# AN EXPLORATION OF THE MOTIVATIONS OF COURT OF APPEALS JUDGES

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**Abstract**

Why does the Supreme Court reverse Court of Appeals decisions? The answer, I argue, can provide us with important insight about the goals of court of appeals judges and the means they use to accomplish those goals. We have grown accustomed to viewing Supreme Court justices as "single-minded policy seekers" and have habitually applied the same framework to court of appeals judges, making adjustments for their subservient status to the Supreme Court. But being a step lower in the federal judicial hierarchy may introduce more complexity than has been previously imagined. We expect lower court judges to use different means to accomplish their goals than is likely the case for Supreme Court justices. At the very least, we expect them to be more strategic than their counterparts on the High Court.

It is possible that appellate judges have goals that differ from their policy preferences and those goals are relevant to their decision-making behavior. They may genuinely be motivated by a desire to make good law, and are certainly affected by a much higher caseload than that of the Supreme Court. Using Supreme Court reversal of Court of Appeals decisions and the variation in the number of reversals and who is reversed over time, I look at the responsiveness of court of appeals judges to changes in Supreme Court membership. Doing so can enhance our understanding of both the goals of Court of Appeals judges and the means they use to accomplish them.

Scholars have devoted considerable effort over the past several years to explaining the nature of the relationship between the US Supreme Court and the federal courts of appeals. Perhaps due in part to the declining caseload of the Supreme Court, a growing consensus has emerged that judges on the courts of appeals occupy an important role in the judicial hierarchy and have the opportunity to have a significant influence on important policy questions. Until the Supreme Court decided this term to review a Sixth Circuit decision regarding the constitutionality of affirmative action in higher education, courts across the country had reached a variety of disparate outcomes on the question. Policy areas like affirmative action are the rule, and not the exception: the Supreme Court has allowed the courts of appeals to grapple with a myriad of issues ranging from criminal defendants' rights to environmental regulation without interfering in the lower courts' attempts to shape policy in these areas. Even in affirmative action, at least three other circuits (Fifth, Ninth, Eleventh) had reached decisions before the Supreme Court decided to review the Sixth Circuit decision.

Not only do the courts of appeals occupy an increasingly important role in the judicial hierarchy, their relationship with the Supreme Court remains an interesting question that rightfully draws the attention of political scientists and legal scholars on its own terms. Court of appeals judges have emerged as a mechanism for understanding the relative impact of different models of decision making behavior. Supreme Court justices are unique amongst members of the American judiciary: they are unlikely to have higher political ambition, they have life tenure, they have control over their docket, and, of course, no one is able to exercise review of their decisions. At best, the greatest constraints on Supreme Court justices come from their own views about the nature of judging, the acceptance of their decisions by the legal community, the other branches of government, and the public's ability to express approval or disapproval of Court decisions.

Court of appeals judges, on the other hand, are constrained on several fronts. Their lack of control over their docket introduces strains that limit the capacity of appellate judges to focus on the cases that present novel or interesting legal questions and provide opportunities to make policy. Even when court of appeals judges have the opportunity to make policy, they may be constrained by their colleagues or other circuits. Most importantly, of course, the Supreme Court acts as a constraint on court of appeals judges. Because lower court decisions face the possibility of Supreme Court review and reversal, court of appeals judges are often characterized as sensitive to the limitations imposed by the Supreme Court (Songer, Segal, Cameron, 1994; Cameron, Segal, Songer, 2000). This constraint can be characterized as inducing strategic behavior on the part of court of appeals judges. Court of appeals judges are sufficiently constrained by the threat of Supreme Court reversal that they alter their behavior from their preferred outcomes to avoid reversal by the Supreme Court.

In reality, this constraint is very nearly a miracle of institutional design. In an era where the Supreme Court reviews only 1% of court of appeals decisions, the finding that judges curtail their behavior to avoid this threat suggests that factors in addition to the threat of reversal induce compliant behavior by appellate judges. Caminker (1994a, 1994b) suggests that the culture of which all judges are part plays an important role in encouraging lower court judges to comply with Supreme Court decisions. The "doctrine of hierarchical precedent" flows most clearly from Article III's creation of a Supreme Court and the permission granted to Congress to create inferior courts. This creation of a hierarchy governs, at the very least, the relationship between the Supreme Court and all other federal courts (Caminker, 1994a, 837). Judges decide in accordance with Supreme Court doctrine not because they fear reversal by the Supreme Court, but because norms unique to the legal profession imbue them with a respect for the Supreme Court over their own preferences. Both explanations for compliance with Supreme Court behavior by lower courts produce

behaviorally similar outcomes: whether lower court judges comply because of some sense of legal norms or because of strategic adjustment of their behavior to avoid Supreme Court reversal, both visions of appellate court behavior suggest that court of appeals judges *respond* to changes on the Supreme Court.

Further complicating the issue is attempting to ascertain exactly what shifts cause responses by court of appeals judges. Caminker (1994b) develops the proxy and precedent models of change by an inferior appellate court. Under the precedent model of change, lower court judges do not respond to perceived policy shifts by a superior court, they respond to actual changes in policy by the superior court. This would mean that if lower court judges change their behaviors, the change should be in response to actual doctrine shifts, *not* changes in membership. The proxy model of change views the lower courts as proxies of the perceived preferences of the higher court: lower court judges anticipate the policy changes that membership changes often signal and respond to the signal instead of the actual change.

An alternative conception of appellate court behavior gives little weight to the impact of the Supreme Court on the choices made by appellate court judges. If court of appeals judges behave according to their sincere policy preferences, they are much less likely to respond to changes on the Supreme Court. If all judges on the courts of appeals behave according to their sincere preferences, a different set of judges would be reversed as the Supreme Court moves in a different ideological direction. For example, as the Court becomes more conservative, liberal judges would be reversed more often while conservative judges less often *if* the lower court judges decide according to their policy preferences[1]. This essentially amounts to an "attitudinal model" (Segal and Spaeth, 2002) for appeals judges.

[1] This argument makes the reasonable assumption that the Supreme Court decides cases according to the ideological preferences of the judges, and accepts and reverses cases the majority finds ideologically offensive (Spitzer and Talley, 2000).

Previous research on strategic behavior by court of appeals judges and Supreme Court justices largely consist of two forms of strategic behavior: behavior that varies from case to case and behavior that responds to changes over time. There has been considerable research on the changes by Supreme Court justices over time (Spiller and Gely, 1992; Segal, 1997) and the sensitivity of court of appeals judges to different cases (Van Winkle, 1996; Cameron, Segal, Songer, 2000; Klein, 2002), but only limited attention to the responsiveness of court of appeals judges to shifts in the membership and output of the Supreme Court. Songer, Segal, and Cameron (1994) demonstrate that as the Supreme Court grows more conservative, so do the court of appeals decisions. Separately, the considerable literature on judicial compliance (Songer, 1987; Songer and Sheehan, 1990; Songer and Haire, 1992) demonstrates that court of appeals judges are also sensitive to particular changes in Supreme Court doctrine. But the former finding, that court of appeals decisions grow more conservative as Supreme Court membership becomes more conservative, may also be partially explained by the latter phenomenon. That is, Supreme Court policy changes closely track membership changes, so some portion of responsiveness attributed to membership change may be a product of responsiveness related to doctrine change.

The difference between the precedent and proxy models can be observed over time. The proxy model would predict that court of appeals judges react immediately to membership changes, and the precedent model would predict a more gradual adjustment to changes on the Supreme Court. A third possibility would suggest that judges do not respond at all to changes in the Supreme Court: due to the low probability of reversal of any given decision, court of appeals judges may not alter their behavior as Supreme Court membership or policy changes. This would not necessarily mean that Supreme Court shifts result in a greater absolute number of reversals, but different judges may be reversed by a new Supreme Court than were reversed by an earlier Supreme Court (liberal

judges not reversed often by the Warren Court would be reversed more often by a more conservative Burger or Rehnquist Court, for example).

These three possibilities, no response to change, response to membership change, and response to doctrine change, nicely illustrate the possible behaviors that have been hypothesized for court of appeals judges. That judges may not respond to change accords well with the belief that judges decide cases largely according to their policy preferences and the nature of the environment in which they make those decisions permits this sincere behavior. The proxy model of change, where inferior court judges respond to signaled changes on superior courts, suggests that lower court judges are concerned about pursuing their policy preferences, but do so with sensitivity to the environment. The precedent model of change suggests that judges are, to some degree, sensitive to attempts to make clear, coherent, and consistent law. Compliance with existing precedent satisfies at least most components of the desire to make good law, independent of judges' policy preferences. It provides consistent law, which means that participants in the process, though they may disagree with a particular precedent, can expect to be treated equally if precedent is correctly applied. Following precedent may also improve the efficiency of decision making: if both participants know the outcome of an appeal because the law in the area is clear, then fewer appeals are filed by parties unwilling to bear the cost of a fruitless appeal.

In this paper, I seek to integrate the three possible interpretations to assess which best explains the responsiveness of court of appeals judges to a particular change in the external environment: membership change on the Supreme Court. In doing so, I look at the three competing explanations for the behavior of court of appeals judges and hope to draw some conclusions about which of the three possible types of behavior by court of appeals judges best accounts for the findings.

**Hypotheses**

Depending on the type of behavior pursued by court of appeals judges, different factors predict the responsiveness of court of appeals judges to change. Movement on the Supreme Court should not necessarily guarantee movement in the courts of appeals: even if judges are attentive to membership changes on the Supreme Court, they may feel that it is more proper to wait until doctrine changes rather than follow membership changes. It may not be the case that judges believe that they need to change: they may achieve the greatest utility by acting according to their sincere preferences either because the probability of reversal is so low or because the utility they receive from acting sincerely is so great, regardless of the threat of reversal.

If judges behave according to their sincere preferences, one can expect two patterns to be relatively clear. First, the number of reversals judges experience should be a product of their ideological distance from the Supreme Court. The outcome of the Supreme Court should approximate the preferences of the median member of the Court. If judges pursue their policy preferences sincerely, liberal judges will make liberal decisions and conservative judges will make conservative decisions. Accordingly, a liberal Supreme Court would reverse conservative lower court judges, and a conservative Supreme Court will reverse liberal lower court judges if every one behaves according to their preferences.[2]

Second, if judges act in accordance with their sincere policy preferences, they would not respond to membership or doctrinal changes by the Supreme Court. Liberal judges who are committed to sincere pursuit of their policy preferences would not respond to appointments which make the Supreme Court more conservative, and would be reversed more frequently as a result. Conservative judges who followed the same path would be reversed *less* often by a more conservative Supreme Court. In short, judges who occupy their preferred position regardless of

[2] Put a slightly different way, only when judges behave according to their sincere preferences do they occupy the location where they fall along the spectrum between liberal and conservative ideological positions.

changes in their environment would find alteration in their reversal rate conditioned by the direction of the Supreme Court's shift.

The expectations would be different for judges who follow the proxy model of decision making. According to this model, judges anticipate changes in Supreme Court doctrine by responding to changes in Supreme Court membership, suggesting a much closer level of attention to the preferences of the Supreme Court. These judges engaged in strategic behavior should experience no increase in the frequency of reversal after a membership change on the Supreme Court that shifts the median member of the Court—they should adjust their decision making behavior to take into account the preferences of the Supreme Court, and should have been engaging in this kind of anticipation all along. Strategic behavior does not mean that court of appeals judges abandon their policy preferences. Instead, they take into account the preferences of the Supreme Court when making their decisions. Recognizing that to shape policy, they must avoid reversal by the Supreme Court, court of appeals judges who act strategically would seek to place policy as close as possible to their own preferred position while not sufficiently offending the Supreme Court to trigger review and reversal.

The Supreme Court has limited capacity to audit the decisions of the lower courts—they can only reverse the most offensive court of appeals decisions and rely on compliant behavior by the balance of the judges to comply, either because they actively attempt to follow Supreme Court precedent or simply because their policy preferences are congruent with those of the Supreme Court. If the Supreme Court's capacity is 1% of court of appeals decisions, the decisions that are 98.9% most offensive stand as policy, at least for the time being.[3] So judges who are engaged in

[3] This conception raises a question of the considerable decline in Supreme Court caseload over the past 10 years or so. Have the lower courts been making fewer "offensive" decisions or has the Supreme Court simply retreated from its role as supervisor of the lower courts?

strategic behavior may vary their decision making to accommodate the relatively modest probability of reversal by the Supreme Court.

Strategic behavior produces an interesting empirical expectation. If judges are engaged in sincere behavior, the important expectation is that a shift in the Supreme Court's preferences (the preferences of the median justice) would result in a different set of judges being reversed. If judges engage in strategic behavior, judges who find themselves ideologically distant from the Supreme Court after a preference shift would adjust their behavior--liberal judges would behave more conservatively as the Court becomes more conservative, while conservative judges would also behave more conservatively as the Supreme Court shift permits them to behave more like their sincere preferences. This would mean that changes on the Supreme Court would produce *no increase in reversals*. If the lower court judges move in anticipation of policy shifts by the Supreme Court, then there would be no set of decisions that a new Supreme Court would reverse that the earlier Court would not.

Finally, the behavior of judges attempting to make good law by pursuing the precedent model of decision making would be the most likely to experience an increase in reversals regardless of ideological location. Particularly after an extended period of time where a Court of one ideological inclination remakes the law in accordance with its preferences, the change in membership may not produce an immediate change in doctrine. Imagine the quandary judges committed to following precedent may have found themselves in in the wake of the appointment of the early Rehnquist justices. After years of following increasingly liberal precedents laid down by the Warren Court, they may find themselves at odds with the newly conservative Burger Court. But the precedent model of decision making suggests that they should follow the liberal Warren Court precedents until the law itself changes. As a result, one would expect judges attempting to make

good law (as opposed to move policy closest to their preferred point) to follow existing precedent without regard to the ideological content of those precedents.

For judges engaged in strategic pursuit of policy goals (proxy model of decision making) and pursuit of legal goals (precedent model), ideological distance should not predict the number of times judges are reversed. Judges behaving strategically would view avoiding reversal as more important than occupying their preferred positions and would be willing to diverge from their preferred positions as necessary to help shape policy. For judges attempting to make good law, the ideological position that matters would be that of the Supreme Court writing the relevant precedent, not the ideological location of the judges themselves.

**Using Reversal Instead of Votes**

There are two features of this research design that merit special attention. First, I use reversal of court of appeals decisions instead of the decisions themselves. There is considerable utility to studying the votes of court of appeals judges, but it imposes a series of restrictions. Perhaps most important, it is difficult to assess what divergence from sincere policy preferences might mean. If court of appeals judge decide cases in ways that can not be explained by reference to their ideology, it could mean that they are concerned about the possibility of reversal by the Supreme Court. It could also mean that they diverge from their preferred positions in order to comply with existing precedent. Related to this is the challenge of deriving precise estimates of ideology for court of appeals judges. Myriad approaches, starting with using party of appointing president or NOMINATE score of appointing president (for a review, see Pinello, 1999). One of the more recent approaches is to regress voting scores on a series of background characteristics and use the coefficients to impute ideology scores for each judge (Songer, Segal, Cameron, 1994; Cameron, Segal, Songer, 2000; Humphries and Songer, 1999). None of these approaches are entirely satisfactory when trying to discern deviations from preferred positions because, especially in

the case of party of appointing president, they provide relatively low degrees of precision when attempting to measure the ideology of court of appeals judges.

Using Supreme Court reversal of court of appeals decisions requires a relatively reasonable inference about how the Supreme Court determines which cases to reverse. Beyond some well-established legal criteria, such as disagreement among circuits or within a circuit (as indicated by dissent or *en banc* review), external indications of case importance (press coverage, *amicus curiae* participation) and other factors that may increase the likelihood of a case being reviewed by the Supreme Court (see, e.g., Caldeira, Wright and Zorn, 1999), the Supreme Court is more likely to reverse cases it sees as wrongly decided. If the Supreme Court justices use their policy preferences to decide cases (Segal and Spaeth, 2002), then wrongly decided cases are those that are decided in the wrong ideological direction. This would mean that court of appeals judges have the opportunity to increase or decrease the probability that any given case is reversed, and, over a series of cases, can affect the number of decisions they make that are reversed. In all, this is not an unreasonable interpretation of the accepted views of Supreme Court decision making. What is unconventional is the notion that court of appeals judges can act to increase or decrease the probability of reversal by deciding the case in a given way. But even this is not a unique perspective: Cameron, Segal and Songer (2000) suggest this very possibility when referring to Supreme Court review of lower court search and seizure decision: "[b]ecause the model treats certiorari as part of an interactive incentive system, it generates hypotheses not only about the probability of review but also about the exclusion of evidence in the lower court." (107)

The second feature that merits attention is consideration of judges and the goals they pursue and the means they use to accomplish those goals. I do not want to argue that any court of appeals judges are pure types, motivated *only* by any of the three possible types of behavior that appear to be possible (sincere pursuit of policy preferences, strategic pursuit of policy preferences, attempts to

make good law). Instead, I argue that in the body of decision making on the courts of appeals, there is evidence of all three types of behavior. What my research seeks to distinguish is if any of the three conceptions of appellate behavior better explain what we observe than the other two. I should note that it is entirely possible that there is some support for any two or all three of the possible types of behavior, but if that is the case, then the evidence in support of any one of the three possible types of behavior would be quite limited.

**Data and Methods**

I collected data on the number of times each judge on the twelve circuit courts of appeals was reversed between July 1, 1969 and June 30, 1983. I counted the number of times each judge was reversed each fiscal year (July 1 to the following June 30). District judges and judges who had taken senior status were not counted, and only judges who had been on active duty for at least eleven months of any given fiscal year were counted[4]. Data on reversals was taken from the U.S. Supreme Court Database (Spaeth, 2001), and LEXIS was used to determine the lower court decision(s) that were reversed by a Supreme Court decision. I included all cases that were reversed or vacated at least in part, but cases where the Supreme Court issued a grant, vacate, remand (GVR) order and cases where the lower court decision could not be located were excluded from the analysis. If a judge in the lower court decision concurred in part and dissented in part, I studied the special opinion and the Supreme Court decision to determine if the judge concurred with the portion of the Supreme Court decision that was reversed.

For each judge-year (my unit of analysis), I coded the ideology of the judge and of the median member of the Supreme Court and calculated the distance of the judge from the Supreme Court's median member. Doing this created a series of challenges. In addition to the problems suggested above that accompany measuring the ideology of court of appeals judges, a method of

[4] Data on judges was taken from the Database of Biographies of Federal Judges at the Federal Judicial Center, www.fjc.gov, and the Attributes of Court of Appeals Database, (Zuk, Barrow, Gryski, ICPSR No. 6796)

measurement which places court of appeals judges on the same metric as the Supreme Court. To resolve this problem, I started by using ideology measures for court of appeals judges that reflect the nomination process. Giles, Hettinger and Peppers (2001a, 2001b) suggest that, in situations where senatorial courtesy does not apply, the appointing president's ideology is a good indicator of an appellate judge's ideology (as a counterpoint to this assumption, see Songer and Humphries Ginn, 2002). In situations where senatorial courtesy applies, then the midpoint between the appointing president and the senior senator might be a better indication of the judge's ideology. I find this argument convincing and consider this to be a valid way to measure the preferences of the ideology of court of appeals. Most major competitors to this approach rely on judge's votes when calculating preferences (and, one conception of the Giles, Hettinger, Pepper method does this as well), and my theory suggests that votes do not always reflect the preferences of judges. More specifically, some judges may rely on their sincere preferences more than others, raising questions of the validity of some of these measures.

Having offered one solution to the problem of measuring the preferences of court of appeals judges, the next problem is placing them on the same metric as the Supreme Court. Using Bailey and Chang's (2001) development of inter-institutional preference measures helps provide a solution to this problem. Using the positions taken by justices on cases where the solicitor general takes an (uninvited) position, and positions on legislation taken by senators where the president expresses a preference, Bailey and Chang tie the three institutions together. Because my measures of court of appeals judges' ideology are based on appointing presidents and senators, their measures of the three institutions exist on the same dimension, allowing me to calculate ideological distances between the Supreme Court's median justice and court of appeals judges.

The second variable of interest is simply a measure of when the Supreme Court undergoes substantial change. At the beginning of the 1969 term (which follows relatively closely 1970 fiscal

year), Burger's appointment to replace Warren indicated a shift in substantial shift in the policy preferences of the Supreme Court. Not only was there a perception that the Burger appointment represented a shift in policy, but the median member of the Court, as measured by Bailey and Chang, moved from -1.11 to .69 on a scale of -4 to 4, with -4 being the most liberal. While the later appointments of Blackmun, Powell and Rehnquist made the Court substantially different from that of the Warren Court, they replaced two liberal (Black, Fortas) and one relatively conservative (Harlan) justice. The collective impact may have been substantial, but the shift in the median from Warren to Burger was considerably greater (Bailey and Chang, 2001). Later changes in the period under analysis—Stevens' replacement of Douglas and O'Connor's replacement of Stewart—do not appear to have had a substantial impact on the median member of the Court (which was Stewart until he resigned, and then shifted to White). The measure that I use for significant change is simply a dummy variable for the 1969 term (1970 fiscal year). This should be the period in which judges making good law should be most likely to be reversed more often, and judges pursuing their policy preferences sincerely should be most likely to experience a change in the number of reversals. I include an interaction term to look at the most liberal judges, those who would be most likely to be reversed more frequently. If the coefficient on this interaction term is positive, there is evidence that judges pursue policy goals sincerely and fail to react to the change in Supreme Court membership.

There are a couple of control variables that merit brief discussion. I include the American Bar Association rating of the judges in some of the models, as well as the natural log of the number of years a judge has sat on the appellate bench. There is some suggestion that more competent or more experienced judges may be better at avoiding reversal, either because they are more capable of making good law or because they are better at understanding what the Supreme Court wants (Spitzer and Talley, 2000). In addition, I provide a control for the number of cases that a judge decides in a

given year. I queries LEXIS for the number of cases in which each judge's name appears in a given year. Most of the variation in caseload, of course, is determined by the circuit in which a judge presides, but there may also be (and there is) a fair amount of variation within each circuit.

A fair question in study of court of appeals behavior, which appears to be understudied at this point, is the degree to which the Supreme Court's supervision of judges of the courts of appeals is tied to the circuit of which they are members. The circuits demonstrate an impressive degree of homogeneity at times, in part because the political culture of the areas they represent can be quite homogenous. Little work has effectively separated judges from circuits, in part because doing so can involve difficult statistical adjustments and in part because it is difficult, theoretically, to separate the impact of circuit on judges' behavior from other influences. I include statistical controls for each of the circuits to attempt to sort out some of the differences between circuit effects and judge effects.

The data under analysis are properly considered panel data, which suggests correlations between the observations, which can alter both the standard errors and the estimates of the coefficients. Noting also that the dependent variable is an event count, caution must be exercised when choosing the appropriate statistical technique. To properly analyze a count variable in this format, I use one of a class of generalized estimating equations (GEEs). Zorn (2001) argues that GEEs "allow for a range of substantively-motivated correlation patterns within clusters and offer the potential for valuable insights into the dynamics of that correlation" (471). GEE also allows for a more flexible, unspecified correlation between observations within a cluster, which proves useful for the research question at hand. It is possible that there is a general correlation among the fourteen years in each panel. Using a GEE structure allows flexibility that avoids imposing a correlation on the data.

While one improves the efficiency of GEE estimates by specifying the correlation matrix ($\alpha$) a priori, GEE1 estimators (those which assume conditional independence of $\alpha$ and $\beta$) remain

consistent even in the absence of a proper specification of $\alpha$ (Zorn, 2001). GEE1 estimators also treat the correlation matrix as a nuisance parameter, which means that one can not perform hypothesis tests on the correlations themselves. For this particular analysis, I do not find the correlations to be of substantive interest: they do not seem to offer added insight into the relationship between the covariates and the number of reversals judges experience in a given year.

**Results**

The first model results are presented in Table 1. There are three variables of interest. First, the ideological distance between the judge and the median justice of the Supreme Court. The p-value ($p=.112$, two-tailed test), strongly suggests that judges that are ideologically distant from the Supreme Court are more likely to be reversed, all else equal.

**Table 1 Here**

This suggests that judges occupy their preferred positions, a sign of sincere pursuit of policy preferences. If judges were solely concerned about trying to make good law, there would be no evidence of a relationship between a judge's ideological location and the number of reversals experienced. The expectation on this variable is less clear if judges pursue policy goals, but do so strategically. If judges pursue this kind of behavior, it would be reasonable for them to locate their decisions as close to their preferred position as they see feasible while avoiding reversal. But they should be able to avoid reversal, suggesting that the weak relationship observed here could be interpreted as some judges occupying their preferred positions at least some of the time and being reversed for doing so. In other cases, though, judges may be behaving strategically (or, for that matter, following the law without regard to ideology).

The other two variables, the dummy variable for the change during the 1969 Term (lower court cases decided during the 1970 fiscal year), and the interaction between the change and ideological distance, produce results that are even more difficult to interpret. The change in the

Supreme Court itself does not appear to produce more reversals, as might be expected if judges follow the precedent of the previous Supreme Court. Relatedly, judges who find themselves ideologically distant from the new Court are not more likely to be reversed in a period of change than in other periods. Collectively, one can interpret these results as suggesting that judges do adapt to the changes in Supreme Court direction, anticipating shifts in policy instead of reacting to them.

Even this finding might be interpreted with some caution, for it risks the danger of reading too much into null results, which can happen for several different reasons (not the least of which is measurement error...). But it seems reasonable to expect that the Supreme Court would subject a new set of judges to reversal as its preferences shift, a supposition that the evidence here does not support. One possible source of concern is that the period of significant change is too small—court of appeals judges may have perceived a more gradual shift as the four Nixon appointees (Burger, Blackmun, Powell, Rehnquist) recast the Court in a more conservative mold. I reran the analyses using a more expansive view of the Court's change, allowing for decisions made between July 1969 and June 1972 (October Terms 1969-71) to be considered as a period of significant change. The results are presented in Table 2.

**Table 2 Here**

A couple of features merit discussion. First, ideological distance now passes conventional levels of significance. Second, though the effect for the period of change is now positive, it is still not significant ($p=.242$, two-tailed test). Finally, the interaction between ideological distance and significant change on the Supreme Court is *negative*, but as a quick look at the predicted number of reversals (all control variables set at their means or medians) demonstrates that the effect does not outweigh the collective effect of the two variables. Table 3 reports some of the predicted probabilities from the models presented in Tables 1 and 2.

**Table 3 Here**

Finally, Table 4 presents the two models previously discussed, with dummy variables added for the circuits. It is not surprising to find significant differences for the Ninth and DC Circuits, as the Ninth is well known for its long-running struggle with the Supreme Court, and the nature of the cases heard by the DC Circuit leave neither of these findings particularly surprising. The significance of the Third and Seventh Circuits is interesting, but may be a product of the (admittedly arbitrary) choice of the Tenth Circuit as the excluded category, which is less likely than any other Circuit to be reversed.

**Table 4 Here**

Of somewhat more interest is the fact that ideological distance loses its significance. But this may be explained by the relative ideological homogeneity of the circuits. That is, the significance of some of the circuit effects may be explaining some of the ideological variation in lower court decisions. It is difficult to separate judge-related and circuit-related effects, driven to some degree by the small size of most of the circuits and the relative similarity of judges. What these findings tentatively suggest is that inter-circuit differences may be greater than intra-circuit differences. This may be a product of ideological differences, but may also reflect, to some degree, variations between circuits of practices like the reliance on *en banc* proceedings to correct perceived errors made by panels.

I was puzzled by the inclusion of the Third and Seventh Circuits as those more likely to be reversed, so I ranked the Circuits by ideological distance (all judge-years included) and found, interestingly, that the four circuits with the greatest ideological distance were the First, DC, Seventh and Third. Even more interesting is that the Ninth Circuit is in the lower half by this measure (8$^{th}$ of 12). Table 5 presents the results.

**Table 5 Here**

I think these findings bolster support for the argument that ideological distance can be absorbed by including the circuit dummies. Looking briefly at the standard deviations for each circuit, a measure

of ideological homogeneity, and nothing really stands out. Large circuits would produce smaller standard deviations due to larger numbers (confirmed by the 9th and 5th Circuits) and smaller circuits might also have smaller standard deviations simply due to the small number of judges. Perhaps the strategy for future research may be to more carefully consider what attributes make each of the circuits unique instead of trying to read too much into dummy variables for each circuit.

There are two final, important considerations about the four models presented in Tables 1, 2 and 4. First, all four models predict overdispersion in the data, suggesting a positive contagion (one reversal increases the probability of another reversal, all else equal). This is not surprising, given that one might expect judges who are reversed once to be reversed more frequently. The size of $\alpha$, the measure of overdispersion, decreases once the circuit effects are added. Second, the two models without circuit effects are of questionable overall value. That is, the models only barely achieve statistical significance over a null model. The models with circuit effects fare much better, suggesting that there are important inter-circuit differences that merit continued attention.

**Discussion and Conclusion**

Probably the easiest way to assess these results is to gauge the support they provide for each model of appellate behavior. Regardless of the time period allotted to the change on the Supreme Court, there seems to be at least modest support for the argument that the number of reversals judges experience is a function of their sincere policy preferences. This can only be true if the judges actually occupy their positions—if judges' behavior matches their ideology. This suggests at least some support for the notion of sincere, policy-oriented behavior by court of appeals judges. Though there appears to be no evidence that ideologically distant judges are reversed more frequently in the wake of a Supreme Court shift, it seems fair to suggest that the relationship between ideological distance and the number of reversals provides a foundation for the assertion

that judges occupy their sincere preference positions frequently enough to attract the attention of the Supreme Court.

The evidence for the precedent-based model of decision making is even less clear. When the time period for significant change is expanded, there appears to be an increase in the number of reversals of court of appeals decisions. One can tentatively reject the argument that this might be a feature unique to the Burger Court, as the entire period of study is within the confines of the Burger Court. One possibility is to suggest that judges are reversed more often in the wake of a Supreme Court shift because they are more closely attuned to the precedent of earlier Courts and forced to follow those decisions until the Supreme Court's membership changes translate into actual policy changes.

The problem with assessing strategic behavior, or a proxy model of decision making, is that the hypotheses all suggest null results: that ideological distance will not matter, that change will not increase the likelihood of reversal, and that the judges who find themselves ideologically distant from a new Supreme Court would be those most likely to alter their behavior to avoid reversal. A fair interpretation of the results suggests that the latter two of these hypotheses are confirmed: there is no statistically significant increase in the number of reversals after the Court shifts, and certainly no increased numbers for judges ideologically distant. But an interpretation of null results should be made with caution, suggesting that it may be premature to regard this as strategic behavior.

In all, the evidence for any one type of behavior is quite weak. The problem presented by the results are that they have two possible interpretations. First, it could be that the model fundamentally misspecifies the predictors of the numbers of reversals: some judges may be reversed more often simply because they decide more interesting cases. But factors like this should not vary within a Circuit: all DC Circuit judges hear and decide a mix of cases that is distinct from the other circuits, for example. And, in each case, regardless of the novelty of the legal questions presented,

each judge has several options on each legal question. In the most simple vision of appellate decision making, judges can decide as they think the Supreme Court, as currently constituted, would, or decide according to relatively clear precedent, which may produce a different outcome. Once judges' own policy preferences are added to the mix (if they choose to rely on them), the possible outcomes increase. And cases are not so simple as to be classified as being able to sort them into favoring appellants or appellees: the rule a case creates or applies is what is most likely to attract Supreme Court attention.

This suggests the second possibility of the results I find here: that judges engage in some combination of the three types of behavior. They are, at times, concerned about applying precedent as a means of achieving clear and consistent law. At other times, their policy preferences outweigh all calculations and they make decisions that accord with those policy preferences and run the risk of reversal if the Supreme Court disagrees with the result. In other cases, appellate judges care sufficiently about the prospect of reversal that they attempt to predict the ultimate outcome of the case before making their decisions, and adjust from their preferred positions if doing so decreases the chances of Supreme Court reversal. If this is an accurate conception of appellate judges' decision making behavior, then no one model (attitudinal, proxy, precedent) would receive strong support by data, while all three would receive at least some support. Though the results presented here hint at this possibility, one would certainly prefer clearer indicators of how judges behave, and this is a topic of continuing research.

**Table 1: Number of Reversals of Court of Appeals Judges, July 1970-June 1983**

| Variable | Coefficient |
|---|---|
| Number of Participations | 0.003<br>(0.001)** |
| Ideological Distance from Supreme Court | 0.069<br>(0.044) |
| Natural Log of Years as Appeals Judge | 0.013<br>(0.052) |
| ABA Rating of Judge | 0.078<br>(0.056) |
| Dummy Variable for 1969 Term | -0.183<br>(0.386) |
| 1969 Term*Ideological Distance | -0.038<br>(0.162) |
| Constant | -0.208<br>(0.193) |

Observations 1306
Number of Judges 199
Standard errors in parentheses
* significant at 5%; ** significant at 1%

Model Significance:

Wald $\chi^2$=13.83 Pr>$\chi^2$=.0316

Test for Overdispersion:

$\alpha$=.0688 Pr>$\chi^2$=.008 (can reject null hypothesis of no overdispersion)

**Table 2: Number of Reversals Using 1969-71 Terms as Period of Supreme Court Change**

| Variable | Coefficient |
|---|---|
| Number of Participations | 0.003<br>(0.001)** |
| Ideological Distance from Supreme Court | 0.092<br>(0.047)* |
| Natural Log of Years as Appeals Judge | 0.007<br>(0.053) |
| ABA Rating of Judge | 0.074<br>(0.056) |
| Dummy Variable for 1969-71 Terms | 0.247<br>(0.211) |
| 1969-71 Terms*Ideological Distance | -0.146<br>(0.092) |
| Constant | -0.238<br>(0.195) |

Observations 1306
Number of Judges 199
Standard errors in parentheses
* significant at 5%; ** significant at 1%

Model Significance:

Wald $\chi^2$=13.30 Pr>$\chi^2$=.0386

**Table 3: Predicted Probabilities**

| | Model 1<br>Smaller Period of Change | Model 2<br>Larger Period of Change |
|---|---|---|
| Mean Ideological Distance, No Change | 1.499 | 1.491 |
| Mean Ideological Distance, Change | 1.161 | 1.437 |
| Greater Ideological Distance (mean + 1 s.d.), No Change | 1.607 | 1.635 |
| Greater Ideological Distance (mean + 1 s.d.), Change | 1.198 | 1.361 |

Note: Mean of the dependent variable is 1.476 reversals per year.

**Table 4: Number of Reversals of Court of Appeals Judges, Circuit Effects Added**

| Variable | Model 1<br>(1969 Term as Change) | Model 2<br>(1969-1971 Terms) |
|---|---|---|
| Number of Participations | 0.004 | 0.004 |
| | (0.001)** | (0.001)** |
| Ideological Distance from Supreme Court | 0.037 | 0.058 |
| | (0.045) | (0.048) |
| Natural Log of Years as Appeals Judge | 0.023 | 0.017 |
| | (0.052) | (0.052) |
| ABA Rating of Judge | 0.041 | 0.037 |
| | (0.054) | (0.054) |
| Dummy Variable for S.C. Change | -0.164 | 0.228 |
| | (0.390) | (0.212) |
| S.C. Change*Ideological Distance | -0.037 | -0.134 |
| | (0.163) | (0.093) |
| First Circuit | 0.385 | 0.371 |
| | (0.267) | (0.266) |
| Second Circuit | 0.327 | 0.336 |
| | (0.206) | (0.205) |
| Third Circuit | 0.476 | 0.480 |
| | (0.213)* | (0.212)* |
| Fourth Circuit | 0.319 | 0.321 |
| | (0.218) | (0.217) |
| Fifth Circuit | 0.385 | 0.383 |
| | (0.198) | (0.198) |
| Sixth Circuit | 0.303 | 0.307 |
| | (0.207) | (0.206) |
| Seventh Circuit | 0.428 | 0.440 |
| | (0.213)* | (0.212)* |
| Eighth Circuit | 0.286 | 0.290 |
| | (0.216) | (0.215) |
| Ninth Circuit | 0.620 | 0.619 |
| | (0.185)** | (0.184)** |
| D.C. Circuit | 0.817 | 0.824 |
| | (0.207)** | (0.205)** |
| Constant | -0.643 | -0.673 |
| | (0.232)** | (0.232)** |
| Model Significance (Wald $\chi^2$) | 38.47 | 38.04 |
| Pr>$\chi^2$ | .0013 | .0015 |

Observations 1306
Number of Judges 199
Standard errors in parentheses
* significant at 5%; ** significant at 1%

**Table 5: Ranking of Circuits by Ideological Distance from Supreme Court**[5]

| Circuit | Mean Ideological Distance | Standard Deviation | Judge-Years (Frequency) |
|---|---|---|---|
| D.C. | 2.6068 | 1.1423 | 118 |
| Seventh | 2.5367 | 1.2436 | 100 |
| Third | 2.4074 | 0.6762 | 112 |
| First | 2.3637 | 0.5174 | 42 |
| Eighth | 2.1348 | 0.9651 | 103 |
| Second | 2.0928 | 1.0548 | 118 |
| Sixth | 2.0406 | 0.7395 | 113 |
| **Average** | **1.9460** | **1.0038** | **--** |
| Ninth | 1.8567 | 0.9221 | 192 |
| Tenth | 1.7359 | 0.8832 | 94 |
| Fourth | 1.3599 | 0.9362 | 94 |
| Fifth | 1.2364 | 0.5750 | 228 |

[5] During the time period of this study, the 5th Circuit split, but no new judges were added to the 11th Circuit that had not previously served on the 5th Circuit, so I coded all of them as members of the 5th Circuit.

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