RESEARCH NOTE

Foreign Affairs Litigation in the U.S. Courts of Appeals: A Preliminary Analysis*

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The terrorist attacks of September 11, 2001, 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. 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 foreign affairs.

Three significant limitations hinder 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 use 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 because judges often encounter competing principles and preferences (i.e., individual rights versus security). Weighing these potentially contradictory aspects presents a substantially different challenge than resolving domestic policy disputes, and scholars must account for

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these competing principles to better understand the decision-making processes outside the domestic context.

Finally, most studies focus exclusively on the United States Supreme Court. The federal courts of appeals 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. Unfortunately, there is a dearth of empirical analyses that systematically explore patterns of judicial behavior under these circumstances.

This article focuses on foreign affairs litigation in the U.S. Courts of Appeals and, therefore, contributes to the literature on judicial politics by examining the influence of competing preferences (i.e., individual rights versus security) on decision making. In the following sections, I first describe the paradoxical dilemma facing judges in foreign policy cases. I then develop theoretical expectations for judicial behavior and empirically test these expectations using a unique data set.

THE COURTS OF APPEALS AND U.S. FOREIGN POLICY

Since their inception in 1891, the U.S. Courts of Appeals have occupied a "pivotal position as the vital center of the federal judicial system" (Howard, 1977:8). Songer states, "As the number of litigated cases grows both quantitatively and in complexity, while the number of cases reviewed by the Supreme Court remains static, the role of the courts of appeals as the final authoritative policymaker in the interpretation of many areas of federal law expands apace" (1991:35). Consequently, this pivotal position provides the appeals courts with several opportunities to review questions pertaining to the structure, authority, and conduct of the federal government.

According to Spitzer (1993), the realm of foreign affairs has been central in shaping intergovernmental relations involving these three aspects. As the president and Congress expand their constitutional capabilities, individual civil liberties are often sacrificed. Yet, as the Constitution dictates, the courts are responsible for protecting the rights of citizens within the United States. This creates a paradox for the courts when called upon to resolve foreign policy disputes:

> The courts have no authority to conduct U.S. foreign relations. They are, however, authorized to adjudicate all cases or controversies properly before them in accordance with applicable law. Their function is essential to the maintenance of the separation of powers among the branches and the protection of individual rights. Since no other branch has the authority to exercise the judicial power, practices that permit the Executive [or Legislature] to exercise unilateral decision-making authority in particular court cases may be inconsistent with the constitutional plan. On its face, the Constitution does not exclude or limit the courts' authority in cases or controversies touching on foreign relations. Furthermore, matters with for-

> eign relations implications may involve the legal rights and duties of individuals or the states under federal law, clearly within the courts' authority. Judicial deference or abstention in such cases may compromise the authority of the federal courts (Charney, 1989:807)

Federal judges historically have remained sensitive to this paradox, cognizant of the dilemma posed from the necessity to weigh the competing principles of rights versus security. According to Judge Arlin Adams of the Third Circuit, "Among the more perplexing dilemmas faced by a democratic society is that of securing its territorial and institutional integrity, while at the same time, preserving intact the core liberties essential to its existence as an association of truly free individuals."[1] Judge Murnaghan of the Fourth Circuit Court of Appeals also recognized this dilemma: "We are equally troubled by the notion that the judiciary should abdicate its decision making responsibility to the executive branch whenever national security concerns are present. 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."[2]

Are the courts defenders of civil liberties or champions of security? The Restatement of Foreign Relations Law states that "the provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations."[3] According to this component of the American legal system, the conduct of foreign affairs should not violate the civil liberties of U.S. citizens. However, as Dorsen argues, "foreign affairs, and its close relation, national security, have usually been graveyards for civil liberties. This is true even though governmental authority in the foreign sphere is not exempt from the liberty-bearing provisions of the Constitution" (1989:840). The conclusions from a limited number of empirical examinations at the Supreme Court level (King and Meernik, 1998; Yates, 2002; Yates and Whitford, 1998) and at the district court level (Ducat and Dudley, 1989) support Dorsen's argument about the adjudication of foreign policy disputes.

Therefore, foreign policy cases provide useful opportunities to test different theoretical expectations. 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).[4] These disputes differ from domestic issues (such as racial dis-

[1] *United States v. Butenko* 494 F. 2d 593 (1974).

[2] *In Re Washington Post Co.* 807 F. 2d 383 (1986).

[3] Restatement (Third) of Foreign Relations Law of the United States, Section 721 (1986).

[4] As scholars note, contemporary definitions of foreign policy are becoming increasingly vague and more inclusive (see Hermann and Hermann, 1989). This definition preserves the continuum of issues ranging from the most foreign to the most domestic (see 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.

crimination, and economic regulation). In many domestic policy cases there is a clear violation of the law. For example, many domestic criminal cases involve frivolous appeals by convicted felons. Consequently, individual judicial preferences pertaining to the law are often identifiable and well defined. Conversely, disputes involving the conduct of foreign affairs often involve more complex legal issues, which present judges with competing principles and preferences over appropriate legal remedies. Therefore, it is necessary to borrow from several literatures to develop a theory that helps explain how appellate judges resolve these complex disputes.

THEORETICAL EXPECTATIONS

To develop a rich theory of judicial behavior in foreign policy cases, it is necessary to borrow from the literatures on international relations, foreign affairs, constitutional law, and judicial politics. An element common to these literatures is that individuals are influenced by preferences, which may be constrained by external factors. However, the literatures differ as to which set of preferences is most influential.

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, 2002). Though this model initially was developed for Supreme Court justices, several studies demonstrate the model's predictive accuracy for judges on the courts of appeals.[5] They indicate that traditional notions of ideology positively affect judicial behavior (more liberal judges render more liberal decisions). Based on these analyses, I hypothesize more liberal judges will support civil liberties challenges while their conservative colleagues will be more apt to rule in favor of foreign policy initiatives.

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

[5] Recent examples include Hettinger, Lindquist, Martinek, 2004; Klein, 2002; and Songer, Sheehan, and Haire, 2000.

to support foreign policy interests if they perceive a security threat exists, regardless of their individual ideology.

Another element common to the four literatures is that institutional structures substantially affect individual behavior. For appellate courts, one significant institutional aspect involves caseload considerations. The courts of appeals, since they possess mandatory jurisdiction, often serve as the courts of last resort for most disputes. Unfortunately for these judges, this often translates into increased caseloads as more litigants turn to the courts for relief. As lower courts experience increasing caseloads in a given year (in contrast to the Supreme Court, whose annual caseloads remain relatively static), it is plausible that the judges will work diligently to expedite the process for all the cases on the docket. Failure to clear all the cases results in additional backlogs into the next year, which further increases that year's caseload. Since time is a finite commodity, judges may be inclined to finish drafting opinions as quickly as possible. However, foreign policy cases may present unique issues and conflicts toward which judges are unfamiliar—issues that present competing principles and preferences over governmental authority and protection of civil liberties (see Corwin, 1957; Dorsen, 1989). Rendering a decision against federal interests increases the likelihood of appeal because the government possesses greater resources than other litigants (Songer and Sheehan, 1992). Consequently, judges will need to take more time to ensure the legal principles upon which the decision is grounded are sound, and the language written to minimize a potential appeal. Initially, appellate judges may be inclined to rule in favor of foreign policy interests to dispose of an opinion quickly. Thus, I hypothesize that increased caseloads will pressure judges to quickly dispose of cases, which in turn increases the likelihood of a decision in favor of foreign relations authorities.

A second institutional aspect of the appeals courts involves their error correction responsibilities. Previous research demonstrates that the courts of appeals are predisposed to affirm decisions from lower courts (Howard, 1981; Davis and Songer, 1988). In an analysis of litigant success rates, Songer and Sheehan note an 84 percent affirmance rate by the appeals courts (1992:n. 14). Therefore, the appeals courts seemingly are influenced by the decisions of the lower courts. Thus, if the lower courts rule in favor of civil liberties claims over the foreign policy concerns, I hypothesize the appeals courts will adhere to these rulings and render a similar decision.

Certain broad legal issues, raised by litigants, also are expected to influence appellate decision making in foreign affairs. Previous studies indicate that the presence of a specific constitutional challenge increases the likelihood that courts will rule against foreign policies (Burgess, 1992; King and Meernik, 1998). Initially, one may suspect all civil liberties challenges to foreign policies involve a constitutional challenge; however, this is not the case. One example of a non-constitutional civil liberties challenge is seen in the Freedom of Information Act, where individuals can claim various "rights of access" liberties that do not invoke the Constitution. While judges may be hesitant to curtail foreign policy initiatives in this example, if individ-

uals identify a specific violation of the Constitution I hypothesize the likelihood of judicial opposition to foreign affairs increases (i.e., a pro-civil liberties vote). 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; Scheffer, 1996). Norms of international law or provisions within bilateral or multilateral treaties often attempt to identify explicitly individual rights against which governments cannot intrude. While many courts in the United States are hesitant to cite international law as precedent (especially in opposition to foreign policy initiatives), 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 appellate courts rendering decisions in favor of civil liberties. Finally, several studies comment on the deference given by judges to the federal government when threshold issues (especially a political question or act of state doctrine issue) are present (Halberstam, 1985; Franck, 1992; Bland, 1999; Barron, 2000). These analyses indicate that federal courts often employ threshold issues to refrain from addressing the merits of cases that challenge federal authority to engage in foreign affairs. Therefore, if the courts are asked to resolve a threshold issue I hypothesize that they will be more likely to rule in favor of foreign policy interests.

RESEARCH DESIGN AND EMPIRICAL EVIDENCE

Data for this analysis come from a random sample of 230 appeals court cases involving foreign affairs and civil liberties from 1946 to 2000. Using a LexisNexis keyword search, I initially identified approximately 10,000 cases involving issues such as foreign policy, foreign affairs, national security, national defense, war powers, military, immigration, international law, treaties, ambassadors, and diplomacy. Further scrutiny reduced this number to approximately 2,700 cases involving a civil liberties violation in combination with the various foreign relations issues.[6] The random sample subsequently was drawn from the remaining 2,700 cases. Each decision in the random sample was coded according to litigant characteristics, legal issues, final disposition, and judge characteristics.

The dependent variable for this analysis is whether the courts of appeals voted in favor of foreign policy interests (coded as 0) or civil liberties concerns (coded as 1). It is important to note that the federal government does not have to be a litigant to a particular case to express an interest in the outcome. For example, one case involves a

[6] It is important to note that this number reflects decisions with published opinions. A cursory examination of unpublished decisions contained within the LexisNexis database reveals that these decisions often involve trivial, mundane issues and do not contain detailed opinions, nor are they considered precedents 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.

Freedom of Information Act (FOIA) claim against Lockheed Martin for the details of certain defense contracts, alleged to be public information. In this instance, a ruling in favor of the FOIA claim would be coded in favor of civil liberties, whereas a ruling in favor of Lockheed Martin would be coded in favor of foreign affairs.

To measure the personal preferences of appeals court judges I rely on the Segal, Timpone and Howard (2000) presidential ideology scores. These scores represent a continuous measure of presidential liberalism in areas of social policy. As the authors demonstrate in their article, substituting the appropriate percent liberal score—based on a judge's appointing president—offers a suitable surrogate for judicial ideology. Thus, judges appointed by more liberal presidents will possess more liberal ideology scores. However, since this analysis is at the aggregate panel level, the individual preference measures are combined into a panel average (ranging from 0 to 100 percent). The independent variable *court ideology* measures the dominant ideological preferences of the appeals court panel. As indicated previously, I hypothesize that panels dominated by liberal judges will be more likely to rule in favor of civil liberties. Therefore, I expect a positive relationship to exist between *court ideology* and the dependent variable.

The existence of security preferences are measured by two separate dummy variables. The first, *national security defense*, controls for the presence of a specific national security defense, raised by the federal government. For example, the Freedom of Information Act allows the government to withhold information if access could jeopardize the national security of the United States. If the government raises a specific defense of national security (coded 1), then I hypothesize that federal judges will rule in favor of foreign policy interests, even when controlling for their personal ideology (Cheh, 1984; Dorsen, 1997). Therefore a negative relationship should exist between *national security defense* and the dependent variable. The variable *criminal case* controls for the presence of a violation of criminal law (coded 1). Criminal violations of foreign policies may also present a security issue, because often these violations occur in combination with an intrusion upon U.S. territory or an attack upon government officials or citizens by foreign nationals.[7] Therefore, I hypothesize a negative relationship between *criminal case* and the dependent variable.[8]

The institutional effects of caseload constraints are captured by the variable *workload*. This variable is measured using annual per capita caseload statistics, making comparisons across circuits possible.[9] As I mentioned above, increases in per capita caseload should constrain judges from rendering decisions against the government's

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

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

[9] The author wishes to thank Stefanie Lindquist, at the University of Georgia, for providing these per capita caseload statistics.

foreign policy interests. Therefore, a negative relationship should exist between the variable *workload* and the dependent variable.

The variable *lower court directionality* measures the case disposition by the district court or federal agency conducting the trial. The variable is coded 1 if the lower court (or agency) ruled in favor of foreign policy interests, 2 if the court rendered a mixed decision (both for and against federal government interests), and 3 if the court ruled against federal government interests. Theoretical expectations indicate the appellate courts will be more likely to rule in favor of civil liberties if the lower court ruled similarly. A positive relationship should exist between this variable and the dependent variable.

The complexity of specific cases could be the result of certain challenges or issues. Three dummy variables (coded 1 if aspect is present) measure broad 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 Fourth Amendment). I hypothesize that judges may be sensitive to constitutional challenges and, consequently, will be more likely to rule in favor of civil liberties. 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 a claim focused on a violation of a specific treaty or norm of international law will persuade appeals court judges to rule in favor of individuals. A positive relationship should exist between the variables *constitutional challenge* and *international law or treaty* and the dependent variable. Finally, the dummy variable *threshold issue* measures the presence of a threshold issue such as the political question or act of state doctrine. As hypothesized, the presence of a threshold issue should be negatively related to the likelihood of the courts ruling in support of civil liberties claims (i.e., judges will be more likely to rule in favor of federal government interests).

Since the dependent variable is dichotomous, I employ a multivariate probit model to examine the effects of specific variables, while controlling for the effects of others (see Table 1). An initial examination indicates that the model performs well, offering a 20.6 percent reduction of error over the null model.[10] A closer inspection of the results indicates that the majority of appellate rulings are in favor of foreign policy interests (only 37.8 percent of decisions favor civil liberties).

The three measures of preferences, *court ideology*, *national security defense*, and *criminal case*, are all statistically significant (see Table 1). I hypothesized that the first measure would possess a positive relationship to the dependent variable, while the latter two measures would exert a negative influence. These hypotheses are supported by the data, yet the more interesting result involves examining the relative impact

[10] The reduction of error statistic is calculated using the formula provided in Hagle and Mitchell, 1992:

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

Table 1
Probit Analysis

	Coefficient	Robust Standard Error	Marginal Effect
Court ideology	0.012**	0.006	0.005
National security defense	-0.598*	0.358	-0.198
Criminal case	-0.367*	0.195	-0.134
Workload	-0.007	0.005	-0.003
Lower court directionality	0.492***	0.122	0.185
Constitutional challenge	-0.252	0.208	-0.093
International law or treaty	-0.139	0.219	-0.051
Threshold issue	-0.319	0.206	-0.116
N	230.0		
Log likelihood	-134.896		
Chi-square	29.07		
Probability > Chi-square	0.000		
Pseudo R^2	0.116		
Null model	37.8%		
% correctly predicted	70.0%		
% reduction of error	20.6%		

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

of each variable. An inspection of the marginal effects allows us to determine how much influence a particular coefficient has on the probability of the dependent variable registering a 1 instead of a 0, while holding the effects of the other variables constant. Thus, the interpretation of marginal effects is similar to OLS regression coefficients; they measure the slope of the line tangential to the probability curve at the point where the dependent variable is most influenced.[11]

Examining the marginal effect for the variable *court ideology* indicates that while this variable exerts a significant influence, the magnitude of impact is negligible. Panels dominated by liberal judges are less than 1 percent more likely to rule in favor of civil liberties than panels dominated by conservatives. This finding is remarkable given other analyses on the courts of appeals that find a much stronger impact for ideology. For example, Pinello's (1999) meta-analysis of appellate judges discovers that ideological preferences account for almost 50 percent of the variance in decision making. I suspect that the difference between these findings involves the nature of foreign policy cases, since judges encounter influences from competing preferences. This spec-

[11] In the case of this model the dependent variable Y is most influenced at the point where Y has a .5 probability of being 1 or a .5 probability of being 0. Coefficients indicate the influence of a particular independent variable on Y, holding the other variables constant (at the mean for continuous variables and at 0 for dichotomous variables).

ulation is supported by inspecting the marginal effects for the security-related measures. Judges are 19.8 percent more likely to rule in favor of foreign policy interests, regardless of individual ideology, when confronted with a *national security defense* (see Table 1). Additionally, if the case involves a violation of criminal law (as indicated by the variable *criminal case*), judges are 13.4 percent more likely to support governmental authority in foreign relations. It is apparent that preferences over security concerns exert a greater impact on judicial behavior than traditional notions of ideology.

Institutional effects exert a significant influence on decision making, although the evidence provides only mixed support (see Table 1). The variable *workload* is not statistically significant, suggesting that caseload pressures have no systematic impact on the resolution of foreign policy cases. In contrast, the variable *lower court directionality* is significant and in the hypothesized direction. The marginal effect indicates that appellate panels are 18.5 percent more likely to support civil liberties challenges when the district court ruled in favor of civil liberties.

Finally, the broad legal issues hypothesized to be influential do not affect the adjudication of foreign policy disputes (see Table 1). The variables *constitutional challenge*, *international law or treaty*, and *threshold issue* are not statistically significant in this empirical model.

CONCLUSIONS

Are the appeals courts defenders of civil liberties or champions of security? The empirical results indicate a baseline proclivity to support foreign affairs policies. Yet this analysis also leads to several conclusions beyond the baseline proclivity. First, the results demonstrate the influence of competing preferences over civil liberties and security among appellate judges. While judges remain significantly affected by traditional notions of ideology, the impact of this influence is miniscule. Instead, appellate judges are swayed by security-related preferences to a much greater degree. Second, the empirical data reveal the effects of certain institutional characteristics. Specifically, appellate judges are significantly influenced by the decision of the district court. If the lower court rules in favor of civil liberties, appellate panels are likely to affirm the decisions.

While these results shed light on judicial behavior before 2000, questions remain how the events on September 11 affected the decision process. The U.S. Courts of Appeals have already issued contradictory rulings in cases such as *Detroit Free Press v. Ashcroft* and *North Jersey Media Group, Inc. v. Ashcroft*, which help illustrate the influence of competing preferences. However, additional decisions (both by the U.S. Courts of Appeals and by the Supreme Court) are required to determine systematic patterns of influence. What is important to remember is that federal litigation often raises issues that involve competing preferences. Scholars of the courts of appeals who do not account for these additional dimensions may not adequately capture the complete decision-making process. **jsj**

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