Are Judges 'Strategary'? Evidence from the U.S. Courts of Appeals*

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Will Ferrell's parody of George Bush's creative English leaves scholars of judicial behavior with an accurate description of Court of Appeals judges. While the field begins to treat Court of Appeals judges as strategic actors in pursuit of policy goals, this may not accurately characterize the range of behaviors expressed by Court of Appeals judges. I argue that judges have both policy and legal goals, and pursue those goals strategically and sincerely. Evidence for this conception of Appeals judge behavior is found by looking at Supreme Court reversal of Court of Appeals decisions.

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George W. Bush is a very easy target for sketch comedians. When Will Ferrell lampoons the president on Saturday Night Live, he creates words like "strategary" that mock the president's lack of command of the English language. An interesting byproduct of this particular malapropism is that it might accurately depict political scientists' views of how politicians make the decisions they do. While not entirely prepared to discard the behavioral paradigm, the field is turning in the direction of rational choice and the assumption that actors are strategic. Caught somewhere between the two worlds, perhaps we can say that the subjects of our work are "strategary".

Judges of the US Courts of Appeals are one of the most interesting groups of actors in the American political system. Unlike Supreme Court justices, there are reasons to think that very real constraints prevent judges from sincerely pursuing their policy preferences. They are, after all, at a lower level in the judicial hierarchy and, we assume, are answerable to the Supreme Court. In addition, their own ambition may cause them to behave in ways that are divergent from their policy preferences. Most Supreme Court justices are drawn from their ranks, and more than a few of them are known to harbor desires to sit on the Supreme Court. In addition to these two constraints, they operate in a very different environment than Supreme Court justices. They do not have control of their own docket and the stress of increased litigation is felt more in their offices than in the chambers of the justices of the Supreme Court.

Perhaps foremost among these concerns is the possibility of reversal by the Supreme Court. Though the Court only hears a few of the thousands of decisions rendered by the Courts of Appeals, there is still the possibility that, in any given case, the Supreme Court may find the Court of Appeals out of line with its wishes. One of the more interesting questions in the study

of the relationship between the Courts of Appeals and the Supreme Court, then, must be why Court of Appeals judges are reversed by the Supreme Court. If all Court of Appeals judges strategically pursued their policy goals all of the time, they would anticipate the reaction of the Supreme Court to the decisions they make. The Supreme Court, then, would have accomplished its task of supervising decisions made by the Courts of Appeals without ever having to reverse a case. We know, of course, that this is not the case: the Courts of Appeals, in reality, give the Supreme Court ample material from which to choose the cases they actually review and reverse. The sheer quantity of cases that the Court *could* reverse suggests that Court of Appeals judges are not thoroughly strategic actors. It also suggests that they may not always be acting on policy-related goals.

My research seeks to integrate conflicting conceptions of Court of Appeals judges. Political scientists view Court of Appeals judges as actors motivated by policy goals, though they may disagree as to how judges seek to accomplish those goals. Legal scholars, on the other hand, find such a conception of Court of Appeals judges incorrect, both normatively and empirically. They argue that judges are motivated by legal goals: both trying to make good law (that which is just, fair, and consistent) and by processing cases efficiently. The fairest assessment of Court of Appeals judges would, I think, view them as having both legal and policy goals, and pursuing these goals through strategic and sincere means. By looking at the interaction between the Supreme Court and the Courts of Appeals, I hope to illuminate some of the goals of Court of Appeals judges and the means they use to accomplish their goals. In this paper, I briefly lay out some of the possible behaviors for Court of Appeals judges, and then develop hypotheses related to the likelihood of reversal of Court of Appeals decisions. I test those hypotheses by looking at a sample of Court of Appeals decisions.

1.0 The Goals and Means of Court of Appeals Judges

The study of judicial behavior has been driven by assessments of judges' goals and the means they use to accomplish those goals. The "legal model" argues that judges are driven by the desire to make good law, while most political scientists agree that judges also have policy goals. More recently, political scientists have begun to contemplate whether judges pursue their goals (legal or policy) using sincere or strategic means. Study of behavior of Court of Appeals judges has largely reflected the development of theories about the behavior of Supreme Court justices. The behavioral revolution that gave judicial politics the attitudinal model had its parallel in the study of Court of Appeals decision making. Likewise, the shift toward viewing justices as rational actors who are aware of their political environment has also found an echo among scholars who study the Court of Appeals.

1.1 Policy Goals

The first extended attention given to Court of Appeals judges by political science can be found in Goldman (1966, 1975). Reflecting earlier and contemporaneous study of the Supreme Court (Pritchett, 1948; Rohde and Spaeth, 1976; Schubert, 1962), Goldman argued that the decisions made by Court of Appeals judges could best be explained by their ideological preferences. Using party of appointing president as a proxy measure for the ideology of the judge, he found that judges appointed by Democratic presidents were more liberal than those appointed by Republicans. This finding continues to receive strong support in the literature (see Pinello, 1999), and there is little doubt that the behavior of Court of Appeals judges is, at least in some way, a reflection of their ideological inclinations.

While it is certainly plausible to argue that the justices of the Supreme Court "decides disputes in light of the facts of the case vis-à-vis the ideological attitudes of the justices" (Segal

and Spaeth, 1993; 65), it would be premature to make the same argument about Court of Appeals judges. The attitudinal model rests on the argument that Supreme Court justices, once appointed, have no reason to worry about the preferences of other actors: Congress rarely overrides them, the President rarely defies them, and they are not subject to election. In addition, goals related to other actors in the legal system are essentially irrelevant: as they have reached the pinnacle of their profession, any ambition that might affect their behavior at lower levels no longer matters. But for the same reasons that Supreme Court justices would feel free to enact their preferences into law, Court of Appeals judges are constrained from doing so. Court of Appeals judges can be characterized as agents of the Supreme Court, their principal. The Courts of Appeals process the myriad of cases the Supreme Court can not, and the Supreme Court has the ability to audit the lower court decisions, but at a cost (Cameron, Segal and Songer, 2000; Spitzer and Talley, 2000). One of the fundamental problems of a principal-agent relationship is shirking: the agents act according to their own preferences and not those of the principal. This problem is particularly acute in the relationship between the Supreme Court and the Courts of Appeals for two reasons. First, the Court's auditing capacity is quite limited: even at its most productive, it can only review a small percentage of Court of Appeals decisions. Second, the judges on the Courts of Appeals may be more likely than most agents to have their own preferences about the tasks in front of them. The tension, then, between serving the principal and serving their own interests is likely to be greater in this relationship than most others between principal agent.

On occasion, the Supreme Court can be clear about what it expects from the Courts of Appeals and the consequences of shirking:

> …[T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases 'by virtue of their commissions, not their competence.' And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from Rummel. But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be. *Hutto* v. *Davis* 454 U.S. at 374-75 (1982) per curiam

There is a fundamental problem raised, though, by the rarity of Supreme Court reversal of the Courts of Appeals. While one might expect Court of Appeals judges to behave strategically to avoid Supreme Court reversal, they may consider the likelihood of such reversal so rare as to discourage strategic behavior. If they do acknowledge the possibility of reversal, they would act strategically by coming as close as they can to enacting their policy preferences without triggering review and reversal by the Supreme Court. An alternative perspective suggests that reversal is such a rare event that they need not act as if it is a real constraint on sincere expression of preferences. Even if they do consider reversal a possibility, they may not feel reversal is something to be avoided: Court of Appeals judges may acknowledge the possibility of being reversed but may get more utility by expressing their sincere preferences on an issue. In short, one might expect the rarity of reversal to depress the need and incentives for strategic behavior. At the same time, it is certainly possible that Court of Appeals judges may engage in strategic behavior to avoid reversal. These competing expectations suggest that judges likely engage in a combination of sincere and strategic behavior in pursuit of their policy goals.

1.2 Legal Goals

Both of these perspectives assume that Court of Appeals judges care only about policy goals. But one can expect Court of Appeals judges to have more than just policy goals (Baum, 1997; Klein, 1996; Posner, 1995). While we have little difficulty assuming judges have policy goals, legal scholars have just as little difficulty assuming judges have goals related to making good law (Baker, 1994; Caminker, 1994, 1999; Hellman, 1999). Legal goals can be broken

down in a number of ways. Judges can be interested in accuracy—making good law by interpreting the law correctly, independent of their policy preferences (Baum, 1997). Related to this, judges may have conceptions of what makes "good" law, that which is right, just, and fair to those who have to follow the rules established by Congress and interpreted by the federal judiciary. For example, Court of Appeals judges may believe good law is that which follows Supreme Court precedent, regardless of a judge's personal views of the validity of that precedent (Caminker, 1994). As a result, judges committed to pursuing legal goals may find themselves constrained by precedent.

Judges can also be interested in judicial economy—maximizing their leisure time (Posner, 1995) by efficiently processing cases. Judges may favor consistency over their personal policy goals to accomplish this. It is difficult to sort out the empirical implications of these goals separately, so the tests I propose below deal primarily with a judge's ability to craft law.[1]

Returning to the framework of goals and means, it is difficult to see how strategic pursuit of legal goals differs from sincere pursuit of the same goals. If the Supreme Court is concerned simply about policy positions and does not, in its decisions, take a stand on issues of judicial economy, then at least one constraint on behavior is removed. Court of Appeals judges may also be acting strategically with respect to the Supreme Court, but it is hard to see how this might affect one's pursuit of judicial economy. The constraints, then, that might induce strategic behavior do not seem to affect the pursuit of legal goals. As a result, there may be no difference

[1] Given the importance of workload to Court of Appeals judges (Klein, 1996), one might expect a relationship between how many cases a judge decides and the likelihood of reversal. The relationship would exist at the circuit level, and not at the level of the individual judge or panel. But the exact nature of that relationship is unclear. In the aggregate, one might expect a positive relationship between workload and circuit: the more cases a circuit decides per judge, the more likely that judge is to be reversed, all else equal. But in circuits where workload is a concern, the judges may be committed to avoiding reversal and its consequences of dealing with a remand and other cases decided similarly, so there may be a negative relationship between workload and likelihood of reversal. Because of these competing ideas, I decided not to attempt a substantive interpretation of the variables modeling circuit effects in Model 2 below. But I would hope that I can do so as my research progresses.

between strategic and sincere pursuit of legal goals, at least not with respect to reversal by the Supreme Court.

One can think of these different types of behavior as different preference orderings. Sincere policy-motivated behavior suggests that a judge prefers the expression of her preference (her ideal point) to having an impact on the ultimate policy outcome (accomplished by avoiding reversal) and to promoting judicial economy. Strategic policy-motivated behavior would suggest that a judge prefers impacting the ultimate shape of policy to a sincere statement of beliefs or promoting judicial economy. And behavior driven by legal goals would show a judge that prefers to get it "right" to expressing policy preferences or affecting the ideological location of policy outcomes.

The problem arises when one realizes that each judge on the Courts of Appeals likely engages in some combination of all three behaviors: in areas where a judge does not particularly care about the ultimate shape of policy, she may be more likely to pursue legal goals. On important issues, a judge must choose between a sincere expression of preferences and strategic behavior designed to come closest to the judge's ideal point without invoking Supreme Court review. This complication would prove insurmountable if this project sought to determine conditions under which judges chose different goals and the means necessary to accomplish those goals. My aim is somewhat more modest: I seek to provide evidence for the argument that judges deploy *all three* types of behavior. While this might seem a straightforward argument, it also seeks to integrate a body of literature that has developed competing conceptions of the behavior of Court of Appeals judges.

2.0 Hypotheses and Research Design

Reversals of Court of Appeals decisions offer an opportunity to sort out the possible goals of Court of Appeals judges. Different types of behavior (sincere policy-oriented, strategic policy-oriented, legal-oriented) would suggest different approaches to reversals. A Court of Appeals judge engaged in sincere, policy-driven behavior would not be concerned about reversal by the Supreme Court: she would get value simply from making a decision that accords with her policy preferences. A judge strategically pursuing her policy preferences would attempt to maximize her influence on the final policy outcome, attempting to tread a line between her preferences and those of the Supreme Court. Strategic behavior implies reaction to changing circumstances, while sincere behavior, and its assumption of a direct relationship between attitude and behavior, does not imply variations in behavior related to changes in the environment.

Pursuit of legal goals, on the other hand, produces a different series of expectations. Judges committed to making good law are not operating on the same dimension as the Supreme Court, so it becomes difficult to assess how to map those actions into the policy space in which the Supreme Court operates. One behavior we might expect from a judge pursuing legal goals is to act, at times, in ways inconsistent with her own policy preferences. If, for example, a judge would create conflict among her own circuit or between circuits by voting according to her policy preferences, she might choose to vote against her policy preferences because the value to her of maintaining consistency outweighs the value of expressing her policy preferences. Doing so would conform to a notion of consistency in the law, as well as promoting notions of judicial economy. The same could be said for a judge committed to following precedent because her

notion of good law is related to respecting the role of precedent. If making good law is an important goal, we might expect judges to vote against their preferences, and do so consistently.

2.1 Two Assumptions

I make two assumptions about the nature of the judicial hierarchy to facilitate inquiry into the motivations of Court of Appeals judges. First, I assume that the likelihood of appeal does not affect the decision by a Court of Appeals judge. That is, a judge does not favor one litigant over the other simply to avoid the loser petitioning the Supreme Court for review. This assumption does not appear to be unrealistic: a judge may decide a case based on the facts, the extant law, and her ideological preferences, but it seems unrealistic to assume that she would choose one party over another simply to avoid a petition for certiorari that has little chance of success. In cases that are "certworthy", it is likely both parties to the case would appeal an adverse decision.

Second, I assume that the policy output of the Court reflects the ideological preferences of the median justice. There is little debate that Supreme Court justices' actions are driven by their policy preferences. The centerpiece of the debate among scholars of the Supreme Court is the responsiveness of justices to other actors, both internal and external (Epstein and Knight, 1998; Segal and Spaeth, 1993; Segal, 1997; Maltzman, Spriggs, and Wahlbeck, 2000). Even if justices do anticipate the actions of other justices and other players like Congress and the president, such action does not necessarily change the *votes* of the justices. There is considerable evidence that the exact reach of majority opinions does not reflect the desires of the opinion author: opinions reflect some collaboration amongst the majority and, likely, some accommodation of the minority. Whether justices are strategic or not, the position of the Court maps well to the ideological preferences of the median member of the Court. While we traditionally consider the votes in liberal and conservative terms (Pritchett, 1948; Schubert,

1962), they can also be considered as affirmances and reversals. In short, it does not seem a heroic assumption to assume that the vote of the fifth justice determines the ultimate fate of a lower court decision.

This assumption accommodates the possibility of strategic voting at the *certiorari* stage as well (Caldeira, Wright, Zorn, 1999). Even if four justices vote to grant cert and do so strategically, they are calculating they have the ability to find a fifth justice to reverse a lower court decision. In short, the assumption of the median justice controlling the outcome is, at the least, tenable.

2.2 Hypotheses

Different predictors of the Supreme Court's reversal of Court of Appeals decisions reveal different types of motivations of Court of Appeals judges. The predictors of reversal can be characterized as judge-related and case-related. Judges vary in their ideology, competence, experience and interest in their roles as judges. Cases vary in the nature of the parties, the issues raised, and the salience of those issues. Each decision, then, has case-specific and judge-specific characteristics that help to predict the Supreme Court's disposition of cases.

Some judges are better at crafting law than others and the Supreme Court may find the reasoning in their opinions more persuasive. If a judge is pursuing policy goals, her legal qualifications will have no bearing on the likelihood of reversal. Sincere pursuit of policy goals would dictate that a judge express her preferred policy position on an issue, regardless of her competence. A judge pursuing policy goals strategically may be attempting to avoid reversal, but her legal qualifications would not affect the likelihood of reversal. It certainly may be the case that some judges are better at anticipating the response of the Supreme Court than others, but that should not be related to a judge's legal qualifications.

If we measure competence as legal qualification to be a Court of Appeals judge, and we find that better qualified judges are being reversed less frequently, then we have some evidence that Court of Appeals judges are pursuing legal goals. If competence does not predict reversal, then that provides evidence that judges are pursuing alternative goals—those related to policy.

> *Hypothesis 1a*: If the *competence* of the majority opinion author reduces the likelihood of reversal, there is evidence of pursuit of legal goals. If competence of the majority opinion author has no bearing on the likelihood of reversal, then evidence of policy-oriented behavior (strategic or sincere) exists.

Following the same logic accorded to competence, judges with more experience should be better at crafting opinions that the Supreme Court finds more persuasive and less likely to reverse. It may be the case here, however, that as a judge spends more time on the Court of Appeals, she has better information about the preferences of the Supreme Court and so a negative relationship between experience and likelihood of reversal may also be evidence of strategic pursuit of policy goals. If there is no relationship between experience and reversal, then there may be some evidence of sincere pursuit of policy goals. An experienced judge who finds herself ideologically separate from the Court would be reversed as frequently as a new judge if both were expressing their sincere policy preferences.

> *Hypothesis 1b*: If the *experience* of the majority opinion author reduces the likelihood of reversal, there is evidence of pursuit of legal goals. If experience of the majority opinion author has no bearing on the likelihood of reversal, then evidence of policy-oriented behavior (strategic or sincere) exists.

These two hypotheses probably require the additional assumption that though the Supreme Court's primary concern is reversing ideologically discordant lower Court decisions, it prefers good law to bad. The Court may prefer a particularly clear statement of a principle of application of a doctrine to a particularly poor one. This assumption does not accord with a strictly ideological Supreme Court, but to find that the Supreme Court is less likely to reverse a

lower court decision written by a more competent judge than a similar one written by a less competent judge provides evidence that Court of Appeals judges capable of making good law are doing so and the Supreme Court respects those attempts.

One of the most important criteria on which judges differ is their ideological predisposition. Judges, like other elite actors, have well-defined preferences over public policy. Presidents committed to leaving a legacy beyond their tenure can make a concerted attempt to influence the makeup of the federal judiciary (Goldman, 1997). The effort some presidents expend in this area suggests that it has its payoffs: certainly President Bush and the 107th Senate agree that judicial nominations are a priority. But ideology would only matter if the appointees actually act on their ideological preferences.

If the ideological distance of the judge from the Supreme Court matters, then it is clear that the judges are actually occupying those positions instead of moving from them in order to avoid Supreme Court review. Cameron, Segal, and Songer (2000) argue that the Supreme Court grants more leeway in its certiorari decisions to judges closer to the Supreme Court and exercises tighter control over judges whose ideology distances them from the Court. While this may be the case where certiorari is the dependent variable, it would only affect reversal if the judges were actually expressing their sincere policy preferences. The Supreme Court may closely monitor ideologically distant judges by reviewing their cases more frequently, but they may not actually reverse the decisions if the judges are acting strategically.

> *Hypothesis 2*: If *ideological distance* from the Supreme Court is related to the likelihood of reversal, then evidence exists of sincere pursuit of policy preferences. If the two are not related, then there is evidence that judges are behaving strategically or pursuing legal-oriented goals.

If judges pursue their policy goals strategically, one might expect them to behave differently on different issues. For example, on issues that are more important to the judicial

community or to the particular judge, a judge might be more likely to tailor her opinion to avoid reversal by the Court. Judges interested in expressing their sincere policy preferences would not tailor their behavior based on the area of law or the importance of the case, though they can certainly have different preferences in different areas of law. By the same token, one would not expect judges engaged in pursuit of legal goals to tailor their behavior from issue to issue.

> *Hypothesis 3*: If judges are less likely to be reversed on salient issues, then evidence exists of strategic pursuit of policy preferences. If there is no difference between salient issues and less salient issues, then there is evidence that judges are behaving sincerely or pursuing legal-oriented goals.

One caveat should be kept in mind: the hypotheses proposed here are not intended to be a comprehensive test of the goals of Court of Appeals judges and the means they use to accomplish them. In particular, there are a variety of forms legal goals could take and influence the behavior of Court of Appeals judges. If one form of legal goals involves adherence to precedent, one would expect Court of Appeals judges to be more willing to follow precedent instead of their own preferences when pursuing legal goals. But it is unlikely that such adherence to precedent would affect the likelihood of reversal. The same can be said with some of the other legal goals, like attempts to accurately interpret the law. While this is certainly an important legal goal, it is difficult to conceive of it as affecting the likelihood of reversal. Instead, I use two proxy measures, competence and experience, to assess the relationship between *ability* to make good law and the likelihood of reversal.

2.3 Operationalization of Variables

The measures of competence and experience are relatively straightforward: a judge's competence is measured by her ABA rating and a judge's experience is logged, as it seems unreasonable to expect a linear effect of experience on the likelihood of reversal. I use two variables to tap importance of a case. First, I code whether a case involves a constitutional issue.

Second, I code for the presence of additional publication of the opinion. Both of these variables have been tested in models of certiorari voting (Caldeira, Wright, and Zorn, 1999) as indicators of the importance of a case. The rationale here is somewhat different: though judges can not anticipate in advance that their opinion may be reprinted in a trade publication, it is often clear at the outset which cases are more important than others. A routine admiralty case does not garner the same level of interest that a complex antitrust case, and judges may have different goals in mind when they decide routine cases and more interesting cases. Evidence for this can be found in the implementation of various screening devices that have reduced the proportion of cases that require submission of briefs and an oral argument and result in a published opinion. But even among the limited sample of terminations represented by published opinions, the salience of case varies considerably. The two measures I have included are imperfect, but hopefully provide some leverage on the issue of importance.

I include an interaction term between ideological distance and constitutional claim to measure the difference in behavior by judges of different ideologies on issues of higher importance. If the coefficient is negative, it would provide strong evidence of strategic behavior, as it indicates that, when a constitutional issue is present, judges who are ideologically distant from the Supreme Court avoid reversal.

One of the more difficult variables I had to code was the ideological distance between the Supreme Court and the opinion author on the Court of Appeals. There are a series of options to measure the ideology of the Supreme Court and Court of Appeals judges, all of which have their advantages and disadvantages. With respect to Court of Appeals judges, I have three usable options. First, I can use party of appointing president (Goldman, 1966, 1975; Pinello, 1999). I find this option the least desirable because it means all the judges are either 0s or 1s. While this

option may be tenable under some circumstances, it does not reflect the variation in ideology of presidents or their nominees. The second option is to use some variation of Tate and Handberg (1991), who attribute to each president a strategy of appointment. This option is only somewhat better than using party of appointing president. The third option is to create a score for each judge based on the judge's background characteristics (Humphries and Songer, 1999; Cameron, Segal and Songer, 2000). While this measure certainly provides more variance, it is flawed in that the weights are drawn from a regression where the dependent variable is vote, which is not a pure indicator of a judge's ideological preferences. The fourth option is to use the scores developed by Giles, Hettinger, and Peppers (2001). These scores use the president's DW-NOMINATE score for judges not nominated under conditions of senatorial courtesy and take into account the ideology of the home-state Senators when courtesy applies. These measures would be the optimal indicators of a Court of Appeals judge's ideology because they reflect the nature of the appointment process and lead to the best estimates of a judge's ideology of the available measures. Unfortunately, I was unable to get this data in time to run the analyses below, so I have substituted the DW-NOMINATE score of the appointing president.

The second issue is measurement of the ideology of Supreme Court justices. The standard approach is to take the scores developed by Segal and Cover (1989), but those scores pose some problems in this situation. The median member of the Court in 1983 by these measures is Justice Stevens, whose score is -.5 (on a range of –1 to 1). This is almost certainly an overstatement of the conservativeness of Justice Stevens and may not even select the correct member of the Court as the median. An alternative strategy, Baum's (1989) adjusted measures of civil liberties voting scores, would place Justice White at the median of the Court. These scores, however, are, like Segal-Cover scores, fixed for a lifetime and have the additional

problem of being slightly endogenous because they are based, in part, on the votes to reverse that comprise my sample. Instead of either of these options, I simply calculated voting scores for October Term 1981 for all of the justices. Justice White was the median voter, and his score was .394 (39.4% of his votes were liberal votes in October Term 1981). This approach has the advantage of reflecting the justices at this point in their careers and of addressing the problem of endogeneity.

The scores for the median member of the Court and the Court of Appeals judges were rescaled so they matched, and an ideological distance was created that takes the functional form:

$$|\text{Supreme Court median-Court of Appeals judge}| \qquad (1)$$

This means that judges who are .21 units more conservative than the Court receive the same score as those who are .21 units more liberal.

There are a series of control variables that may have little to do with the behavior of Court of Appeals judges but may affect the Court's propensity to reverse. Those variables, as well as the variables above, are summarized in Table 1.

(Table 1 about here)

I coded for the presence of a dissenting opinion, whether the majority opinion acknowledged conflict, whether the case was heard *en banc*, and if the Court of Appeals decision reversed the lower court or agency. All of these are indicators of discord in the lower ranks and, if they predict reversal, one could interpret the findings as indications of the Court fulfilling its obligation as resolver of conflict. For the purposes of this paper, however, they are considered control variables. The final control variable is the ideological direction of the lower court decision.

2.4 Sampling Strategy and Statistical Analysis

To test my hypotheses, I selected a sample of cases decided by the twelve regular Courts of Appeals between July 1, 1982 and June 30, 1983. I sought cases that were published opinions for three reasons. First, a vast majority of cases reversed by the Supreme Court were published opinions at the lower level. Second, some of the hypotheses articulated above require measurement of attributes of the opinion author. Third, and perhaps most important, to make the adjustments required for rare events logit, I need to know the number of cases that were not reversed. The Administrative Office of the U.S. Courts reports 5,572 signed opinions for the time period I have chosen. I chose this year for a variety of reasons: first, it predates one of the latest expansions of the number of authorized judgeships in 1984, and was a time when workload was considered extremely high (Posner, 1985). The virtue of such a high workload per judge is that it means any one judge is more likely to be reversed than she would be at some other time. The time also falls near the end of the Burger Court, where the Supreme Court was accepting considerably more cases than they have since Rehnquist became chief justice (O'Brien, 1997). As a result, this period represents a high-water mark of the Court's acceptance and reversal of cases decided by the Courts of Appeals. One other advantage of this period is that the membership of the Supreme Court is relatively stable: Justice O'Connor replaced Justice Stewart before the beginning of October Term 1981, but no other membership changes had occurred since the retirement of Justice Douglas.

Since reversals happen so rarely, I drew a choice-based sample (King and Zeng, 2001). Using the Supreme Court Database, I sampled all of the Supreme Court's reversals of Court of Appeals decisions made between July 1, 1982 and June 30, 1983. I then drew a random sample of Court of Appeals decisions not reversed by the Supreme Court in the same time. Each

decision reported to LEXIS-NEXIS is given an ID number by Lexis. I used this number as my sampling unit. King and Zeng (2001) suggest drawing 2-5 times as many 0s (non-reversals) as 1s (reversals) to use their rare events logit procedure. Since I had 72 reversals, I drew 300 nonreversals. Due to sampling some cases twice, I started with 367 cases. Unfortunately, due to unevenness of reporting practices to Lexis, a number of unpublished decisions are given Lexis ID numbers but the record provides no substantive information about the case, including the judges that participated. Of the 367 cases I began with, I had to exclude 107 cases that were effectively unpublished decisions. I also excluded 44 decisions where the opinions were per curiam. This leaves 216 cases, 64 of which are reversals. At this point, a particular oddity emerged. Though the 6th Circuit was reversed twice in 1983, one was a reversal of a per curiam opinion (*City Disposal Systems* v. *NLRB*, 465 U.S. 822) and the other was a reversal of an unpublished opinion (*McDonald* v. *West Branch*, 466 U.S. 284). No Sixth Circuit signed, published opinion was reversed in the time frame of my study, so I have also dropped the 10 cases from the Sixth Circuit that were nonreversals. This leaves me with 206 cases. Thirteen more cases were lost because the opinion author was not a circuit judge or senior circuit judge, so my final analysis rests on 193 cases. This is an extremely small number of cases for logit, so the analyses should be interpreted with caution.

The rarity of Supreme Court reversal of Court of Appeals decisions (1.26% in my sampling frame) makes traditional analysis extremely difficult: one would have to sample and code over 1,000 cases in order to draw enough reversals (1s) and generate reliable parameter estimates. This situation is ripe for choice-based sampling and the accompanying statistical techniques. Rare events logit is well-suited to this type of data analysis. One form of rare events logit, called prior correction "involves computing the usual logistic regression MLE and

correcting the estimates based on prior information about the fraction of ones in the population, τ, and the observed fraction of one in the sample, $\bar{y}$." (King and Zeng, 2001, 144). The correction to the intercept is:

$$b_0 = \hat{b}_0 - \ln\left[\left(\frac{1-t}{t}\right)\left(\frac{\bar{y}}{1-\bar{y}}\right)\right] \quad (2)$$

In this particular case, both $\bar{y}$ and τ are easily obtained. τ is .0126, and $\bar{y}$ is .332. Because the estimation can prove tricky and calculation of quantities of interest is not straightforward, I used the "relogit" command in Stata and the accompanying post-estimation commands.

3.0 Results

The results of two models are presented in Table 2. In the first column, Model 1, I present the variables of theoretical interest without controlling for variation between circuits. In the second model, I create dummies for each of the circuits to control for possible unmeasured variation among circuits. None of the circuit dummies are significant, though their signs seem to point in the correct direction: the 9th Circuit is, all else equal, the most likely to be reversed, even after controlling for the ideology of the judges and the direction of the decision. The DC Circuit follows, while the 7th and 11th Circuits are the least likely to be reversed.

(Table 2 about here)

My first two hypotheses (1a and 1b) suggests that evidence of a negative relationship between a judge's competence and likelihood of reversal, all else equal, would provide evidence that judges better at crafting law would actually do so. The evidence on this point is, at best, limited. Both coefficients for competence and experience are in the hypothesized direction for legal goals. But neither reach conventional levels of significance (P>z=.148, two-tailed test). In a way, this is not surprising, given that I merely measure ability to craft good law and not

propensity to do so. There does appear, however, to be some evidence that competence is related to the likelihood of reversal. While the strength of conclusions one can draw from the results presented here can be no more than tentative, it does appear that there is some support for the contention that judges who are better at crafting law might actually be doing so. If one looks at the predicted probabilities of reversal for the 3 different ABA ratings, one can note some interesting changes (all the other variables are held at their median values):

ABA Rating	**Predicted Probability of Reversal**[2]	**95% Confidence Interval**
Qualified	.00828	.00162 to .04292
Well Qualified	.00567	.00110 to .02877
Extremely Well Qualified	.00398	.00090 to .01818

Though we are certainly speaking of change in the tails of the distribution, the movement appears to at least be in the hypothesized direction. The results of both of these hypotheses provide preliminary, if inconclusive, support for the argument that judges do pursue legal goals, at least under some circumstances.

Turning to hypothesis two, if one relies on the measure of the ideological distance of the Court of Appeals judge from the Supreme Court, there is no real support for sincere pursuit of policy preferences. What is interesting, though, is the strength of the direction of the lower court's decision as a predictor. Expecting the ideological distance of the judge to have an impact beyond the direction of the decision on the Court's likelihood of reversing the case poses a very conservative test for evidence of sincere pursuit of policy goals. It requires that the Court look

[2] Predicted probabilities were generated using the "relogitq" command, a part of the package of ado files available at Gary King's website, http://gking.harvard.edu. They are based on the results of model 2.

beyond the decision to the attributes of the judge to see if the Court of Appeals judge's sincere preferences accord with the position observed in the opinion. Given a slightly easier test of the relationship between a Court of Appeals judge's ideology and the likelihood of reversal, where the direction of the decision is not considered as a factor influencing the likelihood of reversal, there is some evidence that Court of Appeals judges are occupying their preferred positions. Though, again, not meeting conventional levels of significance (P>z=.107, two-tailed), I do find that the greater the distance between the judge and the Court, the more likely the Court of Appeals decision is to be reversed. The full results of this test are presented in Appendix A.

The tests of hypothesis three present confusing results. While the coefficients for additional publication and constitutional claim run in *opposite* directions, the interaction between constitutional claim and ideological distance is negative and nearly significant (P>z=.098, two-tailed test). While this is the case, the sheer size of the coefficient (-4.5528) and the fact that it nearly doubles in size once the circuit effects are added should raise some concern over the results and discourage overinterpretation.

These results require some closer scrutiny. The finding of particular concern is the conflicting direction of the signs for the two indicator of a case's salience. Related to this is the strong positive relationship between a constitutional claim and the likelihood of reversal. This particular finding certainly should discourage any claims about the presence of strategic behavior: judges engaged in strategic pursuit of policy goals are supposed to avoid reversal in high-profile cases and the evidence, at least as measured by constitutional claim, is that the Court is *more* likely to reverse Court of Appeals decisions when constitutional issues are raised. While students of the Supreme Court argue that justices may feel more assertive in areas of constitutional law (Segal, 1997), this would certainly not mitigate the incentives for Court of

Appeals judges to engage in strategic behavior. It may be the case that the strong positive relationship between constitutional issues and the likelihood of reversal is evidence of sincere pursuit of policy goals: judges stick out their necks, so to speak, on issues that are traditionally conceived of as issues for judicial concern (as opposed to legislative or executive), and the Court, also assertive on these issues, is particularly assertive in these areas.

Such an argument does not explain the strong *negative* relationship between a judge's ideological distance from the Court and the likelihood of reversal on constitutional issues. Here may be the strongest support for strategic behavior: on important issues, judges who are further away from the Court are *less* likely to be reversed than those who are closer. But, as mentioned above, such a conclusion appears to be hasty. In short, I find no obvious reason for the findings presented here and suggest that any conclusions should be tentative at best.

4.0 Directions of Future Research

One of the concerns mentioned in discussion of all three hypotheses is that the statistical significance rarely meets conventional levels where I had hoped it might. Part of this may be a problem related to the number of cases coded for this paper. King and Zeng (2001) suggest that the number of 0s be about 2-5 times as many as the number of 1s. I ended up with about 3 times the number of 0s. It seems likely that additional data collection will produce smaller standard errors (King and Zeng, 2001), and may permit more confidence in the conclusions I am attempting to draw about the variables of interest. Refining some of the measures used may also lead to a clearer understanding of the relationships I explore.

Future research should develop more refined conceptions of legal and policy goals and the implications of sincere and strategic behavior. One of the places where this may be found is in how different judges respond to changes in the Supreme Court. Pursuit of policy goals

thorough strategic means would imply a change in behavior to accommodate the shift in the Court's preferences. Sincere pursuit of policy goals would not imply such movement: conservative judge would be reversed less frequently as the Court moves in a conservative direction, while the reverse would be true for more liberal judges. Pursuit of legal goals would suggest a much slower adjustment to the Court: judges concerned about making good law, at least as far as it entails following precedent, should only make adjustments as the Supreme Court changes different areas of law, and not as its membership changes. It may be the case that clearer evidence for the perspective of judicial behavior suggested here is better captured in a dynamic context rather than the static one presented here.

In the context discussed here, though, there is limited support for a three-sided conception of Court of Appeals behavior. There is some evidence that Court of Appeals judges who are better at crafting law actually do so, suggesting that the Supreme Court, all else equal, respects opinions written by more competent judges. This finding also suggests that Court of Appeals judges more qualified to make good law actually do so, but that ability does not appear to improve as judges become more experienced. There are also indications that Court of Appeals judges pursue policy goals, both sincerely and strategically. There is some evidence that Court of Appeals judges occupy their ideal positions, signalling to the Court the ideological location of their behavior. But that behavior changes on more salient issues, suggesting adjustment by Court of Appeals judges to changing circumstances and enhances likelihood of reversal by the Supreme Court. In all, though further research is certainly called for, it is important to remember that Court of Appeals judges do have multiple goals and accomplish them using different means.

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Table 1: Operationalization of Variables

Variable	Measure
Dissent	1 if there was a dissent to the Court of Appeals decision, 0 if not.
Conflict	1 if the majority opinion expressly acknowledges conflict with another Circuit or the Supreme Court, 0 if not (George, 1999).
Reversal of Lower Court/Agency	1 if the lower court or agency was reversed by the Court of Appeals, 0 if not.
Liberal Decision	1 if the Court of Appeals reached a liberal decision, 0 if not[3]
Constitutional Claim	1 if the Westlaw headnotes include a reference to the Constitution or its amendments, 0 if not.
En banc	1 if the decision by the Court of Appeals was made en banc, 0 if not.
Additional Publication	1 if the case was published in U.S. Law Week, 0 if not.
Judge Competence	ABA Rating of the opinion author
Judge Experience	Natural log of the (# of years of judge's experience+1)
Ideological distance from the Supreme Court	The absolute value of the distance between the opinion author and the median member of the Supreme Court (see text for a fuller description).

[3] Whether or not a decision was liberal was based on rules for Songer's coding of DIRECT1 in the US Courts of Appeals Database. Two exceptions were made to avoid missing data. First, if one of the parties' situation was considerably improved by the Court of Appeals decision, but it was not a complete victory, the case was coded as favoring that party. This almost always affected criminal cases, where the accused may improve her position but not win total reversal. Second, in cases where the insured is fighting the insurer, cases where the insured wins are always coded liberal and vice versa.

Table 2: Rare Events Logit Results

	Model 1: No Circuit Effects	Model 2: Circuit Effects
	Coefficient (Robust S.E.)	Coefficient (Robust S.E.)
Dissent	.4728 (.5287)	.4142 (.5178)
Conflict	1.5117** (.4824)	1.9350*** (.5295)
Reverse Lower?	.5289 (.3881)	.4749 (.4264)
Liberal Decision	1.3095** (.4338)	1.3535** (.4343)
Constitutional Issue	1.4338* (.6989)	2.1231** (.7396)
En banc hearing	.8697 (.7580)	.6914 (.7511)
Additional Publication	-.2548 (.4218)	-.1157 (.4198)
ABA rating of opinion author	-.3369 (.2288)	-.9448 (.2384)
Experience	-.1213 (.2520)	-.2398 (.3320)
Ideological Distance	1.4247 (2.0290)	2.0052 (2.1338)
Constitutional Claim x Ideological Distance	-2.3734 (2.6446)	-4.5228 (2.7308)
1st Circuit	--	-.6379 (.9382)
2nd Circuit	--	-.6965 (1.0646)
3rd Circuit	--	.3063 (.9191)
4th Circuit	--	-.07901 (.9301)
5th Circuit	--	-.1444 (.8587)
7th Circuit	--	-1.8279 (1.3207)
8th Circuit	--	-.0581 (.9151)
9th Circuit	--	1.2026 (.7704)
11th Circuit	--	-1.096 (1.0379)
DC Circuit	--	.7717 (.9930)
Constant	-5.6586*** (.9034)	-5.6981*** (1.2352)

N=193, *p<.05, **p<.01, ***p<.001, two-tailed tests. 10th Circuit is omitted variable

APPENDIX A: Rare Events Logit Results with Direction of Lower Decision Omitted

	Model 1: No Circuit Effects	Model 2: Circuit Effects
	Coefficient (Robust S.E.)	Coefficient (Robust S.E.)
Dissent	.4369 (.4755)	.3685 (.4520)
Conflict	1.3304** (.4702)	1.6721** (.5371)
Reverse Lower?	.8567* (.3518)	.8488* (.3876)
Constitutional Issue	1.3631* (.6961)	2.0422** (.7201)
En banc hearing	1.0914 (.7603)	.9020 (.8152)
Additional Publication	-.2630 (.3932)	-.0469 (.3822)
ABA rating of opinion author	-.2789 (.2163)	-.3171 (.2283)
Experience	-.0931 (.2432)	-.1787 (.3039)
Ideological Distance	2.4289 (2.0178)	3.3291 (2.0626)
Constitutional Claim x Ideological Distance	-2.4155 (2.6000)	-4.5638 (2.5674)
1st Circuit	--	-.7075 (.9767)
2nd Circuit	--	-.6724 (1.1198)
3rd Circuit	--	.0375 (.9237)
4th Circuit	--	-.3733 (.9004)
5th Circuit	--	-.3773 (.9276)
7th Circuit	--	-1.8336 (1.4864)
8th Circuit	--	-.2253 (.9291)
9th Circuit	--	1.0631 (.8103)
11th Circuit	--	-1.2661 (1.0628)
DC Circuit	--	.7712 (1.0094)
Constant	-5.3186*** (.9124)	-5.2864*** (1.2868)

N=193. *p<.05, **p<.01, ***p<.001, two-tailed tests
Note: 10th Circuit is omitted variable