

INTRODUCTION

In the early 1980s, the U.S. Drug Enforcement Administration (DEA) began a concentrated effort to curb cocaine trafficking by Mexican drug cartels. By 1984, the DEA had made several significant arrests, resulting in substantial losses of revenue for the Mexican enterprise. In response, the Mexican cartel kidnapped, tortured, and killed DEA Special Agent Enrique Camarena in 1985. Evidence collected by the DEA connected several individuals to the crime, including Honduran national Juan Ramon Matta-Ballesteros and Mexican national Dr. Humberto Alvarez-Machain. The agency believed that Alvarez-Machain helped prolong Agent Camarena's life so that other members of the cartel (such as Ballesteros) could interrogate and torture him. After several unsuccessful attempts to extradite both individuals from their respective countries, the DEA developed plans for their abduction by force and transportation to the United States. To that end, the agency hired several individuals, including members of the Mexican Federal Judicial Police and the Honduran Special Forces, to kidnap Ballesteros from his home and Alvarez-Machain from his office.

During their trials in federal district court, both individuals contended that while being transported to the United States, the abductors repeatedly beat them; applied stun guns to various parts of their bodies, including their feet and genitals; and injected them with substances that caused dizziness. In the matter of Ballesteros, the district court dismissed these contentions and he was convicted and sentenced for the murder of Agent Camarena. In the matter of Alvarez-Machain, the district court ruled that the forcible abduction violated an extradition treaty between the United States and Mexico, and consequently, the federal courts did not possess jurisdiction over the defendant.

Both cases were appealed to the Ninth Circuit, where a panel of appellate judges affirmed each district court decision. In the matter of Alvarez-Machain, the judges based their decision on a Ninth Circuit precedent indicating that forcible abduction of a foreign citizen without the consent of his or her national government violated

certain extradition treaties. In the matter of *Matta-Ballesteros*, the appellate panel stated, "Where the terms of an extradition treaty do not specifically prohibit the forcible abduction of foreign nationals, the treaty does not divest federal courts of jurisdiction over the foreign national."¹ Though the judges expressed their concern over the circumstances surrounding *Matta-Ballesteros's* abduction and treatment, they concluded that U.S. officials had violated no constitutional or statutory rights.

Finally, after the Ninth Circuit's decision in favor of *Alvarez-Machain*, the federal government appealed to the U.S. Supreme Court for a writ of *certiorari*, which it ultimately received. Writing on behalf of a 6-3 majority, Chief Justice William Rehnquist overturned the Ninth Circuit's ruling. The reversal was based on the Court's precedent set in *Ker v. Illinois*, which stated that "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'"²

It is perhaps difficult to determine if both *Alvarez-Machain* and *Matta-Ballesteros* were brought to justice for the murder of Agent Camarena or if they were the victims of an overzealous and abusive U.S. government. Regardless, these cases exemplify the difficulties federal judges encounter when they determine the extent to which government officials—under the guise of foreign policy or national security—may permissibly intrude on civil liberties. Though the cases were adjudicated within the same judicial circuit, the lower court judges responded to different stimuli and preferences. Additionally, the grant of *certiorari* by the Supreme Court in the *Alvarez-Machain* case reminds us of the hierarchical structure of the federal judiciary and its potential influence on judicial behavior. Thus, the litigation of foreign policy cases within the United States presents unique challenges for federal judges, from competing preferences between security and liberty to influences from the judicial hierarchy.

These challenges take on a new significance in contemporary America. The terrorist attacks of September 11, 2001, and subsequent responses by the U.S. federal government have raised fundamental questions about civil liberties, in both domestic and international law. As a result, the U.S. judiciary, out of its responsibility for interpreting the Constitution, has assumed a crucial role in defining the boundaries of domestic and foreign policy and in balancing concerns about security with the protection of liberty. One need look no further than the two most recent Supreme Court cases involving detainees at the U.S. military base in Guantanamo Bay, Cuba, to witness the crucial importance of the judiciary. The first case, *Hamdi v. Rumsfeld* (2004), involved the detention of a U.S. citizen who was captured on the battlefield in Afghanistan. Though the U.S. government attempted to label Hamdi as an enemy combatant and detain him indefinitely, the Supreme Court intervened and ordered that Hamdi's status be litigated in a court of law. Writing on behalf of the majority, Justice Sandra Day O'Connor stated that "we have long made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."³ Additionally, in the most recent Supreme Court case involv-

ing Guantanamo Bay detainees (in this case, the chauffeur of Osama bin Laden), *Hamdan v. Rumsfeld* (2006), the Supreme Court rejected the federal government's attempt to adjudicate offenses in the war on terror before military tribunals. Writing for the Court, Justice John Paul Stevens stated, "Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment."⁴

These two recent cases remind us that how federal courts determine the appropriate balance between security and liberty, and thereby constrain the executive and legislative branches, is therefore of great importance to our understanding of contemporary American politics, U.S. foreign policy, and the behavior of the president and Congress. In short, adjudicating the potentially competing concerns over security versus liberty presents a substantially different challenge for judges than resolving purely domestic policy disputes, and scholars must account for these competing principles to better understand contemporary judicial decision-making processes.

Surprisingly, the majority of studies on U.S. foreign policy ignore this crucial role of the judiciary. The typical focus is on the behavior of the president, Congress, or executive agencies, such as the CIA or the U.S. Department of State. Yet, how and what these actors do in the conduct of foreign policy is constrained fundamentally by the federal courts. Furthermore, the few studies on the judiciary and foreign policy provide an extremely limited view of this topic. Within this extremely small body of literature a majority of the studies rely on qualitative techniques to assess historical relationships between the three branches of the federal government. Typically, they explore whether the Supreme Court defers to either the president or Congress in the formulation and conduct of U.S. foreign policy. But, while these doctrinal analyses provide detailed descriptions of specific case histories, they do not offer rich theoretical explanations for judicial behavior.

An additional limitation is that most studies focus exclusively on the U.S. Supreme Court; the federal courts of appeals and district courts receive virtually no attention. With the Supreme Court gaining almost complete control over its docket, thereby reducing the number of cases it hears, the decisions of the lower federal courts become substantially more significant. Consequently, the courts of appeals and district courts have emerged as powerful constraints on the political branches of government. Thus, an examination of all levels of the federal judiciary is essential to adequately understand how courts in the United States resolve foreign policy disputes.

A HISTORICAL LOOK AT THE FEDERAL COURTS AND U.S. FOREIGN POLICY

Historically, the courts were fundamental participants in the formulation of U.S. foreign policy. During the early nineteenth century, the judiciary adjudicated

several disputes between the political branches of government over the boundaries of foreign affairs decision making. In *Bas v. Tinny* (1800), the Supreme Court ruled that only Congress is able to declare either an “imperfect” (limited) war or a “perfect” (general) war. In *Talbot v. Seeman* (1801), the Court determined that all powers of war are constitutionally vested in Congress. In *Little v. Barreme* (1804), Chief Justice John Marshall held that President John Adams’s instructions to seize hostile ships were in conflict with Congress and therefore illegal. Finally, in the *Prize Cases* (1863) the Supreme Court ruled that the president, in his capacity as commander in chief, possesses the power to repel sudden attacks against the United States. These early cases demonstrated the judiciary’s assertiveness in defining constitutional parameters within which the political branches of government operated.

While the courts were active participants in foreign affairs during the early nineteenth century, the following century witnessed an exercise of judicial restraint in these disputes. Increasingly, the courts utilized certain threshold issues such as the political question and act of state doctrines to limit their involvement in areas of foreign policy (Goldsmith 1999). Consequently, the president successfully expanded his constitutional authority. Cases in which the Supreme Court rendered a decision on the merits, such as *United States v. Curtiss-Wright Export Co.* (1936) and *Korematsu v. United States* (1944), reinforced executive dominance in foreign affairs. Therefore, what most individuals take for granted regarding foreign relations is the product of a long historical development in which the courts played a vital role (Rosati 1999, 352).

Unfortunately, due to the apparent deference given by the courts to the political branches of government—especially the executive—scholars altered the theoretical lenses through which they analyzed the judiciary. Rather than examining the courts as an equal branch, the majority of postwar studies utilizing court cases to examine foreign policy view the judiciary as subservient to either the president or Congress. In 1966, Aaron Wildavsky published his famous two presidencies thesis, arguing that the president exerts a tremendous influence on the shaping and implementation of foreign policy. While scholars ultimately criticized Wildavsky’s thesis (LeLoup and Shull 1979; Cohen 1982; Edwards 1986; Fleisher et al. 2000), its publication prompted additional research of court cases. Subsequent studies examining specific decisions conclude that the president reigns supreme in foreign policy (Perlmutter 1974; Keagle 1985; Cronin and Genovese 1998; LeLoup and Shull 1999). Countering these arguments are analyses of court cases concluding that Congress possesses ultimate authority in the conduct of foreign policy (Henkin 1972; Schlesinger 1989; Fisher 1995; Harris 1995; Korn 1996). However, noticeably lacking is a systematic examination of the judiciary’s role in foreign policy. Silverstein argues while the courts play the least visible role in foreign policy, their decisions often shape the national debate over constitutional interpretation in this

area and influence the behavior of the other branches of government (1997, 6–7). Therefore, an empirical examination of the courts' influence on foreign policy—as the third component of the U.S. governmental triumvirate—is essential to understanding where they fit in the foreign affairs puzzle.

Constitutional law theories on governmental authority and separation of powers are useful in assessing how judicial actions impact U.S. foreign policy. It should be noted that these theories differ from political science separation of powers models. Where the latter assess how institutional preferences and strategic calculations affect institutional behavior, the former focus on jurisdictional disputes of political and legal authority. According to these theories, the Constitution empowers the federal government and structures the distribution of powers, including those related to foreign affairs (Diament 1998, 912–913). The interdependent structure of constitutional authority creates an “invitation to struggle” among three separate branches of government, with each vying to expand its sphere of influence (Corwin 1957, 171). According to Spitzer (1993), the realm of foreign affairs has been central in shaping intergovernmental relations. As the president and Congress expand their constitutional capabilities, individual civil liberties are often sacrificed. The Nixon Watergate scandal and the McCarthy congressional hearings provide two examples of abuses of power by the political branches in the name of security. However, as the Constitution dictates, the courts are responsible for protecting the rights of citizens in the United States. This creates a paradox for the courts when called on to resolve foreign policy disputes:

The courts have no authority to conduct U.S. foreign relations. They are, however, authorized to adjudicate all cases or controversies properly before them in accordance with applicable law. Their function is essential to the maintenance of the separation of powers among the branches and the protection of individual rights. Since no other branch has the authority to exercise the judicial power, practices that permit the Executive [or legislature] to exercise unilateral decision-making authority in particular court cases may be inconsistent with the constitutional plan. On its face, the Constitution does not exclude or limit the courts' authority in cases or controversies touching on foreign relations. Furthermore, matters with foreign relations implications may involve the legal rights and duties of individuals or the states under federal law, clearly within the courts' authority. Judicial deference or abstention in such cases may compromise the authority of the federal courts. (Charney 1989, 807)

If the executive or legislative branch exercises unilateral decision making in foreign relations and infringes on individual rights, are the courts abdicating their constitutional authority by deferring to those branches? According to Judge Arlin Adams, “among the more perplexing dilemmas faced by a democratic society is that of securing its territorial and institutional integrity, while at the same time, preserving intact the core liberties essential to its existence as an association of truly free

individuals” (*United States v. Butenko* 1974). A systematic analysis of foreign policy cases is necessary to examine how the courts resolve the paradox between security and liberty described by Professor Charney and Judge Adams.

THE SCOPE OF THE PROJECT

This book fills a significant gap in the literatures on judicial behavior and foreign policy. Using an original dataset of civil liberties challenges to foreign policy, and incorporating sophisticated techniques in formal and empirical modeling, I examine two main questions: (1) To what extent do federal judges defend liberty or champion security when adjudicating disputes? (2) To what extent does the hierarchical structure of the federal judiciary influence the decisions of lower court judges? The initial question focuses on how federal judges balance influences from competing preferences over security and liberty, and the latter examines whether lower court judges strategically anticipate the decisions of higher courts and constrain their behavior to avoid reversal.

My empirical analyses support several novel conclusions. First, it is readily apparent that federal judges are not defenders of liberty. One can reasonably conclude that federal judges champion foreign policy interests, though liberal judges are more likely to support civil liberties than conservatives. Though this finding confirms the conventional wisdom on judicial decision making—that judicial decisions are impacted by the ideological preferences of judges—the data demonstrate a second, more counterintuitive conclusion. According to the analyses, the influence of competing preferences (i.e., security versus liberty) is more pronounced in the lower federal courts and virtually nonexistent in the Supreme Court (where justices are influenced by the traditional, one-dimensional notion of ideology). These two findings are significant because the majority of analyses in the judicial behavior literature operate under the assumption that preferences influence all judicial decision making along a single liberal-conservative ideological dimension. My results demonstrate both the multidimensionality of preferential influences and the asymmetric impact of these influences on specific judges (i.e., differences across district and appellate judges and Supreme Court justices).

Third, the empirical results demonstrate that the hierarchical structure of the federal judiciary exerts significant constraints on the lower courts, but that these constraints are different for the courts of appeals and the district courts. While the evidence indicates judges on both lower levels strategically anticipate reactions from higher tribunals, the magnitude of constraint exerted by this anticipation differs as one moves from the district courts to the appellate courts. One explanation for this difference involves the Supreme Court’s *certiorari* decisions—a unique institutional feature that allows the justices to review certain lower court decisions with specific ideological dispositions and potentially overturn those decisions. This feature allows the Supreme Court to threaten appellate judges with reversal more credibly

than appellate judges can threaten their district court colleagues. These results are significant because they are the first comparisons of hierarchical constraints across all levels of the federal judicial system.

Finally, both a quantitative analysis of lower court decisions and a qualitative analysis of the Supreme Court cases after September 11, 2001, indicate that these patterns change somewhat in the contemporary judicial environment. While the federal courts continue to remain deferential to governmental foreign policy interests, judges are becoming more ideologically polarized. Consequently, the influence of individual preferences is more prominent, which in turn mitigates the effects of security influences on judicial behavior. These findings are important because they help shed light on the potential challenges facing federal judges that are caused by the war on terror.

ORGANIZATION OF THE BOOK

Chapter One explores the theoretical foundations of the analysis, beginning with a historical examination of foreign policy litigation in the United States. Next, since many readers may not be familiar with the foreign policy literature, I offer a definition of foreign policy and then explore the literatures of international relations, constitutional law, and judicial politics to illustrate how foreign policy cases differ from domestic policy issues and how this difference affects judicial behavior. Specifically, the theoretical expectations focus on the influence of competing preferences over liberty and security that judges encounter when adjudicating foreign policy disputes.

Chapter Two begins with anecdotal evidence (from judges' opinions) about the balancing of preferences over liberty and security. I then discuss the operationalization and measurement of concepts discussed in the previous chapter and conduct empirical analyses on individual courts in the federal system. Using a unique dataset of foreign policy cases from 1946 to 2000, I estimate a series of empirical models: for the district courts, courts of appeals, and the Supreme Court. In general, I discover that federal judges are influenced more by preferences over security than by preferences over liberty. However, this influence decreases as a case reaches the Supreme Court, where the justices are motivated more by traditional ideological notions of liberty and individual rights.

Chapter Three focuses on the relationship between the courts of appeals and the Supreme Court. Borrowing from the literature on principal-agent theory, I examine whether appellate judges are motivated by a fear of reversal from the Supreme Court. I develop a formal model to explicitly state certain theoretical expectations and then empirically estimate the formal model using a set of recent, sophisticated techniques designed to explore specifically strategic choices. These techniques were developed in international relations to test formal models of strategic behavior on the part of states, and I demonstrate their usefulness in testing models of strategic

behavior on the part of judges. The empirical results from the strategic choice probit analysis demonstrate that appellate judges condition their decisions on an anticipated response from the Supreme Court, an aspect of strategic behavior that would not be discovered using traditional probit models.

Chapter Four extends the strategic analysis to examine the relationship between the federal district courts and the courts of appeals. As with the previous chapter, I develop a formal model to specify theoretical expectations and then empirically test the theory using a strategic choice probit model. The results indicate district judges strategically anticipate reactions on appeal, and constrain their personal ideological voting if they believe a reversal likely.

Finally, in Chapter Five I restate the general conclusions from the previous chapters and comment on the broader implications of this research. Additionally, I conduct a quantitative analysis of post-September 11 cases in the district and appeals courts to determine whether my empirical results in Chapter Two remain consistent in the current environment. I also conduct a qualitative analysis of the four recent Supreme Court cases involving enemy combatant status. The results indicate that the current environment and the war on terror have altered judicial behavior in foreign policy litigation.