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# When Liberty and Security Collide: Foreign Policy Litigation and the Federal Judiciary

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*In the wake of the September 11th attacks, questions regarding the relationship of civil liberties to foreign affairs have received renewed salience within our society. This paper reviews historical patterns of decision-making in the U.S. Supreme Court and the courts of appeals when confronted with questions of individual rights versus the government's ability to engage in foreign relations. Using an original dataset of federal cases from 1946 to 2000, this Article examines the influence of competing preferences and constraints (i.e., individual rights versus security) on judicial behavior. The empirical results indicate that traditional notions of ideology and preferences over security concerns significantly affect the federal judicial system. However, examinations of individual court levels reveal that the lower courts respond more to security concerns, whereas the Supreme Court is influenced solely by ideological proclivities. Scholars of the judiciary who do not account for these additional dimensions may not adequately capture the complete decision-making processes across the judicial system.*

"THE perennial issue of the appropriate balance between civil liberties and the demands of national security has lost none of its poignancy; nor is it any easier today than it was in the past to determine how, where and when to draw the line between these two sets of interests."[2]

1 Kirk A. Randazzo is an assistant professor in the Department of Political Science at the University of Kentucky. The author wishes to thank the following individuals for their helpful comments and suggestions: Thomas Hansford, Burt Monroe, Reginald Sheehan, Christopher Smith, Donald Songer, and Harold Spaeth. A portion of this research was supported financially through a grant from the University of Kentucky.

2 Duncan L. Clarke & Edward L. Neveleff, *Secrecy, Foreign Intelligence, and Civil Liberties: Has the Pendulum Swung Too Far?*, 99 POL. SCI. Q. 493 (1984).

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. In an effort to concentrate on the President, Congress, or agencies such as the Central Intelligence Agency (CIA) or the 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 analyzing the influence of the judiciary in foreign affairs.

Three significant limitations hinder our systematic 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 exercise of U.S. foreign policy. While these doctrinal analyses provide detailed descriptions of specific case histories, they do not develop broad 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 these competing principles to better understand the decision-making processes outside the domestic context.

Finally, most studies focus exclusively on the Supreme Court while virtually ignoring the lower federal courts. Since the Supreme Court has control over its docket and may reduce the number of cases it hears, the decisions of the lower federal courts become increasingly significant because the possibility of review is reduced. Unfortunately, a dearth of empirical analyses exists which systematically explore patterns of judicial behavior under these circumstances.

This Article explores judicial influences in foreign-policy litigation across all three levels of the federal judiciary focusing specifically on the effects of competing preferences and constraints. In the following sections, I first describe the paradoxical dilemma facing judges in foreign policy cases, highlighting some anecdotal evidence pertaining to judges' responsibilities. I then develop theoretical expectations for judicial behavior and empirically test these expectations using a unique dataset.

## I. The Paradox of Foreign Policy Adjudication

According to Robert J. Spitzer, presidential-congressional relations are different in the realm of foreign affairs as compared to domestic matters.[3] As the President and Congress expand their regulatory capabilities, individual civil liberties often are 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 the applicable law. Their function is essential to the maintenance of the separation of powers among the branches and the protection of individual rights. Since no other branch has the authority to exercise the judicial power, practices that permit the Executive [or Legislature] to exercise unilateral decision-making authority in particular court cases may be inconsistent with the constitutional plan. On its face, the Constitution does not exclude or limit the courts' authority in cases or controversies touching on foreign relations. Furthermore, matters with foreign relations implications may involve the legal rights and duties of individuals or the states under federal law clearly within the courts' authority. Judicial deference or abstention in such cases may compromise the authority of the federal courts.[4]

The extent to which judicial opinions offer insights into institutional differences among federal judges' attitudes is uncertain. A brief examination of opinion language leads to the conclusion that federal judges, regardless of their institutional position, heavily weigh the rights of individuals versus the authority of the government to engage in foreign relations.

3 Robert J. Spitzer, President and Congress: Executive Hegemony at the Crossroads of American Government 142–43 (1993).

4 Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 Am. J. Int'l L. 805, 807 (1989).

There are several district court examples. For instance, 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."[5] Similarly, in *United States v. Molina-Chacon*,[6] Judge Platt of the Eastern District Court for New York admonished, "Of course, United States courts must guard against those rare situations where overzealous United States law enforcement personnel attempt to... circumvent constitutional safeguards."[7] These opinions indicate that district court judges are cognizant of their responsibility to ensure individual liberties. However, these judges also are cognizant of the government's authority to formulate U.S. foreign policy. Judge Zilly of the Western District Court for Washington warns, a court "must be particularly careful not to substitute its own judgment as to what is 'desirable' or its own evaluation of what the executive branch may have intended by a given policy."[8]

Similar sentiments are identified in the opinions of appeals court judges. Several cases demonstrate these judges balance their responsibility as "defender of civil liberties" versus the government's ability to dictate 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 of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.[9]

Likewise, the case *United States v. United States District Court for the Eastern District of Michigan*[10] 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."[11] 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 authority, especially the executive's authority, to act in foreign affairs. Judge Cummings of the Seventh Circuit captures this judicial balancing:

5 Parker v. Lester, 98 F. Supp. 300, 308 (N.D. Cal. 1951).

6 United States v. Molina-Chacon, 627 F. Supp. 1253 (E.D.N.Y. 1986).

7 *Id.* at 1260.

8 Cammermeyer v. Aspin, 850 F. Supp. 910, 915 (W.D. Wash. 1994).

9 *In re* Washington Post Co. v. Soussoudis, 807 F. 2d. 383, 391–92 (4th Cir. 1986).

10 United States v. U.S. Dist. Court (*Keith*), 444 F. 2d 651 (6th Cir. 1971).

11 *Id.* at 664.

> 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.[12]

The language from these circuit courts' opinions reflects the similar attitude of the district courts. 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.

Decisions by the Supreme Court indicate that the justices maintain analogous views of their responsibilities. For example, Chief Justice Warren claimed, "When Congress' 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."[13] The same year Warren wrote this decision, Justice Black delivered the majority opinion in which the Court stated, "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."[14] However, the Supreme Court has also rendered decisions urging judicial restraint in foreign-affairs litigation. In *Harisiades v. Shaughnessy*,[15] the Court stated that matters relating "to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[16]

The cases cited from the district courts, courts of appeals, and Supreme Court 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 has recognized that some foreign-relations matters are beyond judicial review.

Since the anecdotal evidence is inconclusive, an examination of previous empirical analyses is helpful understand judicial behavior in this area.

12 Flynn v. Shultz, 748 F.2d. 1186, 1190-91 (7th Cir. 1984).

13 United States v. Robel, 389 U.S. 258, 264 (1967).

14 Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

15 Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

16 *Id.* at 589.

Unfortunately, few empirical studies, which focus on judicial involvement in foreign policy litigation, exist. One notable study, conducted by Craig R. Ducat and Robert L. Dudley, analyzes the adjudication of cases involving presidential power at the federal district court level.[17] They note that the "few constraints the courts have imposed upon the executive in peacetime all but vanish in times of war and national emergency."[18] This conclusion supports the courts' opinions discussed above, which urged deference to the political branches of government, especially when a security threat exists. Kimi King and James Meernik have published two studies analyzing how the Supreme Court has treated challenges to presidents' exercise of executive powers.[19] The authors found that since the post-Vietnam era, the Supreme Court has shown a tendency to side in favor of the executive.[20] However, "when executive powers conflict with civil liberties, the Supreme Court tends to take the side of individual rights."[21] While these studies are not directly comparable, since Ducat and Dudley did not test for civil liberties conflicts similar to the King and Meernik analyses, they indirectly support Burbank and Friedman's contention about institutional influences on judicial behavior.[22] However, Burbank and Friedman's analysis did not include the courts of appeals because there was no previous research which examined foreign affairs litigation.[23] While both lower court judges and Supreme Court justices possess initial proclivities favoring the federal government, it is unclear whether both groups respond similarly to civil liberties challenges. The empirical analysis in this paper conducts this examination at each federal level—district courts, courts of appeals, and the Supreme Court—to determine whether specific stimuli exert similar influences across the federal judiciary.

17 Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power During the Postwar Era*, 5 J. POL. 98 (1989).

18 *Id.* at 99.

19 Kimi Lynn King & James Meernik, *The "Sole Organ" Before the Court: Presidential Power in Foreign Policy Cases, 1790-1996*, 28 PRESIDENTIAL STUD. Q. 666 (1998) [hereinafter King & Meernik, *The "Sole Organ" Before the Court*]; Kimi Lynn King & James Meernik, *The Supreme Court and the Powers of the Executive: The Adjudication of Foreign Policy*, 52 POL. RES. Q. 801 (1999) [hereinafter King & Meernik, *Adjudication of Foreign Policy*].

20 *See* King & Meernik, *The "Sole Organ" Before the Court*, *supra* note 19, at 667.

21 *Id.* at 815.

22 *See generally* Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, (Stephen B. Burbank & Barry Friedman eds., 2002).

23 The courts of appeals are deliberately excluded from this comparison because no previous research has examined this level in relation to foreign affairs litigation.

## II. Theoretical Expectations

A common element of the theories regarding international relations (particularly the neo-liberal theories), constitutional law, and judicial politics is that the internal dynamics substantially impact individual behavior.[24] One of the most important facets for the judiciary involves the application of the attitudinal model.[25] Scholars relying on the attitudinal model operate under the assumption that judges are policy "maximizers," who render decisions based on their personal policy preferences.[26] However, measuring personal preferences is often difficult. The majority of research developing quantitative measures focuses on the preferences of Supreme Court justices.[27] Comparable research 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.[28]

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. Ole R. Holsti and James N. Rosenau rely on survey evidence of American elites to examine this question.[29] They discovered 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, one may argue that partisan

24 *See* Kirk A. Randazzo, *Foreign Affairs Litigation in the U.S. Courts of Appeals: A Preliminary Analysis*, 25 Just. Sys. J. 227 (2004).

25 *See generally* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 Just. Sys. J. 219 (1999) (discussing partisan affiliation in the lower federal courts).

26 *See* Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993).

27 *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 Pol. Analysis 134 (2002); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 Am. Pol. Sci. Rev. 557 (1989). *But see* Lee Epstein, Valerie Hoekstra, Jeffrey A. Segal & Harold J. Spaeth, *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. Pol. 801 (1998); Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 Am. J. Pol. Sci. 261 (1996).

28 *See generally* Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 Just. Sys. J. 219 (1999) (discussing partisan affiliation in the lower federal courts).

29 Ole R. Holsti & James N. Rosenau, *The Domestic and Foreign Policy Beliefs of American Leaders*, 32 J. Conflict Resol. 248 (1988); Ole R. Holsti & James N. Rosenau, *Consensus Lost. Consensus Regained? Foreign Policy Beliefs of American Leaders, 1976-1980*, 30 Int'l Stud. Q. 375 (1986).

affiliations will be related significantly to the disposition of foreign policy cases. Thus, 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.[30] Since the courts of appeals and the Supreme Court are collegial tribunals, this hypothesis applies to their aggregate preferences.

In addition to traditional notions of ideology, though, judges also possess preferences unique to foreign-policy litigation, namely preferences involving the security of the United States and its government officials and citizens.[31] 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 and the national interest of security.[32] 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 the governmental authority when the state responds to a security issue. Certainly, one would expect the magnitude of the stimulus to affect judicial behavior; judges would view the authority of the government to combat terrorist attacks or espionage within the United States differently than the government's authority to regulate immigration. I therefore hypothesize that federal judges will be more likely to support foreign policy interests if they perceive a security threat exists, regardless of their individual ideology.

Another aspect of the federal courts involves their adjudicatory responsibilities. Since the district courts initially decide disputes, they are responsible for determining questions of fact and law. The courts of appeals are subsequently responsible for reviewing the decisions of the district courts as well as for reviewing administrative agency decisions. The Supreme Court has jurisdiction to review decisions rendered by the courts of appeals, as well as state supreme courts.[33] While the courts of appeals possess mandatory jurisdiction over district courts, the Supreme Court has discretionary control over its docket. For the majority of cases, the appeals courts serve as the court of last resort. According to Donald Songer, "as the number of litigated cases grows both quantitatively and in complexity, while the number of cases reviewed by the Supreme Court remains static,

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

31 *See* Randazzo, *supra* note 24.

32 *See* Ole R. Holsti, *Theories of International Relations and Foreign Policy: Realism and Its Challengers*, *in* CONTROVERSIES IN INTERNATIONAL RELATIONS THEORY: REALISM AND THE NEOLIBERAL CHALLENGE 35, 37 (Charles W. Kegley, Jr. ed., 1995).

33 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.

the role of the courts of appeals as the final authoritative policymaker in the interpretation of many areas of federal law expands apace."[34] Therefore, it is important to determine how the appellate levels exercise their error correction responsibilities in relation to district court decisions.

The question becomes whether a systematic difference exists 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.[35] 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.[36] 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 disagreement within the judicial system as Perry[37] discovers).

In the realm of foreign affairs, several scholars demonstrate the tremendous influence exerted by the executive branch.[38] Additional studies demonstrate the extent to which this influence carries to the judicial branch.[39]

34 Donald R. Songer, *The Circuit Courts of Appeals, in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 35, 35 (John B. Gates & Charles A. Johnson eds., 1991).

35 Sue Davis and Donald R. Songer, *The Changing Role of the United States Courts of Appeals: The Flow of Litigation Revisited*, 13 JUST. SYS. J. 323 (1988–1989). *See generally* Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 256(1992) (recognizing that because courts of appeals have mandatory jurisdiction, these courts must accept even frivolous appeals, which is a contributing factor to the courts' higher rate of affirming the lower court decisions).

36 LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, AND THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS, SECOND EDITION 212–19 (1996).

37 H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991). One of Perry's main contentions is that circuit conflict and internal conflict (i.e. diagreement between district courts and appeals courts) lead to a higher probability of the Supreme Court granting *certiorari*. *See* Perry chapters 8 and 9.

38 *See* David Gray Adler, *Court, Constitution, and Foreign Affairs, in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 19 (David Gray Adler & Larry N. George eds. 1996); RANDALL WALTON BLAND, THE BLACK ROBE AND THE BALD EAGLE: THE SUPREME COURT AND THE FOREIGN POLICY OF THE UNITED STATES, 1789–1961, SECOND EDITION (1999); LOUIS FISHER, PRESIDENTIAL WAR POWER 185 (1995); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 94–95 (4th ed. 1997) (1978). MICHAEL A. GENOVESE, THE POWER OF THE AMERICAN PRESIDENCY, 1789–2000 (2001); ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1989).

39 *See* Ducat & Dudley, *supra* note 17, at 98; King & Meernik, *Adjudication of Foreign Policy*, *supra* note 19, at 801; Jeff Yates & Andrew Whitford, *Presidential Power and the United States Supreme Court*, 51 POL. RES. Q. 539, 539 (1998).

As Ducat and Dudley conclude, foreign policy–making is an area dominated so extensively by the executive branch that courts are unlikely to challenge the President's power.[40] Although Ducat and Dudley argue that more popular presidents receive greater levels of deference by the judiciary than unpopular ones,[41] they discover an insignificant statistical relationship for the district courts. Therefore a question remains about the potential influence of presidential popularity, and whether this influence extends to all levels of the judiciary. Consequently, I hypothesize that federal judges will be more likely to render decisions favoring foreign policy (and against civil liberties claims) when presidential popularity is high.

Finally, certain legal issues also are expected to impact judicial decision-making in foreign affairs. Previous studies indicate that the presence of a specific constitutional challenge increases the likelihood that courts will rule against the interests of the federal government.[42] Thus, I hypothesize that even though judges may be initially hesitant to rule against the government in foreign policy cases, they will be more likely to do so if the parties identify a specific constitutional violation.

Additionally, the presence of a claim citing international law or treaty obligations may affect judicial behavior. A limited number of studies demonstrate that American courts are becoming increasingly more sensitive to claims of international law violations.[43] Norms of international law or provisions within bilateral or multilateral treaties often attempt to explicitly identify individual rights against which governments cannot intrude. While some courts in the United States may be are hesitant to cite international law as precedent, especially in opposition to the federal government, studies indicate that judges may rely on international legal principles to extend individual protections. Therefore, I hypothesize the presence of an international law or treaty claim will increase the likelihood of federal courts rendering decisions in favor of civil liberties.

The final legal influence involves potential threshold issues involved in a case. Several studies comment on the deference given by judges to the federal government when threshold issues, such as a political question or act of state doctrine issue, are present.[44] These analyses indicate

40 *See* Ducat & Dudley, *supra* note 17, at 115.

41 *See id.* at 111.

42 *See* SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES (1992).

43 *See* Martin A. Rogoff, *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*, 11 AM. U. J. INTL. L. AND POL'Y. 559 (1996); and, David J. Scheffer, *International Judicial Intervention*, 102 FOR. POL'Y. 34 (1996).

44 *See, e.g.*, David Barron, *Constitutionalism in the Shadow of Doctrine: the President's Non-Enforcement Power*, 63 L. and Cont. Prob. 61 (2000); BLAND, *supra* note 38; WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998); THOMAS M. FRANCK,

federal courts often avoid addressing the merit of cases challenging federal authority to engage in foreign affairs by refusing to decide those cases on the grounds of threshold issues. Therefore, if judges are asked to resolve a threshold issue, I hypothesize that they will be more likely to rule in deference to foreign policy interests.

## III. Research Design and Methods

Data for this analysis come from an original sample of federal court decisions from 1946 to 2000 involving foreign affairs and civil liberties. Following several international relations analyses,[45] foreign policy is defined as any issue involving relations between the federal government and individuals, groups, and nations outside its borders.[46] 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 to the Cold War (as one of two international superpowers) and reorganized some of its bureaucratic agencies accordingly—most notably the foreign policy and intelligence-gathering agencies. Additionally, with the creation of the United Nations, the international system entered into a new era with nations becoming increasingly interdependent. To include cases before 1946 risks analyzing qualitatively different issues; issues arising before World War II—when the United States possessed a different perception of its international responsibilities—and also from the war itself. Similarly, the time sequence ends at the year 2000 so as to not include cases arising under a new presidential regime (President George

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Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs? (1992); J. Graham Noyes, *Cutting the President Off From Tin Cup Diplomacy*, 24 U.C. Davis L. Rev. 481, 464 (1991); Charney, *supra* note 4, at 805; and Malvina Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 Am. J. Int'l L. 68, 68 (1985).

45 *See* Earl H. Fry, Stan A. Taylor, and Robert S. Wood, America the Vincible: U.S. Foreign Policy for the Twenty-First Century (1994).

46 As several scholars note, contemporary definitions of foreign policy are becoming increasingly vague and more inclusive. *See* Margaret G. Hermann and Charles F. Hermann, *Who Makes Foreign Policy Decisions and How: An Empirical Inquiry*, 33 J. Stud. Q. 361 (1989); Randall B. Ripley & James M. Lindsay, *Foreign and Defense Policy in Congress: An Overview and Preview*, in Congress Resurgent: Foreign and Defense Policy on Capitol Hill 1 (Randall B. Ripley & James M. Lindsay, eds., 1993); Eugene R. Wittkopf & Christopher M. Jones, *New Priorities for a New Era? Or Afloat in Unchartered Waters*, *in* The Future of American Foreign Policy, Third Edition 1 (Eugene R. Wittkopf & Christopher M. Jones, eds., 1999). This definition preserves the continuum of issues ranging from the most foreign to the most domestic (*see* Marie T. Henehan, Foreign Policy and Congress: An International Relations Perspective (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.

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 2,900 district court cases, 2,700 courts of appeals cases, and exactly 123 Supreme Court decisions involving a civil liberties violation in combination with the various foreign-relations issues.[47] As I stated at the beginning of this paper, the primary focus of this research is to examine how federal judges balance claims of civil liberties against foreign policy issues. Therefore, I exclude cases that do not possess a civil liberties claim, though a foreign-policy issue is present. Similarly, I exclude civil liberties cases that are not combined with a foreign-policy issue. I define civil liberties as the fundamental freedoms from which individuals are protected against governmental intrusion.[48] 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 civil liberties (coded as '1') or against the civil liberties claim—in support of the foreign policy (coded as '0'). 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, al-

47 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 generalized only to published decisions.

48 LEE EPSTEIN AND THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES AND JUSTICE, FIFTH EDITION 101 (5th ed. 2003).

leged to be public information.[49] 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.[50] 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.[51] 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 Democrat judges on a court increases, the likelihood of a decision favoring civil liberties claims will increase.

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.[52] If the government raises a specific defense of national

49 United States v. General Dynamics, 315 F.Supp.2d 939 (2004).

50 J. Scott Long, Regression Models for Categorical and Limited Dependent Variables (1997); Scott R. Eliason, Maximum Likelihood Estimation: Logic and Practice (1993); John H. Aldrich and Forrest D. Nelson, Linear Probability, Logit and Probit Models (1984); G.S. Maddala, Limited Dependent and Qualitative Variables in Econometrics (1983).

51 See Kirk A. Randazzo & Reginald S. Sheehan, Measuring Judges' Ideology on the U.S. Courts of Appeals (2001) (unpublished manuscript on file with the author) for a more detailed description of the difficulties inherent in empirically measuring personal preferences of appellate judges.

52 5 U.S.C. § 552(b) (2002).

security (coded '1'), then I hypothesize that federal judges will rule in favor of foreign policy interests, even when controlling for their personal ideology. Therefore a negative relationship should exist between *national security defense* and the dependent variable.

The variable *criminal case* controls for the presence of a violation of criminal law (coded '1'). Criminal violations of foreign policies may also present a security issue, because often these violations occur in combination with an intrusion upon U.S. territory or an attack upon government officials or citizens by foreign nationals.[53] I therefore hypothesize a negative relationship between *criminal case* and the dependent variable.[54]

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

To measure the strength of the chief executive, I rely on presidential approval scores calculated through Gallup Poll surveys.[55] The data reflect the percentage of the public that view the president in a positive fashion. As Ducat and Dudley note, "[s]ince a one-point-in-time measure could be distorted by last-minute changes in public mood, especially at a point falling so late in the process of judicial decision, we computed average measures of presidential prestige for each decision."[56] Following their example, I aggregate the Gallup surveys to provide an annual measure of presidential approval. As noted earlier, I expect courts to exert higher degrees of deference to foreign policy initiatives when the president possesses high presidential approval scores. Thus, the variable *presidential approval* should be related negatively to the dependent variable.

The complexity of specific cases could be the result of certain legal challenges or issues. Three dummy variables measure legal issues that might appear within a case. *Constitutional challenge* tracks whether a litigant

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

54 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.

55 *Available at* http://brain.gallup.com/documents/topics.aspx#P; *also available at* www.ropercenter.uconn.edu.

56 Ducat & Dudley, *supra* note 19, at 106–07.

alleges a specific constitutional violation, such as 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 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).

## IV. Empirical Results

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

Table 1
Descriptive Examination of Court Decisions

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

While the preliminary evidence presented in these three tables offers insight into my first general hypothesis, a more rigorous analysis is needed. Therefore, to examine systematically the empirical influences of the independent variables, I conducted separate analyses for the district courts, courts of appeals, and the Supreme Court. The results of these analyses are reported in Table 2. Each of the models performs adequately, although the district courts model only offers a slight reduction of error (5.3%) compared to the appeals courts model (24.1%) and the Supreme Court model (16.6%).[57]

The first model examines influences on the federal district courts. According to Table 2, only the variables measuring court preferences over security concerns—*national security defense* and *criminal case*—exert statistically significant influences in the expected direction. I hypothesized that these variables would be negatively related to the likelihood of civil liberties' decisions. These hypotheses are confirmed by the empirical results. Unfortunately, the variables *court partisanship*, *presidential approval*, *constitutional challenge*, *international law or treaty*, and *threshold issue* do not significantly affect judicial behavior.

While determining the statistical significance of independent variables is noteworthy, a more interesting finding occurs when one examines the changes in predicted probabilities for each equation, the results of which are presented in Table 3. These values measure the probability of a decision in favor of civil liberties and are calculated by adjusting the variable of interest from its minimum to its maximum value while simultaneously holding the remaining variables at their mean values. An examination of Table 3 indicates that district court judges are 21.9% less likely to render decisions in favor of civil liberties (or, conversely, are 21.9% more likely to render decisions favoring foreign policy) if a specific *national security defense* is present in the case. Similarly, if these judges resolve *criminal cases*, they are 19.4% less likely to render decisions favoring civil liberties.

The second empirical model evaluates the courts of appeals. According to the results listed in Table 2, the variables *court partisanship*, *national security defense*, *criminal case*, and *lower court directionality* exert statistically significant influences (though the variables *national security defense* and *criminal case* barely achieve significance). I hypothesized that *court partisanship* and *lower court directionality* would be related positively to the dependent variable while the remaining two variables would possess a negative relationship. These hypotheses are supported empirically, while the expect-

57 The reduction of error statistic is calculated using the formula provided in Timothy M. Hagle & Glenn E. Mitchell, *Goodness-of-fit Measures for Probit and Logit*, 36 AM. J. POL. SCI. 762, 781 n.13 (1992).

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

TABLE 2
PROBIT ANALYSES OF INDIVIDUAL COURT LEVELS

| | Coefficients (Robust Standard Errors) | | |
|---|---|---|---|
| | *Model 1 District Courts* | *Model 2 Appeals Courts* | *Model 3 Supreme Court* |
| *court partisanship* | .133 | .783*** | 2.979*** |
| | (.171) | (.292) | (.962) |
| *national security defense* | -.682*** | -.590* | -.235 |
| | (.264) | (.358) | (.498) |
| *criminal case* | -.570*** | -.355* | .084 |
| | (.204) | (.199) | (.396) |
| *lower court directionality* | N/A | .477*** | -.095 |
| | | (.123) | (.141) |
| *presidential approval* | -.008 | .000 | -.018 |
| | (.007) | (.008) | (.012) |
| *constitutional challenge* | -.146 | -.213 | .359 |
| | (.168) | (.209) | (.247) |
| *international law/treaty* | -.220 | -.159 | .373 |
| | (.249) | (.217) | (.437) |
| *threshold issue* | .111 | -.326 | -.099 |
| | (.189) | (.205) | (.310) |
| Constant | .335 | -1.030 | -.183 |
| | (.528) | (.554) | (.782) |
| N | 251 | 230 | 123 |
| Log Likelihood | -156.961 | -133.953 | -75.411 |
| $\chi^2$ | 15.44 | 28.90 | 17.61 |
| Probability > $\chi^2$ | .031 | .000 | .024 |
| Pseudo $R^2$ | .054 | .122 | .106 |
| Null Model | 37.9% | 37.8 | 43.9 |
| % Correctly Predicted | 64.1% | 71.3 | 63.4 |
| % Reduction of Error | 5.3% | 24.1 | 16.6 |

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

ed influences of the variables *presidential approval*, *constitutional challenge*, *international law or treaty*, and *threshold issue* do not achieve statistical significance. The predicted probabilities—listed in Table 3—for *court partisanship* indicate that appeals court panels dominated by Democratic judges are 28.5% more likely to rule in favor of civil liberties than are panels controlled by Republican judges. Additionally, if the lower court initially ruled in favor of civil liberties, the appeals courts are 36.1% more likely to follow this ruling and render a decision favoring civil liberties. Table 3 also reveals when appellate judges confront a *national security defense*, they are 18.5% less likely to support civil liberties (or, conversely, 18.5% more likely to support foreign policy concerns). Finally, when appellate judges resolve a criminal appeal (as indicated in the variable *criminal case*), they are 12.9% less likely to render a decision favoring civil liberties.

TABLE 3
CHANGES IN PREDICTED PROBABILITIES (PERCENT CHANGE)

| | *District Courts* | *Appeals Courts* | *Supreme Court* |
|---|---|---|---|
| *court partisanship* | 4.9% | 28.5% | 63.9% |
| *national security defense* | -21.9 | -18.4 | -7.8 |
| *criminal case* | -19.4 | -12.9 | 3.1 |
| *lower court directionality* | N/A | 36.1 | -7.9 |
| *presidential approval* | -15.6 | 0.3 | -29.3 |
| *constitutional challenge* | -5.3 | -7.9 | 13.7 |
| *international law/treaty* | -7.8 | -5.7 | 13.4 |
| *threshold issue* | 4.4 | -11.6 | -3.5 |

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

The final empirical model examines influences on the Supreme Court. According to Table 2 only one variable achieves statistical significance: *court partisanship*. The predicted probabilities in Table 3 demonstrate that as more justices appointed by Democratic presidents assume the Supreme Court bench, their decisions are substantially more likely to support civil liberties claims than when the Supreme Court is controlled by Republican-appointed justices. The Democratic justices are 63.9% more likely to render decisions favoring civil liberties than their Republican colleagues. The

hypotheses for the remaining variables are not supported by the empirical evidence displayed in Table 2.

## V. Conclusions

The opening quotation, from Clarke and Neveleff (1984),[58] mentioned the difficulty for judges in maintaining 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 (37.9% for the district courts and 37.8% for the appeals courts). The Supreme Court is more sensitive to individual challenges, supporting these claims in 43.9% of their decisions. However, it is apparent that the federal courts more often defer to governmental authority in foreign relations.

While the federal judiciary is prone to support foreign policy interests, it is also important to understand the conditions under which these judges will rule in favor of civil liberties claims. An important influence is the ideological preferences of judges as measured by partisan affiliations of the appointing president. The empirical results provide general support for my hypothesis: liberal judges are more likely to render decisions in favor of civil liberties. However, this result does not hold for all levels of the federal judiciary. They are most influential in the Supreme Court, where Democratic justices are approximately 64% more likely to vote in favor of civil liberties than Republicans. However, they are only moderately influential in the courts of appeals, where panels dominated by Democratic judges are 28.5% more likely to render decisions supporting civil liberties than panels dominated by Republicans. Yet, the impact of ideological preferences among district court judges is non-existent statistically. Within the federal trial courts there is no significant difference between Democratic and Republican judges.

My second general hypothesis focuses on judicial preferences pertaining to security. I claimed that judges will be more likely to render decisions favoring foreign policy interests when the state responds to a security threat. The empirical results support this hypothesis, but only within the lower federal courts. The Supreme Court is not affected significantly by either the presence of a *national security defense* or a *criminal case*. In contrast, both variables exert significant influences in the lower courts. Yet, even here the effects are more pronounced in the district courts, and barely significant for the courts of appeals. It therefore appears that federal judges

58 Clark & Neveleff, *supra* note 2, at 493.

become less influenced by security issues as one moves up the judicial hierarchy.

While these results shed light on judicial behavior before 2000, questions remain how the events on September 11th affected the judicial decision process. The federal courts have already issued contradictory rulings in recent cases such as *Rasul v. Bush*,[59] *Padilla v. Rumsfeld*,[60] *Hamdi v. Rumsfeld*,[61] *Detroit Free Press v. Ashcroft*,[62] and *North Jersey Media Group, Inc. v. Ashcroft*,[63] which help illustrate the influence of competing preferences. However, additional decisions (at all levels) are required in order to determine systematic patterns of influence. What is important to remember is that federal litigation often raises issues which involve competing preferences. Scholars of the judiciary who do not account for these additional dimensions may not adequately capture the complete decision-making process.

59 Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C 2002) (holding that writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States, thus, neither this court nor any U.S. court has jurisdiction to entertain such a claim), *aff'd*, 321 F.3d 1134 (D.C. Cir. 2003).

60 Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003) (holding that the District Court has jurisdiction to determine whether a writ of habeas corpus may be issued and that the Non-Detention Act prohibits the detention of American citizens without express congressional authority), *rev'd*, 542 U.S. 426 (2004).

61 Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (holding that the fact that an enemy combatant is a U.S. citizen and is being detained in the United States does not affect the legal implications of his status as an enemy combatant, and likewise, a court cannot set aside executive decisions to detain enemy combatants without clear evidence that it is a violation of the Constitution or the laws of Congress), *vacated*, 542 U.S. 507 (2004).

62 Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (holding that the First Amendment to the U.S. Constitution confers a public right of access to deportation hearings).

63 North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002) (holding that the First Amendment does not confer upon the press and public a right of access to deportation hearings regarding national security concerns).