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The View from the Bench and Chambers: Examining Judicial Process and Decision Making on the U.S. Courts of Appeals

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INTRODUCTION

The Courts of Appeals in the U.S. Legal System

For much of their history, the U.S. courts of appeals have toiled in obscurity, well out of the limelight of political controversy. But as the number of appeals has increased dramatically in recent decades, while the number of cases heard by the Supreme Court has remained the same, the courts of appeals have increasingly become in practice the courts of last resort for the vast majority of litigants. This enhanced status has been recognized by important political actors, and as a result, appointments to the courts of appeals have become increasingly controversial since the 1990s (Binder and Maltzman 2009). This combination of increasing political salience accompanied by increasing political controversy finally led scholars, particularly in the past two decades, to undertake serious empirical studies of the role of the courts of appeals in the U.S. legal and political system. In particular, a number of studies have sought to test theories developed to explain the politics of the Supreme Court in the context of the courts of appeals (see Cross 2007; Hettinger, Lindquist, and Martinek 2006; Klein 2002; Sunstein et al. 2006). As a result, scholars now debate the applicability of both attitudinal and strategic models to describe decision making on the courts of appeals. With that said, the courts of appeals still remain understudied compared to the more extensive body of scholarship on the Supreme Court, but both the volume and quality of empirical work on the intermediate courts have risen sharply in the past two decades.

Despite the increased scholarly attention, one relevant line of inquiry remains largely ignored: the perspective of the judges themselves. This book seeks to fill that lacuna in the literature with a comprehensive

examination of processes and politics on the courts of appeals as seen from the dual perspectives of the judges and their clerks, on the one hand, and empirical research grounded in statistical analysis on the other.

The Evolution of the Courts of Appeals

A decade ago, commentators wrote that "the average American is barely aware (if at all) of the courts of appeals, in spite of their importance" to the legal system in the U.S. (Songer, Haire, and Lindquist 2000, 3). In the words of other scholars, they are the "least noticed of the regular constitutional courts" (Carp and Stidham 1991, 13). The national media largely confine their attention to the decisions of the Supreme Court, because that is where the most dramatic and controversial issues appear to be resolved. The local media often cover the decisions of the federal district courts in their state when local celebrities and politicians take center stage in the hottest local political controversies. But the courts in the middle, the U.S. courts of appeals, appear to have no natural constituency and thus receive very little systematic attention from the media. This limited visibility to the American public notwithstanding, the courts of appeals occupy a pivotal position, the "vital center of the federal judicial system" (Howard 1981, 8). The courts of appeals have long played a central role in maintaining the uniformity of national law and in maintaining judicial oversight of the federal regulatory agencies whose rulemaking authority in an increasingly national and international market is vital to the economic well-being of the country. Moreover, with the Supreme Court able to review only one in every five thousand decisions of the district courts, the courts of appeals have become the primary creators and enforcers of federal legal policy. With the courts of appeals deciding roughly 60,000 cases per year, and with fewer than three-tenths of 1 percent of those decisions undergoing Supreme Court review, the U.S. courts of appeals have become the de facto courts of last resort for most litigants in the federal judicial system. Thus, the appeals courts have become important policymakers, announcing the final word on most questions of statutory interpretation of federal laws, the meaning of federal rules of civil and criminal procedure, and the limits of the powers of the administrative state.

The structure of the federal court system is not spelled out in the Constitution. Instead, that document confines itself to the general proposition that there will be a single Supreme Court and "such inferior courts as Congress may from time to time establish."[1] The basic current structure of the lower federal court was not established until the passage

of the Evarts Act in 1891. With modifications in the law adopted in 1911, 1925, and 1988, the current system consists of three main layers. At the bottom of the structure, the U.S. district courts serve as the basic trial courts for virtually the entire range of federal jurisdiction. These courts are divided into ninety-one geographically defined units (called districts), with each state having one to four judicial districts that are completely encompassed by the state boundaries. The courts typically are presided over by a single judge, frequently sitting with a jury, though the total number of district judges serving within a district varies substantially across districts.

Almost all litigants losing a decision in the federal district courts are entitled to one appeal.[2] Those appeals compose the mandatory jurisdiction of the U.S. Courts of Appeals, which form the middle layer of the federal judicial system. The appeals courts are divided into eleven numbered, geographically defined circuits that comprise all the federal districts within a contiguous group of from three to nine states, plus the districts in various U.S. territories, such as Guam and Puerto Rico. A twelfth circuit is limited to hearing appeals from the district court of the District of Columbia and from a number of federal administrative agencies. A final (thirteenth) circuit, the Federal Circuit, sits in the District of Columbia and has a specialized jurisdiction, including customs and patent appeals. Each circuit is presided over by between six and twenty-nine full-time appeals court judges, who typically sit in panels of three judges to decide their appeals. On occasion, a retired judge or an active judge from another court sits "by designation" with two regular appeals court judges to make up the three-judge panel of the court of appeals. Losing litigants may petition for a review of the panel's decision by the entire membership of the circuit sitting en banc, or may petition for review by the Supreme Court.

At the top of the federal judicial hierarchy, a single Supreme Court, currently composed of nine justices, is empowered to review any of the decisions of the federal courts of appeals, and may also review decisions of the highest court in each state if a federal question is involved (e.g., in state cases raising an issue related to the interpretation of a federal statute or the Constitution of the United States). The Supreme Court has nearly complete discretionary control of its docket and typically grants full review to fewer than one hundred of the nearly 10,000 petitions for review (e.g., petitions for certiorari, or requests for the Supreme Court to use its discretionary jurisdiction to call up the records of the lower court so that the Supreme Court can review the decision below) it receives each year.[3]

The Data

The study reported here utilized two major sources of data—the most comprehensive sets of both qualitative interviews and quantitative case data ever assembled. First, we conducted a set of in-depth interviews with current and former judges sitting on the U.S. courts of appeals and with their law clerks (the general text of the interview questions is provided in the technical appendix following chapter 7). In all, formal interviews were conducted with sixty active and senior judges of the courts of appeals. We also held more informal discussions with several groups of additional judges at the circuit retreats of the Second and Ninth Circuits. Most interviews were conducted in the offices of the appellate court judges and typically lasted about an hour. While we tried to ask all the judges a similar set of questions, the interviews were conversational in nature. Our goal, first and foremost, was to allow the judges to speak freely about the various topics we covered in response to our asking open-ended questions. The interviews were conducted over seven years and included judges from every circuit. Judges were promised as a condition of their participation in interviews that none of their comments would be attributed to them by name or through a combination of characteristics that could reveal the identity of the judge (e.g., "a female appointee of Clinton in the Third Circuit"). Consequently, in the discussions cited in this book, judges are typically referred to by an alphabetic code (e.g., Judge W, Judge BB). Male pronouns are occasionally used to refer to judges regardless of their actual gender to further maintain anonymity.

While we sought a richer understanding of the courts of appeals by hearing from the judges themselves, we also understood that interview data have limitations. First, the interview sample is not random. Because of this, we are cautious in making generalizations about judge behavior. On the other hand, we can and do draw several inferences from the interviews about how the courts of appeals and judges operate. Second, because of the conversational format of the interviews, the questions posed to the judges were not identical in every case. We made every attempt to ask the judges similar questions and tried to follow a general format, but at times the interview veered in a different direction, or we simply ran out of interview time. Finally, the judges may have been guarded in their responses, which is not unusual with interview data. However, even with these limitations in mind, we believe the information gleaned from the judge interviews far outweighs the possible limitations presented.

The perspectives gained from the interviews are supplemented by quantitative analyses of an empirical database of decisions spanning more than three-quarters of a century and aggregated from every region of the country. Specifically, we utilized the United States Courts of Appeals Database (Songer 2002) and its update.[4] These databases consist of a stratified random sample of more than 20,000 cases decided by the U.S. Courts of Appeals from 1925 through 2002. The databases report information on more than two hundred variables for each case, including the votes of the judges and a detailed coding of the issues and the litigants. We extended the coding of the existing database through the year 2005.

The analyses we present in this book are among the first, if not the first, to combine the insights gained from in-depth interviews with appellate court judges with quantitative analyses of judicial decisions. The addition of interviews with law clerks, whose daily close working relationships with their judges provided a unique insider perspective, lent a richness to the analysis not available in any previous work on courts of appeals in the United States.

The interviews with the judges were used to derive a thick description of the actual practices of courts of appeals judges as they select panels to review each case, prepare for the judicial hearing, interact with attorneys during oral arguments, reach a tentative decision in conference, and then negotiate over the substance and style of the final opinion. The interviews also explored the perceptions of the judges as to possible patterns of decisions, the extent of collegiality and conflict, and the substantive nature of the decisions.

To supplement the perspectives of the judges gained from the interviews, each chapter presents a set of descriptive statistics to provide an empirical overview of the work of the courts. In addition, several statistical models are estimated to illustrate the perspective of the court developed in recent scholarly work. In particular, we empirically model the likelihood that an oral argument will be granted, the nature of the opinion assignment process, the likelihood that the decision will be published, factors affecting both the time to decision and the length of the majority opinion, the grounds of dissent, and attitudinal and strategic accounts of judicial decision making.

Theoretical Perspective

While one might argue that there is a single dominant model of Supreme Court behavior (Segal and Spaeth 1993, 2002), no one appears to have posited a single dominant model of U.S. appellate court behavior.

Based on the qualitative and quantitative analyses presented in this book, in every aspect of court of appeals decision making, we found that the judges are influenced by a variety of factors. In other words, following the language of other scholars who have examined a variety of courts, we posit an integrated model of decision making (Brace and Hall 1993; George and Epstein 1992; Songer and Haire 1992). While this theoretical perspective is not novel, it is the truest reflection of the behavior of the U.S. intermediate appellate courts. Moreover, the combination of the comprehensive examination of different types of decisions with the mixed methods research design is novel. Before sketching the contents of the book, we briefly describe some of these theoretical approaches that, we believe, together contribute to the integrated model.

A variety of models of judicial behavior have been theorized, with three alternatives having the most traction in the community of judicial scholars: the attitudinal, strategic, and legal models. Attitudinal explanations of judicial decision making typically contend that a judge will take the position that is closest to his or her policy preferences. Specifically, judges "decide disputes in light of the facts of the case vis-à-vis" their ideology and values (Segal and Spaeth 2002, 86).

Like the attitudinal model, strategic accounts assume that judges are motivated by policy goals (see Epstein and Knight 1998). Moreover, while many statements of the theory suggest that judges can have a variety of goals (e.g., Baum 1997), empirical studies usually focus on policy preferences (e.g., Cross 2007; Hettinger, Lindquist, and Martinek 2006). The real distinction between attitudinal and strategic accounts is the context in which the actor is situated. The former assumes that the judge does not factor in institutional constraints, while the latter theory assumes that judges consider the context, including institutional rules and the behavior of external actors, when taking a position. Given these constraints, according to the strategic account, a judge will behave in the manner that he or she believes will result in the outcome closest to his or her goals. The key distinction may thus be phrased in the following way: the attitudinal account suggests that judges will always take the position closest to their ideal position (sincere behavior), while the strategic account posits that judges will sometimes behave insincerely, depending on the contextual setting.

The other major model of judicial decision making, the legal model, comes in two basic flavors. The first conception of the legal model assumes that legal factors such as the text of the law, original intent or meaning, precedent, and other elements determine judicial behavior

(Segal and Spaeth 2002, 48). Often labeled "mechanical jurisprudence," this approach has largely been discredited. Instead, most scholars posit that the law functions to constrain the number of potential choices available to a judge but does not determine any one choice (e.g., Bailey and Maltzman 2011; Songer and Lindquist 1996). This modern approach is not inconsistent with the attitudinal model: within the constraints of the law, judges are free to take positions that are consistent with their policy preferences. This version of the legal model also shares a similarity with the strategic approach: judges take into account the constraints of institutions. However, the strategic model tends to focus on extralegal institutions, while the legal model does not assume judges will behave insincerely.

These are only the most dominant approaches to describing judicial decision making, and scholars have also posited alternative explanations. Of those, new institutionalism is perhaps the most prominent. New institutionalism designates a broad approach with many flavors, including both strategic and legal approaches. New institutionalism holds that institutions, both formal and informal, affect the behavior of political actors. Whether judges are strategic or sincere depends on the flavor. Moreover, some new institutionalist approaches hold that institutions can affect how preferences form, or may even take on a life of their own (Gillman and Clayton 1999). Another variant contends that we must look not just at the effects of institutions but also at the broader social context, which includes a variety of social constructions such as race and gender (Gillman and Clayton 1999, 7).

In light of the breadth of the theory, a variety of influences and causal mechanisms fall under the purview of new institutionalism. For example, a judge might feel constrained by nonlegal formal or informal institutions without choosing the goal-maximizing alternative. Alternatively, nonlegal institutional factors could determine the judge's behavior, regardless of goals or preferences. Finally, characteristics such as race or gender could influence judges' decisions.

In our analyses of various aspects of judicial behavior on the U.S. courts of appeals, we found evidence that each of these models could explain some of the judges' choices in a variety of different contexts. Hence, we prefer what we call the integrated model (i.e., a perspective that combines or integrates the insights gained from the legal, attitudinal, and strategic approaches to understanding judicial behavior). We found evidence that appellate court judges are sometimes guided by policy preferences, but judges are also often constrained by the law or other

institutional factors. Sometimes judges react strategically when considering these constraints, but in other instances they appear to consider these institutions without attempting to maximize goals. Finally, characteristics such as race and gender sometimes influence judicial decisions.

An Overview of the Analysis

Most scholarship that exists on the courts of appeals is limited to attempts to explain the ultimate decisions of the courts. Much less is known about the processes used by the courts to reach those decisions. In the first two chapters we seek to fill that gap in the understanding of the appellate courts, drawing heavily on our interviews with the judges and their clerks.

Before turning to the details of the way the courts operate, the first chapter describes the institution, from the basic structure to the selection and characteristics of judges, followed by the workload of the court. The chapter presents a portrait of who the judges are, focusing on characteristics such as partisanship, gender, and race. It also provides a broad statistical overview of the business of the courts of appeals, highlighting the dramatic changes that have occurred in the workload and agenda of the courts of appeals over the past half century.

Because the workload crisis described in chapter 1 has led judges to modify their procedures for handling the cases appealed to them, chapter 2 examines the screening procedures used by the courts of appeals, utilizing both the detailed explanations of the judges themselves about how such procedures work and why they are needed and statistical accounts. The procedures discussed include the process used to decide which cases are favored with oral argument. The chapter then moves on to other preliminary procedures, starting with the selection of panels and a discussion of another method for dealing with the caseload crisis, the use of designated judges. After reviewing how cases are assigned to panels, we examine the role of oral arguments. Finally, we address the panel conference, focusing primarily on the assignment of the opinion of the court. In general, institutional factors, both formal and informal, appear to influence most of these preliminary processes.

Chapter 3 describes the process of decision making, particularly the important process of arriving at the opinion of the court, from the perspective of the judges. In contrast to the extensive literature on the patterns of *votes* of judges in appellate courts (particularly in the United States), much less is known about how the final decision of the court is reached. Here we describe, from the judges' viewpoint, what happens

after a tentative decision has been reached in the private conference proceedings. We include a description of the role of clerks in writing the initial draft opinion, as well as the bargaining and negotiations that sometimes occur. Overall, opinion writing is a collaborative process, though the named author of the opinion does primarily control the direction and content of the majority opinion.

Chapter 3 then examines two different indirect measures of the length of the panel's deliberations: the amount of time it takes to produce an opinion of the court and the length of that opinion. Once again, the workload crisis plays a role in whether the opinion is published. We end the chapter with a discussion of the likelihood that a three-judge panel decision will be reviewed, either en banc or by the U.S. Supreme Court. For the most part, consistent with the integrated model we pursue in this book, a combination of legal, attitudinal, strategic, and institutional influences plays a role in these aspects of the appellate process.

In the following chapters we turn to factors that affect the judges' disposition of a case. Chapter 4 looks at the decision to cast a dissenting vote. Again combining judge interviews with quantitative analyses, we identify a variety of factors—attitudinal, legal, and institutional—that affect the decision to dissent. In the end, it appears that collegial norms exert the most influence—most disagreements are worked out during the postconference stage discussed in chapter 3.

Chapters 5 and 6 attend to the three most prominent models of judicial decision making noted earlier in this introduction. In chapter 5, relying primarily on the perspectives of the judges, with some supplemental quantitative analyses, we explore the degree to which legal and attitudinal factors affect the decisions of judges as to the merits of cases. It appears that both legal and attitudinal factors play a role, though the law clearly constrains judges in most cases. Conversely, in chapter 6 we look at strategic behavior. While earlier chapters found some support for this model, particularly in the bargaining and negotiations that often occur during the opinion-writing phase, our interviews and analyses in chapter 6 suggest one type of strategic behavior likely does not occur. Specifically, we examine the frequently posited view that the possibility of review, either en banc or by the Supreme Court, encourages the three-judge panelists to decide cases strategically. If this were so, these types of review should be frequent and predictable. However, they are not. These empirical findings appear to confirm the results of our judicial interviews.

The concluding chapter begins by pulling together the results presented in the previous chapters. Two key themes are examined. First,

we examine the extent to which the perspectives of the judges and their clerks are consistent with the picture painted in mainstream analyses of the courts by empirical social scientists, as well as by our own analyses. Second, we discuss how well our integrated model of judicial behavior is supported by the qualitative and quantitative evidence.