

Judicial dissents from ideological allies in lower court cases are more likely to lead to en banc review.

In the US Court of Appeals, a panel of judges can vote to rehear a case which had previously been heard by the court, a procedure known as en banc review. In new research, [Deborah Beim](#) and colleagues find that when a judge who is an ideological ally dissents with the majority decision, this can act as a strong signal that something that is inappropriate has occurred, which in turn can increase the probability of an en banc review from 3 to 17 percent.



In any hierarchical organization, the people at the top face a dilemma: they must delegate many tasks to their subordinates, but they can't observe all of their subordinates' actions. How can superiors effectively monitor subordinates? This issue arises frequently in many political institutions—including the federal judicial hierarchy. Higher court judges, such as the justices of the Supreme Court, are tasked with overseeing the work of lower court judges. Higher courts, however, usually have discretionary dockets, meaning they can pick the cases they want to hear. While this discretion has its advantages, it creates a problem: how should higher court judges choose the most worthy cases for review?

In new research, we focus on the role of judicial dissents in helping higher courts overcome their informational disadvantages relative to lower courts. We examine the hierarchical relationship that exists within the [U.S. Courts of Appeals](#) (or circuit courts), the level of appellate federal courts below the U.S. Supreme Court. Cases in these courts are heard by panels of three judges, who are randomly chosen among the judges of a given circuit. A judge who disagrees with the decision of her colleagues may publicly signal her disagreement by writing a dissenting opinion. Following a panel's decision, a majority of active judges on a circuit can vote to rehear the case in a procedure known as *en banc review*. These reviews are rare, occurring in only about 1 percent of cases. This rarity means that the judges of the Courts of Appeals will only want to invest their time in cases where they think review is really worth it.



In [previous work](#) we developed a formal theory in which judges use dissents to try to signal non-compliance to the full circuit; that is, they act as judicial “whistleblowers.” In this paper we test a key prediction of the whistleblower theory—that certain types of judges will be more effective whistleblowers because their ideological preferences make them more credible messengers of non-compliance. The idea is simple. If a judge who everyone expects to agree with the majority based on his ideology nevertheless dissents, that dissent is a much stronger signal that something inappropriate occurred than if a known ideological opponent dissents. Such dissents, which we call counter-preference signals, should therefore be much more effective at triggering review by the full circuit. We find that counter-preference signals are indeed an important predictor of *en banc* review, a finding that sheds light on the relationship between lower courts, judicial opinions, and the higher courts that oversee them. Specifically, moving from a whistleblowing dissent written by an ideological opponent of the panel to one that is an ideological ally raises the probability of *en banc* review from 3 to 17 percent, a striking result given the overall rarity of *en banc* review. Intuitively, an implication of our finding is that a dissent by a moderately liberal judge from a liberal ruling has a much bigger impact on a conservative circuit’s decision to review than a dissent by a like-minded conservative.

Our whistleblower theory also predicts that whistleblowing dissents should be most effective at triggering review when the panel and full circuit are ideologically distant. When the potential for noncompliance is greater, dissent is more likely to indicate severe non-compliance. We find strong support for this prediction: the marginal effect of a whistleblowing dissent is about 46 percentage points when panels and full circuits are distant, compared to about three percentage points when they are close. Both this and the effect of counter preference signals are quite striking, given the overall rarity of *en banc* review. Taken together, these results have important implications for assessing the role of whistleblowers in the judicial hierarchy, and suggest ways forward for understanding whistleblowing more broadly in other institutional contexts.

*The article first appeared at the [AJPS blog](#) and is based on the paper “[Signaling and Counter-Signaling in the Judicial Hierarchy](#),” in the *American Journal of Political Science*.*

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About the author

Deborah Beim – *Yale University*

Deborah Beim is an Assistant Professor in the Political Science department at Yale University. She studies American politics in general and judicial politics in particular, with a focus on interactions between the U.S. Supreme Court and the Courts of Appeals.



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