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Joy-Annette Atsegbua April 3, 2015

Practical Appeals: The Influence of Judicial Ideology on the Decision of Litigants to Appeal

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Abstract

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Scholars of judicial politics often use judges as the subject of analysis when investigating what influences judicial outcomes. Because of the vital role litigants play by providing cases for judges to decide, understanding how litigants behave within the judicial system is beneficial for a more comprehensive understanding of judicial outcomes. This study will examine the decision of the litigant to pursue an appeal of the decision of a Court of Appeals three-judge panel to the Supreme Court or the full circuit. I hypothesize that the decision by the litigant of where to appeal is grounded primarily in the ideological preferences of the higher courts, because the litigant is concerned with reversing the decision of the three-judge panel – which is often reflective of the panel's ideological preferences. Using Court of Appeals data from 1970-2002 and the known ideological preferences of judicial actors, I predict the appeal decision of litigants with a model functioning only on ideology and compare these results to the actual decisions of the litigants. The results of this study do not provide support for the expectation that litigants appeal using ideology as their main consideration.

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Introduction

Studies in judicial politics have thoroughly investigated the behavior of federal judges (Epstein and Knight 1998; Cross 2007). Using attitudinal, strategic, and legal approaches, judicial behavior has been analyzed in an effort to better ascertain the mechanisms at work in judicial outcomes (Brenner 2000; Clark 2009; Cameron, Segal, and Songer 2000; George 1999). Because federal judges are often the final arbiters in matters of national and regional importance, continued inquiry into the different components that influence judicial behavior is expected. However, studies about judicial behavior should not be prioritized at the expense of other crucial actors in the judicial process, specifically litigants.

Investigations into the decision calculus of litigants to the same extent as those carried out about judges are few and far between. The current catalogue of judicial scholarship understates the contributions of litigants in the process of adjudication. Since judges are not empowered to raise questions about the law, they rely on litigants to discover and report ambiguities within state and federal statutes. Because of the role that litigants play in the lifecycle of a case, litigant behavior is deserving of a greater volume of political science scholarship with the intent of developing better theories of judicial outcomes.

This thesis will begin to rectify the absence of literature concerning litigant behavior in judicial politics. Specifically, my thesis examines the influence, if any, of ideological preferences of federal judges on the decision of litigants to appeal within the federal courts of general jurisdiction. Beyond this core objective, this study will help further understandings and theories of litigant attentiveness to the behavior of judges. This thesis will proceed as follows: I begin

with a brief description of the American federal court system and an explanation of the pathways of appeal available to litigants beyond the Court of Appeals three-judge panels. Then, I review the existing literature on the decision by judges and justices to grant certiorari or grant an en banc rehearing. This summary is followed by a review of the literature on the decision of the litigant to appeal to the Supreme Court or the full circuit. Then, I explain how the available data was manipulated to help answer the questions raised in this study. Finally, I discuss the results of this study and close with my opinions of the implications of my findings.

The Structure of the Federal Courts of General Jurisdiction

The American Constitution does not discuss the federal judiciary in detail. Article III, the section of the Constitution that addresses the structure and powers of the judiciary, mentions a Supreme Court, inferior courts that the "Congress may from time to time ordain and establish," and the jurisdiction of the Supreme Court, but provides no clear structural parameters for how these courts are to be organized (Constitution of the United States Art. III, Sec. 1). To remedy the lack of explicit guidelines for the federal courts, the first Congress passed the Judiciary Act of 1789 which established a six-judge Supreme Court, three circuit courts, and thirteen district courts (Songer, Sheehan, and Haire 2003, 4).

The Judiciary Act of 1789 created a system of courts where judges had overlapping appointments. Under the 1789 system, district and circuit courts were trial courts with jurisdiction based on state borders (Songer, Sheehan, Haire 2003, 5). District courts were staffed by one judge appointed to a court within his state of residence (Songer, Sheehan, Haire 2003, 5). The Supreme Court – filled only by Supreme Court justices – maintained both appellate and original jurisdiction (U.S. Constitution Art. III, Sec. 2). Unlike district courts and the Supreme Court, circuit courts were not staffed by judges who only heard cases within a circuit (Songer, Sheehan, Haire 2003, 4). Instead, the circuit courts were composed of three judges recruited from other areas within the federal judiciary: initially one district court judge and two Supreme Court justices (Songer, Sheehan, Haire 2003, 4). Despite the structure provided by the Judiciary Act of 1789, the federal judiciary required additional adjustments before it could achieve a more sustainable arrangement.

Because of the high volume of mandatory lower court appeals *and* justices serving on circuits, the Supreme Court's caseload was often overwhelming under the constraints of the Judiciary Act of 1789. In an effort to reduce the workload of the justices, the Evarts Act of 1891 was created to improve the structure and operations of the judiciary (Songer, Sheehan, Haire 2003, 5). The Evarts Act established the U.S. Circuit Courts of Appeal (later renamed the U.S. Courts of Appeals) as a permanent intermediate appellate venue between the trial courts and the Supreme Court. The Evarts Act also created permanent judgeships exclusively for the Courts of Appeals (Songer, Sheehan, Haire 2003, 5). Further, the new Courts of Appeals were empowered to "exercise the full range of federal jurisdiction granted by the Constitution" (Songer, Sheehan, Haire 2003, 5). Through continued legislation during the early 20th century, the district courts were established as the primary trial courts within the federal judiciary, and the Supreme Court's jurisdiction was altered to allow for a predominately appellate docket (Songer, Sheehan, Haire 2003, 5).

Today, the federal courts of general jurisdiction maintain a three-tiered structure. The trial courts make up the lowest tier consisting of the 94 U.S. District Courts ("Structure of the Federal Courts"). The twelve Courts of Appeals and one Court of Appeals for the Federal Circuit make up the second tier of federal courts and have appellate jurisdiction over the district courts ("Structure of the Federal Courts"). The jurisdiction of the district courts and Courts of Appeals are still determined by geographical boundaries[1] (Songer, Sheehan, Haire 2003, 5). Lastly, the Supreme Court – which occupies the highest tier of the federal judiciary – is staffed

[1] The Court of Appeals for the Federal Circuit is an exception.

by nine justices and maintains appellate jurisdiction over the Courts of Appeals (Structure of the Federal Courts).

Pathways of Appeal

In total, there are thirteen federal Courts of Appeals. Of these, the Court of Appeals for the Federal Circuit is unique in that it does not hear appeals based on geographical jurisdiction but instead hears cases that fall within specific issue areas (Clark 2009, 2). The remaining Courts of Appeals are required to review all cases appealed from the district court level as well as appeals from the decisions of some federal administrative agencies (Songer, Sheehan, and Haire 2003, 8). Despite being staffed by nearly 200 judges, the Courts of Appeals caseload is still considerably large. Each year, the Courts of Appeals resolve over 50,000 cases with and without oral argument ("U.S. Courts of Appeals"). In some circuits, where staff attorneys are used, preliminary screenings of litigant briefs decrease the court's caseload by over 40 percent (Songer, Sheehan, Haire 2003, 9). Cases that are disposed of during the preliminary screening do not receive oral argument, and judges are not required to write opinions explaining their decisions in these cases (Songer, Sheehan, Haire 2003, 9).

A randomly assigned three-judge panel hears cases that progress beyond the preliminary screening (Songer, Sheehan, Haire 2003, 10). These three-judge panels may include active judges on that particular circuit, district judges called "by designation" to serve, non-active senior circuit court judges, and active circuit court judges from other circuits (George 1999; Clark 2009, 2). In an overwhelming share of these panel hearings, the decision of the three-judge panel stands as the final word by the federal judiciary concerning the matter in dispute (Cross 2007, 2; George 1999, 226). Should one party in the case find the panel decision unsatisfactory, a request for a panel rehearing, a petition for a rehearing en banc before the full circuit, or a petition for a grant of certiorari by the Supreme Court is the next step available to the litigant(s).

Of the three avenues for further legal action available to litigants, the en banc rehearing and the grant of certiorari are distinctive in that they involve upward movement in the judicial hierarchy (Clark 2009, 10). Additionally, whether an appeal will be heard by a full circuit or the Supreme Court is completely dependent on the discretion of the judges or justices (Cross 2007, 108; George 1999, 239). The influence rendered to the full circuit or Supreme Court through their discretionary power to grant an en banc rehearing or cert, respectively, is noteworthy for a few reasons. A grant of cert by the Supreme Court opens that door to judicial policy-making with the potential to alter policies in every circuit. Comparatively, an en banc is the only avenue through which circuit law can be changed and a panel decision can be overturned (Giles, Walker, and Zorn 2006, 853). The discretionary nature of the decision to hear appeals via these avenues gives judges and justices unchecked autonomy to choose when they will exercise their power to alter policy for large portions of the population.

One significant difference between the cert petition and the en banc petition is the terminal nature of a petition for certiorari. If a litigant seeks cert and is denied, the litigant would have exhausted all possibility of future litigation on the issue in that case. The logic is that since the litigant has appealed his or her case to the highest court available and received a response, there is nowhere else to pursue further litigation. Conversely, if a litigant pursues an en banc petition and is denied, the litigant can still petition the Supreme Court for a grant of cert ("Supreme Court Procedure"). Because the Supreme Court is superior to the full circuit, the litigant who was denied a rehearing en banc has not yet exhausted all their chances for appeal within the federal judiciary.

The Decision to Grant Review

According to the Rules of the Supreme Court, certiorari should be granted when there are "compelling reasons" present within a case that make it worthy of oral argument before the Supreme Court (Rules of the Supreme Court 2013, 5). According to Rule 10 of the Court's regulations, compelling reasons include the following: when a circuit court has made a decision in conflict with another circuit, in conflict with the ruling of a state court of last resort, or that breaks with precedent; when a state court of last resort decides a case in a manner that conflicts with another state court of last resort or with a court of appeals; and when a state court or circuit court has made a decision in a case concerning "an important question of federal law that has not been, but should be" heard before the Supreme court; or when a state court or court of appeals decides a case in a direction that conflicts with Supreme Court precedent (Rules of the Supreme Court 2013, 6). There is no enforcement mechanism that requires Supreme Court justices to consider Rule 10 when deciding to grant cert, but the guidelines within Rule 10 have been used as justification for the granting of cert in Court opinions (Smith 2001, 737). When an appeal reaches the Supreme Court, the law clerks of the Court submit peer-reviewed memos to their respective justices that condense the facts of each appeal. Then, based on their evaluations of the law clerks' memos, the justices are able to decide which appeals they care to add to the "discuss list" of cases to deliberate in conference (Epstein and Knight 1998, 187). Lastly, for an appeal to be granted cert, it must receive a positive vote from at least four justices; this benchmark for review is known as the *Rule of Four* (Brenner 2000, 194; Epstein and Knight 1998, 187).).

Previous scholarship has attempted to identify factors that indicate the likelihood of a grant of cert. Justices appear to be attentive to whether the federal government is in support of a

grant of cert, disagreement among lower court judges, and the presence of a question addressing civil liberties (Tanenhaus, Schick, Muraskin, and Rosen 1963; Smith 2001, 743: Ulmer, Hintze, and Kirklosky 1972). Further research suggests that when deciding to grant cert, the Supreme Court may also be sensitive to the "status" of the petitioner – for example, whether the petitioner is advantaged or if the petitioner is a state government or business association – and the number amicus briefs filed in relation to the case (Smith 2001, 744-5, 763). In addition, certain issue areas are associated with higher probabilities of cert grants like gender discrimination or privacy, a "core governmental function," and cases with issues "implicating federalism" (Smith 2001, 762-3). Conflict with Supreme Court precedent has also been identified for having a significant impact on the grant of cert (Cameron, Segal, and Songer 2000, 102).

According to the Federal Rules of Appellate Procedure,[2] the en banc rehearing should only be permitted when it is necessary to "maintain uniformity" within the circuit or when a dispute involves an issue of "exceptional importance" (Federal Rules and Procedures of Practice and Procedure Rule 35, 39). For the en banc rehearing to take place, a request for a vote to allow an en banc rehearing must be made by either an active judge on the circuit or by a litigant in the case (McFeeley 1988, 261). If the request for an en banc rehearing is requested by one of the litigants, an active judge must first support the request before a vote can be taken (McFeeley 1988, 261). If this requirement is reached, a majority of the active judges must vote to rehear the case en banc (McFeeley 1988, 261). The majority requirement for the en banc contrasts with the Supreme Court's *Rule of Four* stipulation, because the *Rule of Four* does not require a majority vote for a case to be granted cert. The en banc rehearing allows for the use of discretionary

[2] Amended periodically by the Supreme Court and/or The Committee on the Judiciary for the U.S. House of Representatives

power normally unavailable to circuit court judges (Cross 2007, 108; George 1999, 239). An en banc ruling is perceived as more important than the panel ruling because of the "precedential and persuasive value" inherent in the procedure (George and Solimine 2001, 197).

Use of the en banc rehearing is discouraged. One criticism is that frequent use of the en banc poses a threat to "collegiality" on the circuit. Frequent use of the en banc could undermine the legitimacy of the three judge panels (George 1999, 218; Cross 2007, 108; Ginsberg and Falk 1990, 1021-22). The flipside of the latter criticism is that the en banc makes the panel more "responsible" to the rest of the circuit, because panel judges are aware that their colleagues can review their decisions (Ginsberg and Falk 1990, 1021). Another criticism of the use of the en banc is that it consumes a large portion of the court's resources. Beyond logistics, en banc proceedings inhibit judges from focusing their attention and time on their primary duty – sitting on *panels* and resolving disputes (Cross 2007, 108).

Criticisms of the en banc may affect judicial behavior or may mirror the sentiments of circuit court judges, because less than one percent of the cases that come before the Courts of Appeals each year receive an en banc hearing (Cross 2007, 108). Though selectiveness concerning en banc hearings is valued and encouraged, it may have practical limits. As the size of a circuit increases, the chances that a panel will make a decision out of sync with the majority of the circuit also increases (Ginsberg and Falk 1990, 1018, 1048). One reason for this could be that the judges on a larger circuit do not have as many opportunities to interact with each other as do judges on smaller circuits (Ginsberg and Falk 1990, 1018). For a litigant petitioning in a large circuit, this constraint may prove beneficial when seeking an en banc rehearing. The reasoning

being, increased heterogeneity and low frequency of full circuit interaction might yield a necessary and higher incidence of en banc hearings (Ginsberg and Falk 1990, 1018).

Beyond the legal factors that contribute to the likelihood of review by the full circuit or the Supreme Court, there is evidence that the ideological preferences of court personnel influences decisions to grant review (Giles, Walker, and Zorn 2006, 853; Harvard Law Review, 866). At the Supreme Court, the decision to grant cert has been linked to the ideological distance between the Supreme Court and the circuit panel and to the distance between the Supreme Court and panel decision (George and Solimine 2001, 184, 193). Cameron, Segal, and Songer (2000) find that as the ideological distance between a higher court and a lower court decreases, the likelihood of the higher court reviewing lower court decisions decreases (110). For example, George and Solimine (2001) find that the Rehnquist Court was more likely to grant cert for liberal decisions that were "ideologically inconsistent" with its own views (185, 198). Further, when the ideological composition of the D.C. Circuit began to change because of conservative Reagan appointments to that court, grants of cert to disputes coming from the D.C. circuit experienced a decrease – also during the time of the conservative Rehnquist Court (Banks 1997, 410).

The ideological direction of the lower court decision may be a better signal to the higher court, because the lower court will not always decide in accordance with its ideological preferences. Cameron, Segal, and Songer refer to this as the "Nixon goes to China" proposition. The "Nixon goes to China" proposition places emphasis on information provided by a biased source – in this context, information exchanged between ideologically distant lower and higher courts (Cameron, Segal, and Songer 2000, 108). The proposition assumes that if actor A behaves

in a manner unlike his or her own ideological preferences, then actor A's behavior may not be influenced by biased preferences (Cameron, Segal, and Songer 2000, 113). A hypothetical example of the "Nixon goes to China" proposition would be if a Court of Appeals panel more conservative than the Rehnquist Court decided a case liberally. Because of the known preferences on the panel, it is expected that the liberal decision is less likely to be reviewed by the Rehnquist Court. The reasoning being that, if a panel more conservative than the Rehnquist Court decided a case liberally, it is a fairly reliable indicator that the panel was not behaving ideologically and that the Rehnquist Court is also likely to decide the dispute in a liberal manner.

The potential ideological considerations in Supreme Court cert grants provides some support to arguments that characterize cert grants as a means for the Court to "polic[e] the doctrinal decisions of lower courts" (Cameron, Segal, and Songer 2000, 102). A grant of cert means that the Supreme Court has made a conscious decision to further scrutinize the facts of a case as well as the decision that was made by the lower court. The application of an additional level of scrutiny combined with the possibility of reversal has the potential to undermine the legitimacy of the lower court (Cameron, Segal, Songer 2000, 102).

Before the full circuit, the regulations provided for the Courts of Appeals may not be explicit enough to provide accurate guidance to judges on when to grant an en banc rehearing (Giles, Walker, and Zorn 2006, 855; Solimine 1988, 54). There is evidence to suggest that as the ideological distance between the panel and the circuit increases an en banc hearing becomes more likely (George 1999, 257; Clark 2009, 16). George (1999) bases this understanding of the use of the en banc on the attitudinal model, which interprets judicial decision-making as a function of the ideological biases of each judge (George 1999, 232). Building on George's

findings concerning the influence of ideology in panel decisions, Clark (2009) states that the ideological positions of the panel, circuit, and Supreme Court impact the decision of the circuit to grant an en banc rehearing. Clark (2009) finds that when a panel makes a decision that contradicts its own "perceived ideological bias" that decision is less likely to be reviewed en banc (Clark 2009, 15; Giles, Walker, and Zorn 2006, 862). This finding comports with the "Nixon goes to China" proposition. Conversely, when a panel decision appears to affirm the perceived ideological bias of the panel, an en banc rehearing is more likely to follow (Clark 2009, 15-6).

Further evidence of ideological use of the en banc has shown that personnel changes on the bench that mirror ideological shifts influence the use of the en banc rehearing. Following several appointments by President Reagan to the Courts of Appeals, the federal judiciary experienced an increase in the use of en banc rehearings (Harvard Law Review 1989, 868). Reagan judges appeared to voting in blocs along appointive lines (Harvard Law Review 1989, 871-3). These ideological splits and non-unanimous decisions highlighted "conflict and disharmony" within the panels (Banks 1997, 405).

A strong body of evidence exists to show that when the full circuit and the Supreme Court receive appeals from the lower courts, they are attentive to the ideological direction of the decision and to the ideological preferences of the panel. The higher courts – the full circuit and the Supreme Court – appear to qualify the level of bias in a decision based on the level of bias they perceive from the panel. Whether the high court agrees with the decision is paramount to the grant of further review, but the panel's ideological position provides an additional signal for whether to review (Giles, Walker, and Zorn 2006, 854; George 1999, 271).

The Decision to Seek an Appeal

The most basic explanation for why a litigant chooses to appeal a decision by a three-judge panel is the sentiment, by the losing litigant, that the decision is unsatisfactory. The classic economic model of litigant decision making posits that a litigant will pursue further litigation or appeal if he or she believes that doing so will result in a net pay-off – usually financial – that cannot otherwise be secured through mediation outside of the court (Cross 2001, 4). When a litigant appeals, they do so with the hope or expectation that on appeal their case will be decided in a manner unlike that of the panel.

The particulars of a case may lead a litigant to believe that their appeal will be treated favorably. If a case possesses one or more of the aforementioned qualities that have historically accompanied grants of cert or en banc rehearings, they may be more likely to appeal a decision. These components include the presence of a dissent, the status of the petitioner, the issues area addresses, conflict with Supreme Court precedent, and disagreement among the lower courts. What stands out about these indicators of a successful appeal is that judges and justices can use them to determine whether their ideological preferences are being threatened.

One reason why a litigant might choose to appeal via a petition for an en banc rehearing is the belief that the decision of the panel is not representative of the entire circuit (Clark 2009, 2). Such assumptions are not far-fetched because, as the size of the circuit increases, homogeneity within the circuit becomes less likely (Ginsberg and Falk 1990, 1018, 1048). Because of randomization in constructing three-judge panels, panel decisions on average are expected to remain close to the ideal point of the entire circuit (George 1999, 242-243).

Unfortunately, this randomization mechanism does not guarantee a representative panel. The possibility always remains that a panel will be composed of a majority of "outliers" from the circuit. A panel decision that appears to be at odds with the ideological preferences of the full circuit may be a positive sign that a petition for an en banc rehearing may fare well before the entire circuit. Thus, petitioning for an en banc rehearing is the only way to involve the remaining judges on the circuit who may also be unsatisfied with the ruling of an unrepresentative panel (Clark 2009, 2; George 1999, 274). Likewise, a litigant choosing to petition the Supreme Court would have to believe that the decision by the panel does not agree with the known preferences of the majority of Supreme Court justices.

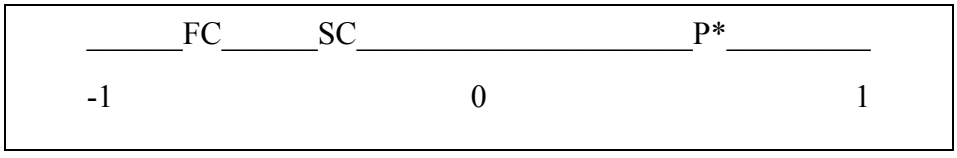
For a litigant to choose to appeal based on ideological considerations, the litigant must have knowledge of the ideological preferences of judges and justices. Information on judicial preferences can be gathered by researching previous judgments of the Supreme Court or full panel, but there are limits to the amount of information attorneys and litigants filing pro se can gather in the time they have to file an appeal. Because winning is the ultimate goal of every attorney, it comes as no surprise that attorneys are attentive to the ideological preferences of judges and justices (Giles, Walker, and Zorn 2006, 865). Further, since certain litigants have the benefit of repeated interaction with the courts, they will be better equipped to decide which cases are best suited for appeals before the Supreme Court or a full circuit (Songer, Sheehan, and Haire 2003, 92).

Statement of Hypotheses

The foundational assumption of the following hypotheses is that litigants appealing the decisions of Court of Appeals three-judge panels are rational and primarily concerned with moving the decision of whichever court they appeal to in the direction of their ideological preferences. Accordingly, litigants will appeal to the venue – Supreme Court or full circuit – that they expect will reverse the decision of the panel. Likewise, when making decisions, judges and justices are assumed to be attempting to move the decision of the court in the direction of their ideological preferences (Segal and Cover 1989). If litigants expect judges to make their decisions with ideological preferences in mind, then the litigants are expected to appeal to whichever venue is most likely to overturn the panel decision with the intent of resolving the dispute in a manner that is closer to their ideological preferences.

Hypothesis 1: *If the panel is more liberal (conservative) than both the Supreme Court and the full circuit, then the appellant will appeal to the court that is the most liberal (conservative) between the Supreme Court and the full circuit.*

Figure 1: Spatial Representation of Hypothesis 1



In the Figure 1, the Supreme Court is represented by *SC*, the full circuit by *FC*, the panel by *P,* and the panel decision by the asterisk *. The panel is more conservative than the Supreme Court and the full circuit and has decided a case in a manner that agrees with its ideological

preferences. The appellant in this situation is expected to appeal to a liberal court in pursuit of a decision more liberal than the conservative decision of the panel. In this situation, the appellant is expected to appeal to the full circuit because the full circuit is the most liberal option. If Hypothesis 1 accurately mimics litigant decision-making in the real world, then litigants that are appealing the decision of a panel that is positioned on the extreme are expected to appeal to whichever venue is most unlike the decision of the panel.

> **Hypothesis 2:** *If the panel is ideologically positioned between the Supreme Court and the full circuit, then the appellant will appeal to whichever venue's – Supreme Court or full circuit – ideological preferences are the opposite of the ideological direction or the panel decision.*

Figure 2: Spatial Representation of Hypothesis 2

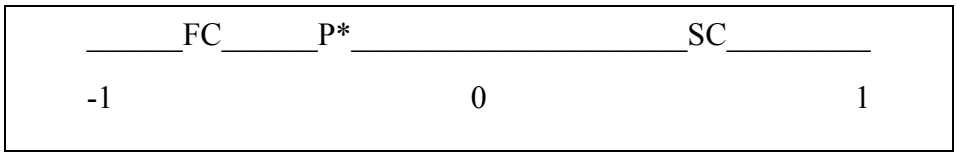


Figure 2 depicts a liberal full circuit, a relatively less liberal panel that has made a decision that comports with its ideological preferences, and a conservative Supreme Court. The spatial representation allows for predictions on where the appellant is expected to appeal. Since the panel has made a liberal decision, the appellant is expected to appeal to the Supreme Court. Because the Supreme Court is conservative, the appellant will pursue an appeal at a conservative venue that is more likely to overturn the liberal decision of the panel.

Hypothesis 2 places the panel between the Supreme Court and the full circuit. This orientation of the federal courts makes the decision of where to appeal 'easy' for the litigant, because only one of the Supreme Court or the full circuit is expected to make a decision that would move the decision in the direction of the losing litigants preferences. The specific ideological preferences of the Supreme Court and the full circuit are not relevant to draw conclusions on Hypothesis 2, so either the full circuit or the Supreme Court can be conservative or liberal. If the assumptions underlying Hypothesis 2 are correct, the litigants acting within an ideological set-up like Hypothesis 2 are expected to be more likely to appeal to whichever venue's ideological preferences are opposite to that of the panel's decision.

> **Hypothesis 3:** *If the appellant pursuing an appeal of a three-judge panel decision has experience before the federal judiciary (i.e. private businesses, private organizations, federal governments, sub-state governments, etc.), then the appellant's behavior will be more likely to conform to the expectations of Hypothesis 1 and Hypothesis 2.*

Hypothesis 3 focuses on the benefits gained through repeated interaction with the judges and justices of the federal courts. Because the federal government, state governments, local governments, businesses, and interest group organizations are more likely to be involved in litigation at the federal level than most other litigants, they are expected to show a greater propensity to conform Hypothesis 1 and Hypothesis 2. Because I expect these litigants to be more experienced, I refer to all of these litigants that fit with this category as experienced litigants. The attorneys for these litigants benefit from repeated interaction with the courts and as a result, they are expected to possess better knowledge of the ideological preferences of judges and justices within the judiciary.

Description of Data

The unit of analysis for this project is the case decided by the three-judge panel. Cases are the most fitting unit of analysis, because the independent variables – the ideological direction of the decision, the ideological preferences of the panel, the ideological preferences of the Supreme Court, the ideological preference of the full circuit, and the identity of litigants – are all related to the cases. The dependent variable for this study is which court, the Supreme Court or the full circuit, litigants choose to appeal to if they are unsatisfied with the decision rendered by the three-judge panel.

The cases used in this study are taken from the Court of Appeals Database that includes a random sample of cases taken each year from 1925-2002. The Court of Appeals database includes information on the direction of the decision and the identity of the petitioners in each case. The Court of Appeals Database will be used in conjunction with the Shepardized Court of Appeals Database. The Shepardized Court of Appeals Database provides information on the case history beyond the three-judge panel that is of interest to this study but is absent from the original Court of Appeals Database – for example, information on petitions for rehearings en banc and petitions for certiorari (Shepardized Codebook 2010, 1).

To measure the ideological position of the Supreme Court, the full circuit, and the panel, I use the ideological measurement scores developed by Giles, Hettinger, and Peppers (GHP) (Giles, Hettinger, and Peppers 2001). In my analysis, I use median GHP scores – the ideological position of the median judge or justice on a court – for the Supreme Court, full circuit, and three-judge panel to measure the overall ideological preference of the court. I use this approach,

because evidence suggests that the ideological bias of the justice occupying the median position on the Supreme Court influences the overall ideological direction of Supreme Court decisions (Clark and Lauderdale 2010).

To test the hypotheses, I look only at Courts of Appeals cases taken from the Courts of Appeals Database from the 1970 to 2002 terms. This timeframe covers the Supreme Court under the leadership of Chief Justices Warren E. Burger and William H. Rehnquist. During Burger's tenure (1969-1986) there were seven natural courts – only the latter six of these will be covered by this study. Rehnquist led the Supreme Court during the remainder of the time of this study (1986-2005). All seven natural courts during Rehnquist's time as Chief Justice are a part of this study.

The 1970-2002 timeframe was selected because in the years preceding 1970, the Court of Appeals database contained less than ten cases with requests for a rehearing en banc. After 1970, the number of en banc requests in the database increased dramatically. The lack of en banc requests in the years preceding 1970 may be partially due to inconsistencies surrounding en banc procedure within the Courts of Appeals system. En banc hearings and rehearings were not used by any of the Courts of Appeals until the late 1930s (Madden 1974, 402). It was not until 1941, in *Textile Mills Securities Corp. v. Commissioner* that the Supreme Court ruled that Courts of Appeals possessed the "inherent right" to hear cases en banc (Madden 1974, 403). From that point forward, Courts of Appeals were empowered to hear cases en banc, but uniform standards for granting en banc hearings and rehearings were not instituted until 1968. It is possible that clearer instructions on the use of en bancs hearings encouraged judges to use the en banc more often. It is also possible that litigants began to request for en banc hearings and rehearings more

frequently because of the new regulations. Because of the inconsistencies in the data before and after 1970, the study will only consider those cases from the database that occur after the 1970 term.

For the majority of the chosen time from 1970-2002, the ideological median of the Supreme Court was moderately conservative – the most conservative natural court was during the 1988 term – shortly after Rehnquist was sworn in as Chief Justice and Associate Justices Antonin Scalia and Anthony Kennedy joined the Court ("Members of the Supreme Court"). The Court median was slightly liberal during two periods within the timeframe of this study. In the first instance, the Court was liberal from the 1977 term to the 1981 term. When Justice Stewart Potter was replaced by Justice Sandra Day O'Connor, the Court median moved back to being conservative (COA Database, "Members of the Supreme Court"). The next period during which the Supreme Court median was liberal occurs during the 2001 term when the Court moved from being weakly conservative to being weakly liberal (Court of Appeals Database). The significance of this information is that, for an overwhelming majority of the cases included in this study, the Supreme Court had conservative preferences.

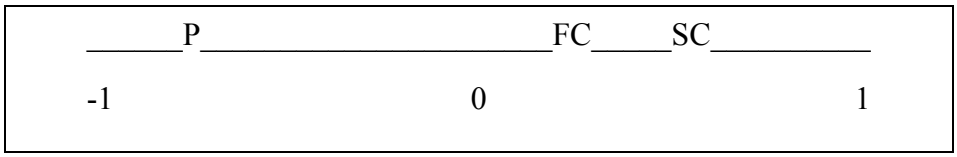
The data available through the Court of Appeals Database was manipulated in order to answer the questions raised by this study. First, difference variables were constructed to calculate the distance between the GHP medians of the panel and the circuit (*pancirc_diff*) and the panel and the Supreme Court (*pansct_diff*). These difference scores allow for the placement of the courts along a finite line ranging from -1 to 1 – the -1 end of the finite line represents the most liberal rating and the 1 represents the most conservative rating. To simplify the placement of the panel, the full circuit, and the Supreme Court, the difference variables were converted into

dummy variables. Two variables, Supreme Court direction (*sctdr*) and en banc direction (*ebdr*), were constructed to identify the placement of the Supreme Court and the full circuit in comparison to the panel using the difference variables. The Supreme Court direction and en banc direction variables were populated with a '1' if the difference between the panel and the Supreme Court or the full circuit was greater than zero. If the difference between the panel and the Supreme Court or the full circuit was less than zero, then the Supreme Court direction and en banc direction variables were populated with a '-1.'

After placing the panel, full circuit, and Supreme Court on a continuum from liberal to conservative, a dummy variable for the ideological outcome of the panel decision was constructed. In the Court of Appeals Database, the *direct1* variable codes the ideological direction of the panel decision. Cases that were coded as having a mixed outcome or when the direction of the panel decision could not be coded using "conventional outcome standards" were dropped off from the analysis (Court of Appeals Database Codebook 1996, 89). With the dataset reduced, the dummy variable for the ideological outcome of the panel decision (*panlib*) was generated to signify if the panel decision was liberal or conservative.

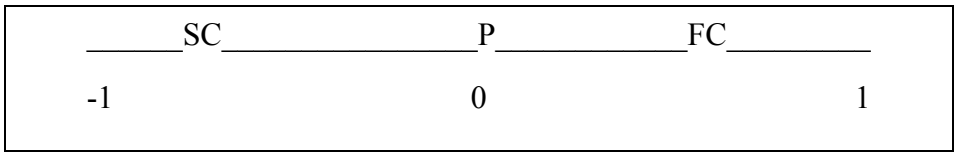
After the construction of a variable that allowed for the placement of the various courts on the -1 to 1 continuum and the creation of the *panlib* variable, four scenarios were constructed to capture Hypothesis 1 and Hypothesis 2. In Scenario 1, the panel is more liberal than both the Supreme Court and the full circuit.

Figure 3: Spatial Representation of Scenario 1 (Hypothetical)



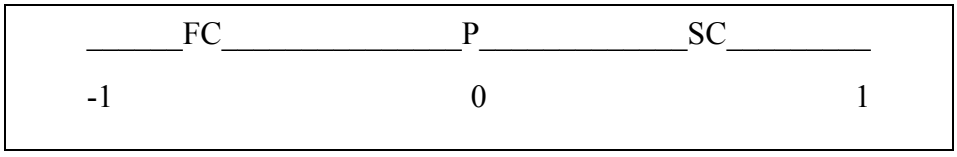
In the Scenario 2, the panel is positioned between the Supreme Court and the full circuit. This scenario is broken down into two sub-scenarios. In Scenario 2a, the Supreme Court is more liberal than the panel and the full circuit is more conservative than the panel.

Figure 4: Spatial Representation of Scenario 2a (Hypothetical)



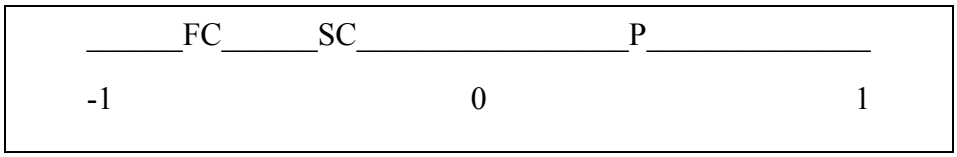
In Scenario 2b, the Supreme Court is more conservative than the panel and the full circuit is more liberal than the panel.

Figure 5: Spatial Representation of Scenario 2b (Hypothetical)



In Scenario 3, the panel is more conservative than both the Supreme Court and the full circuit.

Figure 6: Spatial Representation of Scenario 3 (Hypothetical)



After this, another variable, *certrq,* is constructed to predict whether the litigant will seek cert rather than petition for an en banc rehearing. The *certrq* variable indicates the expectations of each case based on the scenario into which it fits. In Scenario 1, the *certrq* variable is populated with a 1 if the *scen1* variable equals 1, the *panlib* equals 1, and the *pansct_diff*' variable was less than the *pancirc_diff*' variable. In Scenario 2a, the *certrq* variable is populated with a 1 if the '*scen2a'* variable equals 1, the *panlib* variable equals 0, and the *sctdr* variable equals -1. Likewise in Scenario 2b, the *certrq* variable is populated with a 1 if the *scen2b* variable equals 1, the *panlib* variable equals 1, and the *sctdr* variable equals 1. Finally in Scenario 3, the *certrq* variable was populated with a 1 if the *scen3* variable equals 1, the *panlib* variable equals 0, and if the *pansct_diff* was greater than the *pancirc_diff*.

To isolate cases for Hypothesis 3, non-experienced litigants are filtered out of the dataset to allow for more narrow analysis. The *applwin* variable was created to identify which party to the suit lost before the three-judge panel. The losing litigant in the panel hearing indicates which litigant is appealing to the full circuit or the Supreme Court. This allows for identification within the Court of Appeals Database of what kind of litigant is pursuing the appeal. The high quality appellant (*hqapp)* variable was created to identify high quality litigants like private businesses, private organizations, federal governments, sub-state governments (county, local, special district,

etc.), state governments, and governments for which the level is not specified by the dataset. After this was done, the scenarios presented in Hypothesis 1 and Hypothesis 2 were reassessed by examining only those cases where the appellant is considered high quality. Last, a variable representing the actual appeal decision of the appellant (*act_certrq)* was constructed to identify whether the appellant actually appealed to the Supreme Court or the Full Circuit.

Cases with a subsequent history in the federal courts that did not meet the requirements for cases in this study were removed from the dataset. Cases that had a subsequent history beyond the panel but were not associated with an appeal to the full circuit or the Supreme Court were removed – there are 400 such cases. The cases that included a panel rehearing before an appeal to the Supreme Court or the full circuit were not removed dataset – there are 362 of these cases. These cases were kept because this study is interested in the decision to appeal the decision of the three-judge panel to a court other than the three-judge panel. The presence of a rehearing by three-judge panel does not disrupt the main objective of this project.

Analysis

To evaluate the constructed models' ability – based on the hypotheses – to accurately determine the venue of appeal for the sample of cases from 1970 to 2002, statistical tests two sample t-tests were run to determine the difference of the means of the predicted and actual venues of appeals. First, I evaluate the dataset as a whole by running a two-sample t-test. Then, I separate the dataset into each of the previously described scenarios. With the dataset as a whole and within each scenario, I address the ability of the hypotheses to predict whether losing litigants would petition for a grant of certiorari or for a rehearing en banc based on the ideological preferences of the panel, Supreme Court, and full circuit.

In the first stage of the analysis, I run a two-sample t-test on all of the cases in the sample. If the prediction were correct, the mean of the cases where I predicted a cert request should be close to 1, and the mean of the cases where I predicted a petition for a rehearing en banc should be close to 0. Again, if my predictions are correct, the difference of the means should be a negative number since the mean of the cases where an en banc request was expected would be subtracted from the cases where a cert request was expected.

$$\text{diff} = \text{mean}(0) - \text{mean}(1)$$

For all the cases in the dataset, the models accurately predicated where the losing litigant would appeal in 39% of the cases. The null hypothesis was that the difference of the means would equal zero (H_o: diff = 0), and the alternative hypothesis was that the difference of the means would not equal zero (H_o: diff $\neq$ 0). Though the difference of the means for the entire dataset was negative

(-0.0281596), at a significance level of 0.05, the results of the t-test were not statistically significant with $p = 0.0832$, so I cannot reject the null hypothesis.

Table 1: Proportional Distribution of All Cases

		Predicted	
		En Banc	Cert
Actual	En Banc	.13	.05
	Cert	.55	.26

Total: 2629

At this stage of analysis, I removed from cases where the model would not predict an appeal to either the Supreme Court or the full circuit from the dataset. This happens in two situations. First, when the Supreme Court and the full circuit are both more liberal than a conservative panel that has rendered a liberal decision. In this situation, the losing litigant is not expected to appeal the panel decision, because ideologically, doing so is not expected to yield an opposite result, because the liberal full circuit or Supreme Court would be expected to affirm the decision of the panel. The losing litigant is also not expected to appeal the decision of a panel that is more liberal than the Supreme Court and the full circuit if the panel had decided a case conservatively. In the next stage of analysis, cases that fit these descriptions are removed from the dataset. The total number of cases remaining when cases where an appeal was not expected were removed is 1548. With the dataset narrowed, the models accurately predict the venue of appeal for approximately 53% of the cases. However, with a mean of -0.0078712, the null hypothesis cannot be rejected because the results are not significant, $p = 0.6791$.

Table 2: Proportional Distribution of All Cases with Predicted Appeal

		Predicted	
		En Banc	Cert
Actual	En Banc	.08	.09
	Cert	.39	.45

Total: 1548

Once again, the dataset is reduced to only include cases where the losing litigant is experienced. In this study, experienced litigants are include private businesses, private organizations, federal governments, sub-state governments (county, local, special district, etc.), state governments, and governments for which the level is not specified by the dataset. This level of analysis tests Hypothesis 3 which predicts that experienced litigants will behave more strategically with ideology in mind. Only analyzing the behavior of experienced litigants shrinks the dataset down to 514 cases. The models were able to accurately predict the venue of appeal for approximately 54% of the cases. With a $p = 0.8909$, these findings are not statistically significant. Again, I cannot reject the null hypothesis.

Table 3: Proportional Distribution of Exp. Litigants in All Cases with Predicted Appeal

		Predicted	
		En Banc	Cert
Actual	En Banc	.08	.10
	Cert	.36	.46

Total: 514

Hypothesis 1

Now, the dataset will be broken down based on the different scenarios explained by the hypothesis to see if there is any validity to the models in each situation. Hypothesis 1 states that

when a panel is more liberal (conservative) than both the full circuit and the Supreme Court, the losing litigant is expected to appeal to whichever venue is most liberal (conservative). This orientation of the courts is captured by the spatial set-up of Scenario 1 (where the panel is more liberal) and Scenario 3 (where the panel is more conservative). It should be noted that the ability of Hypothesis 1 to predict the venue of appeal is slightly limited, because there was no way incorporated into the model to account for those litigants that choose to go en banc before they appeal to the Supreme Court when the panel is an ideological opposite of the Supreme Court and the full circuit.

The model for Scenario 1 predicts that the litigant will seek an appeal with whichever venue is most conservative. There were 917 cases that matched the ideological set-up of Scenario 1. The model accurately predicted that the losing litigant would seek an appeal in 29% of the cases but predicted the venue of appeal incorrectly for the remaining cases. When a two-sample t-test was conducted, the difference of the means was 0.021348, the findings were not statistically significant at $p = 0.5799$. Therefore, I cannot reject the null hypothesis.

Table 4: Proportional Distribution of Scenario 1

		Predicted	
		En Banc	Cert
Actual	En Banc	.18	.03
	Cert	.67	.11

Total: 917

After this initial stage of analysis, cases where an appeal is not expected in Scenario 1 because the liberal panel rendered a conservative decision are removed from the dataset. Now there are

241 cases in the dataset. The model accurately predicted the appeal venue in 54% of the cases, but the findings were not statistically significant with *p = 0.5289.*

Table 5: Proportional Distribution of Scenario 1 with Expected Appeals

		Predicted	
		En Banc	Cert
Actual	En Banc	.12	.13
	Cert	.33	.42

Total: 241

There were 1186 cases that matched the set-up of Scenario 3 where the panel is more conservative than the Supreme Court and the full circuit. The model accurately predicted where the losing litigant would appeal in approximately 46% of these cases. Unlike Scenario 1, the difference in the means was negative (-0.1033807). The findings for Scenario 3 are statistically significant at a *p-value* of 0.05 with a *p = 0.0000*. In this scenario, I can reject the null hypothesis. This means that a relationship exists between the predicted venue of appeal and the actual venue of appeal for Scenario 3. The statistical significance of Scenario 3 may be a result of the nature of the Supreme Court during most of the time frame for this study – the Supreme Court was conservative. It is possible that the conservative ideological preferences of the Supreme Court made the Court a regular venue for litigants hoping to reversal liberal decisions that fit within this spatial model. If it is true, as the previous results have shown, that ideology is not the main determinant of where a losing litigant will appeal, then it possible that the coincidental ideological preferences of the Court during this time are affecting the findings in this scenario. In the results shown thus far, litigants are choosing to petition for cert in greater

numbers than they are choosing to petition for an en banc rehearing, so this scenario could be benefiting from that coincidence.

Table 6: Proportional Distribution of Scenario 3

		Predicted	
		En Banc	Cert
Actual	En Banc	.13	.04
	Cert	.51	.33

Total: 1186

When the appeals that the model would not expect to occur are removed from the dataset for Scenario 3, the model accurately predicts where the losing litigant will seek an appeal in approximately 59% of the cases. Again, the findings of the two sample t-test for Scenario 3 are statistically significant with $p = 0.0001$, so I can reject the null hypothesis.

Table 7: Proportional Distribution of Scenario 3 with Expected Appeals

		Predicted	
		En Banc	Cert
Actual	En Banc	.09	.06
	Cert	.36	.50

Total: 781

Hypothesis 2

In Hypothesis 2 the panel is placed between the full circuit and the Supreme Court. Hypothesis 2 is represented by the ideological placement of the panel, full circuit, and Supreme Court in Scenario 2a and Scenario 2b. There were 197 cases that matched the set-up of Scenario 2a, and 295 cases that matched the set-up of Scenario 2b. In Scenario 2a, the panel is positioned between a liberal Supreme Court and a conservative full circuit. The model accurately predicted where

losing litigants would appeal in approximately 61% of the cases. In Scenario 2a, the difference of the means was not significant, so the null hypothesis cannot be is rejected.

Table 8: Proportional Distribution of Scenario 2a

		Predicted	
		En Banc	Cert
Actual	En Banc	.05	.23
	Cert	.16	.56

Total: 197

In Scenario 2b, the panel is positioned between a conservative Supreme Court and a liberal full circuit. The model accurately predicts where the losing litigant will appeal in 36% of the cases. When the two-sample t-test was run on the Scenario 2b sample, the difference in the means was not statistically significant at a *p-value of 0.05* – though it did come quite close with $p = 0.0920$; I cannot reject the null hypothesis.

Table 9: Proportional Distribution of Scenario 2b

		Predicted	
		En Banc	Cert
Actual	En Banc	.06	.05
	Cert	.59	.30

Total: 295

For the cases that fit into Scenario 2a and 2b, it is not necessary to take out the cases where appeals are not expected, because such cases are not expected within these scenarios. The placement of the panel between the full circuit and the Supreme Court means that in each case I expect there to be a venue of appeal with ideological preferences that contradict the ideological preferences of the panel decision.

Hypothesis 3

Hypothesis 3 states that when a litigant has more experience within the federal judiciary, the litigant will be more knowledgeable of the ideological preferences of the judges and justices on the federal courts. Knowing the ideological preferences of judges and justices is beneficial, because the litigant is better able to choose which venue to appeal to when hoping to reverse the decision of a lower court. Holding the assumptions made by Hypothesis 1 and Hypothesis 2 to a higher standard, I conduct another set of two-sample t-tests to evaluate whether the expectations of Hypothesis 3 capture a feature of litigant behavior within the federal courts.

To test Hypothesis 1 under the constraints of Hypothesis 3, all inexperienced litigants are removed from the sample to allow for isolated scrutiny of the experienced litigants. All cases where an appeal would not be expected based on the ideological preferences of the different courts were also removed from this dataset. In Scenario 1, there were 175 cases with experienced litigants as appellants that were expected to appeal. The model accurately predicted where experienced litigants would appeal to in 56% the cases. The difference of the means in Scenario 1 (-0.0466667) was not statistically significant, so I cannot reject the null hypothesis.

Table 10: Proportional Distribution of Scenario 1 with High Quality Appellants

		Predicted	
		En Banc	Cert
Actual	En Banc	.11	.13
	Cert	.31	.45

Total: 293

In scenario 3, there were 439 cases with experienced litigants as appellants. Of these, about 60% of the appellant's venue of appeal were accurately predicted by the model. Unlike the previous t-tests for Scenario 3, the difference of the means (-0.0534476) was not statistically significant at a *p-value = 0.05,* so I cannot reject the null hypothesis.

Table 11: Proportional Distribution of Scenario 3 with Experienced Appellants

		Predicted	
		En Banc	Cert
Actual	En Banc	.08	.08
	Cert	.32	.52

Total: 143

In Scenario 2a and Scenario 2b, the panel is positioned between the Supreme Court and the full circuit. Within Scenario 2a, there are only 56 cases where the appellant was experienced. The model for Scenario 2a accurately predicted where the losing litigant would seek an appeal in 43% of the cases. The difference in the means of the predicted and actual venues of appeal is not statistically significant for Scenario 2a; I cannot reject the null hypothesis.

Table 12: Proportional Distribution of Scenario 2a with Experienced Appellants

		Predicted	
		En Banc	Cert
Actual	En Banc	.16	.14
	Cert	.43	.27

Total: 56

In Scenario 2b, there were 126 cases with experienced litigants as appellants. In 55% of these cases, the model accurately predicted where the losing litigant would seek an appeal. Again, the

difference of the means for Hypothesis 2 in Scenario 2b is not statistically significant, so I cannot reject the null hypothesis.

Tables 13: Proportional Distribution of Scenario 2a with Experienced Appellants

		Predicted	
		En Banc	Cert
Actual	En Banc	.02	.09
	Cert	.36	.53

Total: 126

Among, the results of the two-sample t-tests for the larger sample of cases and the cases that involved experienced appellants, only one scenario – Scenario 3 with inexperienced and experienced litigants – was statistically significant. It should also be noted that of the experienced litigant scenarios, Scenario 3 – though not statistically significant – came the closest to being statistically significant ($p = 0.1287$). As previously stated, the statistically significant relationship present in the Scenario 3 for Hypothesis 1 may be a result of the existing composition of the Supreme Court during the time frame of this study and the Court's ideological position relative to other federal judicial bodies. As a group, the experienced litigant two-sample t-tests had *p-values* that were closer to being statistically significant than the scenarios that included inexperienced appellants. Thus, while Hypothesis 3 did not produce any statistically significant findings, it may lend some truth to the reasoning behind Hypothesis 3 that expects experienced litigants to make decisions with the ideological preferences of the different appeal venues in mind.

Conclusion

The ability of the models to predict the decision of litigants – both inexperienced and experienced – based solely on the ideological preferences of the different appeal venues was not strong. Only one scenario produced statistically significant results. The model's failure to predict the venue of appeal to a level of statistical significance suggests that ideology alone cannot explain the decision-making of litigants pursuing an appeal within the federal judiciary. Litigants may be paying attention to other features unique to their dispute – like the issue area – that may have a greater influence on their decision of where to appeal. Despite this fact, there are lessons to be learned from the failure of this study to capture the influence that ideological preferences may have on appealing litigants.

In each scenario, there appeared to be preferences by litigants to pursue a petition for a grant of certiorari instead of a petition for a rehearing en banc. The reason for this discrepancy is not obvious, but it is possible that there are other institutional factors that discourage litigants from using the en banc. For an en banc rehearing to occur, the appellant must jump through a few more hoops than with a petition for cert. With the en banc, the litigant must persuade at least one judge on the circuit to support the vote to rehear the dispute en banc. Further, a judge's willingness to spearhead the poll of the rest of the bench is only the first threshold that must be passed before a rehearing en banc can be achieved. Once a judge takes it upon him or herself to poll the other judges, the majority of the judges on the circuit have to vote to rehear the case.

At the midpoint of this study – around 1985 – the Court of Appeals for the First Circuit had six judges on the bench, the Second Circuit had thirteen, the Third Circuit had twelve, the

Fourth Circuit had eleven, the Fifth Circuit had twenty-eight, the Sixth Circuit had fourteen, the Seventh Circuit had eleven, the Eighth Circuit had twelve, the Ninth Circuit had twenty-eight, the Tenth Circuit had ten, and the Eleventh Circuit had twelve. In all but one of these Courts of Appeals, securing a majority vote from the judges – strictly considering the likelihood of securing that majority – was more difficult than receiving a grant of cert from the Supreme Court where only *four* yes votes are required. When this primary challenge is combined with the variety of preferences within each circuit, the process for securing an en banc rehearing is further complicated. For the litigant, it may have been easier to convince four Supreme Court judges of the importance of their dispute than it may have been to convince six judges on the Fourth Circuit or even fourteen judges on the Ninth Circuit. Additionally, the cert petition may be more appealing simply, because it is more popular than the en banc. The prominence of the Supreme Court might be enticing to some litigants who hope that the outcome of their case will have lasting effects on large portions of the population.

The findings in this study do not provide sufficient support for the theory that the litigants are exclusively attentive to the ideological preferences of judges and justices when they appeal. it does not appear that the litigants during the time frame of this study are primarily concerned with the ideological preferences of the full circuit and Supreme Court. At first glance, these findings seem strange, because it is not unusual for courts to decide cases in manners that appear ideologically motivated. However, the complexities of legal disputes often mean that litigants have a variety of objectives in mind when they appeal. As with the legal, strategic, and attitudinal models used to explain judicial behavior, there are several ways to evaluate litigant behavior. As this study shows, the decision to appeal is not one-dimensional and does not depend

too heavily on one aspect of the decision being appealed. Litigant decision-making appears to be concerned with more factors than are evaluated by this study. Possible considerations of litigants seeking to appeal a panel decision include the ripeness of the case, the expected expertise of the judges or justices in the issue area the case covers, or the influence the litigant hopes the outcome of case will have on the population. Future studies into the nature of litigant decision-making should find ways to measure and test the impact these considerations may have on the decision of the litigant to appeal to the Supreme Court of the full circuit.

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