

Judicial Decision Making in U.S. Foreign Policy Litigation

Kirk A. Randazzo
Assistant Professor
Department of Political Science
University of Kentucky
Kirk.Randazzo@uky.edu

Paper prepared for presentation at the annual meeting of the Southern Political Science Association, January 8-11, 2004, New Orleans, LA.

Judicial Decision Making in U.S. Foreign Policy Litigation

Abstract

The terrorist attacks of September 11, 2001, and subsequent actions by the Bush administration, remind us that the federal courts often are required to resolve questions of individual rights in lieu of foreign policy concerns. This paper explores judicial influences in foreign policy litigation across all three levels of the federal judiciary to determine whether judges systematically rule in favor of foreign affairs when confronted with civil liberties challenges. Using an original dataset of federal cases from 1946-2000, the paper provides evidence that the federal judiciary is extremely deferential to governmental authority in the conduct of foreign relations. While the federal judiciary is prone to support foreign policy interests, it is important to understand the conditions under which these judges will rule in favor of civil liberties claims. An important influence is the ideological preferences of judges. The empirical results indicate that more liberal judges – as measured by partisan affiliations of the appointing president – are more likely to render decisions in favor of civil liberties. This result holds for each level of the federal judiciary, although the results are more pronounced in the Supreme Court, less so for the Appeals Courts, and the weakest for District Courts. A second important influence involves the presence of a national security defense. The empirical data suggest that lower court judges are significantly affected by these situations; systematically ruling in favor of foreign affairs. However, Supreme Court justices do not respond in a similar fashion; the presence of a specific national security defense is not significantly related to judicial decisions.

The perennial issue of the appropriate balance between civil liberties and the demands of [foreign policy] 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.¹

The terrorist attacks of September 11, 2001, and subsequent actions by the Bush administration, remind us that the federal courts often are required to resolve questions of individual rights in lieu of foreign policy 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.

¹ Clarke and Neveleff (1984, 493).

Three significant limitations have hindered our understanding of how the judiciary operates in the foreign relations scheme. First, within the small body of literature examining courts and foreign policy, a majority of these studies utilize qualitative techniques to assess historical relationships between the three branches of the federal government. These studies examine whether the Supreme Court defers to either the President or Congress in the formulation and conduct of U.S. foreign policy. While these doctrinal analyses provide detailed descriptions of specific case histories, they do not offer theoretical contributions to judicial behavior. 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. Arguably, this responsibility becomes difficult to fulfill when judges resolve disputes between the rights of individuals and the authority of the federal government to engage in foreign affairs. 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 explores judicial influences in foreign policy litigation across all three levels of the federal judiciary and consequently contributes to the literature on U.S. foreign policy by focusing on a historically neglected branch. Additionally, the research contributes to the literature on judicial decision making by comparing differences among the three levels of the federal court system. The following sections explore anecdotal evidence pertaining to the nature of judicial responsibilities in foreign affairs litigation, further develop theoretical expectations, specify the research design and analytic methods employed and empirically evaluate influences on judicial behavior.

ANECDOTAL EVIDENCE

The extent to which judicial opinions offer insights into institutional differences among federal judges' attitudes is questionable. A brief examination of opinion language leads to the conclusion that federal judges, regardless of their institutional position, weigh heavily the rights of individuals versus the authority of the government to engage in foreign relations. For example, Judge Murphy of the Northern District Court for California stated, "those who founded this nation placed upon the judiciary the grave responsibility of safeguarding constitutional rights regardless of from what quarter comes the attack."² Similarly, in the case *U.S. v. Molina-Chacon*, Judge Platt of the Eastern District Court for New York admonished, "Of course, U.S. courts must guard against those situations where overzealous United States law enforcement personnel attempt to...

² *Parker v. Lester* 98 F. Supp. 300 (1951).

circumvent constitutional safeguards.”³ These opinions indicate that District Court judges are cognizant of their responsibility to ensure individual liberties. However, these judges also are cognizant of the government’s authority to formulate U.S. foreign policy. Judge Zilly of the Western District Court for Washington warns, “court(s) must be particularly careful not to substitute [their] own judgment as to what is ‘desirable’ or [their] own evaluation of what the executive branch may have intended by a given policy.”⁴

Similar sentiments are identified in the opinions of appeals court judges. Several cases demonstrate these judges balance their responsibility as ‘defender of civil liberties’ versus the government’s ability to dictate foreign policy. Judge Murnaghan of the Fourth Circuit writes, “History teaches us how easily the spectre of a threat to ‘national security’ may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts... would impermissibly compromise the independence of the judiciary and open the door to possible abuse.”⁵ Likewise, the case *U.S. v. U.S. District Court* brings a statement from Judge Edwards of the Sixth Circuit Court of Appeals, “It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land.”⁶ While these cases initially lead to the conclusion that the Courts of Appeals may be more sensitive to civil liberties concerns, other cases admonish appellate judges to refrain from intruding upon the government’s (especially the Executive’s) authority to develop foreign policy. Judge Cummings of the Seventh Circuit Court of Appeals captures this judicial balancing role when he states,

³ 627 F. Supp. 1253 (1986).

⁴ *Cammermeyer v. Aspin* 850 F. Supp. 910 (1994).

⁵ *In re Washington Post Co.* 807 F. 2d. 383 (1986).

⁶ 444 F. 2d 651 (1971).

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.⁷

The language from these Courts of Appeals' opinions reflects the language issued in the aforementioned District Courts' opinions. It is therefore apparent that judges presiding in the lower federal courts view their responsibilities in a similar fashion. The opinions consistently stress an initial deference to the policymaking branches of government, especially in foreign affairs, while at the same time monitoring potential infringements of constitutional liberties.

Various decisions handed down by the Supreme Court indicate the justices maintain analogous views of their responsibilities. For example, Chief Justice Warren claimed, "When [government's] exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated."⁸ The same year Warren handed down his decision, Justice Black rendered an opinion in which he concluded, "Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones."⁹ 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

⁷ *Flynn v. Schultz* 748 F. 2d. 1186 (1984).

⁸ *United States v. Robel* 389 U.S. 258 (1967).

⁹ *Afroyim v. Rusk* 387 U.S. 253 (1967).

of foreign relations... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”¹⁰

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

THEORETICAL EXPECTATIONS

A common element to international relations (particularly the neo-liberal theories), constitutional law, and judicial politics theories is that internal dynamics substantially impact individual behavior. One of the most important facets for the judiciary involves the application of the attitudinal model. Scholars relying on the attitudinal model operate under the assumption that 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 focuses on the preferences of Supreme Court

¹⁰ 342 U.S. 580 (1952).

justices (Segal and Cover 1989; Martin and Quinn 2002).¹¹ Comparable development of quantitative measures for lower court judges is scarce. Therefore, to measure the preferences of lower court judges, scholars rely on partisan affiliations of either the judges themselves or of their appointing presidents.¹² However, an underlying assumption of the partisan surrogate is that this measure focuses mainly on preferences pertaining to domestic issues. One must question whether attitudes toward foreign affairs elicit similar partisan responses as attitudes towards domestic policy issues. Holsti and Rosenau (1986; 1988) rely on survey evidence of American elites to examine this question. They discover a strong and consistent relationship between domestic and foreign policy attitudes, which correlate with partisan affiliations and ideological beliefs. Assuming that judges possess similar attitudes as other elites within the United States, I therefore hypothesize that partisan affiliations will be related significantly to the disposition of foreign policy cases. Democratic judges will be more inclined to render decisions in favor of civil liberties, and Republican judges will be more likely to rule in favor of foreign policy interests.¹³ Since the Courts of Appeals and the Supreme Court are collegial tribunals, this hypothesis applies to their aggregate preferences.

A second aspect of the federal courts involves their adjudicatory responsibilities. Since the District Courts initially decide disputes, they are responsible for determining questions of fact and law. The Courts of Appeals and the Supreme Court are subsequently responsible for reviewing these initial decisions – with the Courts of Appeals also responsible for reviewing administrative agency decisions and the Supreme

¹¹ See Epstein and Mershon (1996) and Epstein et. al., (1998) for discussion about measurement issues on the Supreme Court.

¹² See Pinello (1999) for a detailed discussion of partisan affiliation in the lower federal courts.

¹³ These directions reflect traditional liberal and conservative decisions in foreign affairs.

Court able to review decisions from state courts.¹⁴ Since the Courts of Appeals possess mandatory jurisdiction over District Courts, while the Supreme Court exercises discretionary control over its docket, for a large majority of cases the appeals courts serve as the court of last resort. According to Songer (1991), “as the number of litigated cases grows both quantitatively and in complexity, while the number of cases reviewed by the Supreme Court remains static, the role of the courts of appeals as the final authoritative policymaker in the interpretation of many areas of federal law expands apace.” Therefore, it is important to determine how the appellate levels exercise their error correction 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 foreign policy, I hypothesize that the Courts of Appeals will adhere to these rulings and render a similar decision, or vice versa. Conversely, the Supreme Court will be more likely to reverse an appeals court decision (this is especially true if the appeals courts and the District Courts issue contradictory rulings, thereby causing dissensus within the judicial system as Perry (1991) discovers).

¹⁴ 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.

Certain legal issues, raised by litigants, also are expected to impact judicial decision making in foreign affairs. Previous studies indicate that the presence of a specific constitutional challenge increases the likelihood that courts will rule in favor of civil liberties over foreign policy interests (Burgess 1992; King and Meernik 1998, 1999). While judges initially may be hesitant to rule against the government in foreign policy cases, if individuals identify a specific constitutional violation, I hypothesize the likelihood of judicial opposition to foreign affairs initiatives increases. Additionally, the presence of a claim citing international law or treaty obligations may affect judicial behavior. A limited number of studies demonstrate that American courts are becoming increasingly more sensitive to claims of international law violations (Forsythe 1990; Rogoff 1996; and Scheffer 1996). Norms of international law or provisions within bilateral or multilateral treaties often attempt to explicitly identify individual rights against which governments cannot intrude. While many courts in the U.S. are hesitant to cite international law as precedent (especially in opposition to the federal government), these studies indicate that judges may rely on international legal principles to extend individual protections. Therefore, I hypothesize the presence of an international law or treaty claim will increase the likelihood of federal courts rendering decisions in favor of civil liberties.

A final set of legal or case variables are needed to control for potential effects of issues, not necessarily raised by litigants. First, several studies comment on the deference given by judges to the government when threshold issues (especially a political question or act of state doctrine issue) are present (Halberstam 1985; Charney 1989; Franck 1992; Rehnquist 1998; Bland 1999; Barron 2000). These analyses indicate federal courts often

employ threshold issues in order to refrain from addressing the merits of cases that challenge federal authority to engage in foreign affairs. Similarly, if the government raises a national security defense, courts are unlikely to rule against foreign relations (Cheh 1984; Dorsen 1997). Therefore, if judges are asked to resolve either a threshold issue or a defense of national security, I hypothesize that they will be more likely to rule in deference to foreign policy interests. Finally, scholars note that some judges are sensitive to specific case issues (Songer 1987; Songer, Sheehan and Haire 2000; Zorn 2002). I therefore include a variable to control for criminal cases since many of these issues, especially on appeal, are frivolous. When federal judges, at any level, confront these frivolous challenges to foreign policy initiatives it is difficult for them to support criminal defendants. Consequently, I hypothesize that the federal courts will be more likely to rule in favor of foreign policy interests when confronted with a criminal case.

RESEARCH DESIGN AND METHODS

Data for this analysis come from an original sample of federal court decisions involving foreign affairs and civil liberties, from 1946-2000. Following several international relations analyses, I define foreign policy as any issue involving relations between the federal government and individuals, groups, and nations outside its borders (Fry, Taylor and Wood 1994; Bueno de Mesquita 2003).¹⁵ 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

¹⁵ As several scholars note, contemporary definitions of foreign policy are becoming increasingly vague and more inclusive (Hermann and Hermann 1989; Ripley and Lindsay 1993; Wittkopf and Jones 1999). This definition preserves the continuum of issues ranging from the most foreign to the most domestic (Henehan 2000) and includes issues pertaining to diplomatic relations with other nations; issues with foreign nationals, states or international corporations; immigration; international law; and military relations.

War (as one of two international superpowers), and reorganized some of its bureaucratic agencies accordingly – most notably the foreign policy and intelligence gathering agencies. Additionally, with the creation of the United Nations the international system entered into a new era with nations becoming increasingly interdependent. To include cases before 1946 risks analyzing qualitatively different issues; issues arising before World War II – when the United States possessed a different perception of its international responsibilities – and also from the war itself. Similarly, the time sequence ends at the year 2000 so as to not include cases arising under a new presidential regime (George W. Bush) and, more importantly, issues following the September 11, 2001, terrorist attacks.

Cases for this analysis were identified using a Lexis-Nexis keyword search. I retrieved numerous cases for each federal judicial level using the following issues as keywords: foreign policy, foreign affairs, national security, national defense, war powers, military, immigration, international law, treaties, ambassadors, and diplomacy. Initially, I identified approximately 10,000 cases each for the District Courts and the Courts of Appeals, and 400 cases for the Supreme Court. Further scrutiny (i.e., eliminating observable economic cases and retaining potential civil liberties cases) reduced this number to approximately 2900 District Court cases, 2700 Courts of Appeals cases, and exactly 116 Supreme Court decisions involving a civil liberties violation in combination with the various foreign relations issues.¹⁶ As I state at the beginning of this paper, the primary focus of this research is to examine how federal judges balance claims of civil

¹⁶ 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.

liberties against foreign policy issues. Therefore, I exclude cases that do not possess a civil liberties claim, though a foreign policy issue is present. Similarly, I exclude civil liberties cases that are not combined with a foreign policy issue. I define civil liberties as the fundamental freedoms from which individuals are protected against governmental intrusion (Epstein and Walker 1998; Domino 2003). Examples of civil liberties include First Amendment protections of free speech and press, Fourth, Fifth and Sixth Amendment protections for individuals subjected to the criminal justice system, and other rights or protections (such as access to an open government). Random samples for the lower federal courts were drawn subsequently from these remaining cases, with the universe of Supreme Court decisions included. Decisions for each judicial level were coded according to litigant characteristics, legal issues, final disposition, and judge characteristics.

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 (i.e., open access to information), 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, measuring the personal preferences of judges (especially lower court judges) is extremely difficult.¹⁷ Consequently, I rely on the partisan affiliation of a judge's appointing president to serve as proxy for preferences. Initially judges appointed by Republican presidents are coded '0' and those appointed by Democratic presidents are coded '1'. However, since the unit of analysis is aggregated to the court level, individual preference measures are combined. This combination is captured through the independent variable *Court Partisanship*, which is defined as the proportion of judges appointed by Democratic presidents. Since the majority of District Court decisions are delivered by a single judge, values for this variable will be either '0' for a Republican appointment or '1' for Democrat. However, in those instances in which the District Court sits as a three judge panel, and for the Courts of Appeals and the Supreme Court, the values for *Court Partisanship* will range from '0' to '1' with most entries falling proportionately within those extremes. As indicated previously, I hypothesize that Democratic judges will be more likely to rule against foreign policy interests (i.e., to rule in favor of civil liberties). Therefore, I expect a positive relationship to exist between *Court Partisanship* and the dependent variable; as the proportion of Democratic judges on a court increases, the likelihood of a decision favoring civil liberties claims will increase.

The variable *Lower Court Directionality* measures the case disposition by the district court or federal agency conducting the trial. The variable is coded '1' if the lower

¹⁷ See Randazzo and Sheehan (2001) for a more detailed description of the difficulties inherent in empirically measuring personal preferences of appellate judges.

court (or agency) ruled in favor of foreign affairs interests, '2' if the court rendered a mixed decision (both for and against governmental interests), and '3' if the court ruled against federal government interests. Theoretical expectations indicate the Courts of Appeals will be more likely to affirm a District Court (or administrative agency) ruling and the Supreme Court more likely to reverse the lower court ruling. Therefore, I anticipate a positive relationship to exist for the Courts of Appeals and a negative relationship to exist for the Supreme Court.

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

The final three legal issue variables are hypothesized to be negatively related to the dependent variable. The dummy variable *Threshold Issue* measures the presence of a threshold issue such as the political question or act of state doctrine. As hypothesized, the presence of a threshold issue should be negatively related to the likelihood of the courts ruling in support of civil liberties claims (i.e., judges will be more likely to rule in favor of federal government interests). The dummy variable *National Security Defense* controls for the presence of a specific national security defense, raised by the federal government. If the government claims an issue of national security, I hypothesize that the judges will be more likely to rule in favor of the government. Finally, *Criminal Case* measures whether the courts are reviewing criminal petitions related to foreign affairs.¹⁸ I hypothesize that judges will be more likely to rule in favor of foreign policy interests when resolving criminal appeals.

EMPIRICAL RESULTS

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 1. Each of the models performs well, possessing a 34.8, 49.0, and 43.0 percent reduction of error for the District Courts, Courts of Appeals and Supreme Court, respectively.¹⁹ Also, upon initial examination of these results it is apparent that the federal courts render decisions more

¹⁸ 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).

¹⁹ The reduction of error statistic is calculated using the formula provided in Hagle and Mitchell (1992)

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

often in favor of foreign policy interests than in support of civil liberties. The numbers reported in the null models indicate that District Courts render 34.4% of their decisions in favor of civil liberties, with the Courts of Appeals ruling 37.8% and the Supreme Court 44.0% of the time in favor of civil liberties. However, to determine specific influences on judicial behavior one must examine the impact of individual variables.

Insert Table 1 About Here

The first model examines influences on the federal District Courts. According to Table 1, the variables *Court Partisanship*, *National Security Defense*, and *Criminal Case* exert statistically significant influences in the expected direction. I hypothesized that the first variable would be related positively to the likelihood of judges ruling in favor of civil liberties, while the latter two variables would be negatively related. These hypotheses are confirmed by the empirical results, although the influence for *Court Partisanship* barely achieves statistical significance. Unfortunately, the variables *Workload*, *Constitutional Challenge*, *International Law/Treaty*, and *Threshold Issue* do not significantly affect judicial behavior.

To determine the magnitude of impact for the significant variables, I calculated predicted probabilities for each variable according to algorithms developed by Tomz, Wittenberg and King (2003). Predicted probabilities allow researchers to measure magnitudes of impact for a single variable, while holding the other variables constant either at their means for continuous variables or at zero for dichotomous variables. Evaluating predicted probabilities provides more meaningful conceptual estimates (King,

Tomz and Wittenberg 2000) than simply reporting probit coefficients. Examining the predicted probabilities for *Court Partisanship* therefore reveals that District Court judges appointed by Democratic presidents are 7% more likely to rule in favor of civil liberties than their Republican colleagues. If District Court judges encounter a *National Security Defense*, however, they are 23.8% more likely to rule in favor of foreign policy interests. Similarly, if these judges adjudicate a criminal case related to foreign relations, they are 19.5% more likely to support governmental authority in this realm.

The second empirical model evaluates the Courts of Appeals. According to the results listed in Table 1, the variables *Court Partisanship*, *Lower Court Directionality*, and *National Security Defense* exert statistically significant influences (though the variable *National Security Defense* barely achieves significance). I hypothesized the first two variables would be related positively to the dependent variable while the latter would possess a negative relationship. These hypotheses are supported empirically, while the expected influences of the variables *Workload*, *Constitutional Challenge*, *International Law/Treaty*, or *Threshold Issue* do not achieve statistical significance. The predicted probabilities for *Court Partisanship* indicate that Appeals Court panels dominated by Democratic judges are 10.3% more likely to rule in favor of civil liberties than are panels controlled by Republican judges. Additionally, if the District Courts (or federal agency) initially ruled in favor of civil liberties, the Appeals Courts are 14.0% more likely to affirm this ruling and render a decision favoring civil liberties. Finally, Table 1 reveals when appellate judges confront a *National Security Defense*, they are 22.9% more likely to support foreign policy concerns.

The final empirical model examines influences on the Supreme Court. According to Table 1 only one variable achieves statistical significance: *Court Partisanship*. The predicted probabilities demonstrate that as more justices appointed by Democratic presidents assume the Bench, their decisions are 23.7% more likely to support civil liberties claims than when the High Court is controlled by Republican appointed justices. The hypotheses for the remaining variables are not supported by the empirical evidence displayed in Table 1.

CONCLUSIONS

The opening quotation, from Clarke and Neveleff (1984), mentioned the difficulty for judges to maintain an appropriate balance between civil liberties and foreign affairs. Through a series of empirical analyses on all levels of the federal judiciary, one can reasonably conclude that judges favor the latter claim over the former. The lower federal courts seldom rule in favor of civil liberties claims (34.4% for the District Courts and 37.8% for the Appeals Courts). The Supreme Court is more sensitive to individual challenges, supporting these claims in 44.0% of their decisions. However, it is apparent that the justices more often defer to governmental authority in foreign relations.

While the federal judiciary is prone to support foreign policy interests, it is important to understand the conditions under which these judges will rule in favor of civil liberties claims. An important influence is the ideological preferences of judges. The empirical results indicate that more liberal judges – as measured by partisan affiliations of the appointing president – are more likely to render decisions in favor of civil liberties. This result holds for each level of the federal judiciary, although the results are more

pronounced in the Supreme Court, less so for the Appeals Courts, and the weakest for District Courts. Hence, the empirical data support an extension of the attitudinal model into the realm of foreign relations. As Holsti and Rosenau (1986, 1988) discovered for other elites, attitudes on domestic issues closely correlate to attitudes on foreign issues.

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

Table 1: Probit Analysis

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

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

REFERENCES

- 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.
- 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, Fourth Edition*. Boston: Houghton-Mifflin Company.
- Bland, Randall Walton. 1999. *The Black Robe and the Bald Eagle: The Supreme Court and the Foreign Policy of the United States, 1789-1961, Second Edition* Lanham: Austin & Winfield.
- Brace, Paul and Melinda Gann Hall. 1990. "Neo-Institutionalism and Dissent in State Supreme Courts" *Journal of Politics* 52 (February): 54-70.
- 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.
- 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, KS: University Press of Kansas.
- Carp, Robert A. and Ronald Stidham. 2001. *Judicial Process in America, Fifth Edition*. Washington, DC: CQ Press.

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

- 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 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, Second Edition* Washington, DC: CQ Press.
- Epstein, Lee and Thomas G. Walker. 2003. *Constitutional Law for a Changing America: Rights, Liberties and Justice, Fifth Edition*. Washington, DC: CQ Press.
- Fisher, Louis. 1995. *Presidential War Power*. Lawrence, Kansas: University of Kansas Press.
- 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.
- Genovese, Michael A. 2001. *The Power of the American Presidency, 1789-2000* New York: Oxford University Press.
- 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.
- Hagle, Timothy M. and Mitchell, Glenn E., 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.
- Harris, Fred R. 1995. *In Defense of Congress*. New York: St. Martin's 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.
- Jacob, Herbert. 1965. *Justice in America* Boston: Little, Brown Publishers.
- _____. 1984. *Justice in America, Fourth Edition*. Boston: Little, Brown Publishers.
- 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.
- Korn, Jessica. 1996. *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto*. Princeton: Princeton University Press.
- 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.
- 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.
- 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 Edition*, Alfred A. Knopf, Inc.
- Murphy, Walter F., C. Herman Pritchett and Lee Epstein. 2002. *Courts, Judges, and Politics: An Introduction to the Judicial Process*. Boston: McGraw-Hill.

- Peterson, Paul E. 1994. "The President's Dominance in Foreign Policy Making." *Political Science Quarterly* 109 (Summer): 215-234.
- 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.
- Perry, H.W., Jr. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge: 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." 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.
- 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, Second Edition*. 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.
- 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. 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.
- 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.
- Spitzer, Robert J. 1993. *President and Congress: Executive Hegemony at the Crossroads of American Government*. Philadelphia: Temple University Press.
- 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. 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, MI: 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/>

- 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* Volume 18 (Spring): 39-52.
- 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, Third Edition*, Eugene R. Wittkopf and Christopher M. Jones, eds. New York: Wadsworth Publishers.
- Zorn, Christopher J.W. 2002. "U.S. Government Litigation Strategies in the Federal Appellate Courts." *Political Research Quarterly* 55 (March): 145-166.