

STRATEGIC BEHAVIOR AND FOREIGN POLICY LITIGATION IN THE FEDERAL DISTRICT COURTS

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ABSTRACT

Does the hierarchical relationship between the district courts and the courts of appeals influence decision-making at the trial level? Stated another way, are district court judges constrained by the appeals courts, according to the tenets of principal agency theory? Do these judges anticipate responses by appellate panels and condition their decisions based on these expectations? Using an original dataset of foreign policy cases from 1946-2000 and incorporating a strategic choice statistical framework to analyze a formal model, I discover that the District Courts are not constrained by the anticipated responses of the Appeals Courts. Whether one examines District Courts in isolation from other tribunals or within a hierarchical structure, conclusions regarding ideological voting remain consistent: Democratic judges are more likely to rule in favor of civil liberties than their Republican colleagues. Thus, the hierarchical structure of the federal judiciary does not appear to be a significant constraint to the District Courts as it seemingly is for the Courts of Appeals.

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.¹

It is important to realize that the federal courts often determine the extent to which the government may permissibly intrude upon individual civil liberties. The terrorist attacks of September 11, 2001, and subsequent actions by the Bush administration, have reminded us that the federal courts often are required to resolve questions of individual rights in lieu of foreign policy or national security concerns. Unfortunately, the majority of U.S. foreign policy studies focus on interactions between the executive and legislative branches of government during the conduct of foreign affairs. They examine the politics of a decision-making process, designed to confront the numerous challenges encountered from the participation of a government in an interdependent, international system. Thus, scholars focus primarily on those actors within the United States who proactively determine foreign relations policy.

Consequently, in an effort to concentrate on the President, Congress, or agencies such as the CIA or Department of State, these examinations neglect the roles played by the judiciary. While the political branches of government most directly determine policy outcomes, the contributions of the judiciary are no less significant. Many foreign policy questions involve constitutional interpretations regarding the authority vested in the executive and legislative branches. Since the courts possess the authority to interpret the Constitution, judicial decisions often define the parameters and boundaries within which the political branches must operate. Despite this substantial impact on foreign policy decision-making, little scholarship exists on judicial influences in the conduct of foreign affairs.

Three significant limitations have hindered our understanding of how the judiciary operates in the foreign relations scheme. First, within the small body of literature examining courts and foreign policy, a majority of these studies utilize

¹ Wyzanski (1959).

qualitative techniques to assess historical relationships between the three branches of the federal government. These studies examine whether the Supreme Court defers to either the President or Congress in the formulation and conduct of U.S. foreign policy. While these doctrinal analyses provide detailed descriptions of specific case histories, they do not offer theoretical contributions to judicial behavior. Consequently, a richer set of theoretical expectations is needed to understand judicial behavior in foreign affairs.

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

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

This paper therefore contributes to the literature on U.S. foreign policy by focusing on a historically neglected branch. Additionally, it contributes to the literature on judicial politics by examining structural differences among the lower federal courts, with a particular focus on the district courts. A major theme throughout the paper is the effect of the federal structure on the behavior of district court judges. Does the hierarchical relationship between the district courts and the courts of appeals influence decision-making at the trial level? Stated another way, are district court judges constrained by the appeals courts, according to the tenets of principal agency theory? Do these judges anticipate responses by appellate panels and condition their decisions based on these expectations? To address these questions, I initially explore previous research

pertaining to District judges as policy makers within a judicial hierarchy. Then, I develop a simple 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.

PREVIOUS RESEARCH ON JUDICIAL HIERARCHIES

The institutional structure of the federal judiciary facilitates an application of the legal concept of *stare decisis*. Under this principal, courts located in the lower echelons of the hierarchy apply binding precedents – handed down by higher tribunals – to resolve current disputes. As Canon and Johnson (1999, 30) state, “all courts lower in the hierarchy must attempt to apply the policy to relevant cases, interpreting the policy as necessary to fit the circumstances at hand.” Several scholars have examined lower court treatment of legal precedents and concluded that inferior judges generally adhere to Supreme Court pronouncements of law (Gruhl 1980; Johnson 1987; Songer and Sheehan 1990; Benesh and Reddick 2002). Additionally, lower court judges tend to follow ideological trends from these higher tribunals (Baum 1980; Songer 1987). According to Baum, the reason for compliance by lower court judges is that while those judges seek to set doctrine near their personal ideal points, they realize that doing so increases the chance of being reversed by a higher court. Therefore, judges “must balance their preferences against the preferences of [the higher] court and sometimes take positions that diverge from their own preferences in order to avoid reversals that would move policy even further from those preferences” (1997, 115).

In order to understand the influence of this hierarchical relationship, scholars have turned to principal-agent theory. The fundamental premise behind this theoretical construct (see Brehm and Gates 1997 for a more detailed explanation) is that the principal seeks to produce results according to his personal preferences. However, due to a lack of resources the principal cannot review every aspect of a particular policy arena. Therefore, the principal “delegates some rights... to an agent who is bound by a (formal or informal) contract to represent the principal’s interests...” (Eggertsson 1990, 40). The tension within this relationship arises because the agent also seeks to produce results according to his personal preferences, which may not be similar to those of the principal. The

difficulty for the principal involves establishing substantial controls, inducements or other enforcement mechanisms to ensure that the agent does not deviate from the principal's preferences (Shepsle and Bonchek 1997). Yet, because a principal cannot develop perfect enforcement mechanisms and due to information asymmetries between the principal and the agent, it is always possible for the agent to "shirk."

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

Empirical examinations of the principal-agent model, within the judiciary, traditionally focused on the impact of Supreme Court decisions on lower courts.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 which deviates from the preferences of Supreme Court justices. However, they do note a substantial difference between liberal and conservative judges (panels) at the appellate court level. "These findings suggest that appeals court judges are substantially constrained by the preferences of their principal,

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).

but the complexity and tremendous variety of the fact situations presented on appeal frequently provide them with room to maneuver” (1994, 692-693).

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

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

Though this statement was not directly tested by Songer, Segal and Cameron their indirect evidence, and evidence by Benesh (2002), leads one to conclude that the appeals court judges factor potential responses by the Supreme Court into their decision

calculus.³ 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.

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

³ I also provide empirical evidence supporting the notion of anticipatory behavior by appeals court judges (see Randazzo 2002).

since a non-zero probability of reversal exists (a probability that is larger than the non-zero probability of the Supreme Court granting *certiorari*) an application of the principal agent model to the District Courts is appropriate.

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

In sum, while a simple logical extension of the principal agent model to the District Courts initially leads one to the conclusion that these courts should engage in anticipatory behavior similar to appellate judges, additional theoretical expectations limit an application of principal agency theory to the trial level. Given these apparent

contradictions, it is prudent to develop a formal model which provides additional analytical leverage over testable hypotheses.

FORMAL MODEL OF DISTRICT COURT DECISION MAKING

Reliance on formal modeling for judicial behavior has increased over recent years. Scholars use formal models to help explain voting behavior in the U.S. Supreme Court (Stearns 2000), interactions between the Supreme Court and other branches of government (Segal 1997; Shipan 1997; Vanberg 2001) and between the Supreme Court and lower courts (McNollgast 1995; Cameron, Segal and Songer 2000). “The principal advantage of formal modeling is the clarity and rigor afforded through deductive analysis. For game theoretic analysis this means identifying equilibrium conditions not predicting specific outcomes of a particular case” (Gates and Humes 1997, 7). Thus, one may explicitly state precise assumptions about expected behavior and mathematically derive general patterns of behavior (i.e., best responses) of individuals within a strategic environment. Following in this tradition, I present a formal model that helps explain the principal agent relationship between the District Courts and the Courts of Appeals.⁴

Insert Figure 1 About Here

Immediately, one can see in Figure 1 the sequential nature of the process. Decisions on foreign policy issues (or any other issue) are first heard in the District Courts for trial. The majority of litigation in the District Courts is presided over by a single judge. He can choose between ruling in favor of civil liberties (denoted B for this game) or he can support foreign policy interests (denoted ~B). Once the District Courts rule on a case, the Courts of Appeals encounter a similar choice: ruling in favor of civil liberties (B) or foreign policy interests (~B).⁵ Since the Appeals Courts possess mandatory jurisdiction they must review all appeals. In reality “about twenty percent of district court decisions are appealed in any given year” (Rowland and Carp 1996, 8).

⁴ Note that this model is a simplification of reality and therefore focuses on a narrow set of potential influences on judicial behavior.

⁵ 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.

However, examining why certain litigants choose to appeal (or not appeal) is beyond the scope of this dissertation. Since the Appeals Courts cannot selectively review appeals, I assume that every case tried in the District Courts is appealed to the Courts of Appeals for review.

In order to derive equilibrium behavior, one must specify assumptions about payoffs for the players. These payoffs assist in calculating the expected utilities, which are necessary to determine the specific strategies players adopt. As Figure 1 illustrates, judges on the District Courts are motivated by two primary concerns. The first involves the policy outcome of a specific vote. For illustration purposes, let us assume that the District Courts prefer to rule in favor of civil liberties and the Courts of Appeals prefer a ruling supporting foreign policy interests.⁶ Since the District judges are actors within the federal judicial system, they receive a vote benefit X_1 for each decision they render. I assume that the judges are policy maximizers, and as such prefer to render decisions according to their personal ideological preferences (this is the standard assumption for the attitudinal model).⁷ Therefore, if the District Courts prefer decisions favoring civil liberties, they receive a positive X_1 for each decision reflecting this preference and a negative X_1 for decisions favoring foreign policy.⁸ However, these judges realize that the Appeals Courts can review their decisions and either affirm or reverse their rulings. When the Appeals Courts review a decision, the District Court judges are subjected to a reputation effect Y . If the decision is affirmed on appeal, then this reputation effect is added to the vote benefit ($X_1 + Y$). However, if the Appeals Courts reverse the decision, then the reputation effect is subtracted from the vote benefit ($X_1 - Y$). Given this ordering, it is apparent that District Court judges prefer to have their decisions affirmed on appeal rather than overturned and do not prefer to vote against their preferences.

⁶ Opposite patterns of behavior will occur if one assumes the District Courts favor foreign policy and the Courts of Appeals favors civil liberties. If the District Courts prefer similar policy outcomes as the Courts of Appeals, then these judges will rule according to their preferences without fear of reversal (regardless of the ideological direction of those preferences).

⁷ Baum (1997) describes other motivational factors for lower court judges, not the least of which is adherence to legal precedent. This model, by focusing primarily on attitudinal concerns, is therefore an oversimplification of potential influences.

⁸ It is important to note that this term X_1 applies only to the decision by the District Courts. Though the ultimate policy decision may favor foreign policy interests, X_1 will remain positive if the District Courts voted in favor of civil liberties (though the reputation effect Y will be subtracted from this term ($X_1 - Y$) consequently producing a smaller payoff).

Therefore, the preference ordering for District Courts is $(X_1 + Y) > (X_1 - Y) > (-X_1 + Y) > (-X_1 - Y)$.

Figure 1 also reveals the payoffs for the Appeals Courts. First, I assume the appellate judges are motivated by policy concerns, similar to the district judges. In this case, according to the illustrative example, the Appeals Courts receive a vote benefit X_2 for decisions favoring foreign policy interests and a benefit $-X_2$ for decisions supporting civil liberties. Again, I assume that the appellate judges are policy maximizers and, therefore, prefer to render decisions according to their ideological preferences. Second, unlike the Supreme Court which incurs a cost for granting *certiorari*, the Appeals Courts must review all appeals and therefore any cost for review is constant across all cases. Consequently, this facet is excluded from the model. Third, though the appellate judges may prefer to render decisions according to their personal preferences, a growing body of literature demonstrates that these judges face additional constraints (such as legal precedent and possible review by the Supreme Court), which limit their ability to rule ideologically.⁹ Thus, a constraint term (Z) is included in their payoff matrix. If the constraint term is greater than the vote benefit ($Z > X_2$) the Appeals Courts will rule against their preferences. If the constraint term is less than the vote benefit ($Z < X_2$) then the appellate judges will vote according to their preferences. In terms of the illustration explained earlier, Figure 1 operates under the assumption that the Appeals Courts prefer to vote in favor of foreign policy interests. Therefore, if the constraint is less than the vote benefit, we should expect to observe the appellate panel reversing a civil liberties decision by the District Courts. However, if the constraint exceeds the policy benefit, then the Appeals Courts will affirm the decision and vote in favor of civil liberties.

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

Definition of Player Choices:

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

Definition of Player Payoffs:

⁹ See Songer, Sheehan, and Haire (2000) for a discussion of these constraints and their influence on Appeals Court decision making.

Let X_1 = District Court Benefit for civil liberties decision

Let Y = District Court Reputation Effect

Let X_2 = Court of Appeals Benefit for foreign policy decision

Let Z = Court of Appeals Constraint Term

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

$$EU_{\text{District}}(B) \succ EU_{\text{District}}(\sim B) \quad [1]$$

$$PR_{\text{Appeals}}(B) + PR_{\text{Appeals}}(\sim B) \succ PR_{\text{Appeals}}(B) + PR_{\text{Appeals}}(\sim B) \quad [2]$$

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

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

Equation [3] is a function of choices made by the Appeals Courts and the subsequent payoffs afforded to the District Courts. Determining whether the Courts of Appeals will rule in favor of civil liberties involves examining their respected payoffs between this vote, and a decision supporting foreign policy interests. Figure 1 indicates that the Appeals Court receives $(-X_2 + Z)$ if it affirms the District Court's decision in favor of civil liberties. However, if the appeal is reversed then the Appeals Court receives $(X_2 - Z)$ as a payoff. Therefore, determining the expected utility for the Courts of Appeals involve calculations for X_2 and Z . If $X_2 > Z$ the panel will reverse the District Court decision, and if the $X_2 < Z$ the panel will affirm the decision. While we cannot determine this calculation *a priori*, we do know from previous research that the Appeals Courts affirm approximately 75% of the decisions they review (Songer, Sheehan and Haire 2000). Therefore, the probability of affirmance is .75 and the probability of reversal is .25. Consequently, the Courts of Appeals will most likely choose to support civil liberties

(B) when reviewing a decision by the District Courts to support civil liberties. Similarly, the Appeals Courts will most likely affirm a decision favoring foreign policy interests when reviewing a decision by the District Courts to support foreign affairs. Substituting these probabilities into Equation [3] we see that,

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

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

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

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

Since the reputation terms (Y) are equal on both sides of the equation they mathematically cancel each other and we are left with,

$$X_1 > -X_1 \quad [7]$$

Substituting this result into Equation [1] we are left with the conclusion that,

$$EU_{\text{District}} (B) > EU_{\text{District}} (\sim B) \quad [8]$$

Equation [8] indicates that the District Courts derive a greater expected utility from rendering decisions according to their policy preferences without fear of reversal by the Courts of Appeals. It is therefore unclear whether the principal agent model is applicable to an examination of the relationship between the District and Appeals Courts.

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

appellate panels. While the District Courts may be able to identify the general ideological preference of the circuit, the Appeals Courts will retain private information about the preferences of the three judges assigned to the appellate panel. Likewise, the District Courts will possess private information regarding their policy preferences and their fear of reversal. This private information allows for variation within the formal model's predicted responses, thereby facilitating empirical tests of these theoretical expectations.

RESEARCH DESIGN AND METHODS

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

[I]f game theory has taught us anything, it is that the likely outcome of such situations can be greatly affected by the sequence of players' moves, the choices and information available to them, and the incentives they face. In short, in strategic interaction, *structure matters*. Because of this emphasis on causal explanation and strategic interaction, we would expect that the statistical methods used to analyze [judicial] theories also account for the structure of the strategic interdependence. Such is not the case (1999, 279).

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

in statistical methods offer more efficient techniques that are capable of modeling strategic interdependence.

In a series of working papers and published articles, Signorino (1999a, 1999b, 2000, 2001; and Signorino and Yilmaz 2000) argues the merits of incorporating strategic discrete choice models into analyses of interdependence. Traditional maximum likelihood techniques are limited to a single actor confronted with a single discrete choice (often binary). Relying on logit or probit models to estimate strategic formal models ignores two essential structural components: multiple (often sequential) decisions and multiple actors. Therefore, “logit and probit [models] induce a distributional misspecification. Even when that is negligible, the estimates of the effects of regressors – especially for the conditioning variables – are likely to be biased and inconsistent” (Signorino and Yilmaz 2000, 3-4). The consequences of this distributional misspecification are similar to omitted variable bias, which affect the estimates and leads to inaccurate conclusions.

To alleviate part of the functional form specification issue, scholars have turned to selection models. These models allow researchers to capture the sequential decision-making process in their empirical estimations, thereby eliminating one source of bias introduced in the traditional maximum likelihood models (Heckman 1979). Essentially, strategic models are selection models “because the actors select themselves and others into ‘subsamples’ based on their choices” (Signorino 2001, 3). However, whereas traditional selection models are useful at modeling sequential decisions, strategic choice models extend the analysis by also allowing for the incorporation of multiple actors within a sequential decision calculus.¹⁰

To facilitate a strategic choice analysis, I collect data from an original sample of federal court decisions involving foreign affairs and civil liberties, from 1946-2000. While the cutoff points in the timeline are somewhat arbitrary, a rationale exists for this choice. The sequence begins in 1946, a year in which the United States transitioned from World War II and to the Cold War (as one of two international superpowers), and reorganized some of its bureaucratic agencies accordingly – most notably the foreign

¹⁰ Signorino acknowledges that strategic choice models are deficient relative to traditional selection models in the assumption that errors or private information are independent. The strategic choice model does not capture correlation in the disturbances associated with each player’s decision. “Substantively, this implies that [players] learn nothing about each other’s incentives when viewing their own private information” (2001, 14).

policy and intelligence gathering agencies. Additionally, with the creation of the United Nations the international system entered into a new era with nations becoming increasingly interdependent. To include cases before 1946 risks analyzing qualitatively different issues; issues arising before World War II – when the United States possessed a different perception of its international responsibilities – and also from the war itself. Similarly, the time sequence ends at the year 2000 so as to not include cases arising under a new presidential regime (George W. Bush) and, more importantly, issues following the September 11, 2001, terrorist attacks. Initially I identify 103 cases that were reviewed in both the district and appeals courts. These cases were coded at both levels bringing the total number of cases in this sample to 206 (103 cases at the district court level and 103 cases at the appeals court level).

In the strategic choice probit model there are essentially two dependent variables. The first dependent variable is whether the District Courts vote in favor of foreign policy interests (coded ‘0’) or civil liberties claims (coded ‘1’). The second dependent variable is whether the Appeals Courts vote in a similar fashion (‘0’ for a vote favoring foreign policy interests and ‘1’ for a decision supporting civil liberties). It is important to note that the federal government does not have to be a litigant to a particular case in order to express a foreign policy interest in the outcome. Since the dependent variables are conditioned on the choice probabilities of the two actors, traditional maximum likelihood techniques (including multinomial logit and selection models) are inappropriate (Signorino 1999a, 1999b, 2000, 2001; and Signorino and Yilmaz 2000). I therefore rely on a strategic choice probit model.¹¹

Evaluating the strategic aspects of District Court decision making also involves the inclusion of several independent variables to control for specific exogenous influences. 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 rely on the partisan affiliation of a judge’s

¹¹ 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/.

appointing president to serve as proxy for ideological preferences. Initially judges appointed by Republican presidents are coded '0' and those appointed by Democratic presidents are coded '1'. However, since the unit of analysis is aggregated to the court level for appellate panels, individual preference measures are combined for the Appeals Courts. This combination is captured through the independent variable *Court Partisanship*, which is defined as the proportion of judges appointed by Democratic presidents. As several scholars note, Democratic judges are more likely to render liberal decisions than their Republican colleagues.¹² This tendency translates into Democratic judges being theoretically more likely to rule in favor of civil liberties claims than Republicans, and the latter being more likely to support foreign policy concerns than Democratic judges. However, if the tenets of principal agent theory hold then I expect District Court judges will mask their ideological preferences when they believe their decision will be overturned on appeal. Consequently, if district judges anticipate appellate responses (according to principal agency theory), then I expect the relationship between *Court Partisanship* and the dependent variable either to be non-significant or negative.

In addition to the ideological variable of interest, the model includes several control variables. In the equation for the District Courts, I first include the variable *Threshold Issue* which is a dummy variable that measures the presence of a threshold issue such as the political question or act of state doctrine. 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 (i.e., judges will be more likely to rule in favor of federal government interests). Second, I include the dummy variable *National Security Defense* to control for the presence of a specific national security defense, raised by the federal government. If the government claims an issue of national security, I hypothesize that the judges will be more likely to rule in favor of the government. Finally, *Criminal Case* measures whether the courts are reviewing criminal petitions related to foreign affairs.¹³

¹² 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.

¹³ 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).

Since many criminal cases involve frivolous challenges, I hypothesize that judges will be more likely to rule in favor of foreign policy interests when resolving criminal issues.

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

EMPIRICAL RESULTS

Table 1 presents the empirical results of several analyses. The latter two columns are the results from the strategic choice probit model. This is the model that directly tests the theoretical expectations generated by the formal model in Figure 1. For comparative purposes, I also conducted two traditional probit analyses: one on the district court decisions and one on the appeals court decisions. These results are presented in the beginning two columns of Table 1, and are the results I shall discuss first.

As indicated by the first two columns of Table 1, the two traditional probit analyses perform quite well. The results for the District Courts are listed first, followed by the results for the Courts of Appeals. As one can see each model correctly predicts approximately 65% of the overall variance (64.1% for the District Courts and 65.0% for

the Courts of Appeals). This translates into a 36.2% reduction of error for the District Courts and a 40.9% reduction of error for the Courts of Appeals.

According to Table 1, the effects of the variable *Court Partisanship* are statistically significant and in the anticipated direction for both the District Courts and the Courts of Appeals. This conclusion supports the hypothesized expectation that judges render decisions according to their ideological preferences. Those individuals appointed by Democratic presidents are significantly more likely to rule in favor of civil liberties than their Republican colleagues. To determine the magnitude of this effect, I calculated changes in the predicted probabilities.¹⁴ These changes are reported in Table 2 and represent the effects of isolated variables on the probability of a vote for civil liberties, holding the other variables constant. Table 2 indicates when the value of the variable *Court Partisanship* is increased by one standard deviation above the mean, the probability of a vote in favor of civil liberties increases to .693 (an increase of 14.9%). The only other variable statistically significant, according to Table 1, for the District Courts is the one controlling for criminal cases. This result supports the hypothesis that District judges are less likely to rule in favor of civil liberties claims when confronted with a criminal case. Table 2 indicates that the probability of these judges ruling in favor of civil liberties decreases to .287 (a decrease of 25.7%). The remaining variables did not achieve statistical significance in the traditional probit analysis.

While these results reinforce the conventional wisdom about trial court decision making, the more interesting story involves the application of principal agency theory to the District Courts and the potential constraints imposed by a hierarchical structure. An examination of the last two columns in Table 1 reveals the coefficients from the strategic choice probit model. Before I discuss the individual coefficients, let me restate some aspects underlying the strategic choice probit model. First, the model can be conceptualized as a combination between a multinomial probit model and a system of simultaneous equations. The model is multinomial insofar as one can estimate the likelihood of multiple actors choosing different paths (i.e., B or ~B) without specifying a particular preference order for the choices. The model is simultaneous in that actions

¹⁴ Since the focus of this paper is on anticipatory behavior (i.e., strategic behavior) by district court judges, the predicted probabilities are calculated only for the district courts.

taken later in the sequence (by other players) affect the likelihood of choices at the beginning of the sequence. Second, similar to simultaneous equations models, one cannot include the same regressors in each equation; otherwise the model is unidentified and cannot be estimated. Therefore, some of the variables should have been included in the traditional probit model are excluded so as to preserve comparability between the strategic choice probit model and the traditional probit model. Finally, since the strategic choice probit model incorporates the decisions of multiple actors the model is divided into two sections: the District Courts' decisions on the merits and the Appeals Courts' decisions on the merits. These sections are estimated simultaneously and therefore the values of coefficients in a section are calculated according to their influence on the dependent variable and conditioned on the influence of regressors in other sections.

Overall, this model performs well, correctly predicting 44.6% of the variance for a 14.4% reduction of error over the null model. While this reduction is smaller than the traditional probit model, one should be cautious about directly comparing these goodness-of-fit estimates. Since the strategic choice probit model estimates multiple dependent variables (and influences across multiple actors) its goodness-of-fit statistics will rarely outperform a model that only focuses on a single aspect. Therefore, since the strategic choice model offers a 14.4% reduction of error over the null model, we can safely conclude that the model performs well and subsequently turn to examine individual coefficients.

If we examine the section pertaining to the District Courts we notice several points. First, the ideological variable *Court Partisanship* remains statistically significant and positive. As I mention earlier, if District Court judges anticipate responses on appeal and fear reversal, then I hypothesize this constraint would curtail their desire to rule ideologically. However, according to Table 1, District Court judges continue to rule ideologically, even when evaluated in a strategic environment. An examination of the predicted probability indicates that Democratic judges are 17.4% more likely to rule in favor of civil liberties concerns than their Republican colleagues (increasing the likelihood of a civil liberties vote to .663). Second, the control variable *Criminal Case* continues to exert a significant influence on District Court behavior. When judges are confronted with a criminal case the probability of a civil liberties vote decreases to .333

(a 15.6% decrease). Finally, in the strategic choice probit model the control variable *National Security Defense* is statistically significant indicating that district court judges are less likely to rule in favor of civil liberties. In fact, according to Table 2, the probability of a civil liberties vote decreases to .212 (a decrease of 27.7%) in the strategic model.

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

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

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

CONCLUSIONS

This paper addresses the question as to whether anticipatory behavior exists in the federal District Courts. Are District Court judges constrained by the Appeals Courts, according to the tenets of principal agency theory? Do these judges anticipate responses by appellate judges and condition their decisions based on these expectations?

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

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

TABLE 1: STRATEGIC ANALYSIS OF DISTRICT COURTS

	Probit Model		Strategic Model	
	Coefficient Value	Robust Std Err	Coefficient Value	Robust Std Err
District Courts				
Court Partisanship	.387*	.201	.918**	.430
Threshold Issue	-.032	.212	.436	.289
National Security Defense	.018	.255	-.521***	.119
Criminal Issue	-.696***	.228	-.355*	.178
Constant	-.261	.189	-.313	.211
N	103			
Null Model	43.7%			
Correctly Predicted	64.1%			
Reduction of Error	36.2%			
Courts of Appeals				
Court Partisanship	.674**	.272	.941**	.420
Lower Court Directionality	.014	.091	.130*	.063
Constitutional Challenge	-.121	.192	.772	.052
International Law or Treaty	-.602*	.343	-.871	.677
Constant	-.471	.217	1.249	.336
N	103		206	
Null Model	40.8%		35.3%	
Correctly Predicted	65.0%		44.6%	
Reduction of Error	40.9%		14.4%	

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

TABLE 2: PREDICTED PROBABILITIES

Variables	Probability of District Court Vote in Favor of Civil Liberties Claim
Traditional Probit Model	
All variables at mean ^a	.544
Court Partisanship (increase by one standard deviation)	.693
Criminal Issue (move from 0 to 1)	.287
Strategic Probit Model	
All variables at mean ^a	.489
Court Partisanship (increase by one standard deviation)	.663
National Security Defense (move from 0 to 1)	.212
Criminal Issue (move from 0 to 1)	.333

^a dichotomous variables at 0

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