brehm and Gates 1997 for a more detailed explanation) is that the principal seeks to produce results according to his or her 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 or her 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, the principal is 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 or her] 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 match his or her 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, 675) 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." 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 might attempt to anticipate the Supreme Court, but they also might not, choosing instead to rely on their own preferences."[5] 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 the "proxy model") occurs quite frequently. If this conclusion is accurate, then, according to theoretical predictions from principal-agent theory, a final testable hypothesis emerges:

> *H_4: Lower court judges will be constrained from voting ideologically 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-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 mentioned 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: constitutional/legal theories, international relations/foreign policy theories, and theories of judicial politics (including individual behavioral and institutional theories). Based on a juxtaposition of these theories, three general expectations 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 ones—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 security challenge (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 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 foreign policy 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.

2

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.
—Thomas Jefferson, qtd. in *Dombrowski v. Pfister*

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, 870) 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 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 paradox of foreign affairs litigation, further develop theoretical expectations for judicial decision making, specify the research design and analytic methods employed, and empirically evaluate influences on judicial behavior.

THE PARADOX OF FOREIGN AFFAIRS LITIGATION

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 that "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 and inconclusive generalizations about the possibility of institutional differences influencing behavioral patterns in foreign policy adjudication. This evidence highlights an important aspect of judicial decision making in this arena—what I call the paradox of foreign affairs litigation. As I quoted from Charney in the introduction:

> 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, 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)

Simply put, the paradox of foreign affairs litigation involves the delicate balance of security against the backdrop of liberty. If the executive or legislative branch exercises unilateral decision making in foreign relations and infringes on individual rights, are the courts abdicating their constitutional authority by deferring to those branches? Examination of judicial opinions offers insights into the recognition by federal judges of this dilemma—balancing national security concerns versus indi-

vidual rights and liberties. A brief look at the 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 Brian 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."[1] Similarly, in the case *U.S. v. Molina-Chacon*, Judge Thomas 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."[2] These opinions illustrate that district court judges are cognizant of their responsibility to ensure individual liberties. However, these judges also are aware of the government's authority to formulate U.S. foreign policy. Judge Thomas 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 [foreign] policy."[3]

Similar sentiments are identified in the opinions of appeals court judges. Several cases demonstrate that these judges balance their responsibility as defenders of liberty versus the government's ability to dictate policy and ensure security. Judge Francis 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 the door to possible abuse."[4] Likewise, the case *U.S. v. U.S. District Court* brings a statement from Judge George Clifton Edwards Jr. 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."[5] While these cases initially lead to the conclusion that the courts of appeals may be more sensitive to liberty concerns, other cases admonish appellate judges to refrain from intruding on the government's (especially the executive's) authority to develop foreign policy. Judge Walter J. 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.[6]

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 policy-making 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).

Various decisions handed down by the Supreme Court indicate that the justices maintain analogous views of their responsibilities. For example, Chief Justice Earl 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."[7] The same year Warren handed down his decision, Justice Hugo 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."[8] 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."[9]

The cases cited from the district courts, the appeals courts, and the Supreme Court provide useful illustrations into the paradox of foreign affairs litigation. 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. While this anecdotal evidence illustrates the potential tension between security and liberty, it does not help in determining whether the paradox of foreign affairs litigation influences judicial behavior. To better understand this potential influence, an examination of previous empirical analyses is necessary.

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, especially when the state responds to a security threat. 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" (King and Meernik 1999, 815). 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.

More recently studies have begun to systematically explore the conflict between civil liberties and foreign policy. For example, Epstein et al. (2005) discover that threats to national security influence the Supreme Court to curtail civil liberties in non-war-related cases. Additionally, Clark (2006) examines the concept of separation of powers during wartime in the courts of appeals. His analysis reveals that there is no evidence of a heightened deference to the executive branch during national security crises.

While these recent studies provide more systematic analyses, they do not examine the entire federal judicial system, focusing instead on one particular level of the judicial hierarchy. Consequently, while it is apparent 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 an examination (and also includes all court levels) to determine whether specific stimuli exert similar influences across the federal judiciary.

THEORETICAL EXPECTATIONS

In Chapter One, I presented a broad outline of the general expectations and identified broad hypotheses offered by theories of constitutional law, international relations, 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 constitutional law, international relations (particularly the neo-liberal theories), 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).[10] Comparable development of quantitative measures for lower court judges is scarce. Initially, scholars often relied on the partisan affiliations of either the judges themselves or their appointing presidents as surrogate measures of ideology.[11] Fortunately,

a more accurate measure of ideology was developed by Giles, Hettinger, and Peppers (2001) using common space ideology scores of the appointing president and ideology scores of home-state senators when senatorial courtesy was present. Since their initial development, these scores have been extended back through time and developed for federal judges at all levels. I therefore rely on these measures of ideology to measure the preferences of individual judges. However, a potential underlying assumption of the Giles, Hettinger, and Peppers (2001) measure is that it focuses on deriving preferences pertaining to domestic issues. One must question whether attitudes toward foreign affairs elicit similar partisan responses as attitudes toward domestic policy issues. Holsti and 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 ideological beliefs. Assuming that judges possess attitudes similar to those of other elites within the United States, I therefore argue that the measure by Giles, Hettinger, and Peppers (2001) will be significantly related to the disposition of foreign policy cases. Consequently, using this measure will allow for a direct test of hypothesis three—that liberal judges will be more inclined to render decisions in favor of civil liberties and conservative judges will be more likely to rule in favor of foreign policy interests.[12] Since the courts of appeals and the Supreme Court are collegial tribunals, this hypothesis applies to their aggregate preferences.

In addition to traditional notions of ideology, though, judges also possess preferences unique to foreign policy litigation, namely, preferences involving the security of the United States and its government officials and citizens. The realist paradigm in the international relations literature suggests that actions of states are defined by the nature of the international system and are developed according to various external threats (Holsti 1995). Though theories of realism dismiss internal dynamics, as I mentioned in the previous chapter, one can speculate that these internal components will work together when the state faces an external threat. From a judicial politics perspective, the courts should therefore defer to governmental authority when the state responds to a security issue. Certainly, one would expect the magnitude of the stimulus to affect judicial behavior; judges would view the authority of the government to combat terrorist attacks or espionage within the United States differently than the government's authority to regulate immigration. I therefore hypothesize that federal judges will be more likely to support foreign policy interests if they perceive a security threat exists, regardless of their individual ideology.

Another 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.[13] 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 courts of last resort. According to Songer (1991, 35), "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 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 (especially if the appeals courts and the district courts issue contradictory rulings, thereby causing dissensus within the judicial system, as Perry [1991] discovers).

In the realm of foreign affairs, several scholars demonstrate the tremendous influence exerted by the executive branch (Adler and George 1996; Bland 1999; Fisher 1995, 1997; Genovese 2001; Schlesinger 1989). Additional studies demonstrate the extent to which this influence carries over to the judicial branch (Ducat and Dudley 1989; King and Meernik 1998, 1999; Yates and Whitford 1998). As Ducat and Dudley (1989, 115) conclude, foreign policy making is an area dominated so extensively by the executive branch that courts are unlikely to challenge the president's power. Though Ducat and Dudley argue that more popular presidents receive greater levels of deference from the judiciary than unpopular ones, they discover an insignificant statistical relationship for the district courts. Therefore, a question remains about the potential influence of presidential popularity, and whether this influence extends to all levels of the judiciary. Consequently, I hypothesize that federal judges will be more likely to render decisions favoring foreign policy (and against civil liberties claims) when presidential popularity is high.

Finally, certain legal issues 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 (see Burgess 1992). Thus, I hypothesize that even though judges may be initially hesitant to rule against the government in foreign policy cases, they will be more likely to do so if the parties identify a specific constitutional violation.

Additionally, the presence of a claim citing international law or treaty obligations may affect judicial behavior. A limited number of studies demonstrate that

courts are becoming increasingly more sensitive to claims of international law violations (Rogoff 1996; 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 United States 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.

The final legal influence involves potential threshold issues involved in a case. 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. Therefore, if judges are asked to resolve a threshold issue, I hypothesize that they will be more likely to rule in deference to foreign policy interests.

RESEARCH DESIGN AND METHODS

Data for these analyses come from an original sample of federal court decisions involving foreign affairs and civil liberties from 1946 to 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 (as one of two international superpowers) transitioned from World War II to the Cold War 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 important, 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.

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 2,900 district court cases, approximately 2,700 courts of appeals cases, and exactly 123 Supreme Court decisions involving a civil liberties violation in combination with the various foreign relations issues.[14] As I stated at the beginning, 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 2003; Domino 2009). 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 coded according to litigant characteristics, legal issues, final disposition, and judge characteristics.[15]

The dependent variable for this analysis is whether the federal courts voted in favor of foreign policy interests (coded as 0) or in favor of civil liberties (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 in favor of civil liberties, 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.[16] Consequently, I rely on the measure of judicial ideology developed by Giles, Hettinger, and Peppers (2001). These scores range from a minimum of -.656 (most conservative) to a maximum of .784 (most liberal). The variable *Court Ideology* captures the influence of this measure at the aggregated court level (where individual preferences measures are combined for collegial courts). Since the majority of district court decisions are delivered by a single judge, values for this variable reflect the preferences of the individual. 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 Ideology* range from –.656 to .784, with most entries falling proportionately within

those extremes. As indicated previously, I hypothesize that liberal judges will be more likely to rule in favor of civil liberties. Therefore, I expect a positive relationship to exist between *Court Ideology* and the dependent variable; as the proportion of liberal judges on a court increases, the likelihood of a decision favoring civil liberties claims will increase.

The existence of security preferences is measured by two separate dummy variables. The first, *National Security Defense*, controls for the presence of a specific national security defense raised by the federal government. For example, the Freedom of Information Act allows the government to withhold information if access could jeopardize the national security of the United States. If the government raises a specific defense of national security (coded 1), then I hypothesize that federal judges will rule in favor of foreign policy interests, even when controlling for their personal ideology. Therefore, a negative relationship should exist between *National Security Defense* and the dependent variable. The variable *Criminal Case* controls for the presence of a violation of criminal law (coded 1). Criminal violations of foreign policies may also present a security issue, because often these violations occur in combination with an intrusion on U.S. territory or an attack on government officials or citizens by foreign nationals.[17] I therefore hypothesize a negative relationship between *Criminal Case* and the dependent variable.[18] The variable *Lower Court Directionality* measures the case disposition by the previous judicial entity. The variable is coded 1 if the lower court 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 in favor of civil liberties. Theoretical expectations indicate the courts of appeals will be more likely to affirm a lower court 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.

To measure the strength of the executive, I rely on presidential approval scores calculated through Gallup Poll surveys.[19] The data reflect the percentage of the public that view the president in a positive fashion. As Ducat and Dudley (1989, 106) note, "since a one-point-in-time measure could be distorted by last-minute changes in public mood, especially at a point falling so late in the process of a judicial decision, we computed average measures of presidential prestige for each decision." Following their example, I aggregate the Gallup surveys to provide an annual measure of presidential approval. As noted earlier, I expect court to exert higher degrees of deference to foreign policy initiatives when the president possesses high presidential approval scores. Thus, the variable *Presidential Approval* should be related negatively to the dependent variable.

The complexity of specific cases could be the result of certain challenges or issues. Three 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 hypoth-

esize 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 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 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).

EMPIRICAL RESULTS

The descriptive results presented in Table 2-1 provide preliminary evidence concerning generals levels of deference to foreign policy initiatives. As the table indicates, the district courts and courts of appeals rarely constrain governmental interests in foreign affairs—ruling in favor of civil liberties only 37.9% (for district courts) and 37.8% (for appeals courts) of the time. Standing in slight contrast is the Supreme Court—though somewhat deferential to foreign policy initiatives, it rules in favor of civil liberties 43.9% of the time.

While the preliminary evidence presented in Table 2-1 offers insights into my first general hypothesis, 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 2-2. Each of the models performs adequately, although the district courts model only offers a slight reduction of error (5.3%) compared to the appeals courts model (24.1%) and the Supreme Court model (16.6%).[20]

Table 2-1: Descriptive Examination of Court Decisions

	Foreign Policy Decision	Civil Liberties Decision
District Courts	62.1%	37.9%
Appeals Courts	62.2%	37.8%
Supreme Court	56.1%	43.9%

Table 2-2: Probit Analyses of Individual Court Levels

	Coefficients (Robust Standard Errors)		
	Model 1 District Courts	Model 2 Appeals Courts	Model 3 Supreme Court
Court Ideology	.020 (.292)	.853** (.420)	4.034*** (.1.213)
National Security Defense	–.904** (.471)	–.606* (.357)	–.227 (.467)
Criminal Case	–.609*** (.230)	–.441** (.203)	.148 (.393)
Lower Court Directionality	N/A	.435*** (.123)	–.125 (.137)
Presidential Approval	–.002 (.009)	.000 (.008)	–.018 (.012)
Constitutional Challenge	–.310 (.206)	–.320 (.213)	.379 (.247)
International Law/Treaty	–.337 (.286)	–.257 (.224)	.436 (.441)
Threshold Issue	–.048 (.234)	–.316 (.209)	–.025 (.308)
Constant	.238 (.576)	–.765 (.520)	.985 (.727)
N	251	229	123
Log Likelihood	–156.961	–134.867	–74.754
χ^2	15.44	26.56	19.25
Probability > χ^2	.031	.000	.013
Pseudo R^2	.054	.110	.114
Null Model	37.9%	37.8%	43.9%
% Correctly Predicted	64.1%	71.3%	63.4%
% Reduction of Error	5.3%	24.1%	16.6%

Note: Dependent variable: case outcome (1 for civil liberties; 0 for foreign policy).
* $p < .10$ ** $p < .05$ *** $p < .01$

The first model examines influences on the federal district courts. According to Table 2-2, only the variables measuring court preferences over security concerns—*National Security Defense* and *Criminal Case*—exert statistically significant influences in the expected direction. I hypothesized that these variables would be negatively related to the likelihood of civil liberties' decisions. These hypotheses are confirmed by the empirical results. Unfortunately, the variables *Court Ideology*, *Presidential Approval*, *Constitutional Challenge*, *International Law/Treaty*, and *Threshold Issue* do not significantly affect judicial behavior.

While determining the statistical significance of independent variables is noteworthy, a more interesting finding occurs when one examines the changes in predicted probabilities for each equation, the results of which are presented in Table 2.3. These probabilities are calculated by adjusting the variable of interest from its minimum to its maximum value while simultaneously holding the remaining variables at their mean values. An examination of Table 2-3 indicates that district court judges

Table 2-3: Changes in Predicted Probabilities (percent change)

	District Courts	Appeals Courts	Supreme Court
Court Ideology	1.1	33.9	67.6
National Security Defense	–24.4	–18.0	–7.8
Criminal Case	–20.6	–13.4	6.6
Lower Court Directionality	N/A	34.0	–10.0
Presidential Approval	–4.6	3.2	–30.1
Constitutional Challenge	–11.2	–7.9	15.0
International Law/Treaty	–11.4	–7.6	15.9
Threshold Issue	–1.5%	–11.2	–0.1

Note: Changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value while simultaneously holding the remaining variables at their mean values.

are 24.4% less likely to render decisions in favor of civil liberties (or, conversely, are 24.4% more likely to render decisions favoring foreign policy) if a specific *National Security Defense* is present in the case. Similarly, if these judges resolve *Criminal Cases*, they are 20.6% less likely to render decisions favoring civil liberties.

The second empirical model evaluates the courts of appeals. According to the results listed in Table 2-2, the variables *Court Ideology*, *National Security Defense*, *Criminal Case*, and *Lower Court Directionality* exert statistically significant influences (though the variables *National Security Defense* and *Criminal Case* barely achieve significance). I hypothesized that *Court Ideology* and *Lower Court Directionality* would be related positively to the dependent variable while the remaining two variables would possess a negative relationship. These hypotheses are supported empirically, while the expected influences of the variables *Presidential Approval*, *Constitutional Challenge*, *International Law/Treaty*, or *Threshold Issue* do not achieve statistical significance. The predicted probabilities—listed in Table 2-3—for *Court Ideology* indicate that appeals court panels dominated by liberal judges are 33.9% more likely to rule in favor of civil liberties than are panels controlled by conservative judges. Additionally, if the lower court initially ruled in favor of civil liberties, the appeals courts are 34.0% more likely to follow this ruling and render a decision favoring civil liberties. Table 2-3 also reveals when appellate judges confront a *National Security Defense*, they are 18.0% less likely to support civil liberties (or, conversely, 18.0% more likely to support foreign policy concerns). Finally, when appellate judges resolve a criminal appeal (as indicated in the variable *Criminal Case*), they are 13.4% less likely to render a decision favoring civil liberties.

The final empirical model examines influences on the Supreme Court. According to Table 2-2, only one variable—*Court Ideology*—achieves statistical significance.

The predicted probabilities in Table 2-3 demonstrate that as more liberal justices assume the bench, their decisions are substantially more likely to support civil liberties claims than when the High Court is controlled by conservatives. The liberal justices are 67.6% more likely to render decisions favoring civil liberties than their Republican colleagues. The hypotheses for the remaining variables are not supported by the empirical evidence displayed in Table 2-2.

CONCLUSIONS

Are the federal courts defenders of liberty or champions of security? This chapter employed 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 statistical models, one can reasonably conclude that federal judges are champions of security, in support of my first hypothesis in Chapter One. The lower federal courts seldom rule in favor of civil liberties claims (37.9% for the district courts and 37.8% for the appeals courts). The Supreme Court is more sensitive to individual challenges, supporting these claims in 43.9% of its 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 also 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 provide general support for my third hypothesis: that more liberal judges are likely to render decisions in favor of civil liberties. However, this result does not hold for all levels of the federal judiciary. They are most influential in the Supreme Court, where liberal justices are approximately 68% more likely to vote in favor of civil liberties than conservatives, and moderately influential in the courts of appeals, where panels dominated by liberal judges are 34% more likely to render decisions supporting civil liberties than panels dominated by conservatives. Yet, the impact of ideological preferences among district court judges is nonexistent statistically. Within the federal trial courts there is no significant difference between liberal and conservative judges.

My second general hypothesis focuses on judicial preferences pertaining to security. In Chapter One, I claimed that judges will be more likely to render decisions favoring foreign policy interests when the state responds to a security threat. The empirical results support this hypothesis, but only within the lower federal courts. The U.S. Supreme Court is not affected significantly by either the presence of a *National Security Defense* or a *Criminal Case*. In contrast, both variables exert significant influences in the lower courts. Yet, even here the effects are more pronounced in the district courts and barely significant for the courts of appeals. It therefore appears that federal judges become less influenced by security issues as one moves up the judicial hierarchy.

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? Similarly, do the appellate judges estimate how the Supreme Court justices will react to a particular decision? Chapters Three and Four conduct empirical analyses of anticipatory behavior through the utilization of strategic choice models to resolve these questions.

3

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.

—Burbank and Friedman, "Reconsidering Judicial Independence."

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?

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 af-

fairs? 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 on 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 model 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 U.S. 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 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

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.[1]

Since their inception in 1891, the U.S. courts of appeals have occupied a "pivotal position as the vital center of the federal judicial system" (Howard 1981, 8). Songer (1991, 35) 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, 35). Consequently, this 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—to review a decision from a court of appeals or one from 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 principle, 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 exam-

ined 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 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 or her 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 or her 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, a principal is 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 that the principal believes ensures that the agent's preferences match his or her 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.[2] 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 that 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-agent theory to model relationships between the Supreme Court and lower courts. For 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-agent 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 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-agent 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 negative response is likely (i.e., fear of reversal), judges alter their behavior accordingly. Thus, the type of behavior commented on in previous research suggests that appellate judges strategically anticipate the actions of the Supreme Court and adjust their decisions if necessary.

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) interviewed 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)

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 that "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. Consequently, one may legitimately inquire whether appellate judges are potentially influenced by concerns on appeal.

To examine this question initially, I include two examples from appeals court decisions, in which judges specifically discuss the ambiguity of precedent and/or present requests to the Supreme Court to resolve particular foreign policy disputes because the law is unclear. For example, in *INS v. Chadha*[3], Judge Anthony Kennedy of the Ninth Circuit stated, "We explain in detail our reasons for that conclusion, but preface our discussion by a consideration of some elementary principles. This is necessary because no circuit or Supreme Court authority we have found holds that the Legislature has impermissibly invaded the prerogative of the Executive or the

Judiciary absent a clause in the Constitution which confers the power upon another branch with great specificity." A second example is *United States v. U.S. District Court*[4]—which is often cited in the current debate surrounding the domestic spying program of the National Security Agency and also includes references to the lack of precedent. In this case, Judge George Clifton Edwards Jr. of the Sixth Circuit states, "From what has already been said, it is obvious that we agree that this is in all respects an extraordinary case. Great issues are at stake for all parties concerned. . . If this were not enough to occasion our deciding this case on the merits rather than on procedural grounds, it also clearly appears that the issue posed here is a basic issue which has never been decided at the appellate level by any court."

These examples illustrate the unique aspects of foreign affairs litigation and the ambiguity of precedent available to judges. However, to more accurately determine the extent to which appellate judges strategically anticipate decisions from the Supreme Court, I initially develop a formal model in the following section and later test specific hypotheses empirically.

FORMAL MODEL OF APPEALS COURT DECISION MAKING

Reliance on formal modeling for judicial behavior has increased in recent years. Scholars use formal models to help explain voting behavior in the U.S. Supreme Court (Stearns 2000; Hammond, Bonneau, and Sheehan 2005), interactions between the Supreme Court and other branches of government (Segal 1997; Shipan 1997; Vanberg 2001), and interactions 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 when judges on the courts of appeals may feel constrained by the actions of the Supreme Court.[5]

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.[6] The judges on the appellate panel can choose between ruling in favor of civil liberties (C) or ruling against them (A). Once the courts of appeals rule on a case, the Supreme Court can decide whether to grant *certiorari* (G) or deny review (D).[7] 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 (C) or against (A).[8]

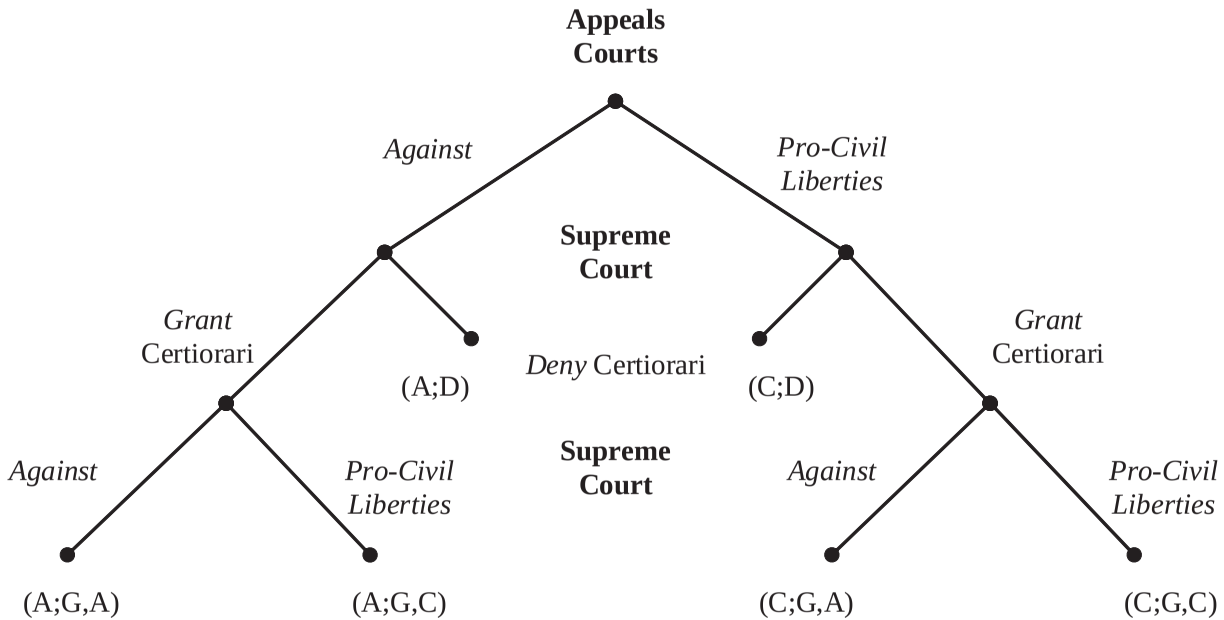

Figure 3-1: Appeals Court/Supreme Court Decision Sequence

Determining equilibrium behavior for the game tree depicted in Figure 3-1 initially involves describing the preference ordering for both the appeals courts and the Supreme Court. As with most sequential games, one can begin at the end of the decision sequence and rely on backward induction to infer accurate preference orderings. In this instance, determining the preference ordering for the Supreme Court is relatively straightforward because we can plausibly assume that if the justices rule on the merits of a dispute, the ruling will be based on their ideological preferences. Consequently, it is plausible to assume that a more liberal Court would prefer to rule in favor of civil liberties (C) and a more conservative Court would prefer to render decisions against these challenges (A). A potentially more important question for the Supreme Court is whether it will grant or deny *certiorari* to a particular case. Since the justices only review less than 1% of the cases heard by the courts of appeals, it is reasonable to assume that grants of *certiorari* will occur more often when the justices wish to reverse an appellate decision. And this will occur only when the appeals court renders a decision contrary to the collective preferences of the Supreme Court (and even then, only in rare circumstances). If the decision at the appellate level is congruent with the preferences of the justices, then it is more likely a denial of *certiorari* will occur. Consequently, the most likely (and potentially most preferred) outcome for the Court is a denial of *certiorari*, with grants occurring when the appeals courts deviate from the collective preferences of the justices. Therefore, more liberal Supreme Courts prefer to deny *certiorari* in most cases and grant *certiorari* when they wish to rule in favor of civil liberties (D; G,C). Conversely, more conservative Supreme Courts prefer to deny *certiorari* in most cases and grant *certiorari* when they wish to rule against civil liberties (D; G,A).

Determining the preference orderings for the appeals court judges is a bit more complex because their decisions are potentially monitored by the Supreme Court, thereby increasing the possibility of reversal. Yet, even with this increased complexity we can plausibly assume that the most preferred outcome for appeals court judges is to rule according to their ideological preferences and have this decision affirmed on appeal. This is the greatest way for appellate judges to maximize their policy preferences because they receive positive utility from both their own case and the appellate decision. Thus, liberal appellate panels prefer to rule in favor of civil liberties, followed by a grant of *certiorari* and an affirmance from the Supreme Court (C; G,C). Similarly, conservative appellate panels prefer to rule against civil liberties, followed by a grant of *certiorari* and an affirmance from the Supreme Court (A; G,A). However, since it was stated earlier that the Supreme Court is unlikely to grant *certiorari* and affirm a decision, it follows that the second most preferred outcome for appeals court judges is to rule according to their ideological preferences and have the Supreme Court deny *certiorari*. Therefore, liberal appellate panels would next prefer to rule in favor of civil liberties followed by a denial of

certiorari (C;D), and conservative panels would prefer to rule against civil liberties followed by a denial of *certiorari* from the Supreme Court (A;D).

The complexity occurs when determining the preference ordering for the remaining alternatives, situations in which appeals court judges must weigh the utility of ruling according to their ideological preferences against the utility of having their decisions reversed by the Supreme Court. Those judges who believe the likelihood of reversal is low (or who do not fear reversal) have incentives to continue rendering decisions according to their ideological preferences, regardless of what happens on appeal,[9] and their lesser preferred alternatives are to rule against these preferences (with the least preferable outcome to rule against their preferences and have the decision affirmed by the Supreme Court). Therefore, for liberal appellate panels who believe the probability of reversal is low (i.e., no fear of reversal), the entire preference ordering is (C; G,C) > (C; D) > (C; G,A) > (A; D) > (A; G,C) > (A; G,A), and for conservative panels the preference ordering is (A; G,A) > (A; D) > (A; G,C) > (C; D) > (C; G,A) > (C; G,C).

For appeals court judges who are motivated by a fear of reversal and believe the probability of reversal is high, the preference ordering changes for the remaining alternatives. In contrast to the purely ideologically motivated judges, these judges abhor reversal by the Supreme Court and would rather rule against their ideological preferences (in congruence with the preferences of the Supreme Court) and have the justices deny *certiorari*. Consequently, though these judges most prefer to rule ideologically and have the decision affirmed by the Supreme Court (an unlikely outcome) or have the Court deny *certiorari*, the next preferable alternative is to rule against their ideological preferences and have the Court deny *certiorari*. The least preferred alternatives are to rule according to their ideological preferences and be reversed by the Court, or (even worse) rule against their ideological preferences and be reversed by the justices. Therefore, for liberal appellate panels who are motivated by a fear of reversal the entire preference ordering is (C; G,C) > (C; D) > (A; D) > (A; G,A) > (C; G,A) > (A; G,C), and for conservative panels the entire preference ordering is (A; G,A) > (A; D) > (C; D) > (C; G,C) > (A; G,C) > (C; G,A).

To determine the equilibrium behavior of the actors, I rely on the Quantal Response Equilibrium (QRE) concept, 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 1996, 186).[10] Over time, the players are more likely to choose better strategies than worse strategies, but they do not always play the best strategy with a probability of 1 (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, introducing variation in the probability of Player 1 choosing Strategy A. Thus, in Figure 3-1, the

Supreme Court is allowed to possess private information over the exact nature of its preferences and the likelihood of a grant of *certiorari*, and the appeals courts retain private information of 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 my theoretical expectations.

Deriving the equilibrium probabilities for the actors therefore involves calculating expected utilities for the decisions—in relation to the decisions of the other actors—combined with a private information component. Returning to the game depicted in Figure 3-1, estimates are necessary for the expected utilities for the appeals courts U_A (A; D), U_A (C; D), U_A (A;G,A), U_A (A;G,C), U_A (C;G,A), and U_A (C;G,C); and for the Supreme Court U_S (A;D), U_S (C; D), U_S (A;G,A), U_S (A;G,C), U_S (C;G,A), and U_S (C;G,C). Assuming that the random error component is independently and identically distributed (i.i.d) normal, then we can work up the game tree to calculate the QRE probabilities. Let z equal the probability that the Supreme Court will rule in favor of civil liberties after granting *certiorari* to an appeals court decision (where Φ is the standard normal cumulative distribution).

$$z = \Pr\left[U_S(C,G,C) + U_S(A,G,C) + \pi_C > U_S(C,G,A) + U_S(A,G,A) + \pi_A\right]$$

$$z = \Pr\left[\pi_A - \pi_C < U_S(C,G,C) + (A,G,C) - U_S(C,G,A) + U_S(A,G,A)\right]$$

$$z = \Phi\left[\frac{\text{Us}(C,G,C) + (A,G,C) - U_S(C,G,A) + (A,G,A)}{\sqrt{\sigma^2_{\pi C} + \sigma^2_{\pi A}}}\right] \qquad [1]$$

In a similar fashion, we can derive the equilibrium choice probability of the Supreme Court granting *certiorari*. Let w equal the probability of the Supreme Court granting *certiorari* to an appeals court decision. Estimating this probability involves a consideration of the utility for the Supreme Court to choose between a decision on the merits favoring civil liberties or one against if it grants *certiorari*. Thus, estimating w involves the following:

$$w = \Pr\left[U_S(G) + \pi_G > U_S(D) + \pi_D\right]$$

$$= \Pr\left[\pi_G - \pi_D < U_S(G) + U_S(D)\right]$$

$$= \Pr[\pi_G - \pi_D < zU_S[(C,G,C) + (A,G,C)] + (1-z)U_S[(C,G,A)+(A,G,A)] - U_S(D)]$$

$$w = \Pr\Phi\left[\frac{zU_S[(C,G,C) + (A,G,C)] + (1-z)U_S[(C,G,A) + (A,G,A)] - U_S(D)}{\sqrt{\sigma^2_{\pi G} + \sigma^2_{\pi D}}}\right]$$

Finally, we must derive the equilibrium choice probabilities for the appeals courts in choosing either civil liberties or against. Determining these probabilities involves consideration of both the Supreme Court's decision to grant *certiorari* and its preferences on the merits. Therefore, let t equal the probability that the appeals courts choose civil liberties. Estimating t involves the following calculations:

$$t = \Pr\left[U_A(C) + \pi_C > U_A(A) + \pi_A\right]$$

$$= \Pr\left[\pi_C - \pi_A < U_A(C) + U_A(A)\right]$$

$$= \Pr\left[\pi_C - \pi_A < \{w[zU_S[(C,G,C)+(A,G,C)] + (1-z)U_S[(C,G,A)+(A,G,A)]] - (1-w)U_S(D)\}\right]$$

$$t = \Pr \Phi$$

$$\left[\frac{w[zU_S(C,G,C)+(1-z)U_S[(C,G,A)+(1-w)U_S(D)]-v[yU_S(C,G,C)+(1-y)U_S(C,G,A)+(1-v)U_S(D)]}{\sqrt{\sigma^2_{\pi C} + \sigma^2_{\pi A-}}}\right]$$

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 based on its 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 or her 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). Multiplying these choice probabilities, for all combination of actors' choices results in the equilibrium outcome probabilities depicted in Figure 3-2.

The outcome probabilities listed in Figure 3-2 assist in determining the equilibrium behavior of the courts of appeals and the Supreme Court. If we rely on backward induction and work up the game tree as we did for the QRE probabilities, we can determine probabilistically the substantive behavior of these courts. For the Supreme Court, the choice to render a decision favoring civil liberties (z) will be a function of the justices' collective ideological preferences. This leads to the first testable hypothesis (the Supreme Court merits hypothesis):

> ***Supreme Court Merits Hypothesis****: The Supreme Court will render decisions according to the justices' collective ideological preferences. Therefore, more liberal Courts will be more likely to rule in favor of civil liberties (z) and more conservative Courts will be more likely to rule against civil liberties (1 – z),* certeris paribus*.*

Determining the Supreme Court's *certiorari* behavior is also relatively straightforward. Previous research on the Court's agenda setting behavior (see Epstein et al. 1996) indicates that the justices are most likely to grant *certiorari* in order to reverse a lower court decision. This is due to the fact that the Court only accepts approximately eighty to a hundred cases per year, and therefore decisions that contradict Supreme Court preferences are substantially more likely to receive a grant of *certiorari* so that the justices can reverse the decision. Consequently, as the Court becomes more liberal the justices will be more likely to grant *certiorari* (w) to those

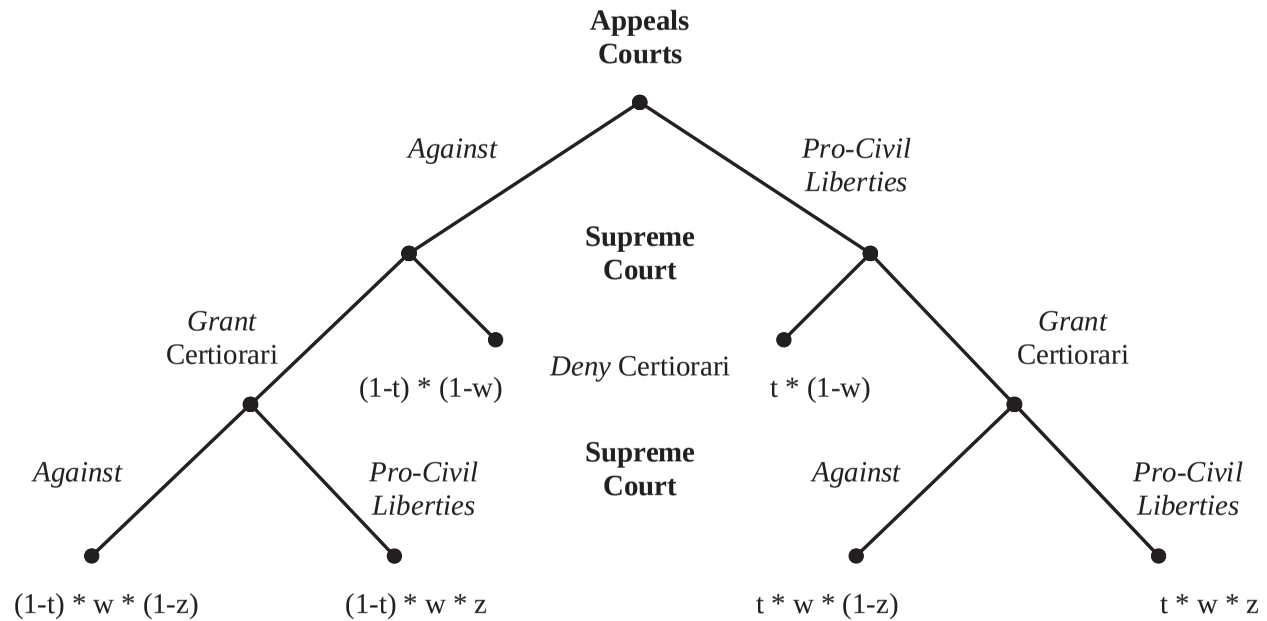

Figure 3-2: Appeals Court/Supreme Court Equilibrium Outcome Probabilities

appellate cases that rule against civil liberties ($1 - t$). Conversely, as the Court becomes more conservative the justices will be more likely to grant *certiorari* (w) to those appellate cases that favor civil liberties (t). This leads to a second testable hypothesis (the Supreme Court *certiorari* hypothesis):

> ***Supreme Court* Certiorari *Hypothesis***: *The Supreme Court will be more likely to grant* certiorari *(w) to those cases that render decisions that contradict the Court's collective preferences. As the likelihood of the Supreme Court ruling in favor of civil liberties (z) increases, the justices will be more likely to grant* certiorari *(w) to cases that rule against civil liberties. Conversely, as the likelihood of the Court ruling against civil liberties increases (1 – z), the justices will be more likely to grant* certiorari *(w) to cases that rule in favor.*

Appellate judges who do not fear reversal (or who believe the likelihood of reversal is low) receive greater utility by rendering decisions according to their ideological preferences. Therefore, their decision calculus does not require strategically anticipating what might happen on review, because $t > w \geq z$ in every instance. Therefore, judges on the panels receive positive utility by voting ideologically, regardless of whether the Supreme Court grants *certiorari* or whether it reverses the appellate decision. Consequently, for liberal appellate panels the equilibrium behavior is {C; (G,D), (C,A)} and for conservative panels the equilibrium behavior is {A; (G,D), (C,A)}. This leads to a third testable hypothesis (the no strategic anticipation hypothesis):

> ***No Strategic Anticipation Hypothesis***: *Courts of appeals panels that do not fear reversal (or that believe the likelihood of reversal is low) will render decisions according to their collective ideological preferences. Consequently, as ideological preferences become more liberal, the likelihood of ruling in favor of civil liberties increases (and vice versa for conservative panels),* ceteris paribus.[11]

As the likelihood of reversal increases, appellate court judges who fear reversal will become increasingly constrained from ruling ideologically. The QRE outcome probabilities reveal that fear of reversal occurs when $(1 - z) > w > t$ for liberal panels or when $z > w > (1 - t)$ for conservative panels. By extension one would expect the fear of reversal to become more pronounced as the inequality for z (or $1 - z$) becomes larger in relation to t (or $1 - t$) because the likelihood of the Supreme Court granting *certiorari* (w) will increase if the appellate panel issues an ideological ruling contrary to the Supreme Court's collective preferences. Consequently, the equilibrium behavior of liberal appellate panels shifts from {C; (G,D), (C,A)} to {A; D, (C,A)} as $(1 - z)$ increases; and, similarly for conservative appellate panels, the equilibrium shifts from {A; (G,D), (C,A)} to {C; D, (C,A)}. This leads to the final hypothesis (the fear of reversal hypothesis):

> ***Fear of Reversal Hypothesis***: *Appeals court panels that are motivated by a fear of reversal will be more likely to render decisions against their collective ideological preferences as the probability of reversal (and the probability of a grant of* certiorari*) by the Supreme Court*

> *increases. Consequently, liberal panels will be more likely to rule against civil liberties (and conservative panels more likely to rule in favor of civil liberties) as the probability of reversal increases,* ceteris paribus.

If the formal model depicted in Figure 3-2 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 generated a set of models that can assist in specifically determining whether lower court judges strategically anticipate responses from their colleagues on superior tribunals. 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.[12] 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-agent theory indicates). As Signorino observes:

> If 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, 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 (1999a, 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; 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, 2001a, 2001b; 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 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 affects the estimates and leads to inaccurate conclusions.

To address these issues methodologically, Signorino (1999b, 2002) has developed a set of discrete choice models that statistically incorporate the strategic interdependence derived from formal models. As he acknowledges, "using a statistical equilibrium concept such as the QRE, one can derive statistical versions of a strategic model in extensive form that directly incorporates the structure of strategic interaction" (1999a, 282). Essentially, strategic models are selection models "because the actors select themselves and others into 'subsamples' based on their choices" (Signorino 2001a, 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.[13] While the strategic choice models initially were developed to model interactions among states in international relations, scholars increasingly are incorporating their predictive power to analyze strategic relationships in American politics and other areas.[14]

RESEARCH DESIGN AND METHODS

Data for this analysis are taken initially from the number of Supreme Court decisions also litigated in the courts of appeals (n = 93). This provides data on those case heard by both levels of the judiciary. Yet, the model portrayed in Figure 3-1 also indicates that a number of appeals courts' decisions never reach the Supreme Court, and these must be taken into account in order to accurately capture any strategic interdependence. Thus, I also include the random sample of appeals courts' decisions described in Chapter Two (n = 230). This increases the dataset to 323 cases for the appeals courts in addition to the 93 cases coded at the Supreme Court, for a total number of cases equal to 416.

In the strategic choice probit model there are essentially three dependent variables, which are estimated in tandem: one equation for the appeals courts' merits decision, one equation for the Supreme Court *certiorari* decision, and one equation for the Supreme Court merits decision. The dichotomous dependent variable for each equation is captured whether the court voted in against civil liberties or denied *certiorari* (coded 0) or whether the court voted in favor of civil liberties claims or to grant *certiorari* (coded 1). Similar to calculating the equilibrium choice probabilities (by working up the game tree), the strategic model estimates the likelihood of the Supreme Court ruling in favor of civil liberties and then incorporates these predicted probabilities into the estimation of the *certiorari* decision. Both likelihood

functions are then incorporated in the equation calculating the likelihood of the appeals courts ruling in favor of civil liberties. Thus, the behaviors of appellate judges are examined in relation to potential actions by the Supreme Court justices.

Evaluating the strategic aspects of judicial decision making also involves the inclusion of several independent variables to control for specific exogenous influences. Similar to the empirical analysis in Chapter Two, I use the measure developed by Giles, Hettinger, and Peppers (2001) to control for ideological preferences. 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 Ideology*, which is defined as the proportion of liberal judges. As I discovered in Chapter Two, liberal judges are more likely to rule in favor of civil liberties than their conservative 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-agent theory), then I expect the relationship between *Court Ideology* and the dependent variable to be either 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 theoretical expectations similar to those of the models in Chapter Two). In the equation for the courts of appeals, I first include a 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 against civil liberties. Second, the variable *Criminal Case* controls for the presence of a criminal appeal. If the appeals courts adjudicate a criminal issue, I hypothesize that the judges will be more likely to render decisions against civil liberties. Third, 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), or 3 if the court ruled in favor of the civil liberties challenge. Theoretical expectations indicate the courts of appeals will be more likely to affirm a district court ruling. The variable *Presidential Approval* measures the strength of the executive branch. As I explained in Chapter Two, this variable should be negatively related to the dependent variable. Fifth, *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. Next, the variable *International Law/Treaty* measures the presence of this legal provision. As I stated in Chapter Two, this variable should be positively related to the dependent variable. Finally, 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).

In the *certiorari* equation for the Supreme Court, I include a single variable *Lower Court Directionality* to capture the justices' responses to appellate decisions.[15] Since the federal government is more likely than individual litigants to appeal to the Supreme Court for a writ of *certiorari* following an unfavorable appellate decision, I hypothesize that this variable will be positively related to a grant of *certiorari* from the Court. Additionally, several scholars note the tremendous deference given to the solicitor general by the justices (Salokar 1992; Pacelle 2003). This supports the hypothesis of the positive relation between *Lower Court Directionality* and the likelihood of a grant of *certiorari* by the Supreme Court.

Finally, the equation for the Supreme Court's merits decisions includes two variables. The first is the primary variable of interest, *Court Ideology*. As I hypothesized in Chapter Two, I expect a positive relationship to exist between this variable and the likelihood of the Supreme Court ruling in favor of civil liberties. The second variable is *Lower Court Directionality*. Though this variable is also part of the *certiorari* equation, as I conjectured in Chapter Two, previous research notes a tendency by the justices to reverse cases decided on the merits. Thus, I expect a negative relationship to exist between this variable and the dependent variable.

EMPIRICAL RESULTS

Table 3-1 presents the empirical results for a series of statistical models. The first column contains estimates from standard probit models, applied separately to the district courts and appeals courts (i.e., one probit model for each court level). Estimates in the second column are derived from a strategic probit model that analyzes both court levels in tandem. Comparing the models provides several interesting insights into the behavior of lower court judges.

If one examines the coefficients in the traditional probit model (the first column of coefficients), the results would lead to the conclusion that the variables *Court Ideology*, *Criminal Case*, and *Lower Court Directionality* significantly influence the decision of appeals court judges and the variable *Court Ideology* significantly affects the decisions of Supreme Court justices. The data support each of the hypotheses related to these variables, while the remaining hypotheses are not supported.[16] While these results support the conventional wisdom about decision making in both court levels, the more interesting story (one that is masked by a traditional

Table 3-1: Probit and Strategic Probit Analysis

	Coefficients (Robust Standard Errors)	
	Probit Model	Strategic Probit Model
Appeals Court Equation (ACE)		
Court Ideology	.436* (.225)	12.425** (5.510)
National Security Defense	–.349 (.271)	–1.220 (1.389)
Criminal Case	–.476*** (.173)	–2.039** (.823)
Lower Court Directionality	.274*** (.097)	.775 (3.001)
Presidential Approval	–.009 (.006)	.035 (.016)
Constitutional Challenge	–.193 (.157)	–1.180 (.929)
International Law/Treaty	–.163 (.192)	.004 (.544)
Threshold Issue	.083 (.170)	.745 (.717)
Constant	–.119 (.413)	.449 (.926)
Certiorari Equation (CERT)		
Lower Court Directionality	N/A	–.533*** (.134)
Constant	N/A	–.753 (.746)
Supreme Court Equation (SCE)		
Court Ideology	2.393*** (.916)	1.389*** (.488)
Lower Court Directionality	–.114 (.136)	.002 (.411)
Constant	–.716 (.492)	.197 (.279)
N	322 (ACE) 93 (SCE)	416
Null Model	41.9% (ACE) 43.9% (SCE)	34.1%
Correctly Predicted	65.2% (ACE) 65.9% (SCE)	55.2%

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

probit analysis) involves placing these courts into a strategic environment. Examining the coefficients in the strategic probit model reveal that the variables *Court Ideology* and *Criminal Case* continue to exert a significant influence on the appeals courts, and *Court Ideology* remains statistically significant for the Supreme Court. Additionally, the variable *Lower Court Directionality* loses significance for the appeals courts, and achieves statistical significance for the Supreme Court, but in the *certiorari* decision only. To better understand the impact of these variables on judicial behavior and to identify the potential constraints imposed by the hierarchical structure of the judiciary, one must examine changes in predicted probabilities when these judges anticipate a denial of *certiorari* versus when they anticipate the Supreme Court deciding on the merits of an appeal. Doing so reveals several remarkable findings.

Table 3-2: Changes in Predicted Probabilities

	Probit Model	Strategic Probit Model	
		Appeals courts choose foreign policy while anticipating a denial of *certiorari* (A;D)	Appeals courts choose civil liberties while anticipating a denial of *certiorari* (C;D)
Appeals Courts			
Court Ideology	.167	.318	.286
National Security Defense	–.122	–.057	–.051
Criminal Case	–.174	–.108	–.097
Lower Court Directionality	.211	.073	.065
Supreme Court (CERT)			
Lower Court Directionality	N/A	–.008	.279

Note: Changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value while simultaneously holding the remaining variables at their mean values.

First, Table 3-2 presents the changes in predicted probabilities[17] when the appeals courts anticipate either no appeal from the losing litigant or a denial of *certiorari* by the Supreme Court. For comparison, the changes in predicted probabilities from the traditional probit model (which does not account for strategic interdependence) are also represented in the table. Examining the entries in Table 3-2 for the influence of *Court Ideology* on the appeals courts indicates that panels dominated by liberal judges are 16.7% more likely to rule in favor of civil liberties, if these courts are examined in a non-strategic environment, using traditional maximum likelihood methods. However, if we examine the appeals courts in a strategic environment, we see a dramatic increase in the influence of ideology. Regardless of the final decisions by the appeals courts, liberal panels are approximately 30% more likely to favor civil liberties than panels dominated by their conservative colleagues, if they anticipate a denial of *certiorari* by the Supreme Court. This is almost twice the impact calculated by a traditional probit model, and it provides an important first piece of evidence for the effects of the hierarchical structure on judicial behavior. According to Table 3-2, when appellate judges believe they will be the court of last resort, the impact of ideology on their decisions increases substantially.

Table 3-2 reveals a second notable finding in addition to this discovery about ideological influences pertaining to the Supreme Court's decision on *certiorari*. According to the table, if appellate judges render a decision favoring foreign policy, this choice does not significantly affect the Court's likelihood of granting *certiorari*; the change in predicted probability for the variable *Lower Court Directionality* is negligible (less than 1%). By contrast, when appellate judges render decisions favoring civil liberties this translates into a 27.9% increase in the likelihood of a grant of *certiorari*. It is therefore apparent that the Supreme Court is substantially more likely to review civil liberties decisions by the appeals courts than foreign policy decisions.

Taken together, these results begin to paint the picture that appellate judges will cast votes in accordance with their ideological preferences when they anticipate no action by the Supreme Court. However, for more liberal judges (who tend to support civil liberties claims), voting according to ideology actually increases the potential for review by the Supreme Court. The next obvious question, then, is whether this potential increase (and the subsequent voting on the merits) has a systematic impact on appellate behavior. To examine this phenomenon, I calculated changes in predicted probabilities for those instances in which the Supreme Court grants *certiorari* and renders a decision on the merits. These are reported in Table 3-3.

Examining the predicted probabilities in Table 3-3 reveals a final piece of evidence pertaining to ideological influences on the behavior of appeals court judges. The first column of coefficients restates the predicted probabilities estimated by a traditional probit model. As I stated earlier, had I run a traditional probit model, I would conclude that appellate panels dominated by liberal judges are 16.7% more likely to rule in favor of civil liberties than conservative panels. However, the probabilities calculated in the strategic probit model reveal different conclusions. First,

Table 3-3: Changes in Predicted Probabilities

	Probit Model	Strategic Probit Model			
		When both courts choose foreign policy (A;G,A)	When Supreme Court reverses foreign policy decision (A;G,C)	When Supreme Court reverses civil liberties decision (C;G,A)	When both courts choose civil liberties (C;G,C)
Appeals Courts					
Court Ideology	.167	.108	.095	–.180	.056
National Security Defense	–.122	–.019	–.017	.032	.001
Criminal Case	–.174	–.036	–.032	.061	.019
Lower Court Directionality	.211	.025	.022	.041	.013
Supreme Court (merits)					
Court Ideology	.545	.129	.114	.070	.217
Lower Court Directionality	–.090	.003	–.002	–.001	.001

Note: Changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value while simultaneously holding the remaining variables at their mean values.

though three of the four cells possess positive probability coefficients (indicating the liberals are more likely to favor civil liberties), the magnitude of influence for ideology decreases substantially when appellate judges anticipate review by the Supreme Court. Rather than an approximate 17% difference between liberal and conservative panels, the impact of ideology in the strategic environment is no greater than 10.8% and as low as -18%. This stands in stark contrast to the impact of ideology when appellate judges anticipate a denial of *certiorari* by the Supreme Court, where liberal panels are approximately 30% more likely to support civil liberties than conservative panels (as listed in Table 3-2).

The second notable finding in Table 3-3 involves the final cell (not discussed previously) demonstrating the influence of ideological voting on appellate judges. The empirical results indicate that when appellate panels anticipate a reversal by the Supreme Court to a decision favoring civil liberties (C,G,F), this anticipation substantially curtails the influence of ideology. No longer are liberal panels more likely to support civil liberties; rather, in these situations (C,G,F) liberal panels are 18% less likely to rule in favor of civil liberties. It is therefore apparent that liberal appellate panels encounter a greater fear of reversal than conservative panels, and adjust their behavior accordingly when they anticipate a negative response from the Supreme Court.

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 asked if judges on the courts of appeals guess the preferences of their Supreme Court colleagues, and if this anticipatory behavior exerts 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-agent theory (as modified to conform to the federal judiciary). Using a Quantal Response Equilibrium, the model demonstrates that appellate judges will render decisions according to ideological influences when they believe the Supreme Court will deny *certiorari*. However, when the judges believe the Supreme Court will review a case in order to reverse a decision, then strategic appellate judges will render non-ideological decisions (or mask their ideological preferences).

Testing this theoretical expectation involves relying on a strategic choice probit model. These 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 anticipate responses from the Supreme Court and adjust their behavior according to this perceived constraint. However, this constraint is not experienced by all appellate judges. Instead, liberal

appellate panels encounter greater constraints than conservative panels. First, the Supreme Court is more likely to grant *certiorari* to those appellate decisions that favor civil liberties (probably because the federal government is more likely to appeal an unfavorable decision to the Supreme Court than are nongovernmental litigants). Second, if appellate judges anticipate this action, and also believe the Court will reverse the civil liberties decision, then liberal panels are substantially less likely to rule in favor of civil liberties.

Thus, the hierarchical structure of the federal judiciary exerts a significant constraint on the ability of judges on the courts of appeals to render decisions according to their ideological preferences. In the language of principal-agent 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 to 2000), and this in turn severely curtails the agents' ideological voting. Consequently, liberal 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 in order. While the strategic choice probit 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 strategic choice model to those within a traditional probit model. While inferences can be made, the conclusive generalizability of those inferences is limited.

4

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.

—Charles E. Wyzanski, Jr., "The Importance of the Trial Judge.

In Chapter Two I presented an individual analysis of influences on district court judges and discovered their decisions are not impacted by traditional ideological concerns—unlike judges on appeals courts and the Supreme Court—but, rather, are affected by preferences over security concerns. In Chapter Three I provided 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. I proceed under the premise that if principal-agent 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 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 underanalyzed judicial entity: the federal district courts.

Are district court judges constrained by the appeals courts, according to the tenets of principal-agent 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 mentioned 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 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 established 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 periodically passes legislation increasing the number of district court judges. The most recent statute, the Federal Judgeship Act of 1990, created 74 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 on scholars to examine how district court judges resolve disputes. Focusing on this question involves 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 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?

The extent to which district court judges hint at forms of anticipatory behavior in their opinions lends support to the notion that trial judges guess what might happen on appeal—especially when adjudicating foreign policy disputes. For example, in a case involving the law pertaining to citizenship for foreign nationals, District Judge Dickinson R. Debevoise (District Court of New Jersey) indicates, "*Chaunt*

and *Fedorenko* in combination leave us with a number of rules which could be applied in determining if defendant's misstatements and concealments were material and therefore a basis for loss of citizenship. Certain of the rules are inconsistent . . . I believe that it is most probable that when the Supreme Court decides the question it will apply *Chaunt* to the visa application stage as well as the citizenship application stage. There is no reason I can think of not to do so."[1] Additionally, during the trial court's disposition of the case *United States v. New York Times Co.* 328 F. Supp. 324 (1971), which involved the publication of the Pentagon Papers during the Vietnam War, District Judge Murray Gurfein (Southern District Court of New York) stated, "This case is one of first impression. In the researches of both counsel and of the Court nobody has been able to find a case remotely resembling this one—where a claim is made that national security permits a prior restraint on the publication of a newspaper." A final example is found in the case *Dombrowski v. Pfister* 227 F. Supp. 556 (1964), District Judge Robert Stephen Ellis (District Court of Louisiana) stated, "For the good of all it is hoped that this case will reach the Supreme Court so that the matter in the judicial field may be clarified. If the federal district judges are to act as a police force to ride herd over state and municipal courts then we had best be so instructed and the matter for once and for all laid to rest." These examples illustrate the unique aspects of foreign affairs litigation and the ambiguity of precedent available to judges. As such, they provide support that a theory pertaining to the potential hierarchical constraints experienced by trial court judges is necessary to completely understand influences on their behavior.

In Chapter Three I explored a manifestation of principal-agent theory between the courts of appeals and the Supreme Court. Building on previous research demonstrating agent compliance with the principal's decisions, I provided empirical support for the notion that the agent anticipates the principal's potential response and conditions his or her 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, 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.

While this logical extension of principal-agent theory to the district courts seems relatively straightforward, there are two theoretical reasons against the application of this 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 noted 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 that exerts a significant constraint on their decisions. 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 Henry N. Graven[2] 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? On the other hand, perhaps the large number of affirmances on appeal signifies that the district courts rarely rule out of step with the appeals courts. Consequently, this would indicate an extreme amount of deference (perhaps caused by a fear of reversal) given to the appeals courts, in accordance with the principal-agent model. Since this empirical question has not been addressed directly, it is essential to determine whether district court judges are constrained by their hierarchical relationship to the courts of appeals. If these judges consistently rule according to their ideological preferences, regardless of the potential for reversal on appeal, then one can reasonably conclude that Judge Graven's statements may reflect a general belief across the federal trial courts. However, if identifiable patterns emerge where district judges rule against their ideological preferences, then the large affirmance rate on appeal becomes more indicative of a viable principal, successfully monitoring the activities of its agents.

The second theoretical reason against application involves the ability of district court judges to estimate 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. Though they can determine the ratio of liberal or conservative judges in a given circuit, and can calculate

the probability of an ideological majority on the panel, the uncertainty involved with this process is less reliable than determining the preferences of Supreme Court justices. 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. It is precisely because of these probabilistic calculations that district court judges must estimate who the principal is likely to be, which introduces a degree of uncertainty into the principal-agent relationship not experienced in other applications (such as the courts of appeals and the Supreme Court). Luckily, researchers can design empirical models that directly account for this level of uncertainty, allowing the equations to incorporate a random component that measures these probabilistic calculations.

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 that of appellate judges, additional theoretical expectations limit an application of principal-agent theory to the trial level. Given these apparent contradictions, it seems prudent to rethink the incentives and constraints foisted on district court judges. In the following section, I begin this process by developing a formal model that incorporates potential strategic choices available to these judges.

FORMAL MODEL OF DISTRICT COURT DECISION MAKING

As I mentioned 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.[3]

Following similar analyses (such as Spiller 1992; Helmke 2005), I present a sequential game where decisions are first heard in the district courts for trial (see Figure 4-1). The majority of litigation in the district courts is presided over by a single judge. He or she can choose between ruling in favor of civil liberties (denoted C for this game) or against (denoted A). Once the district courts rule on a case, the courts of appeals encounter a similar choice: ruling in favor of civil liberties (C) or against (A).[4] Since the appeals courts possess mandatory jurisdiction, they must review all appeals, though in reality "about twenty percent of district court decisions are appealed in any given year" (Rowland and Carp 1996, 8). Examining why certain

litigants choose to appeal (or not appeal) is beyond the scope of this book, but, since every case tried in the district courts *can* be appealed and the appeals courts cannot selectively review appeals, I assume that every case tried in the district courts is reviewed on appeal. Additionally, following the tenets of the attitudinal model (Segal and Spaeth 1993, 2002), I assume judges are primarily motivated by their personal policy preferences. As Baum (1997, 115) notes, policy-minded district 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." Thus, a potential tradeoff exists for the district judge in terms of ruling ideologically and having this decision reversed on appeal. If the trial judge believes his or her preferences are similar to those of the appeals court, then he or she can rule according to those preferences without fear of reversal. Conversely, if the preferences of the district court are contrary to the appellate panel, then the former may curtail his or her ideological proclivities to avoid a possible negative outcome after appeal.

Determining equilibrium behavior for the game tree depicted in Figure 4-1 initially involves describing the preference ordering for both the district courts and the appeals courts. Identifying the preference ordering for the appeals courts is relatively straightforward because we can plausibly assume that these judges prefer to render decisions according to their ideological preferences (subject to any case-specific constraints they might encounter). Though the potential reversal by the Supreme Court may be a motivating factor for appellate judges, as Songer, Segal, and Cameron (1994) discover, these judges retain extraordinary latitude to rule according to their ideological preferences.[5] This is due to the fact that the Supreme Court grants *certiorari* to less than one-half of 1% of appeals court cases. Consequently, it is plausible to assume that the more liberal appellate panels would prefer to rule in favor of civil liberties (C) and the more conservative panels would prefer to render decisions against these challenges (A).

The preference ordering for district court judges is a bit more complex because their decisions are more effectively monitored by the courts of appeals, thereby increasing the potential for reversal. Yet, even with this increased complexity we can plausibly assume that the most preferred outcome for district court judges is to rule according to their ideological preferences and have this decision affirmed on appeal. This is the greatest way for district judges to maximize their policy preferences because they receive positive utility from both their own case and the appellate decision. Thus, liberal judges prefer to render decisions in favor of civil liberties, with an affirmance to follow from the appellate panel (C, C); and conservative judges prefer to rule against civil liberties followed by an affirmance on appeal (A, A).

The complexity occurs when determining the preference ordering for the remaining alternatives, situations in which the district court judges must weigh the utility of ruling according to their ideological preferences against the utility of having their decisions reversed on appeal. Those judges who believe the likelihood of

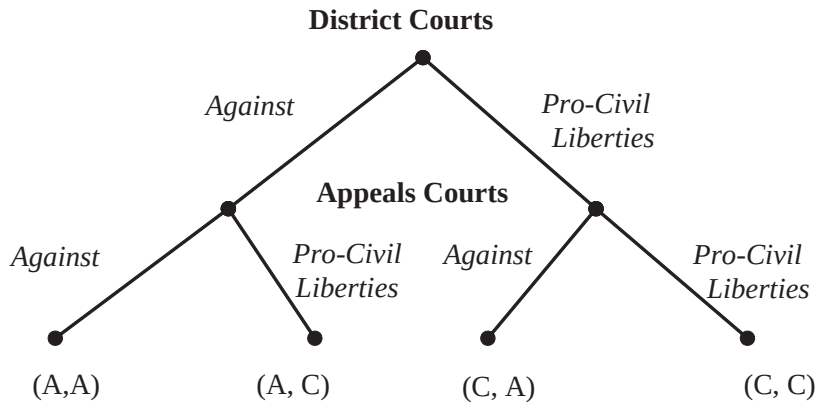

Figure 4-1: District Court/Appeals Court Decision Sequence

reversal is low (or who do not fear reversal) have incentives to continue rendering decisions according to their ideological preferences, regardless of what happens on appeal,[6] and their lesser preferred alternatives are to rule against these preferences (with the least preferable outcome to rule against their preferences and have the decision affirmed by an appellate panel). Therefore, for liberal judges who believe the probability of reversal is low (i.e., no fear of reversal), the entire preference ordering is (C, C) > (C, A) > (A, C) > (A, A), and for conservative judges the preference ordering is (A, A) > (A, C) > (C, A) > (C, C).

For district court judges who are motivated by a fear of reversal and believe the probability of reversal is high, the preference ordering changes for the remaining alternatives. In contrast to the purely ideologically motivated judge, these individuals prefer having their decisions affirmed on appeal. Consequently, though these judges most prefer to rule ideologically and have the decision affirmed, the next preferable alternative is to rule against their preferences and have the decision upheld on appeal. The third preferred alternative involves ruling according to their ideological preferences and having the decision reversed, and the least preferred outcome is to rule against their ideological preferences and have the decision reversed on appeal. Therefore, for liberal justices the entire preference ordering is (C, C) > (A, A) > (C, A) > (A, C), and for conservative judges the preference ordering is (A, A) > (C, C) > (A, C) > (C, A).

Once the preference orderings are determined, we can identify equilibrium solutions and generate testable hypotheses. As in Chapter Three, to determine the equilibrium behavior of the actors, I rely on the Quantal Response Equilibrium (QRE) concept, 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 1996, 186). Over time, the players are more likely to choose better strategies than worse

strategies, but they do not always play the best strategy with a probability of 1 (McKelvey and Palfrey 1998). Though the formal model may be represented in terms of complete information, Quantal Response Equilibria allows for players to possess limited amounts of private information. This refinement is appealing intuitively, because while district court judges 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. Therefore, this introduces a random component to the formal model, which measures the probabilistic calculation required of district court judges to determine the ideological preferences of the appellate panel. Likewise, the district courts will possess private information regarding their policy preferences and their fear of reversal. In sum, the private information allows for variation within the formal model's predicted responses, thereby facilitating empirical tests of my theoretical expectations.

Deriving the equilibrium probabilities for the actors, therefore involves calculating expected utilities for the decisions—in relation to the decisions of the other actors—combined with a private information component. Returning to the game depicted in Figure 4-1, estimates are necessary for the expected utilities for the district courts U_{Dist} (A, A), U_{Dist} (A, C), U_{Dist} (C, A), and U_{Dist} (C, C) and for the appeals courts U_{App} (A, A), U_{App} (A, C), U_{App} (C, A), and U_{App} (C, C). Assuming that the random error component (represented by the term Φ) is independently and identically distributed (i.i.d) normal, then we can work up the game tree to calculate the QRE probabilities. Let z equal probability that the appeals court will rule in favor of civil liberties (where Φ is the standard normal cumulative distribution).

$$z = \Pr\left[U_{App}(C; C) + \pi_C > U_{App}(C; A) + \pi_A\right]$$

$$z = \Pr\left[\pi_A - \pi_C < U_{App}(C; C) - U_{App}(C; A)\right]$$

$$z = \Phi\left[\frac{U_{App}(C; C) - U_{App}(C; A)}{\sqrt{\sigma^2_{\pi C} + \sigma^2_{\pi A}}}\right] \qquad [1]$$

In a similar fashion we can determine the equilibrium choice probabilities for the district court. Let t equal the probability that the district court rules in favor of civil liberties. Estimating this probability requires a consideration of the utility of the appeals court on review. Thus, estimating t involves the following:

$$t = \Pr\left[U_{Dist}(C) + \pi_C > U_{Dist}(A) + \pi_A\right]$$

$$= \Pr\left[\pi_C - \pi_A < U_{Dist}(C) + U_{Dist}(A)\right]$$

$$= \Pr[\pi_C - \pi_A < zU_{App}(C; C) + (1 - z)U_{App}(C; A) - zU_{App}(A; C) + (1 - z)U_{App}(A; A)]$$

$$t = \Pr\Phi\left[\frac{zU_{App}(C; C) + (1- z)U_{App}(C; A) - zU_{App}(A; C) + (1- z)U_{App}(A; A)}{\sqrt{\sigma^2_{\pi C} + \sigma^2_{\pi A}}}\right]$$

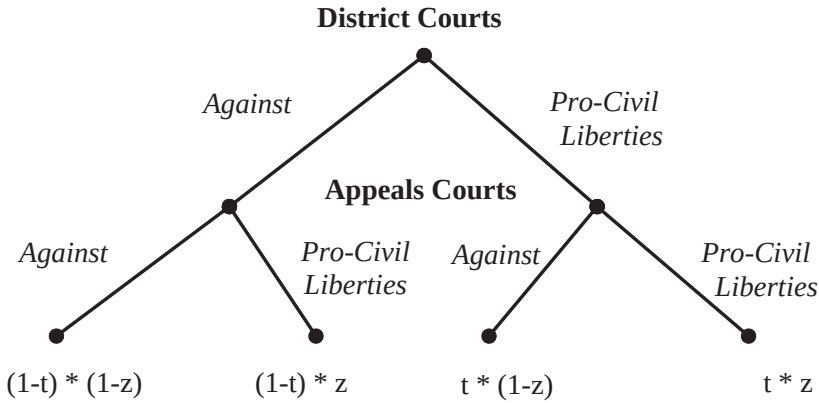

Figure 4-2: District Court/Appeals Court Equilibrium Outcome Probabilities

Multiplying these choice probabilities, for all combination of actors' choices results in the equilibrium outcome probabilities depicted in Figure 4-2. Since the outcome probabilities and expected utilities are functions of a set of explanatory variables and their corresponding parameters (the X• coefficients), it is possible to calculate maximum likelihood estimates of the coefficients using an appropriate statistical model.

The outcome probabilities listed in Figure 4-2 assist in determining the equilibrium behavior of district and appeals court judges. If we use backward induction and work up the game tree as we did for the QRE probabilities, we can determine probabilistically the substantive behavior of judges. For appeals court panels, the choice to rule in favor of civil liberties (z) will be a function of their collective ideological preferences. This leads to the first testable hypothesis (the appellate panel hypothesis):

> ***Appellate Panel Hypothesis****: Appeals court panels will render decisions according to their collective ideological preferences. Therefore, more liberal appellate panels will be more likely to rule in favor of civil liberties (z) and more conservative appellate panels will be more likely to rule against civil liberties (1 – z),* ceteris paribus.

District court judges who do not fear reversal receive greater utility by ruling according to their ideological preferences. Therefore, their decision calculus does not require strategically anticipating what might happen on review, because $t \geq z$ in every instance. Therefore, these judges receive positive utility by voting ideologically regardless of the decision on appeal. Consequently, for liberal district court judges, the equilibrium behavior is {C; A,C} and for conservative judges the equilibrium behavior is {A; A,C}. This leads to the second testable hypothesis (the no strategic anticipation hypothesis):

No Strategic Anticipation Hypothesis*: District court judges who do not fear reversal (or who believe the likelihood of reversal is low) will render decisions according to their ideological preferences. Consequently, as judges' ideologies become more liberal, the likelihood of ruling in favor of civil liberties increases,* ceteris paribus.[7]

As the likelihood of reversal increases, district court judges who fear reversal will become increasingly constrained from ruling ideologically. The QRE outcome probabilities reveal that fear of reversal occurs when $(1 - z) > t$ for liberal judges or when $z > (1 - t)$ for conservative judges. The fear of reversal becomes more pronounced as the inequality for z (or $1 - z$) becomes larger in relation to t (or $1 - t$). Consequently, the equilibrium behavior for liberal judges shifts from {C; C} to {A; A} as $1 - z$ increases; similarly for conservative judges the equilibrium behavior shifts from {A; A} to {C; C} as z increases. This leads to the second hypothesis (the fear of reversal hypothesis):

Fear of Reversal Hypothesis*: District court judges who are motivated by a fear of reversal will be more likely to render decisions against their ideological preferences as the probability of reversal increases. Consequently, liberal judges will be more likely to rule against civil liberties (and conservative judges more likely to rule in favor of civil liberties) as the probability of reversal increases,* ceteris paribus.

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 explained 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. Since the outcome probabilities and expected utilities are functions of a set of explanatory variables and their corresponding parameters (the $X\beta$ coefficients), 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 come from an original sample of federal court decisions involving civil liberties challenges to foreign policy cases from 1946 to 2000. Using a Lexis-Nexis keyword search, I identify a sample of 150 pairs of cases that were reviewed in both the district and appeals courts.[8] Coding the cases at both levels brings the total number of observations in this sample to 300 (150 cases at the district court level and 150 cases at the appeals court level).

In the strategic choice model there are essentially two statistical equations, which are estimated in tandem: one equation for the district courts and one equation for the courts of appeals.[9] The dependent variable is whether a court voted in favor of

a civil liberties challenge (coded 1) or against (coded 0).[10] Similar to calculating the equilibrium choice probabilities (by working up the game tree), the strategic model estimates the likelihood of the appeals courts ruling in favor of civil liberties and then incorporates these predictions into the estimation of the district court equation. Thus, the behaviors of trial judges are examined in relation to potential actions by appellate judges.

Evaluating the strategic aspects of judicial decision making also involves the inclusion of several independent variables to measure specific exogenous influences (the Xβ coefficients). As I stated in Chapter Two, according to advocates of the attitudinal model, judges are motivated by their individual policy preferences and vote according to these influences. Thus, the fundamental purpose of this analysis is to determine whether the hierarchical structure of the federal judiciary induces district court judges to vote against their preferences. To measure individual ideological dispositions, I use the measures developed by Giles, Hettinger, and Peppers (2001). The variable *District Court Ideology* measures this influence for trial judges. However, the variable *Appeals Court Ideology* measures this influence at the appellate level and is aggregated to the court panel (i.e., proportion of liberal judges). As several scholars note, liberal judges are more likely to render liberal decisions than their conservative colleagues.[11] This tendency translates into liberal judges being theoretically more likely to rule in favor of civil liberties claims than conservatives and the latter being more likely to rule against these challenges (a positive relationship). If district court judges do not engage in strategic anticipation (i.e., when $t \geq z$), then I expect the substantive impact of the variable *District Court Ideology* to remain positive, regardless of the decisions from the courts of appeals. This would indicate that liberal judges will rule consistently in favor of civil liberties (and conservative judges will rule consistently against civil liberties), regardless of what happens on appeal. Conversely, if district court judges fear reversal (i.e., when $z > t$), then I expect the substantive impact of *District Court Ideology* to decrease.

In addition to this ideological variable, I also include several control variables (with expected relationships similar to those stated in Chapter Two). In the equation for the district courts, I first include the 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 against civil liberties challenges (Cheh 1984; Dorsen 1997). Second, the dummy variable *Criminal Case* measures whether the courts are reviewing criminal petitions related to foreign affairs,[12] and I hypothesize that judges will be more likely to rule against civil liberties when resolving criminal issues. Third, the variable *Presidential Approval* measures the strength of the executive and is calculated based on an annual approval score calculated from Gallup Poll surveys. Previous research demonstrates the substantial influence a powerful president exerts on the judiciary (Ducat and Dudley 1989; Yates and Whitford 1998). Therefore, I expect court to exert higher degrees of deference to foreign

policy initiatives when the president possesses high presidential approval scores, which translates into rulings against civil liberties. Thus, the variable *Presidential Approval* should be related negatively to the dependent variable.

The final three control variables measure various 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). As stated in Chapter Two, I hypothesize that judges may be sensitive to constitutional challenges, and consequently, will be more likely to rule in favor of civil liberties claims (Burgess 1992). The variable *International Law or Treaty* measures the presence of an issue related to international law or treaties signed by the United States. 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 (Rogoff 1996; Scheffer 1996). Finally, the dummy variable *Threshold Issue* measures the presence of a threshold issue such as the political question or act of state doctrine. Several studies comment on the deference given by judges to the federal government when threshold issues are present (Halberstam 1985; Charney 1989; Franck 1992). I hypothesize the presence of a threshold issue should be negatively related to the likelihood of the courts ruling in support of civil liberties claims.

In the equation for the courts of appeals,[13] in addition to the ideological variable of interest *Appeals Court Ideology*, there is also a variable measuring the effects of *Supreme Court Ideology*. This variable reflects the aggregate ideological preferences of the Supreme Court justices, measured in a similar fashion to the appellate panel ideological measure (i.e., proportion of liberal justices on the High Court). Though the Supreme Court reviews less than 1% of cases reviewed by the courts of appeals (Songer 1991), previous research indicates that appellate judges may be constrained by the justices (Songer, Segal, and Cameron 1994). I also 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 ruled against civil liberties, 2 if the court rendered a mixed decision (both for and against individual rights), or 3 if the court ruled in favor of civil liberties. Theoretical expectations indicate the courts of appeals will be more likely to affirm a district court ruling (Davis and Songer 1988; Songer and Sheehan 1992). This is due to several reasons, including caseload considerations (it is easier and less costly to simply affirm a decision than reverse and possibly remand) and potential idiosyncratic legal influences (such as precedent) that are referenced in the lower court opinion. Though exploring the precise influence on the appeals courts is beyond the scope of this analysis, it is evident that one must control for the directionality of the lower court opinion. I therefore include this control variable and hypothesize a positive relationship. Second, I include the variable *National Security Defense* to track whether this specific issue is raised during litigation, and I hypothesize that judges will be more likely to rule against civil liberties challenges. Finally, the variable *Criminal Case* measures

the presence of a criminal appeal, and I hypothesize that the presence of this issue will persuade federal judges to rule against civil liberties.

EMPIRICAL RESULTS

Table 4-1 presents the empirical results for a series of statistical models. The first column contains estimates from standard probit models, applied separately to the district courts and appeals courts (i.e., one probit model for each court level). Estimates in the second column are derived from a strategic probit model that analyzes both court levels in tandem. Though the coefficients for both models are not directly comparable, I include the standard probit estimates to illustrate the substantive conclusions one would draw had the analysis only involve a traditional maximum likelihood model. Examining the models provides several interesting insights into the behavior of lower court judges.

The first insight pertains to the influence of the primary variables of interest, *District Court Ideology* and *Appeals Court Ideology*. In the standard probit models, the latter variable is statistically significant in both equations while the former is not significant in the District Court Equation. Thus, if a researcher only conducted a standard probit analysis he or she would conclude that the preferences of appellate judges positively affect their decision making (i.e., more liberal appellate panels are significantly more likely to rule in favor of civil liberties) but exert an opposite influence on the district courts.[14] Additionally, the district court judges do not render decisions according to their own ideological preferences. However, the results from the strategic probit model indicate the error of this initial conclusion. As the last column of Table 4-1 displays, the coefficients for *District Court Ideology* and *Appeals Court Ideology* are statistically significant in each respective equation, indicating that ideological preferences influence judges at each level.

Second, the results for the remaining independent variables in the strategic choice model indicate that several other variables significantly influence judicial behavior. The appeals courts are affected by the variable *Lower Court Directionality* as hypothesized; if the lower court ruled in favor of civil liberties, then the appellate panel is significantly more likely to render a similar decision. The variable *Criminal Case* is also significant and negative, as hypothesized. This indicates that appellate panels are less likely to render decisions favoring civil liberties when there is a criminal issue before the judges. Interestingly, the variable *Supreme Court Ideology* is not significant in either the traditional probit or the strategic probit model. Therefore, it is apparent that the preferences of the Supreme Court do not exert a meaningful influence on the decision calculus of appellate panels.

For the district courts, Table 4-1 reveals that two other variables significantly affect judicial behavior. When these judges hear *Criminal Cases,* they are significantly less likely to rule in favor of civil liberties, as hypothesized (similar to the effect noticed in the appeals courts). Additionally, the variable *Presidential Approval* is

Table 4-1: Probit and Strategic Probit Models of Lower Federal Courts

	Coefficients (Robust Standard Errors)		
	District Court Probit Model	Appeals Court Probit Model	Strategic Probit Model
District Court Ideology	–.084 (.229)		1.186* (.052)
Appeals Court Ideology	–.775* (.376)		N/A
National Security Defense (District Court)	–.331 (.352)		–2.334 (2.127)
Criminal Case (District Court)	–.551* (.257)		–13.640* (7.140)
Presidential Approval	–.024* (.011)		–.129** (.037)
Constitutional Challenge	–.131 (.220)		.425 (.697)
International Law/Treaty	.117 (.314)		1.069 (.964)
Threshold Issue	.169 (.255)		1.002 (.753)
Constant (District Court)	1.617 (.714)		2.523 (2.303)
Appeals Court Ideology		.879** (.335)	1.187* (.515)
Supreme Court Ideology		–.279 (.521)	.908 (.563)
Lower Court Directionality		.294* (.127)	.255*** (.071)
National Security Defense (Appeals Court)		–.262 (.370)	–.063 (.261)
Criminal Case (Appeals Court)		–.279 (.271)	–.902** (.291)
Constant (Appeals Court)		–1.227 (.368)	1.090 (.330)
N	150	150	300
Null Model	39.3%	32.9%	32.8%
Correctly Predicted	66.0%	69.8%	52.8%

Note: Dependent variable is vote in favor of civil liberties (1) or against (0).
* $p < .05$ ** $p < .01$ *** $p < .001$

significant and negative. As hypothesized, this indicates that district judges are hesitant to rule in favor of civil liberties when the president possesses strong approval ratings.

Though these results are interesting, my primary research question involves the extent to which district court judges strategically anticipate appellate decisions (and are potentially constrained by this anticipation). Therefore, the remaining discussion will focus on the ideological variables of interest: *District Court Ideology* and *Appeals Court Ideology*.

The strategic probit model indicates that when the strategic interdependence between the district courts and appeals courts is modeled properly, these judges

are influenced significantly by ideological preferences. While this result alone is noteworthy, a more interesting finding occurs when one examines the changes in predicted probabilities for each equation, the results of which are presented in Table 4-2. These probabilities are calculated by adjusting the variables of interest (in this case *District Court Ideology* and *Appeals Court Ideology*) from their minimum to their maximum values while simultaneously holding the remaining variables at their mean values. The first column in Table 4-2 provides information on baseline probabilities, calculated as if no strategic interdependence existed (i.e., from a standard probit model for each equation). As indicated in Table 4-2, the change in predicted probability for the variable *District Court Ideology* is –.032, which indicates no significant difference between liberal and conservative individuals. In contrast, panels dominated by liberal appeals court judges are approximately 31% more likely to render decisions favoring civil liberties than conservative panels. Additionally, the preferences of appellate panels significantly affect district court judges, albeit in a counterintuitive manner. The empirical evidence from the traditional probit model indicates that district court judges are almost 30% less likely to rule in favor of civil liberties when the preferences of the appellate panel become more liberal. Unfortunately, the traditional probit model does not reveal whether this appellate panel influence affects district court judges due to a fear of reversal. Fortunately, though, the strategic probit model allows for a more precise examination.

The final four columns present changes in predicted probabilities when judges are evaluated in a strategic context. Each column represents one of the four possible outcomes as depicted in Figure 4-2: when both courts rule against civil liberties (A,A), when the district courts rule against but are reversed by the appeals courts (A,C), when the district courts rule in favor of civil liberties but are reversed by the appeals courts (C,A), and when both courts rule in favor of civil liberties (C,C). Examining these final columns reveals the specific impact of the strategic environment on judicial behavior. Beginning with judges on the courts of appeals, the data indicate the values for the appeals courts are virtually consistent, regardless of the column examined. With the exception of the third strategic choice column (C,A), Table 4-2 indicates that appellate panels dominated by liberals are more likely to vote in favor of civil liberties than conservative panels. This supports my hypothesis on appellate court behavior; one can reasonably conclude that appellate judges are not acting strategically in this decision sequence, since the impact of ideology does not change systematically in relation to the nodes of the game tree. Additionally, the variable measuring *Supreme Court Ideology* reveals a miniscule impact on the decisions of appellate judges. This conclusion is fairly intuitive since the appeals courts, as depicted in the formal model, are not anticipating the actions of a later decision.

The same cannot be said for district court judges, however. Table 4-2 indicates that the influence of district court ideology is affected significantly by the actions of the appeals courts. However, this effect is not symmetric across the four potential

Table 4-2: Changes in Predicted Probabilities

	Probit Model	Strategic Probit Model			
		When both courts choose against civil liberties (A,A)	When appeals courts reverse a decision against civil liberties (A,C)	When appeals courts reverse a decision favoring civil liberties (C,A)	When both courts choose civil liberties (C,C)
District Courts					
District Court Ideology	–.032	–.764	–.235	.525	.474
Appeals Court Ideology	–.296	N/A	N/A	N/A	N/A
Appeals Courts					
Appeals Court Ideology	.313	.186	.092	–.193	.089
Supreme Court Ideology	–.099	.075	.037	–.098	–.012

Note: Changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value while simultaneously holding the remaining variables at their mean values.

outcomes. When both courts render a decision against civil liberties (A,A), we see that liberal district court judges are approximately 76% less likely to vote according to their ideological preferences (conversely, conservative judges are 76% more likely to vote ideologically). However, when the district courts anticipate a reversal on appeal of a decision against civil liberties (C,A), Table 4-2 indicates that liberal district court judges are approximately 24% less likely to vote according to their ideological preferences (conversely, conservative judges are 24% more likely to vote ideologically). Thus, it is relatively clear from Table 4-2 that the possibility of reversal substantially affects whether district court judges render decisions against civil liberties according to their ideological preferences.

In contrast, Table 4-2 reveals that district court judges render ideological decisions when ruling in favor of civil liberties, regardless of the action taken on appeal. In both instances {(C,A) and (C,C)} liberal district court judges are more likely to rule in favor of civil liberties—approximately 53% more likely when the outcome is (C,A) and 47% more likely when the outcome is (C,C). Thus, it is apparent that the decision to rule in favor of civil liberties is not affected by strategic anticipation (especially by a fear of reversal).

These counterintuitive results are extremely noteworthy because they demonstrate that district court judges are motivated by a fear of reversal, but only in specific circumstances. It is only the decision to vote against civil liberties with which the district courts strategically anticipate what might happen on appeal. If these judges anticipate a reversal (A,C) then the impact of ideology changes by almost 50%. However, the decision to rule in favor of civil liberties is not affected by strategic anticipation. Since the courts of appeals are more likely to vote against civil liberties during the adjudication of foreign policy disputes (as seen in Chapter Two), we can speculate that the observed district court behavior is not caused by a low probability of reversal. Rather, it is more likely that the decision to cast a vote in favor of civil liberties is not affected by strategic anticipation. Regardless of the decision rendered on appeal, district court judges will vote in favor of civil liberties according to their ideological preferences.

CONCLUSIONS

This analysis uses an empirical test of a formal model to examine the tenets of principal-agent theory as it applies to lower federal courts. Do district court judges strategically anticipate decisions on appeal, and does this anticipation constrain their decisions? As the formal model indicates, if district judges believe their preferences are similar to those of the appeals courts, then they can rule according to those preferences without fear of reversal. However, if the preferences of the district courts are contrary to those of the appellate panel, then the former may curtail their ideological proclivities and avoid a negative outcome on appeal.

The empirical results support the general predictions of the formal model (albeit in a somewhat counterintuitive fashion), provided the data are analyzed in a strategic context. If one relies on a standard probit model to estimate statistical effects, then an important relationship between judicial ideology and strategic behavior is missed. Only by specifically modeling this strategic interdependence into the statistical estimation does one uncover the underlying reality. District court judges are significantly constrained by the anticipated responses from the courts of appeals, but only under specific circumstances. It is during the decision to rule against civil liberties that judges strategically anticipate what might occur on appeal. If the federal trial judges anticipate a negative response, then they substantially curtail ideological influences (by almost 50%). Yet, when district court judges consider ruling in favor of civil liberties, this decision is driven primarily by ideological influences, without anticipation of the appellate panel's decision.

These results raise additional questions pertaining to the high affirmance rates exhibited by the appeals courts. Are these rates a function of constraints at the appellate level (such as heavy caseloads) or the result of strategic calculations on the part of district judges? Additional analyses are required to explore this question and other possible manifestations of influence induced by the hierarchical structure of the federal judiciary. What is clear is that scholars must account for potential strategic interdependence among federal judges. Failure to include this aspect could lead to incorrect conclusions about the relationship of judges in the federal judicial hierarchy.

5

Defenders of Liberty or Champions of 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.
—Clark and Neveleff, "Secrecy, Foreign Intelligence, and Civil Liberties"

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 on 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 government to protect the security of the country and its citizens. A dearth of empirical analyses exists that systematically explore patterns of judicial behavior under these circumstances.

Finally, most studies focus exclusively on the U.S. 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 book 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: the roles federal courts have assumed in resolving foreign policy disputes, and the substantial influence on judicial decision making in foreign policy cases exerted by the structure of the judicial system. 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 mentioned 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 behavioral and institutional theories). Based on a juxtaposition of these theories, I initially identify four theoretical expectations. First, courts should possess an initial inclination to defer to governmental authority when adjudicating foreign policy disputes. Second, when facing a security threat, federal judges will be more likely to support foreign policy interests. Third, while the judiciary may possess an initial tendency to rule in favor of foreign policy, liberal judges will be more likely to support civil liberties claims than conservative judges. 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 liberty or champions of security is resolved in favor of the latter. Based on separate probit models one can reasonably conclude that federal judges are champions of security. The lower federal courts seldom rule in favor of civil liberties claims (37.9% for the district courts and 37.8% for the appeals courts), and the Supreme Court is more sensitive to individual challenges, supporting these claims in 43.9% 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 is most pronounced in the Supreme Court, less so for the appeals courts, and weakest for district courts (statistically nonexistent in the traditional probit model). Additionally, the influence of preferences over security—as measured by the presence of a specific national security defense or a criminal case—is most pronounced in the district courts, less so for the appeals courts, and statistically nonexistent for the Supreme Court. Therefore, the first three theoretical expectations are confirmed (although the strength of the evidence changes across judicial levels) through the individual empirical analyses: judges possess an initial inclination to rule in favor of foreign policy interests, which is augmented when security concerns arise; 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-agent theory (as modified to conform to the federal judiciary). Using a Quantal Response Equilibrium, the model demonstrates that appellate judges will render decisions according to ideological influences when they believe the Supreme Court will deny *certiorari*. However, when the judges believe the Supreme Court will review a case in order to reverse a decision, then strategic appellate judges will render non-ideological decisions (or mask their ideological preferences). Testing this theoretical expectation involves relying on a strategic choice probit model.[1] 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 anticipate responses from the Supreme Court and adjust their behavior according to this perceived constraint. However, this constraint is not experienced by all appellate judges. Instead, liberal appellate panels encounter greater constraints than conservative panels. First, the Supreme Court is more likely to grant *certiorari* to those appellate decisions that favor civil liberties (probably because the federal government is more likely to appeal an unfavorable decision to the Supreme Court than are nongovernmental litigants). Second, if appellate judges anticipate this action, and also believe the Court will reverse the civil liberties decision, then liberal panels are substantially less likely to rule in favor of civil liberties. Thus, the hierarchical structure of the federal judiciary exerts a significant constraint on the ability of liberal judges on the courts of appeals to render 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 agent model indicates, compliance by the agent to the principal's wishes is affected directly 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. The empirical results support the general predictions of the formal model (albeit in a somewhat counterintuitive fashion), provided the data are analyzed in a strategic context. If one relies on a standard probit model to estimate statistical effects, then an important relationship between judicial ideology and strategic behavior is missed. Only by specifically modeling this strategic interdependence into the statistical estimation does one uncover the underlying reality. District court judges are significantly constrained by the anticipated responses from the courts of appeals, but only under specific circumstances. It is during the decision to rule against civil liberties that judges strategically anticipate what might occur on appeal. If the federal trial judges anticipate a negative response, then they substantially curtail ideological influences (by almost 50%). Yet, when district court judges consider ruling in favor of civil liberties, this decision is driven primarily by ideological influences, without anticipation of the appellate panel's decision. Thus, the empirical results demonstrate that district judges engage in a form of strategic anticipation as part of their decision calculus.

Given these findings, one final question involves the extent to which judicial behavior has changed in the wake of September 11, 2001. Although only a few years have transpired since the attacks, there are enough cases in the lower federal courts to conduct empirical analyses and a few number that have reached the Supreme Court. The following section therefore explores quantitatively whether the identified patterns of behavior in the district courts and courts of appeals, before September 11, exist in the current environment. I also conduct a qualitative analysis of the four Supreme Court cases involving enemy combatants and the war on terror.

CIVIL LIBERTIES PROTECTION IN A POST-SEPTEMBER 11 ENVIRONMENT

Within weeks of the September 11, 2001, attacks, Congress passed the USA 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 terror. Consequently,

I empirically analyze a random sample of two hundred cases each in the district courts and courts of appeals to determine whether the patterns of behavior identified above continue in the post-September 11 environment.

QUANTITATIVE ANALYSIS OF LOWER COURTS

One of the initial questions posed by many individuals is whether the war on terror substantially changed the protection of civil liberties in America. Table 5-1 provides general information about the tendencies of the lower federal courts to render decisions favoring civil liberties challenges. An examination of this table reveals that the courts continue to defer to governmental foreign policy initiatives rather than rule in favor of civil liberties challenges. The results indicate that district courts will favor civil liberties challenges approximately 41% of the time (compared to 38% before September 11) and the appeals courts will favor civil liberties in approximately 32% of the cases (compared to 38% before September 11). Therefore, while it appears that the district courts are becoming more favorable to civil liberties challenges and the appeals courts are becoming less favorable, the marginal differences in these percentages are too minute to claim any significant change in behavior.

However, if we conduct an empirical analysis of decisions in the lower federal courts, we see noticeable differences (reported in Table 5-2) in the behavioral patterns after September 11. The first model empirically examines the district courts and reveals that these judges are significantly influenced by ideological preferences; the variable *Court Ideology* is significant and positive. This indicates that liberal judges are more likely to vote in favor of civil liberties than their conservative colleagues. A closer look at the change in predicted probabilities indicates that liberal district judges are approximately 20% more likely to rule in favor of civil liberties than conservatives. Additionally, the two variables measuring preferences for security—*National Security Defense* and *Criminal Case*—offer mixed results. The variable *National Security Defense* is not statistically significant, whereas the variable *Criminal Case* is significant and negative. District court judges adjudicating criminal cases are approximately 21% less likely to render decisions in favor of civil liberties, and impact of a specific defense of national security is negligible.

These findings stand in contrast to the patterns of district court behavior identified before September 11. In Chapter Two, the data indicated that district judges are not influenced by ideological preferences. However, after September 11, differences

Table 5-1: Descriptive Examination of Court Decisions

	Foreign Policy Decision	Civil Liberties Decision
District Courts	59.0%	41.0%
Appeals Courts	68.2%	31.8%

Table 5-2: Probit Analysis of Lower Courts

	Coefficients (Robust Standard Errors) Change in Predicted Probabilities (in italics) Model 1 District Courts	Model 2 Appeals Courts
Court Ideology	.524*** (.192) 19.8%	1.191*** (.374) 37.8%
National Security Defense	.167 (.244) 6.7%	.118 (.285) 4.7%
Criminal Case	–.634** (.293) –21.3%	–1.434*** (.508) –29.1%
Constitutional Challenge	.306 (.201) 11.3%	–.539** (.213) –17.7%
International Law/Treaty	–.065 (.222) –2.2%	–.139 (.217) –4.3%
Threshold Issue	–.222 (.196) –8.7%	–.103 (.273) –3.6%
Constant	–.465 (.217)	–.671 (.273)
N	189	195
Log Likelihood	–120.559	–106.559
χ^2	12.93	30.76
Probability > χ^2	.004	.000
Pseudo R^2	.056	.126
Null Model	40.7%	31.8%
% Correctly Predicted	64.6%	68.7%
% Reduction of Error	13.0%	1.6%

Note: Dependent variable: case outcome (1 for civil liberties; 0 for foreign policy). Changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value while simultaneously holding the remaining variables at their mean values.
* p < .10 ** p < .05 *** p < .01

among liberal and conservative judges become substantially more pronounced. In the current environment, liberal judges are significantly more likely to support civil liberties challenges whereas no noticeable ideological difference was apparent before the terrorist attacks. Similarly, before the terrorist attacks district courts were significantly influenced by preferences over security (both variables measuring security preferences exerted substantial influence on judge behavior). After September 11, however, the results concerning security preferences are mixed. Only one of the variables is statistically significant (*Criminal Case*) and the variable *National Security Defense* does not influence the outcomes of district court cases. Therefore, it is apparent that the post-September 11 environment has polarized district court judges along a traditional ideological dimension while simultaneously reducing the influence and importance of the security dimension.

The results for the courts of appeals after September 11 are reported in Model 2, and also portray important differences from the behavioral patterns identified

before the attacks. The variable *Court Ideology* is significant and positive, and the predicted probabilities indicate that liberal appellate panels are approximately 38% more likely to rule in favor of civil liberties than conservative panels. This is almost a 10% increase in ideological influence than observed in the pre-September 11 data. Additionally, the measures of security preferences provide mixed support for its influence over appellate behavior. The variable *National Security Defense* is not statistically significant, in contrast to the influence possessed before September 11. However, the variable *Criminal Case* is significant and negative, and the predicted probabilities reveal that appellate panels (regardless of ideology) are 29% less likely to favor civil liberties when adjudicating a criminal case.

Similar to the results for the district courts, the appeals courts evidence after September 11 indicates important differences brought about by changes since the terrorist attacks. Even though appellate panels were influenced significantly by traditional notions of liberal-conservative ideology before the attacks, these differences have become strengthened and their influence more potent since September 11. Additionally, preferences over security do not possess the level of influence after September 11 that was observed before the attacks. Rather, the mixed empirical evidence presents a hazy picture.

Taken together with the data from the district courts, the data indicate that the lower federal courts have become more ideologically polarized since the terrorist attacks and that these ideological influences exert a more profound impact on judicial behavior than preferences over security. This result is somewhat ironic, given that the lower courts remain extremely deferential to governmental foreign policy initiatives. One could speculate that part of the reason for this apparent contradiction involves a lack of clear signals being sent from the Supreme Court. To better understand whether this is accurate, I analyze qualitatively the four Supreme Court cases involving the war on terror and enemy combatants.

QUALITATIVE ANALYSIS OF THE SUPREME COURT

Currently, the Supreme Court has rendered four decisions involving the U.S. government's war on terror and the labeling of certain individuals as enemy combatants. The first of these cases, *Rasul v. Bush*[2], focused on complaints brought on behalf of individuals detained in Guantanamo Bay, Cuba. As the record indicates, the petitioners were citizens of Australia and Kuwait and were captured by the U.S. military during its armed confrontation with the Taliban regime in Afghanistan. They brought *habeas corpus* suits against the United States in protest of an executive order authorizing for the indefinite detention of individuals suspected of terrorist actions. During the trial proceedings, District Court Judge Colleen Kollar-Kotelly dismissed the case for lack of jurisdiction. Citing the Supreme Court's opinion in *Johnson v. Eisentrager*[3], Judge Kollar-Kotelly stated that alien citizens located outside the territorial boundaries of the United States are not entitled access to U.S. courts.[4] A

three-judge panel for the DC Circuit Court of Appeals affirmed this decision on appeal.[5] Writing on behalf of a 6-3 majority, Justice John Paul Stevens reversed the lower court decisions and ruled in favor of the detainees at Guantanamo Bay. In distinguishing the current case from *Eisentrager*, Justice Stevens stated, "these cases differ . . . in important aspects: they are not nationals of countries at war with the United States . . . they have never been afforded access to any tribunal, much less charged and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction."[6] Thus, Justice Stevens's opinion favored the civil liberties claim and established federal court jurisdiction over *habeas* petitions from Guantanamo Bay, Cuba.

The second enemy combatant case involves allegations by the federal government against Jose Padilla, a U.S. citizen apprehended in Chicago's O'Hare airport for potentially conspiring with the al Qaeda terrorist network. During the course of a grand jury investigation in New York, President George W. Bush signed an executive order directing Secretary of Defense Donald Rumsfeld to designate Padilla an enemy combatant. Rumsfeld complied and Padilla was sent to a military detention facility in South Carolina. His attorney brought a *habeas corpus* suit against Rumsfeld in the federal district court for the Southern District of New York. District Court Judge Michael B. Mukasey ruled for Padilla in part and for the federal government in part. He declared that Rumsfeld was the proper respondent to the suit, but also that President Bush possessed the authority to declare Padilla an enemy combatant.[7] On appeal to the Second Circuit Court of Appeals, a three-judge panel affirmed Judge Mukasey's ruling pertaining to Rumsfeld as the proper party, but reversed the judge's ruling on the president's authority. Writing the majority opinion, Judge Rosemary S. Pooler stated that absent congressional authorization, Article II of the Constitution does not confer on the president the authority to detain an American citizen—seized on American soil, outside a zone of combat—as an enemy combatant.[8] On appeal to the Supreme Court, Chief Justice William Rehnquist—writing on behalf of a 5-4 majority—overturned the appellate decision. In so doing, Rehnquist focused the argument on the proper respondent to a *habeas corpus* proceeding. He indicated that the *habeas corpus* statute, passed by Congress more than a hundred years earlier, specifically indicated that lawsuits should proceed against the individual in immediate custody. As such, Commander M. A. Marr of the South Carolina military detention facility, not Secretary Rumsfeld, was Padilla's custodian and the proper respondent to the *habeas* petition.[9] Thus, Chief Justice Rehnquist's opinion sided with the foreign policy claim in denying *habeas corpus* relief to Jose Padilla.

The third enemy combatant case involves the detention of a U.S. citizen, taken from the field of combat in Afghanistan. Yaser Hamdi was seized by Northern Alliance forces and turned over to the U.S. military shortly after Congress authorized the president to use all necessary and proper force against all nations, organizations, and individuals connected to the September 11 terrorist attacks. During the trial, Judge

Robert G. Doumar of the Eastern District Court of Virginia contended that the government's evidence and justification for Hamdi's classification as an enemy combatant did not supersede the right of an American citizen from filing a *habeas corpus* proceeding in federal court.[10] However, the Fourth Circuit Court of Appeals reversed this decision, claiming that "because it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the [government's evidence] is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution."[11] In granting *certiorari*, the Supreme Court vacated the Fourth Circuit's decision in a 6-3 decision. Writing on behalf of the majority, Justice Sandra Day O'Connor rejected the government's claim that federal courts had no authority to review the status of American citizens labeled enemy combatants. She stated, "we have long made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[12]

The fourth enemy combatant case involved another detainee at Guantanamo Bay, Cuba. Following the Supreme Court's decision in *Rasul v. Bush*, the federal government established a series of military tribunals where detainees could challenge the enemy combatant status. Yet, because these tribunals were established under military regulations, many of the constitutional safeguards that would otherwise operate in civilian courts did not exist. Salim Ahmed Hamdan was captured in Afghanistan and transported to Guantanamo Bay. Because of his close affiliation to Osama bin Laden, President Bush announced that Hamdan was an enemy combatant. In challenging this classification, Hamdan and his military-appointed attorney encountered several significant obstacles placed by the military tribunal. Consequently, he filed a *habeas corpus* petition in federal court for a determination of his status. In writing for the majority, Justice John Paul Stevens announced that the military tribunals violated both the Uniform Code of Military Justice and aspects of international law that are codified under the Geneva Conventions.[13] He noted that, "even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment."

Finally, the Supreme Court ruled on the constitutional question of *habeas corpus* in the case *Boumediene v. Bush*.[14] This case came before the Court after Congress had passed the Military Commissions Act (MCA, 2006), which denied federal court jurisdiction to aliens who had been designated as enemy combatants by a military Combat Status Review Tribunal (CSRT). Further, the MCA explicitly stated that it "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after [that] date."[15] Writing for the Court, Justice Anthony Kennedy noted that the Constitution provides language directly related to the suspension of *habeas corpus*; the Suspension Clause in Article I, §9, cl. 2 states that this protection can be removed in cases involving rebellion or invasion.

Additionally, Justice Kennedy took the federal government to task for tampering with judicial oversight in matters related to *habeas corpus*. He indicated that "in our own system the Suspension Clause is designed to protect against these cyclical [political] abuses . . . It ensures that, except during period of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."[16]

These cases indicate that the status of enemy combatant places individuals in a constitutional limbo, and the Supreme Court has had difficulty announcing clear definitions of the rights and privileges afforded to these individuals. The justices seem to state that the federal government cannot bypass the fundamental protections afforded by the Constitution, but they also allow the government tremendous leeway in the handling of enemy combatants. Examining the behavioral patterns of these cases reveals mixed results regarding the patterns identified in Chapter Two versus the patterns observed in the lower courts after September 11. Regarding the influence of ideology on judicial behavior these cases follow some of the empirical patterns demonstrated in earlier chapters.

At the district court level, the influence of ideology is nonexistent before September 11 and more polarized after September 11. In *Rasul v. Bush*, Judge Colleen Kollar-Kotelly, appointed by a Democratic president, ruled in favor of the government's foreign policy interests. In contrast, the *Padilla* and *Hamdi* cases were reviewed by district court judges appointed by Republican presidents and each decision favored civil liberties. However, in the case *Hamdan v. Rumsfeld*, Judge James Robertson, a Clinton appointee, granted the initial writ of *habeas corpus* to Hamdan. Therefore, we see only one of the four Supreme Court cases follow the post-September 11 pattern concerning ideological influences at the trial. At the appeals court level the panel affirming the *Rasul* decision was dominated by Republican judges, the panel ruling in favor of civil liberties in the *Padilla* appeal was dominated by Democratic judges, the panel ruling against *Hamdi* was dominated by Republican judges, and the panel overturning Hamdan's *habeas corpus* petition was dominated by Republic judges (including John Roberts, the current chief justice of the Supreme Court). Finally, at the Supreme Court level the influence of ideology erodes somewhat. Since the Court's composition does not change across these three cases (i.e., it is dominated by Republican appointees) one would expect consistent rulings favoring foreign policy. Yet, this only occurs in the *Padilla* case. Thus, the empirical patterns identified in previous chapters remain consistent only for the lower court decisions in these three cases and not for the Supreme Court.

A second influence identified in the previous chapters pertains to preferences over security. In all four enemy combatant cases we encounter both measures of security preferences: the presence of a specific national security defense and a criminal case. The empirical evidence before September 11 demonstrates that the lower courts are influenced significantly by security concerns whereas the Supreme Court's behavior is not altered, but the evidence is mixed about security influences once we examine

cases after September 11. Though the pattern remains partially consistent for the Supreme Court (only one of the four decisions favored foreign policy), it does not hold for the lower courts. Only in the *Rasul* case did the district courts rule in favor of foreign policy interests, the *Padilla, Hamdi*, and *Hamdan* decisions favored civil liberties in spite of the security concern. And, for the courts of appeals the pattern is more consistent since panels ruled in favor of foreign policy in the *Rasul*, *Hamdi*, and *Hamdan* cases. Therefore, based on this limited examination of post-September 11 decisions, one cannot reasonably conclude that patterns of behavior over security concerns remain consistent.

Finally, it is difficult to determine whether appellate panels anticipated potential Supreme Court responses when they rendered decisions in the enemy combatant cases. In each instance the Court granted *certiorari* and reversed the courts of appeals' rulings. In two cases the appellate panels ruled in favor of civil liberties and were reversed, consistent with the pattern identified in Chapter Three.

Further rulings are needed to systematically determine the long-term effects of September 11, 2001, on judicial behavior. As Smith (2002, 21) 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 11 on the federal judiciary.

CONCLUSIONS

This book attempts to fill a gap in our knowledge of judicial behavior by focusing on a neglected, yet critically important area of litigation—foreign policy. As I argued at the beginning of the book, the litigation of foreign policy cases within the United States presents unique challenges for federal judges, from competing preferences between security and liberty to influences from the judicial hierarchy. How federal courts determine the appropriate balance between security and liberty, and thereby constrain the executive and legislative branches, is therefore of great importance to our understanding of contemporary American politics, U.S. foreign policy, and the behavior of the president and Congress. In short, adjudicating the potentially competing concerns over security versus liberty presents a substantially different challenge for judges than resolving purely domestic policy disputes, and scholars must account for these competing principles to better understand contemporary judicial decision-making processes.[17]

The multiple empirical analyses within this book reveal several notable findings. First, federal courts possess an initial inclination to defer to the government's foreign policy interests. Second, this deference increases when judges encounter cases involving security threats. Thus, judges remain champions of security rather than

defenders of liberty. Third, liberal judges are more sensitive to civil liberties concerns than their conservative colleagues. Yet, this phenomenon's influence decreases as one moves down the judicial hierarchy. Finally, the institutional structure of the federal courts exerts significant influences on judges. District court judges constrain their ideological voting if they believe an appellate panel will reverse the decision, and this pattern repeats at the appellate level, but only for liberal judges who anticipate reversal by the Supreme Court. It is therefore apparent that the process of foreign policy adjudication is complex, with multiple preferences and constraints competing for dominance in the decision calculus.

Many of these patterns seemingly remain in the post-September 11 environment. Though additional rulings are needed to conduct an empirical analysis, one can safely speculate that the preferences over security have increased. Federal judges are now encountering new areas of law as the government contends with additional threats to security. And the competing preferences over liberty and security—as well as the strategic anticipation of higher tribunals—continue to influence and constrain judicial behavior.

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)
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

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
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
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
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

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
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:

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)

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
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)
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
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

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
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

Notes

ACKNOWLEDGMENTS

1, *Kentucky Law Journal* 94 (4): 629-648 (2006).
2. *Justice System Journal* 25 (2): 227-238 (2004).
3. *American Politics Research* 36 (September): 669-693 (2008).

INTRODUCTION

1. *United States v. Matta-Ballesteros* 71 F.3d 754 (1995).
2. 119 U.S. 436 (1886).
3. *Hamdi v. Rumsfeld* 124 S. Ct. 2633 (2004).
4. *Hamdan v. Rumsfeld* 126 S. Ct. 2749 (2006).

CHAPTER ONE

1. 101 S. Ct. 2766 (1981).
2. 174 F. 2d 961 (1949).
3. 627 F. Supp. 1253 (1986).
4. 807 F. 2d. 383 (1986).
5. 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.

CHAPTER TWO

1. *Parker v. Lester* 98 F. Supp. 300 (1951).
2. 627 F. Supp. 1253 (1986).
3. *Cammermeyer v. Aspin* 850 F. Supp. 910 (1994).
4. *In re Washington Post Co.* 807 F. 2d. 383 (1986).
5. 444 F. 2d 651 (1971).

6. *Flynn v. Schultz* 748 F. 2d. 1186 (1984).

7. *United States v. Robel* 389 U.S. 258 (1967).

8. *Afroyim v. Rusk* 387 U.S. 253 (1967).

9. 342 U.S. 580 (1952).

10. See Epstein and Mershon (1996) and Epstein et al. (1998) for discussion about measurement issues on the Supreme Court.

11. See Pinello (1999) for a detailed discussion of partisan affiliation in the lower federal courts.

12. These directions reflect traditional liberal and conservative decisions in foreign affairs.

13. It should also be noted that the Supreme Court possesses original jurisdiction (which is rarely exercised) in a small number of disputes, mostly between states and in cases involving foreign diplomats.

14. 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.

15. See Appendix One for the coding rules employed during data collection.

16. See Randazzo and Sheehan (2001) for a more detailed description of the difficulties inherent in empirically measuring personal preferences of appellate judges.

17. Examples include convictions for espionage or treason, for drug-related offenses (importation or arrests on the high seas), or of foreign nationals operating within U.S. territories.

18. It is possible that some criminal cases will also present specific national security concerns (i.e., terrorism, espionage, or treason), making the impact of security preferences more prevalent on judicial behavior.

19. These data are located on Gallup's web archive (www.gallup.com).

20. The reduction of error statistic is calculated using the formula provided in Hagle and Mitchell (1992)

$$\text{ROE (\%) } 100\times = \left[\frac{\%\ correctlypredicted - \%\ in\ modal\ category}{100\% - \%\ in\ modalcategory}\right]$$

CHAPTER THREE

1. The federal circuit was created through consolidation of the court of claims and the court of customs and patent appeals.

2. 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).

3. 634 F. 2d 408 (1980).

4. 444 F. 2d 651 (1971).

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

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

7. 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.

8. 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.

9. Even though a reversal sets precedent for the country contrary to the preferences of the appellate panel, they can continue to rule ideologically by distinguishing future cases from the contrary precedent or interpreting the contrary precedent in such a way as to minimize its effect (see Canon and Johnson 1999).

10. Furthermore, the Quantal Response Equilibrium allows for a more direct test of its probabilistic predictions—a factor that is used specifically in the statistical model employed later.

11. Appellate panels who might be motivated by a fear of reversal, but believe the likelihood of the Supreme Court granting *certiorari* is low will also render decisions according to their ideological preferences, because of the belief that the Court will not review the decision. However, the equilibrium behavior becomes {C; D, (C,A)} for liberal panels and {A; D, (C,A)} for conservative panels.

12. For alternative specifications, see Carrubba, Yuen, and Zorn (2007) and Bas, Signorino, and Walker (2008).

13. 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" (2001a, 14).

14. Examples include Carson (2003) and Carson and Marshall (2003).

15. I recognize that other influences may affect decisions of the Supreme Court both on the merits and in grants/denials of *certiorari*. Consequently, these equations may be underspecified. This is necessary to ensure that the appeals court equation is properly specified, which in turn ensures that the strategic choice model is properly identified. Theoretically, since I am interested primarily in the behavior of appeals court judges, the effects of underspecifying the Supreme Court equations are mitigated.

16. The Supreme Court's *certiorari* decision is not examined with the traditional probit model.

17. Changes in predicted probabilities are calculated by moving the variable of interest from its minimum to its maximum value while simultaneously holding the remaining variables constant at their mean values.

CHAPTER FOUR

1. *United States v. Kungys* 571 F. Supp. 1104 (1983).

2. Appointed in 1944 to the Northern District of Iowa.

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

4. 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.

5. In the empirical model I include a variable to control for this potential constraint exerted by the Supreme Court.

6. Even though a reversal sets precedent for the circuit contrary to the district judge's preferences, he or she can continue to rule ideologically by distinguishing future cases from the contrary precedent or interpreting the contrary precedent in such a way as to minimize its effect (see Canon and Johnson 1999).

7. District court judges who fear reversal but believe the likelihood of reversal is low will also render decisions according to their ideological preferences because of the belief that the appeals courts will affirm the decision. However, the equilibrium behavior becomes {C; C} for liberal judges and {A; A} for conservative judges.

8. The Lexis-Nexis search involved the following keywords: foreign policy, foreign affairs, national security, national defense, war powers, military, immigration, international law, treaties, ambassadors, and diplomacy. This search initially retrieved approximately six thousand cases from which I selected the sample.

9. 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/.

10. It is important to note that the federal government does not have to be a direct litigant in a particular case in order to determine the foreign policy interest in the outcome. For cases with private litigants it is possible to determine the foreign policy interest versus the civil liberties challenge through the language of the opinion.

11. See Pinello (1999) for a detailed discussion of partisan affiliation as a surrogate measure for ideology and a listing of previous articles relying on this measure.

12. 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).

13. I recognize that the same influences listed for district court judges could also affect judges on the courts of appeals. Consequently, the appeals court equation may be underspecified. Unfortunately, this is necessary to ensure that the district court equation is properly specified, which in turn ensures that the strategic choice model is identified. Theoretically, since I am interested primarily in the behavior of district court judges, the effects of underspecifying the appeals court equation is understandable. Additionally, since I include the control variable *Lower Court Directionality* in the appeals court equation, it indirectly captures idiosyncratic influences caused by the variables in the district court equation. Consequently, this mitigates any potential bias caused by underspecification of the appeals court equation.

14. Unfortunately, it is difficult to discern whether this influence constrains district judge behavior because the traditional probit model does not identify if the effect is caused by a fear of reversal.

CHAPTER FIVE

1. Scholars of American politics should become familiar with the strategic choice models because they allow for more rigorous empirical testing of formal models. Extensions of this analysis could incorporate models of state court behavior and/or other separation-of-powers phenomena.

2. 124 S. Ct. 2686 (2004).

3. 70 S. Ct. 936 (1950).

4. 215 F. Supp. 2d 55 (2002).

5. *Al Odah, et al. v. United States* 321 F. 3d 1134 (2003).

6. 124 S. Ct. 2686 (2004).

7. *Padilla v. Bush, et al.* 233 F. Supp. 2d 564 (2002).

8. *Padilla v. Rumsfeld* 352 F. 3d 695 (2003).

9. *Rumsfeld v. Padilla* 124 S. Ct. 2711 (2004).

10. *Hamdi v. Rumsfeld* 243 F. Supp. 527 (2002).

11. *Hamdi v. Rumsfeld* 316 F. 3d 450 (2003), Chief Judge J. Harvie Wilkinson writing on behalf of the majority.

12. *Hamdi v. Rumsfeld* 124 S. Ct. 2633 (2004).

13. *Hamdan v. Rumsfeld* 126 S. Ct. 2749 (2006).

14. 128 S. Ct. 2229 (2008).

15. *Boumediene v. Bush* 128 S. Ct. 2229 (2008) at 2232.

16. Ibid at 2247.

17. This conclusion is similar to studies of the influence of multidimensional preferences in other institutional settings (for example, see Hurwitz, Moiles, and Rohde 2001).

References

Adler, David Gray, and Larry N. George. 1996. *The Constitution and the Conduct of American Foreign Policy*. Lawrence: University of Kansas Press.

Aldrich, John H., and Forrest D. Nelson. 1984. *Linear Probability, Logit and Probit Models*. Thousand Oaks: Sage Publications.

Allison, Graham T. 1969. "Conceptual Models and the Cuban Missile Crisis." In *Classic Readings of International Relations*. 1994. Phil Williams, Donald M. Goldstein, and Jay M. Shafritz, eds. Belmont, CA: Wadsworth Publishing Company. Reprinted from the *American Political Science Review* 63 (September): 698–703.

Barron, David. 2000. "Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power." *Law and Contemporary Problems* 63 (Winter/Spring): 61–106.

Bas, Muhammet Ali, Curtis S. Signorino, and Robert W. Walker. 2008. "Statistical Backwards Induction: A Simple Method for Estimating Recursive Strategic Models." *Political Analysis* 16 (1): 21–40.

Baum, Lawrence. 1980. "Response of Federal District Judges to Courts of Appeals Policies: An Exploration." *Western Political Quarterly* 33 (June): 217–224.

———. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor: University of Michigan Press.

———. 1998. *American Courts: Process and Policy.* 4th ed. Boston: Houghton-Mifflin Company.

Benesh, Sara C. 2002. *The U.S. Court of Appeals and the Law of Confessions: Perspectives on the Hierarchy of Justice*. New York: LFB Scholarly Publishing.

Benesh, Sara C., and Wendy L. Martinek. 2002. "State Supreme Court Decision Making in Confession Cases." *Justice System Journal* 23 (1): 109–134.

Benesh, Sara C., and Malia Reddick. 2002. "Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent." *Journal of Politics* 64 (May): 534–550.

Bland, Randall Walton. 1999. *The Black Robe and the Bald Eagle: The Supreme Court and the Foreign Policy of the United States, 1789–1961.* 2nd ed. Lanham: Austin & Winfield.

Boucher, Robert L., and Jeffrey A. Segal 1995. "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court." *Journal of Politics* 57 (August): 824–837.

Brace, Paul, and Melinda Gann Hall. 1990. "Neo-Institutionalism and Dissent in State Supreme Courts." *Journal of Politics* 52 (February): 54–70.

Brehm, John, and Scott Gates. 1997. *Working, Shirking and Sabotage: Bureaucratic Response to a Democratic Public*. Ann Arbor: University of Michigan Press.

Brennan, William J., Jr. 1987. "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises." Speech delivered December 22, 1987, at the Law School of Hebrew University.

Brenner, Saul. 1979. "The New *Certiorari* Game." *Journal of Politics* 41 (May): 649–655.

Brenner, Saul, and John F. Krol. 1989. "Strategies in *Certiorari* Voting in the United States Supreme Court." *Journal of Politics* 51 (November): 828–840.

Bueno de Mesquita, Bruce. 2003. *The Logic of Political Survival*. Cambridge, MA: MIT Press.

Burbank, Stephen B., and Barry Friedman. 2002. "Reconsidering Judicial Independence." In *Judicial Independence at the Crossroads: An Interdisciplinary Approach*. Stephen B. Burbank and Barry Friedman, eds. Thousand Oaks: Sage Publications.

Burgess, Susan R. 1992. *Contest for Constitutional Authority: The Abortion and War Powers Debates.* Lawrence: University Press of Kansas.

Caldeira, Gregory A., John R. Wright, and Christopher J. W. Zorn. 1999. "Sophisticated Voting and Gate-Keeping in the Supreme Court." *Journal of Law, Economics, and Organization* 15 (3): 549–572.

Cameron, Charles M., Jeffrey A. Segal, and Donald R. Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions." *American Political Science Review* 94 (March): 101–116.

Caminker, Evan H. 1994. "Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking." *Texas Law Review* 73 (November): 1–82.

Canon, Bradley C., and Charles A. Johnson. 1999. *Judicial Policies: Implementation and Impact.* 2nd ed. Washington, DC: CQ Press.

Carp, Robert A., and Ronald Stidham. 2001. *Judicial Process in America.* 5th ed. Washington, DC: CQ Press.

Carrubba, Clifford, Amy Yuen, and Christopher J. W. Zorn. 2007. "In Defense of Comparative Statics: Specifying Empirical Tests of Models of Strategic Interaction." *Political Analysis* 15 (4): 465–482.

Carson, Jamie L. 2003. "Strategic Interaction and Candidate Competition in U.S. House Elections: Empirical Applications of Probit and Strategic Probit Models." *Political Analysis* 11 (4): 368–380.

Carson, Jamie L., and Bryan W. Marshall. 2003. "Checking Power with Power: A Strategic Choice Analysis of Presidential Vetoes and Congressional Overrides." Paper presented at the Annual Meeting of the American Political Science Association, Philadelphia, PA.

Charney, Jonathan I. 1989. "Judicial Deference in Foreign Relations." *American Journal of International Law* 83: 805–814.

Cheh, Mary M. 1984. "National Security and Civil Liberties: Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information." 69 *Cornell Law Review* 690.

Clark, Tom S. 2006. "Judicial Decision Making During Wartime." *Journal of Empirical Legal Studies* 3 (November): 397–419.

Clarke, Duncan L., and Edward L. Neveleff. 1984. "Secrecy, Foreign Intelligence, and Civil Liberties: Has the Population Swung Too Far?" *Political Science Quarterly* 99 (Autumn): 493–513.

Cohen, J. E. 1982. "A Historical Reassessment of Wildavsky's 'Two Presidencies' Thesis." *Social Science Quarterly* 63 (3): 549–555.

Corwin, Edward S. 1957. *The President: Office and Powers, 1787–1984.* 5th rev. ed. New York: New York University Press.

Cronin, Thomas E., and Michael A. Genovese. 1998. *The Paradoxes of the American Presidency.* New York: Oxford University Press.

Damrosch, Lori Fisler. 1991. "Constitutional Control of Military Actions: A Comparative Dimension." *American Journal of International Law* 85 (January): 92–104.

Davis, Sue, and Donald R. Songer. 1988. "The Changing Role of the United States Courts of Appeals: The Flow of Litigation Revisited." Paper presented at the Annual Meeting of the Law and Society Association, Vail, CO.

Diament, Nathan J. 1998. "Foreign Relations and Our Domestic Constitution: Broadening the Discourse." *Connecticut Law Review* 30 (Spring): 911–959.

Domino, John C. 2009. *Civil Rights and Liberties in the 21st Century*. New York: Longman Publishers.

Dorsen, Norman. 1989. "Foreign Affairs and Civil Liberties." *American Journal of International Law* 83 (October): 840–850.

____. 1997. "Civil Liberties, National Security and Human Rights Treaties: A Snapshot in Context." *U. C. Davis Journal of International Law and Policy* 3 (Spring): 143–158.

Ducat, Craig R., and Robert L. Dudley. 1989. "Federal District Judges and Presidential Power During the Postwar Era." *Journal of Politics* 51 (February): 98–118.

Edwards, George C., III. 1986. "The Two Presidencies: A Reevaluation." *American Politics Quarterly* 14 (2): 247–263.

Eggertsson, Thrainn. 1990. *Economic Behavior and Institutions*. Cambridge: Cambridge University Press.

Eliason, Scott R. 1993. *Maximum Likelihood Estimation: Logic and Practice*. Thousand Oaks: Sage Publications.

Epstein, Lee, Daniel E. Ho, Gary King, and Jeffrey A. Segal. 2005. "The Supreme Court During Crisis: How War Affects Only Non-War Cases." *New York University Law Review* 80 (April): 1–116.

Epstein, Lee, Valerie Hoekstra, Jeffrey A. Segal, and Harold J. Spaeth. 1998. "Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices." *Journal of Politics* 60 (August): 801–818.

Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.

Epstein, Lee, and Carol Mershon. 1996. "Measuring Political Preferences." *American Journal of Political Science* 40 (February): 261–294.

Epstein, Lee, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. 1996. *The Supreme Court Compendium: Data, Decisions and Developments.* 2nd ed. Washington, DC: CQ Press.

Epstein, Lee, and Thomas G. Walker. 2003. *Constitutional Law for a Changing America: Rights, Liberties and Justice.* 5th ed. Washington, DC: CQ Press.

Fisher, Louis. 1995. *Presidential War Power.* Lawrence: University of Kansas Press.

———. 1997. *Constitutional Conflicts Between Congress and the President.* 4th ed. Lawrence: University of Kansas Press.

Fiss, Owen M. 1983. "The Bureaucratization of the Judiciary." *Yale Law Journal* 92 (July): 1442–1468.

Fleisher, Richard, Jon R. Bond, Glen S. Krutz, and Stephen Hanna. 2000. "The Demise of the Two Presidencies." *American Politics Quarterly* 28 (1): 3–25.

Forsythe, David P. 1990. "Human Rights in U.S. Foreign Policy: Retrospect and Prospect." *Political Science Quarterly* 105 (Autumn): 435–454.

Franck, Thomas M. 1989. "Rethinking War Powers: By Law or By Thaumaturgic Invocation?" *American Journal of International Law* 83: 766–777.

———. 1992. *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* Princeton: Princeton University Press.

Fry, Earl H., Stan A. Taylor, and Robert S. Wood. 1994. *America the Vincible: U.S. Foreign Policy for the Twenty-First Century*. Englewood Cliffs, NJ: Prentice Hall.

Gates, Scott, and Brian D. Humes. 1997. *Games, Information, and Politics: Applying Game Theoretic Models to Political Science*. Ann Arbor: University of Michigan Press.

Genovese, Michael A. 2001. *The Power of the American Presidency, 1789–2000.* New York: Oxford University Press.

Giles, Michael W., Virginia A. Hettinger, and Todd C. Peppers. 2001. "Picking Federal Judges: A Note on Partisan and Policy Selection Agendas." *Political Research Quarterly* 54 (September): 623–641.

Goldsmith, Jack L. 1999. "Separation of Powers in Foreign Affairs: The New Formalism in United States Foreign Relations Law." *Colorado Law Review* 70 (Fall): 1395–1438.

Gruhl, John. 1980. "The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Court." *Western Political Quarterly* 33 (December): 502–519.

Hagle, Timothy M., and Glenn E. Mitchell, II. 1992. "Goodness-of-Fit Measures for Probit and Logit." *American Journal of Political Science* 36 (August): 762–784.

Halberstam, Malvina. 1985. "*Sabbatino* Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law." *American Journal of International Law* 79 (January): 68–91.

Hammond, Thomas H., Chris W. Bonneau, and Reginald S. Sheehan. 2005. *Strategic Behavior and Policy Choice on the U.S. Supreme Court*. Forthcoming, Stanford University Press.

Harris, Fred R. 1995. *In Defense of Congress.* New York: St. Martin's Press.

Heckman, James J. 1979. "Sample Selection Bias as a Specification Error." *Econometrica* 47 (January): 153–162.

Helmke, Gretchen. 2005. *Courts Under Constraints: Judges, Generals, and Presidents in Argentina*. New York: Cambridge University Press.

Henehan, Marie T. 2000. *Foreign Policy and Congress: An International Relations Perspective.* Ann Arbor: University of Michigan Press.

Henkin, Louis. 1972. *Foreign Affairs and the Constitution.* Mineola, NY: Foundation Press.

Hermann, Margaret G., and Charles F. Hermann. 1989. "Who Makes Foreign Policy Decisions and How: An Empirical Inquiry." *International Studies Quarterly* 33 (December): 361–387.

Holsti, Ole R. 1968. "Cognitive Dynamics and Images of the Enemy." In *Classic Readings of International Relations*. 1994. Phil Williams, Donald M. Goldstein, and Jay M. Shafritz,

eds. Belmont, CA: Wadsworth Publishing Company. Reprinted from *Image and Reality in World Politics*, John C. Farrell and Asa P. Smith, eds. New York: Columbia University Press.

———. 1995. "Theories of International Relations and Foreign Policy: Realism and Its Challengers." In *Controversies in International Relations Theory: Realism and the Neoliberal Challenge,* Charles W. Kegley Jr., ed. New York: St. Martin's Press.

Holsti, Ole R., and James N. Rosenau. 1986. "Consensus Lost. Consensus Regained? Foreign Policy Beliefs of American Leaders, 1976–1980." *International Studies Quarterly* 30 (December): 375–409.

———. 1988. "The Domestic and Foreign Policy Beliefs of American Leaders." *Journal of Conflict Resolution* 32 (June): 248–294.

Howard, J. Woodford, Jr. 1977. "Role Perceptions and Behavior in Three U.S. Courts of Appeals." *Journal of Politics* 39 (November): 916–938.

———. 1981. *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits.* Princeton: Princeton University Press.

Hurwitz, Mark S., Roger J. Moiles, and David W. Rohde. 2001. "Distributive and Partisan Issues in Agriculture Policy in the 104th House." *American Political Science Review* 95 (December): 911–922.

Jacob, Herbert. 1965. *Justice in America* Boston: Little, Brown Publishers.

———. 1984. *Justice in America.* 4th ed. Boston: Little, Brown Publishers.

———. 1991. "Decision Making in Trial Courts." In *The American Courts: A Critical Assessment*, John B. Gates and Charles A. Johnson, eds. Washington, DC: CQ Press.

Johnson, Charles A. 1987. "Law, Politics and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions." *Law and Society Review* 21: 325–340.

Keagle, James. 1985. "The President and Foreign Policy." In *The American Presidency: A Policy Perspective from Readings and Documents*, David C. Kozak and Kenneth N. Ciboski, eds. Chicago: Nelson-Hall.

King, Gary, Michael Tomz, and Jason Wittenberg. 2000. "Making the Most of Statistical Analyses: Improving Interpretation and Presentation." *American Journal of Political Science* 44 (April): 347–361.

King, Kimi Lynn, and James Meernik. 1998. "The 'Sole Organ' Before the Court: Presidential Power in Foreign Policy Cases, 1790–1996." *Presidential Studies Quarterly* 28 (Summer): 666–686.

———. 1999. "The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy." *Political Research Quarterly* 52 (December): 801–824.

Klein, David E. 2002. *Making Law in the United States Courts of Appeals*. Cambridge: Cambridge University Press.

Korn, Jessica. 1996. *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto.* Princeton: Princeton University Press.

Leblang, David A. 2001. "To Devalue or to Defend? The Political Economy of Exchange Rate Policy." Unpublished manuscript.

LeLoup, Lance T., and Steven A. Shull. 1979. "Congress versus the Executive: The 'Two Presidencies' Reconsidered." *Social Science Quarterly* 59 (2): 704–719.

———. 1999. *The President and Congress: Collaboration and Combat in National Policymaking.* Boston: Allyn and Bacon Publishers.

Long, J. Scott. 1997. *Regression Models for Categorical and Limited Dependent Variables*. Thousand Oaks: Sage Publications.

Maddala, G. S. 1983. *Limited Dependent and Qualitative Variables in Econometrics*. Cambridge: Cambridge University Press.

Maltzman, Forrest, James F. Spriggs II, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge: Cambridge University Press.

Maltzman, Forrest, and Paul J. Wahlbeck. 1996a. "Strategic Policy Considerations and Voting Fluidity on the Burger Court." *American Political Science Review* 90 (September): 581–592.

———. 1996b. "May It Please the Chief? Opinion Assignments in the Rehnquist Court." *American Journal of Political Science* 40 (May): 421–443.

Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999." *Political Analysis* 10 (2): 134–153.

Martinek, Wendy L. 2000. "Judicial Impact: The Relationship between the United States Supreme Court and State Courts of Last Resort in Search and Seizure Decision Making." Ph.D. Dissertation, Michigan State University, East Lansing.

Mather, Lynn. 1991. "Policy Making in State Trial Courts." In *The American Courts: A Critical Assessment*, John B. Gates and Charles A. Johnson, eds. Washington, DC: CQ Press.

———. 1995. "The Fired Football Coach (Or, How Trial Courts Make Policy)." In *Contemplating Courts*. Lee Epstein, ed. Washington, DC: CQ Press.

McKelvey, Richard D., and Thomas R. Palfrey. 1995. "Quantal Response Equilibria for Normal Form Games." *Games and Economic Behavior* 10 (July): 6–38.

———. 1995. "A Statistical Theory of Equilibrium in Games." *Japanese Economic Review* 47 (2): 186–209.

———. 1998. "Quantal Response Equilibria for Extensive Form Games." *Experimental Economics* 1 (1): 9–41.

McNollgast. 1995. "A Positive Theory of Judicial Doctrine and the Rule of Law." *Southern California Law Review* 68 (September): 1631–1683.

Moe, Terry M., and William G. Howell. 1999. "Unilateral Action and Presidential Power: A Theory." *Presidential Studies Quarterly* 29 (December): 850–872.

Morgenthau, Hans J. 1972. "Six Principles of Political Realism." In *Classic Readings of International Relations*. 1994. Phil Williams, Donald M. Goldstein, and Jay M. Shafritz, eds. Belmont, CA: Wadsworth Publishing Company. Reprinted from *Politics Among Nations: The Struggle for Power and Peace.* 5th ed. Alfred A. Knopf, Inc.

Morton, Rebecca B. 1999. *Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science*. Cambridge: Cambridge University Press.

Murphy, Walter F. 1964. *Elements of Judicial Strategy*. Chicago: University of Chicago Press.

Murphy, Walter F., C. Herman Pritchett, and Lee Epstein. 2002. *Courts, Judges, and Politics: An Introduction to the Judicial Process*. Boston: McGraw-Hill.

Pacelle, Richard L., Jr. 2003. *Between Law & Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation*. College Station: Texas A&M University Press.

Perlmutter, Amos. 1974. "The Presidential Political Center and Foreign Policy: A Critique of the Revisionist and Bureaucratic-Political Orientations." *World Politics* 27 (October): 87–106.

Peterson, Paul E. 1994. "The President's Dominance in Foreign Policy Making." *Political Science Quarterly* 109 (Summer): 215–234.

Perry, H. W., Jr. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge, MA: Harvard University Press.

Pinello, Daniel R. 1999. "Linking Party to Judicial Ideology in American Courts: A Meta-Analysis." *Justice System Journal* 20 (November): 219–254.

Randazzo, Kirk A., and Reginald S. Sheehan. 2001. "Measuring Judges' Ideology on the U.S. Courts of Appeals." Paper presented at the Annual Meeting of the Southern Political Science Association, Atlanta, GA.

Rehnquist, William H. 1998. *All the Laws but One: Civil Liberties in Wartime.* New York: Vintage Books.

Richardson, Richard J., and Kenneth N. Vines. 1970. *The Politics of Federal Courts*. Boston: Little, Brown and Company.

Ripley, Randall B., and James M. Lindsay. 1993. "Foreign and Defense Policy in Congress: An Overview and Preview." In *Congress Resurgent: Foreign and Defense Policy on Capitol Hill.* Randall B. Ripley and James M. Lindsay, eds. Ann Arbor: University of Michigan Press.

Rogoff, Martin A. 1996. "Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court." *American University Journal of International Law and Policy* 11: 559–685.

Rosati, Jerel A. 1999. *The Politics of United States Foreign Policy.* 2nd ed. Fort Worth: Harcourt Brace.

Rowland, C. K. 1991. "The Federal District Courts." In *The American Courts: A Critical Assessment*, John B. Gates and Charles A. Johnson, eds. Washington, DC: CQ Press.

Rowland, C.K., and Robert A. Carp. 1996. *Politics and Judgment in Federal District Courts*. Lawrence: University of Kansas Press.

Salokar, Rebecca Mae. 1992. *The Solicitor General: The Politics of Law*. Philadelphia: Temple University Press.

Scheffer, David J. 1996. "International Judicial Intervention." *Foreign Policy* 102 (Spring): 34–51.

Schlesinger, Arthur, Jr. 1989. *The Imperial Presidency.* New York: Houghton Mifflin.

Segal, Jeffrey A. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91 (March): 28–44.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83: 557–565.

Segal, Jeffrey A., and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University Press.

———. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Segal, Jeffrey A., Richard J. Timpone, and Robert M. Howard. 2000. "Buyer Beware? Presidential Success Through Supreme Court Appointments." *Political Research Quarterly* 53 (September): 557–595.

Shapiro, Martin M. 1964. *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence*. New York: Free Press of Glencoe.

Shepsle, Kenneth A., and Mark S. Boncheck. 1997. *Analysing Politics: Rationality, Behavior, and Institutions*. New York: W. W. Norton.

Shipan, Charles R. 1997. *Designing Judicial Review: Interest Groups, Congress, and Communications Policy*. Ann Arbor: University of Michigan Press.

Signorino, Curtis S. 1999a. "Strategic Interaction and the Statistical Analysis of International Conflict." *American Political Science Review* 93 (June): 279–297.

———. 1999b. "Statistical Analysis of Finite Choice Models in Extensive Form." Paper presented at the Annual Meeting of the Midwest Political Science Association.

———. 2000. "Theoretical Sources of Uncertainty in Discrete Choice Models." Unpublished manuscript.

———. 2001a. "Strategy and Selection in International Relations." Unpublished manuscript.

———. 2001b. "STRAT: A Program for Analyzing Statistical Strategic Models, Version 1.0." Available at www.rochester.edu/college/psc/signorino.

Signorino, Curtis S., and Kuzey Yilmaz. 2000. "Strategic Misspecification in Discrete Choice Models." Paper presented at the Annual Meeting of the American Political Science Association.

Silverstein, Gordon. 1997. *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy*. New York: Oxford University Press.

Sinclair, Barbara. 1993. "Congressional Party Leaders in the Foreign and Defense Policy Arena." In *Congress Resurgent: Foreign and Defense Policy on Capitol Hill*. Randall B. Ripley and James M. Lindsay, eds. Ann Arbor: University of Michigan Press.

Smith, Christopher E. 2002. "Courts and the Constitution in a Post 9/11 World." Paper presented at the Annual Meeting of the American Political Science Association, Boston, MA.

Songer, Donald R. 1987. "The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals." *Journal of Politics* 49 (August): 830–841.

———. 1991. "The Circuit Courts of Appeals." In *The American Courts: A Critical Assessment*, John B. Gates and Charles A. Johnson, eds. Washington, DC: CQ Press.

Songer, Donald R., Charles M. Cameron, and Jeffrey A. Segal. 1995. "An Empirical Test of the Rational-Actor Theory of Litigation." *Journal of Politics* 57 (November): 1119–1129.

Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38 (August): 673–696.

Songer, Donald R., and Reginald S. Sheehan. 1990. "Supreme Court Impact on Compliance and Outcomes: *Miranda* and *New York Times* in the United States Courts of Appeals." *Western Political Quarterly* 43 (June): 297–319.

———. 1992. "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals." *American Journal of Political Science* 36 (February): 235–258.

Songer, Donald R., Reginald S. Sheehan, and Susan B. Haire. 2000. *Change and Continuity on the United States Courts of Appeals* Ann Arbor: University of Michigan Press.

Spiller, Pablo T. 1992. "Agency Discretion under Judicial Review." *Mathematical and Computer Modeling* 16 (8–9): 185–200.

Spitzer, Robert J. 1993. *President and Congress: Executive Hegemony at the Crossroads of American Government*. Philadelphia: Temple University Press.

Stearns, Maxwell L. 2000. *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making*. Ann Arbor: University of Michigan Press.

Tomz, Michael, Jason Wittenberg, and Gary King. 2003. CLARIFY: Software for Interpreting and Presenting Statistical Results. Version 2.1. Stanford University, University of Wisconsin, and Harvard University. January 5. Available at http://gking.harvard.edu/.

Vanberg, Georg. 2001. "Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45 (April): 346–361.

Waltz, Kenneth N. 1988. "The Origins of War in Neorealist Theory." In *Classic Readings of International Relations*. 1994. Phil Williams, Donald M. Goldstein, and Jay M. Shafritz, eds. Belmont, CA: Wadsworth Publishing Company. Reprinted from the *Journal of Interdisciplinary History* 18 (Spring): 39–52.

Wheeler, Stanton, Bliss Cartwright, Robert A. Kagan, and Lawrence M. Friedman. 1987. "Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970." *Law and Society Review* 21 (3): 403–445.

Whitehead, John W., and Steven H. Aden. 2002. "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives." *The American University Law Review* 51 (August): 1081–1133.

Wittkopf, Eugene R., and Christopher M. Jones. 1999. "New Priorities for a New Era? Or Afloat in Unchartered Waters." In *The Future of American Foreign Policy.* 3rd ed. Eugene R. Wittkopf and Christopher M. Jones, eds. New York: Wadsworth Publishers.

Wyzanski, Charles E., Jr. 1959. "The Importance of the Trial Judge." Letter to Senator Leverett Saltonstall, January 12, 1959. Reprinted in *Courts, Judges, and Politics: An Introduction to the Judicial Process*. Walter F. Murphy, C. Herman Pritchett and Lee Epstein, eds. 2002. Boston: McGraw-Hill.

Yates, Jeff, and Andrew Whitford. 1998. "Presidential Power and the United States Supreme Court." *Political Research Quarterly* 51 (June): 539–550.

Zorn, Christopher J. W. 2002. "U.S. Government Litigation Strategies in the Federal Appellate Courts." *Political Research Quarterly* 55 (March): 145–166.

Index

POLITICAL SCIENCE

The terrorist attacks of September 11, 2001, and the subsequent responses by the U.S. federal government have raised fundamental questions about civil liberties in both domestic and international laws. As a result, the U.S. judiciary, out of its responsibility for interpreting the Constitution, has assumed a crucial role in defining boundaries of domestic and foreign policy, and in balancing concerns about security with the protection of liberty. Utilizing a sophisticated blend of quantitative and qualitative analysis, Kirk A. Randazzo examines two main questions: To what extent do federal judges defend liberty or champion security when adjudicating disputes? And to what extent does the hierarchal structure of the federal judiciary influence decisions by lower court judges? There are, he argues, disturbing indications that the federal judiciary as a whole are not defenders of liberty. Furthermore, lower court judges strategically anticipate the decisions of higher courts and constrain their behavior to avoid reversal.

KIRK A. RANDAZZO is Assistant Professor of Political Science at the University of South Carolina.

A volume in the SUNY series in American Constitutionalism
Robert J. Spitzer, editor

SUNY PRESS
State University of New York Press
www.sunypress.edu

ISBN: 978-1-4384-3048-5
EAN 9781438430485 90000>