THE BEHAVIOR OF ELEVATED JUDGES: A CROSS-JURISDICTIONAL ANALYSIS*

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*Prepared for Presentation at the 1999 Annual Meetings of the Midwestern Political Science

Association, Chicago, IL, April 15-17. The authors thank Steve Van Winkle for his assistance locating cases and Larry Baum for his insight and patience.

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I. Introduction

The study of the courts has been primarily the study of the United States Supreme Court. Until very recently, the appellate courts have been largely ignored. Conceptually speaking, appellate court studies should be attractive because they provide a convenient solution to many of the empirical problems that confound study of the Supreme Court, mainly an increase in the number of cases, and the ability to make comparisons across circuits. Appellate courts should interest scholars for another reason: they provide an excellent ground to apply more rigorous tests of theories developed while studying the Supreme Court. While some theories about judicial behavior certainly apply to actors at different levels in the judicial hierarchy, others are clearly limited to members of the Supreme Court. But even these differences can be explored systematically. We propose to explore some of these differences, if they in fact exist, by conducting a preliminary analysis of the search and seizure votes of judges on the appellate courts who were later elevated to the Supreme Court and comparing their votes on the different courts.

Perhaps the most interesting (and hotly debated) of the theories of judicial behavior today is the attitudinal model, or the argument that justices vote based on their personal policy preferences and not on the case facts and controlling case law (Segal and Spaeth, 1993). Whether or not such an argument extends to appellate judges has not been adequately studied given a number of empirical difficulties, particularly finding an adequate indicator of the policy preferences of appellate judges. The test we propose casts the same question in a very different light: do appellate judges change their voting

behavior when promoted to the Supreme Court? If they do, two hypotheses receive additional support. First, justices do employ their policy preferences when reaching decisions on the Supreme Court. Second, as appellate judges, they recognize the constraint[1] on those policy preferences imposed by the Supreme Court. The study we propose, then, has the potential to provide an important piece of evidence on how judicial actors express their preferences and how the hierarchy operates to constrain them.

Integrating these two hypotheses develops a view of judicial behavior that more closely resembles the strategic model of judicial behavior. Recent work has more clearly developed the argument that justices act strategically in order to secure an outcome which most closely approximates their own policy preferences, especially when the justice believes that their policy preference can not win a majority. The justice thus acts strategically to avoid the least preferred outcomes (Epstein and Knight, 1998). Appellate judges can also be assumed to act strategically given the institutional context within which they must work. The Supreme Court creates precedent and can impose sanctions for failure to adhere (Songer, Segal, and Cameron, 1994). Appellate judges have a desire to avoid having their decisions overturned, at the same time as they prefer to have their personal policy preferences implemented. As a result they will act strategically, balancing these goals with an understanding of their position in relation to the Supreme Court, other circuits, and the other judges in the same circuit. We

[1] We would like to note that the concept of constraints on the appellate courts is not alien to the legal or strategic models of judicial decision-making,. While we have concentrated on a strategic model, a legal model would note constraints based on the legal rulings of the Supreme Court in addition to the appellate court's own precedents. The Supreme Court would only be constrained by their own precedents and the Constitution. If these were the only constraints we would not expect to see any real difference in the decisions between a judge on the appellate court and the Supreme Court because of the legal model's assumption that on either court the judge is constrained by the precedents of the Supreme Court which would affect the judges in the same way.

believe this is the model that most accurately assesses the behavior of judges and it has the potential to integrate the literature on appellate judges and Supreme Court justices.

II. The Literature

The literature on the voting behavior of appellate judges is clearly not as well developed as that on Supreme Court justices. Goldman (1966, 1975) made the most notable early attempts to ascertain some of the correlates of appellate court votes. In the first study, he finds demographic variables to be poor indicators of liberalism or conservatism, but political party proved to be a good indicator of the ideological direction of votes. That said, Goldman notes that although party is the characteristic most strongly associated with voting, this association is too limited and imprecise for party affiliation to be consistently identified with specific judicial results by the appellate courts (1966, 383).

His later analysis finds that age also correlates with ideology, with older judges being more conservative but the relationships continue to prove too weak to be considered definitive. Goldman even goes so far as to suggest that party is such a poor predictor of voting behavior that Senators may want to reconsider opposing judicial nominees based solely on the party of the appointing president (1975, 506).

From limited beginning, the study of constraints and opportunities for appellate court judges has been slow to develop. Songer (1982) analyzed the causes of unanimous and non-unanimous opinions in the appellate courts, arguing that there is more at work than traditional explanations for the preponderance of unanimous opinions, which include work levels and norms that discourage dissent. Songer argues that there are a number of cases where the ideology of the appellate justices was the determining factor for the unanimity. In cases where the appellate court overturned a prior decision

(where there was a real "choice" at work), liberal and conservative panels reached different results. That is, given the opportunity to express policy preferences, particularly in cases related to criminal appeals, judges on the courts of appeals feel free to depart from precedent or discover no clear controlling precedent in a much greater proportion than they have been willing to admit (1982, 238). Even in those cases where the panel is split ideologically, the final result remains unanimous, disguising dissensus. The implications of Songer's findings are not entirely clear: they seem to suggest that appellate judges still conform in their actual voting behavior but exploit opportunities to express their preferences when circumstances allow.

Since these early studies the appellate courts have received little attention. However, in the last five years a number of scholars have shown a renewed interest in the appellate courts . Van Winkle (1996) provides confirmation of the argument that appellate court judges can and do act on their policy preferences with an impressively detailed analysis of appellate voting behavior in search and seizure cases. His focus is not unanimous decisions but rather strategic behavior by "circuit outliers", Van Winkle also finds that judges exploit opportunities, specifically temporary status as ideological majority on a panel, to express those preferences because the threat of sanctions from the Supreme Court tends to be limited.

Another strain of research on appellate court voting behavior research reveals a slightly different trend. Looking at the relationship between the appellate courts and the Supreme Court, scholars tend to find significant policy congruence, suggesting that appellate judges generally recognize the constraint placed on their actions by the Supreme Court. Songer (1987) looked at decisional trends in economic cases on the Supreme Court and found that as the Court got more liberal, the appellate court followed

suit. As the Supreme Court became more conservative, the appellate court did the same. Controlling, somewhat, for cohorts (using party of appointing president), Songer's findings still hold, although Democratic judges did not completely follow the conservative turn the Court made in 1971, at least in labor cases.

A more rigorous test of the same concept was developed by Songer, Segal and Cameron (1994). Relying on search and seizure cases from 1961 to 1990, Songer, Segal, and Cameron find that a change variable, representing the increasing conservatism of the Court starting with the Nixon appointees, was an important predictor of appellate court decisions, suggesting both responsiveness and congruence on the part of the appellate courts. This responsiveness happened on both liberal and conservative panels, but there was still considerable variation between the panels. Taken together, then, the literature suggests that the appellate courts are, broadly, constrained by the Supreme Court and responsive to changes in policy. Within that broad framework, however, appellate court judges look for and exploit opportunities to express their policy preferences.

The only study of judges as they moved from the appellate court to the Supreme Court was conducted by Gerber and Park (1997), who looked at the consensual behavior of judges promoted to the Court. They found, after controlling for court size, ideology, case type, and the influence of precedent, that actors were more likely to dissent on the Supreme Court than they were on the appellate court. The limited number of studies on appellate courts leaves open the possibility of much future research on the appellate courts and their interactions with the Supreme Court.

III. Research Design

One of the most important areas of disagreement in the literature on appellate judges is how

their voting behavior will differ from Supreme Court justices and how the Supreme Court acts to constrain the appellate courts. Van Winkle (1996) argues that given the context in which appellate judges operate (particularly, high caseloads and random assignment of cases), there are opportunities for appellate judges to express their policy preferences when the situation allows. Though Van Winkle analyzes appellate judges in relation to en banc review by the entire panel, his argument is important: given the opportunity, appellate judges will exercise their policy preferences in a decision when they feel the likelihood of being overturned by an en banc panel is low. Specifically, Van Winkle finds that liberal judges, who frequently find themselves in a minority on three-judge panels, act strategically and only vote their true policy preferences when random assignment temporarily places them in the majority.

Viewing strategic action on the appellate courts from a slightly different perspective, Songer, Segal, and Cameron (1994) argue that "judges on the courts of appeal appear to be relatively faithful agents of their principal, the Supreme Court" (690). The virtue of both of these conclusions is their comparability: both use search and seizure cases and both rely on very similar models. It should be noted, of course, that both arguments look at different levels: while Songer, Segal, and Cameron, look at the general compliance of appellate judges, Van Winkle analyzes specific opportunities for appellate court judges to express their preferences.

These findings could be taken as part of a broader view of appellate court judges which we hope to test. Appellate court judges are, generally speaking, constrained by the Supreme Court in a variety of ways. In a strictly legal sense, the Supreme Court is the highest court in the land and the final source of appeal, making its decisions apply to all circuits of the appellate and trial courts, as well as

state courts. Appellate court judges have a professional obligation to adhere to the decisions made by the Supreme Court and, should, according to some, merely apply the decisions rendered by the Supreme Court to the facts of the cases under review.

But the people who become appellate court judges also have clearly defined policy preferences and would certainly take advantage of an opportunity, if it arises, to express their policy preferences. The ideal opportunity for a judge to act on the judge's policy preferences is as a Supreme Court Justice, making appellate court judges who become Supreme Court justices an excellent group of subjects to study.

Our hypothesis for this preliminary analysis of appellate judges who become Supreme Court justices is related to the belief that judges will have more freedom to vote their preferences on the Supreme Court than on the appellate courts.

H_1: An appellate court judge will act in an ideologically freer manner once promoted to the Supreme Court.

There seems to be a near-consensus in the literature that Supreme Court justices take policy preferences into account when making their decisions. While there is considerable debate as to the extent of influence on judicial behavior of these policy preferences, one would expect them to play a greater role for a Supreme Court justice than an appellate judge, who is constrained by the actions of the higher court. For this reason, a judge who is promoted to the Supreme Court, lacking accountability to any other Court and facing only limited accountability to other institutional actors and the public, has more opportunity to behave in a way consistent with his or her preferences (Baum, 1998; Epstein and Knight, 1998; Fleming and Wood, 1997; Mishler and Sheehan, 1993, 1994; Norpoth and Segal,

1994; Segal, 1997; Spiller and Gely, 1992).

Ascertaining the amount and direction of this type of action is a perilous task, and would, properly done, account for the constraints that act both on appellate judges and Supreme Court justices. Our hypothesis only posits that the more limited constraints on the Supreme Court give justices more freedom to act. The appointing president of a justice has his expectations about which direction this action will go, so Clinton appointees, for example, would be expected to act more liberally once appointed to the Supreme Court. An important qualification is that this change is relative to the Supreme Court median. That is, an appellate judge should react to how the Supreme Court handles cases and views certain facts: whether exceptions are valid or invalid, the validity of warrantless searches, what locations can be expected to be private, etc.

We have devised a model to test this hypothesis which controls for these case facts in determining the votes of the judge or justice (the dependent variable). All cases Supreme Court and appellate court are included in the same model with the Supreme Court cases controlled through the use of a dichotomous dummy variable. We have also included a control for changes in the composition of the Supreme Court as they are presumed to affect the decisional output of the Supreme Court. We expect to find that the more limited constraints on justices on the Supreme Court changes a judge's voting behavior. We argue that the unique position of the Supreme Court provides the opportunity for a justice to behave more ideologically than is acceptable on the appellate court.

Developing expectations about the direction this more ideological behavior might take is, of course, different for every justice. A president expects his appointees to move the Court in a particular direction, so it would be fair to assume that Clinton appointees, for example, would be more likely to

vote on the liberal side of an issue on the Supreme Court than they were on the appellate courts. The display of ideological behavior takes on different forms for different justices: Nixon, Ford, Reagan and Bush appointees all were expected to display more conservative voting than they had at the appellate court level.

Our model is designed to test the direction of the change once a judge moves from the appellate court to the Supreme Court. As would be expected, justices appointed by Democrats are predicted to move in the liberal direction and justices appointed by Republicans are expected to move in a more conservative direction. The caveat to these predictions is that no change or change predicated on a more sophisticated liberal/conservative scale would be expected if the median of the Supreme Court is on the same ideological side as the newly appointed justice. The two justices in this preliminary study, Breyer and Ginsburg, are expected to have moved in a liberal direction once elevated to the Supreme Court. This is expected in spite of Clinton's propinquity to appoint moderate justices because the then current Supreme Court median was so conservative. Thus even a moderate justice will be freer to divert from the strong conservative guidance from the Supreme Court and vote more liberally than the Court median once elevated.

In order to develop our model, we rely heavily on previous work. Drawing on search and seizure cases we will rely on Segal's model[2] (1984, 1985)and include some modifications by Van

[2] Segal's model was used for the initial derivation of the search and seizure facts variables. Where the two models differ it is primarily because of the necessity of collapsing some of the dichotomous variables into scalar variables to avoid the problems of those variables being perfect predictors given our small number of cases. Eventually we hope

Winkle (1996) to develop a fact-based model for both appellate court and Supreme Court decisions. The case searches are included in Appendix A.

This preliminary step in our research focuses on the two justices with the largest number of cases at the appellate court level: Breyer (65 cases) and Ginsburg (58 cases). These two justices were also selected because they were both appointed to the Supreme Court by President Clinton after having been appointed to the federal bench by President Carter. As a result they were on the appellate court for approximately the same time period. Unfortunately, this provides us with only 6 cases for Breyer and 7 cases for Ginsburg at the Supreme Court level. This fact has forced us to use a single model containing both the Supreme Court cases and the appellate court cases. The model thus includes a dummy variable for the Supreme Court. As more justices are added, we hope to be able to run two separate models, one containing the dummy variable and one with the Supreme Court and appellate court cases run separately.

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to break the fact variables out into dichotomous variables as more cases and judges are added to our analysis. This same problem required a number of the variables to be eliminated from the respective models.

The cases revealed by our LEXIS/NEXIS searches for each of these justices were winnowed down to the usable cases based on the case facts. All non-search and seizure cases were eliminated as well as any case which included at a lower court level search and seizure facts, but which was decided on some other issue. The remaining cases were then coded for case facts.[3]

In order to adjust the model for the differences in justices at the Supreme Court level leading to differences in precedents upon which the appellate court must rely, we have included a change variable for the Supreme Court. We borrow from Segal (1985) to use relative conservatism of the Court as an indicator of the increasingly conservative nature of the Court in the time frame studied. The "change" variable employed by Segal, designed to account for an increasingly conservative Court, suggests that adding a point for each Nixon and Ford appointee will provide an adequate control. Segal's model incorporated only Nixon and Ford appointees who were replacing Democratic president appointees. It does not seem plausible to expect that his finding in favor of a constant effect would hold for later Republican (Reagan and Bush) appointees who replaced prior Republican appointees. Therefore we have modified this approach by only noting a change where the party of the appointing president of the new justice differs from the party of the appointing president of the retiring justice. Thus, prior to the appointment of O'Connor (the first change on the Supreme Court after Breyer and Ginsburg joined the appellate bench) there is no change. For O'Connor there is no change because she replaced another

[3] One of the authors coded the Ginsburg cases, while the other coded Breyer cases. We both coded 10 of the cases to ensure some sense of consistency. Any further research will be supported by statistical inter-coder reliability tests.

Republican appointee, Stewart. There is no change for Scalia because he replaced Burger (via Rehnquist's move to the Chief Justiceship). For Kennedy, Souter and Thomas each we add one as a change on the court. Ginsburg replaced White so there is no change added for her. For a discussion of the issues surrounding the use or non-use of the change variable see Appendix B.

The other variables are related to the facts of the cases. The dependent variable is whether or not the individual judge found the search to be lawful, coded 1 if the search was lawful, 0 if it was not. The independent variables are as follows:

Search location: For each variable, home, business, person, car, and (airport, train station, or bus station), coded 1 if the respective location was searched and/or seized, 0 if not. We also scale coded the locations with 1 for home, 2 for business, 3 for person, 4 for car, and 5 for airport, etc. The ordering of the scale is from most intrusive (home) to least intrusive (airport) based on trends in the decisions of the Supreme Court.[4]

Search Extent: coded 1 for a full search/seizure, 0 if it was a limited intrusion.

Prior Justification: For each variable, warrant, defective warrant, incident to arrest, after arrest, and unlawful arrest, coded 1 if the lower Court found the search/seizure to be part of the event, 0 if not.

Exceptions: coded 1 if any of the following apply hot pursuit, regulatory, limited use, plain view,

[4] The intrusiveness scale is based on Supreme Court rulings which indicate that the home has the highest expectation of privacy and therefore almost always requires a warrant, followed by businesses, then the person which is less intrusive because of the option of conducting Terry stop and frisks, then cars and finally, the almost no limit searches allowed for airports, train stations and bus terminals.

consent, border, exigent circumstances, and good faith exceptions and coded 0 if no exceptions applied to the case.

IV. Results

Because of the dichotomous variable, the appropriate method for analyzing the data is logistic regression.[5] The dependent variable is coded 1 when the judge determined that the search was reasonable, 0 when the search was declared unreasonable. Table 1 shows the results of our combined model for Breyer and Ginsburg.

[TABLE 1 HERE]

The model reports robust standard errors because the errors for each justice are correlated with each other (Box-Steffensmeier, 1999). We felt this analysis was an appropriate starting point because the number of cases is great enough to allow a relatively full model and because we expect both justices to move in the same direction on the Supreme Court and the context of their decisions (time periods on the bench and changes on the Supreme Court) are similar. The results confirm this expectation:the negative coefficient for the Supreme Court variable suggests that both Justices Breyer and Ginsburg were more likely to find searches unreasonable once they were promoted to the Supreme Court. The obvious missing variable from this model is extent, but there is no case for either judge that declared a limited search unreasonable. As a result, this variable was excluded from the model.[6] The general success of the model is considerable, confirming the results of previous research on the fact-based model for search and seizure cases (Segal 1984, 1985). In fact, our results suggest face validity to our research.

[5] The models were run using STATA 5.0.

Though we conceptualize some factors differently, the results prove largely similar, and probable cause is a consistently important predictor, similar to the findings of Songer, Segal and Cameron (1994). General model performance also proves satisfactory: the Chi-Square statistic provides confirmation that the model is an improvement over the null model.

In addition, the direction of the coefficient disputes a plausible alternate hypothesis, that new justices are influenced ideologically by their colleagues. At the same time, our findings may suggest that more liberal justices react to appointment to a conservative Court by moving in a more liberal direction to counterbalance the predispositions of their colleagues. Even if this is true, it provides support for our original hypothesis, which suggests that justices are more likely to reveal their preferences once promoted to the Supreme Court.

Analysis of the individual judges proves considerably more difficult. In the cases reviewed, Justice Breyer never found a search where an exception was present unreasonable. Justice Ginsburg was even more constrained by case facts: she never found a search accompanied by a warrant to be unreasonable, nor were any searches incident to arrest unreasonable. In addition, in the view of Justice Ginsburg, a search after an unlawful arrest was never reasonable.

[TABLE 2 HERE]

The results for Justice Breyer are, understandably, similar to those of the combined model. The signs of the coefficients are all similar to the estimates in the model combining the two judges, but few are significant predictors at standard levels of significance. In all likelihood, this is due to the relatively few

[6] Although the model can still be run, it produces a standard error of nearly 36 on the parameter estimate for extent. The impact on the other variables of excluding extent is limited and has no impact on the significance of any of them.

cases that prove available for study for any one judge. We are content, though not entirely satisfied, to find that the Supreme Court variable for Justice Breyer is in the correct direction and nears statistical significance (one-tailed t=.0544).

The results for Justice Ginsburg prove more elusive and much less satisfactory. Inclusion of the variable that consistently predicts vote in the first two models, probable cause, significantly distorts the results of the other variables. In addition, variables on the presence of a warrant, extent of search, searches incident arrest and after unlawful arrest are all perfect predictors. So the results for Justice Ginsburg must be interpreted with extreme caution.

[TABLE 3 HERE]

Tempting as it is for us to declare this model the definitive predictor of search and seizure votes, where the only thing that matters with any confidence is on which court the judge sits, the previous statements warning caution mitigate against any real enthusiasm. While the model does incorporate some of the most important features of the fact-based model, particularly location, search after arrest and whether or not a warrant was obtained, the absence of the other independent variables specified in the first model suggest that these results are, at best, suggestive of the true nature of the relevant factors for judicial decisions.

Taken together, these three models provide initial support for our hypothesis. The variable indicating the justice presence on the Supreme Court consistently predicts in the correct direction, though it does not always prove statistically significant.

V. Conclusions

We recognize that this is only a preliminary step in our research. There are some inherent

limitations on the model at this stage. These include a limited number of cases at the Supreme Court level for Breyer and Ginsburg due in part to a lessening of the number of unsettled search and seizure cases, and their limited number of years on the bench. The addition of justices Burger and Blackmun should help to resolve this problem. Each of these two justices served for an extended period on both the Supreme Court and the appellate court during a period when new search and seizure issues were being resolved every term. Further, an analysis of the decisions of different justices who served on the same appellate court panels (Thomas and Ginsburg) together could reveal differences in the extent of change once they ascend to the Supreme Court. Ideally, of course, Justices Breyer and Ginsburg could be used to ascertain the relative amount of change on the Supreme Court. To do so, in statistical terms, the model would have to be similar, which they are not at this preliminary stage, but the question underlying such an analysis remains interesting. Ascertaining the direction of change, which we think we may have done, is only part of the puzzle. Assessing the degree of change would help confirm our broader hypothesis.

With more justices and cases to analyze, the model based on Hypothesis 1 should be able to predict the extent of the change in the ideological freedom to vote for one's policy preferences once on the Supreme Court. This can be done by determining the median of the Supreme Court on the case facts, compared to the ideological position of the appointing president. While we have not yet endeavored to attempt such analysis, we hope to be able to attempt the analysis with the addition of future cases.

Once additional cases are added to our analysis we hope to be able to test a related hypothesis which is predicated on comparing the decisions on the appellate court with the decisions by the same

judge on the Supreme Court.

H_2: An appellate court judge will become less constrained by case facts and precedent once promoted to the Supreme Court.

Building on the argument that justices base their decisions on some combination of case facts (including the relevant law and precedent), the institutional context and their policy preferences (see, e.g., George and Epstein, 1992), we believe that a Supreme Court Justice is less likely to be constrained by legal variables and more likely to allow the justice's policy preferences to guide their decision on a given case. As mentioned earlier, there is substantial support, both empirical and theoretical, that justices seek to enact their policy preferences. Studying the same people as they move from one level to the other provides the opportunity to review some of the important findings on both appellate judges and Supreme Court justices. Because of the two different contexts, theory indicates that the same person will act differently at different levels. Confirmation of our hypothesis will provide additional support for the attitudinal model and will also further document, at least for the people we study, the success of the Supreme Court in binding appellate court judges in the principal-agent relationship. Along these lines, assessing interactions of the fact-based variables with the level of Court (say, warrant x Supreme Court) would allow us to assess whether different facts become more or less important to justices as they are promoted.

One caveat, however, is important. The judges who are promoted from the Appellate Court to the Supreme Court differ in some ways from the population of appellate judges. Those differences may prove nearly impossible to ascertain. The assumption made by our research may be that the people nominated to the Supreme Court are not chosen in any systematic manner. Some argue that only

appellate judges with strong, consistent liberal or conservative voting records can attract the attention of the president and his advisors and thus be selected to fill a Court vacancy. Though this certainly depends on a series of contextual factors, its plausibility is also limited by the sheer number of qualified candidates and the infrequency of a vacancy on the Court. Because of this, we do not expect the career goals of judges to influence our study in a substantial manner and thus our findings here may be generalizable to the larger population of appellate judges, though such conclusions should be made with extreme caution.

We expect the hypothesis to manifest itself in our empirical test by comparing the number of cases predicted correctly. A fact-based model provides for two sets of cases: those decided while on the appellate court and those decided while on the Supreme Court. The fact-based model should perform "better" for the appellate court decisions (that is, predict more cases correctly) and "poorer" for the Supreme Court decisions and the difference between the two should be statistically significant.

We are torn between the truly preliminary nature of our findings and our satisfaction that what we have thus far proves theoretically interesting. The question we address is, we think, one of considerable importance to students of judicial behavior, and could potentially clarify some of the arguments over what models justices employ when making decisions. At this point, however, we feel the safest path to take is to refine and expand the results presented in this paper and continue to develop the theoretical underpinnings of both our approach and our findings.

Appendix A

The search was conducted using LEXIS/NEXIS and used the following search terms:

All: And Judges(Breyer or Ginsburg); by relevant circuit

1: Fourth w/10 Amendment
2: Warrant! w/20 (search! or seiz! or arrest!)
3: Cause w/10 (search! or seiz! or arrest!)
4: Reasonable w/10 officer
5: Terry w/5 Ohio
6: Plain w/2 view
7: Evidentiary w/2 hearing and suppres!
8: Incident w/5 arrest!
9: Articulable w/2 suspicion
10: Pretextual and (search! or seiz! or arrest!)
11: States w/3 Leon
12: Knock! w/5 announc!
13: Mere w/3 presence
14: Hodari
15: Protective w/3 sweep
16: Graham w/3 Connor

The previous search was provided by Steven Van Winkle, The authors greatly appreciate the assistance provided.

Appendix B

While the choice of a change variable predicated on party of appointing president has logical support, it does create some problems. First, this more restrictive change variable does not take into account the appointment by a liberal Republican president of a more moderate justice to replace a justice who was appointed by an ultra-conservative president, and vice versa. However, given the current position of the court and the political leanings of the retiring justices compared to the newly appointed justices, we do not feel that this a is a major problem for the time period being studied. Second, it raises the issue of what to do with Justice Harry Blackmun who despite his own protestations moved to the liberal side of the Court over time thus making party of the appointing president a problematic measure. We have chosen to make what we are calling the "Blackmun exception". This exception thus treats Justice Blackmun as if he were appointed by a Democrat president based on his liberal leanings on the Court. Therefore, when Breyer replaces Blackmun, there is no change noted.

The fundamental problem with this variable is that it makes the assumption that the Supreme Court's ideological preferences constrain a judge on the appellate court in the same way that they constrain the judge on the Supreme Court. That is, the change variable is coded as a "3" for every case after Thomas' appointment to the Court, both for cases Breyer and Ginsburg reviewed on the appellate court and for cases they reviewed on the Supreme Court. We recognize that doing so is inadequate, both theoretically and empirically, but it remains a problem we have not yet solved. We do know that if the change variable is removed from the combined Breyer/Ginsburg model, the other covariates perform in much the same manner as presented in Table 1. The results, briefly, are:

Variable	MLE	Robust Standard Error
LOCATION	.8607	.3143
WARRANT	2.2276	.9691
PROBCAUS	4.6832	1.1931
INCIDENT	-.4429	1.1538
AFTERARR	-1.7456	1.1212
AFTERUNL	-1.0436	1.6409
EXCEPTYN	3.2986	1.8404
SUPCT	-4.3958	1.5914
Constant	-3.2268	2.3505

To be candid, we remain unsure how to assess this variable. Since we depart from the traditional approach in three respects, by changing the way the Court's increasing conservatism is counted, by updating to Clinton appointees, and by trying to deal with judges who have themselves been promoted (creating problems of endogeneity), we see this as an important qualification to our results.

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Table 1: Predictors of Search and Seizure Votes, Justices Breyer and Ginsburg

Variable	MLE	Robust Standard Error
Change	1.0079*	.4128
Location of Search	1.0681**	.2871
Warrant	2.6896*	1.1609
Probable Cause	5.3960***	1.1271
Incident to Arrest	-1.1109	1.1108
After Arrest	-1.9438*	.9928
After Unlawful Arrest	-1.9005	1.3464
Exception	2.4605	1.2988
Supreme Court	-6.4748***	1.7991
Constant	-4.7728**	1.7571

Total number of cases: 136

-2 Log Likelihood 48.6942

Model Chi-Square: 52.53 df: 9 Significance: p<.0001

%Correctly Predicted: 91.91%

* significant at p<.05[7] **significant at p<.01 ***significant at p<.001

[7]All significance tests are two-tailed.

Table 2: Predictors of Search and Seizure Votes, Justice Breyer

Variable	MLE	Standard Error
Change	.8366	.5608
Location of Search	1.7449	.9967
Warrant	1.8278	1.1358
Probable Cause	4.8976**	1.5790
Incident to Arrest	-4.7954	2.9961
After Arrest	-5.0940	2.9712
After Unlawful Arrest	-6.6844	3.8167
Supreme Court	-4.5390	2.8295
Constant	-1.3221	2.6188

Total Number of Cases: 71

-2 Log Likelihood 29.267

Model Chi-Square: 28.456 df: 8 Significance: p<.0001

% Correctly Predicted: 92.96%

**significant at p<.01

Table 3: Predictors of Search and Seizure Votes, Justice Ginsburg

Variable	MLE	Standard Error
Change	1.2017	.6226
Location of Search	3693	.4176
After Arrest	-5.0659	2.1440
Exception	-.2368	1.0233
Supreme Court	-4.3884**	1.6246
Constant	.1081	1.4784

Total Number of Cases: 65

-2 Log Likelihood 31.251

Model Chi-Square: 17.241 df: 5 Significance: p<.005

% Correctly Predicted: 90.77%

**significant at p<.01