Assessing the Applicability of Strategic Theory to Explain Decision Making on the Courts of Appeals

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Abstract

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The focus of this analysis is whether a strategic perspective provides a useful approach that enhances an understanding of broad patterns of judicial decision making on the U.S. Courts of Appeals. We examine whether it is reasonable in the majority of cases for appeals court judges to modify their behavior when necessary to avoid reversal by the Supreme Court. Our assessment utilizes statistical analyses and interviews from 28 judges on the U.S. Courts of Appeals. Based on a three part argument we conclude that a strategic perspective is not helpful in understanding the decision calculus of appeals court judges.

Strategic approaches to appellate court decision making, like attitudinal models, usually posit that judges have a goal of making good public policy that is consistent with their own personal political preferences (Cross and Tiller 1998; Epstein and Knight 1998; 2000; McNollgast 1995). But in contrast to attitudinal models that argue that judges vote sincerely to support case outcomes that they most prefer, judges who vote strategically take into account the potential actions of other actors and may modify their behavior in response to probable reactions of others (Baum 1997). The main strategic question facing appeals court judges is usually assumed to be whether they will modify their behavior in order to avoid reversal by the Supreme Court (McNollgast 1995; Songer et al 1994; Klein and Hume 2003).

The focus of the present analysis is whether a strategic perspective provides a useful general approach that enhances an understanding of broad patterns of decision making by judges on the U.S. Courts of Appeals. In particular, we examine whether it is rational in the majority of cases for appeals court judges to modify their behavior when necessary to avoid reversal by the Supreme Court. We conclude that in a large majority of the cases they decide, a strategic perspective is not helpful in understanding the decision calculus of appeals court judges. That conclusion is based on a three part argument. First, we find that circuit judges do not have a strong sense of which of their decisions are likely to be reviewed and potentially reversed by the Supreme Court.[1] Second, we present an analysis of actual appeals court decisions that indicates that even if one makes very conservative assumptions, the objective probability that all but a handful of these cases will be reviewed and reversed is so small that a rational judge would not fear reversal unless the costs of such a reversal were quite high.[2] Finally, we show that in fact, the

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[1] Note that this finding is in contrast to the <u>assumption</u> made by a number of proponents of strategic approaches including McNollgast 1995).

[2] This is also contrary to <u>assumptions</u> made many strategic accounts including that of McNollgast 1995.

perceived costs of reversal are much too small to motivate judges to change their behavior to attempt to avoid reversal by the Supreme Court.

We evaluate these conditions for rational strategic action with two, independent sources of information. First, we rely on interviews with U.S. Courts of Appeals judges to assess their ability to predict which cases will be reviewed and to understand their perceptions about the costs of reversal. Secondly, we model empirically the factors associated with Supreme Court review, relying solely on the characteristics of the cases that would be known to appeals court judges at the time of their decision.

Strategic Accounts of Judicial Behavior

Extant scholarship suggests that attitudes have a substantial effect on the behavior of all appellate court judges in the United States (Hettinger, et. al. 2004, 123). Nevertheless, even when restricting focus to the policy relevant behavior of appellate judges, there appears to be an increasing number of scholars who argue that judges do not vote their sincere ideological attitudes, but instead temper their private preferences with strategic calculations about the probable reaction of others. (Epstein and Knight 1998).

An important dispute is whether appeals court judges' voting is motivated by fear of reversal by the Supreme Court. While some scholars have argued that U.S. Courts of Appeals judges can anticipate when the U.S. Supreme Court will review a case and will modify their decision in anticipation of the probable Supreme Court response, others disagree and claim to find no evidence of strategic behavior (Hettinger, et. al. 2004). The judges themselves also disagree with the advocates of strategic perspectives. Interviews conducted by the authors with 28 judges on the courts of appeal in the United States found the judges to be nearly unanimous in their view that neither they nor their colleagues act strategically to avoid review[3]. Furthermore, other recent interviews with judges on the U.S. Courts of Appeals came to a similar

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[3] Similar interview results were also found in interviews with 35 court of appeals judges from Canada and England.

conclusion (Klein 2002). Yet, advocates of strategic models continually suggest that lower court judges

fear reversal from the Supreme Court.

The underlying premise of strategic models is that judges are motivated by their policy preferences

and that in order for judges to advance their policy preferences or goals they must calculate how others will

react to their decisions.[4] Both strategic theories of appeals court decision making and legal model

accounts of those decisions posit that judges will depart from their private ideological preferences when

deciding cases. But the accounts differ in an important way. "The legal model is retrospective and calls on

circuit courts to adhere the previous rulings of the Supreme Court. The strategic model is prospective and

expects that circuit courts will respond to the anticipated future holdings of the Court" (Cross 2007, 97).   If

lower court judges cannot predict which cases will be reviewed then it would be impossible for them to act

strategically. However, if judges can predict the likelihood of review, then it is reasonable to assume they

might act differently on cases that they believe will be reviewed by the Court especially if reversal is

deemed costly.

Strategic Accounts of the U.S. Courts of Appeals

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[4] Strategic models are not new phenomena.   Both Schubert (1958, 1962) and Murphy (1964) methodically analyzed

strategic behavior on the Supreme Court several decades ago. However, when examining scholarship on strategic judicial

behavior in light of its information assumptions, it is important to distinguish between strategic interactions among judges on the

same court and strategic reactions by judges to external actors. Judges can usually be assumed to have sufficient information

about the preferences and probable actions of colleagues on their own court, but they may have much less information about

judges on other courts or political actors outside the judicial system.   There is considerable evidence that Supreme Court

Justices make strategic calculations about the internal actions of their colleagues on the Court (Epstein and Knight 1998;

Wahlbeck, Spriggs and Maltzman 1998; Spriggs, Maltzman, and Wahlbeck 1999; and Maltzman, Spriggs, Wahlbeck 2000).

However, there is more controversy about whether Supreme Court justices respond strategically to external actors (see Ferejohn

and Weingast, 1992; Gely and Spiller, 1990; Marks 1989; and Spiller and Gely 1992; but contrast Segal 1997).

The evidence is relatively strong that the internal dynamics of appeals court decision making includes extensive interaction among the judges. The nature of this internal strategic interaction came through clearly in the interviews we conducted with judges on the courts of appeals.[5] For instance, Judge B told us that "there is a certain amount of brokering going on; I wrote a lengthy statement this morning to a colleague that said I agreed with the result but wanted to change the way the opinion was structured." In the memo I said, "That if the other judge was able to make those changes I would be able to join the opinion." When asked about this comment of Judge B, his colleague Judge C went so far as to say that such accommodation "is an <u>integral</u> part of the process; it is the core of the appellate process.". Similar comments were made by virtually all of the judges we talked to. Negotiation, compromise, and respect for the positions of colleagues are seen by appeals court judges as a normal part of crafting opinions. There is a definite attempt to accommodate each others views "whenever possible." Such strategic interaction occurs because the judges come to know their circuit colleagues quite well due to the extensive interaction they have with them. In fact, Judge A said that when he starts reading the briefs for a case, the first thing that pops into his mind is how his two colleagues on the panel will react to the key issues. Judges may not have "perfect" information about their colleagues preferences, but they have enough information that they feel confident about their ability to predict the probably reaction of their colleagues in many situations.

There is less agreement about whether or how frequently appeals court judges react strategically to external actors. Strategic appeals court judges would be most concerned with the potential reactions of two other institutional actors; most immediately judges on a three judge panel might be concerned about the possibility of reversal by their circuit sitting *en banc*. Alternatively, they might consider the possibility of

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[5] Please note that in order to protect the anonymity of the judges interviewed we have not identified the judges by name or characteristics and as a result we will only be using male pronouns.

reversal by the Supreme Court. In examining whether federal appeals court judges act strategically in anticipation of *en banc* review, research has focused on dissenting behavior.   Van Winkle (1997), Cross and Tiller (1998), and Hettinger, Lindquist, and Martinek (2004) analyzed whether judges act strategically when deciding to dissent. Van Winkle (1997) put forth a signaling model and analyzed search and seizure cases from 1992 through 1993 and found that appeals court judges are less likely to dissent when they are a circuit outlier denominated by panel of circuit mainstreamers. In addition, Van Winkle (1997) found evidence that a circuit mainstreamer judge on a panel of circuit outliers is more likely to dissent as a signal to the rest of the circuit mainstreamers.   Similarly, Cross and Tiller (1998) in their examination of administrative law cases from the D.C. Circuit from 1991 through 1995 found evidence of strategic behavior by appeals court judges. McNollgast (1995) develops a formal model that predicts the ways in which appeals court judges might modify their opinions to avoid reversal by the Supreme Court in various scenarios. Without presenting any evidence, the McNollgast model <u>assumes</u> (1995, 1636) that appeals court judges are rational actors who are primarily motivated by their policy preferences and also assumes that appeals court judges can perfectly predict the likelihood of review.

        In contrast, Hettinger, Lindquist and Martinek (2004) found no evidence of strategic behavior in three judge panels.   They presented a unidimensional spatial model and found that as the ideological distance between a judge and the panel majority gets larger the likelihood of writing dissent increases (133). However, analysis of differences between the behavior of judges in different signaling regimes provides no evidence that judges make strategic calculations about the probable reactions of judges in the rest of the circuit. They contend this finding supports the attitudinal model rather than the strategic perspective.

        Strategic accounts suggest that judges who face the possibility of review may strategically refrain from voting their personal preferences because they fear reversal. Scholars "have developed a highly

credible body of evidence showing that circuit judges and other lower court judges are generally …

responsive to the policies announced by their superiors" (Klein 2002, 7). This evidence is consistent with a

theory that judges act strategically in order to avoid reversal, but the same evidence might also be

explained by assuming that judges have been successfully socialized to believe that the job of the judge is

to apply the relevant statutes and precedents regardless of their personal preferences. That is, both

strategic and legal accounts of judicial behavior would lead to the same prediction regarding the

responsiveness of appeals court judges to Supreme Court policy.

Existing evidence on whether appeals court judges follow precedent because they are socialized to

accept precedent or because they fear reversal is limited. In an innovative approach to the examination of

this question, Smith and Tiller (1997) suggest that strategic judges concerned about the threat of Supreme

Court reversal may attempt to "insulate" their decisions (based on their own policy preferences) by

choosing an opinion writing style that will be more "costly" for the Supreme Court to review because it is

more complicated and time consuming. An examination of EPA administrative law cases found that

appeals court panels most at risk to having their decisions overturned by a Supreme Court with different

policy preferences were most likely to strategically adopt such an opinion writing style.

Perhaps the strongest evidence that appeals courts respond strategically to possible reversal by

the Supreme Court comes from an analysis of changing patterns of decisions in search and seizure cases.

After employing a case fact model in an attempt to control for precedent, Songer, Segal, and Cameron

(1994) found that appeals court decisions were positively related to both the ideology of the appeals court

judges and to changes in the current ideology of the Supreme Court. The authors conclude that these

results are consistent with a principal agent perspective in which the agents (appeals court judges) attempt

to advance their own policy preferences limited by their perceptions of the constraints imposed by the

preferences of their principal (the Supreme Court). Partial support for this interpretation was provided by

Howard (1981) who found that 57% of the judges who answered his mail survey rated the anticipated reaction of the Supreme Court as "important" or "very important" in their decisional calculus; but such anticipated reactions were cited as important less frequently than six other possible influences on decisions. Songer et. al (2003) took a different approach, examining cases where there is no fear of reversal[6] and conclude that in such cases the judges were just as likely to follow precedent in conflict with their private preferences as in cases in which there was a realistic chance of review and reversal. Thus, they conclude that fear of reversal has little effect on the judges. Likewise, Klein and Hume (2003) in their analysis of search and seizure cases from 1961-1990 found that congruence between lower court decisions and Supreme Court decisions did not stem from the fear of reversal. A similar conclusion was reached by Klein (2002) after an extensive study of cases involving circuit conflict. He found little evidence that the judges attempted to anticipate potential Supreme Court reactions and concluded that they were no more cautious in their decision making in cases likely to be reviewed than in those that had little chance of review by the Supreme Court. Most recently, Cross (2007) finds comparable results. In his analysis of a large sample of appeals court decisions he uncovers results that "are strikingly and directly opposite of what strategic theories of compliance …would suggest." (Cross 2007, 104). Similarly, Benesh and Martinek (2002) in their analysis of state supreme court confessions cases found that ideology of the Supreme Court does not matter in their decision calculus.

Assessing the Application of Strategic Accounts : Is it Rational?

The Supreme Court agrees to hear approximately 80-90 cases per term. This means that the Court hears less than one percent of all petitions it receives. Moreover, many lower court decisions are never appealed. As a result, Supreme Court review of lower court decisions is a rare event (less than one-tenth of one percent of appeals court decisions are typically reviewed). Consequently, the question of

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[6] Tort diversity cases.

interest in the present paper is whether it is rational for appeals court judges to modify their behavior strategically to avoid reversal by the Supreme Court? Given the very low probability that a federal appeals court case will even make it to the Supreme Court it is important to determine if appeals court judges can reasonably predict the likelihood of Supreme Court review. Appeals court judges may not need "completely" perfect information, but unless appeals court judges can accurately predict the likelihood of Supreme Court review and potential reversal and its associated cost it is impossible for them to participate in strategic behavior when deciding cases. However, if appeals court judges can in fact predict what cases are likely to be reviewed and believe there is a substantial cost associated with reversal, then it is at least plausible that they will strategically decide those cases most likely to be reviewed.

In deciphering this puzzle, we make the following three-pronged argument. In order for U.S. Courts of Appeals judges to act strategically judges must have a strong sense of which cases will be reviewed by the Supreme Court. Secondly, cases for strategic action must have a high probability of review. Finally, the cost of reversal must be high. Strategic action is most likely when all three conditions are present. However, the relative magnitude of the second and third "conditions" may affect strategic calculations. For instance, the higher the cost of reversal the lower the probability of review might be required to induce strategic action.

Can Judges Determine Which Cases Will Be Reviewed? – the View of the Judges

In order to determine the extent to which appeals court judges can determine which cases are most likely to be reviewed, we conducted interviews with a sample of 28 judges on the U.S. Courts of Appeals, from the First, Second, Third, Fourth, Sixth, Tenth, and District of Columbia Circuits (details on the interview process can be found in the Supplemental Materials at http://prq.sagepub.com).

Of these twenty-eight judges, only two expressed even a moderately high degree of confidence in their ability to predict accurately which cases would be reviewed by the Supreme Court. Only Judge R

expressed unambiguous confidence, asserting, "We know what cases are likely to go to the Supreme Court." But he quickly added that what was more important was the knowledge that over 99% of their decisions would not be reviewed. Judge Q seemed to agree, but was somewhat more guarded in his assessment, claiming only that "We can predict fairly well what will go to the Supreme Court – or at least which cases have a good chance of being reviewed …. most of our cases clearly will not be reviewed and we all know that."

Twenty-six of the twenty-eight judges said they could not accurately predict which cases would be reviewed. At the other extreme, four of the twenty-eight judges conveyed a sense of bewilderment at the certiorari process. Judge G volunteered "I have been 'flabbergasted' at which cases of mine have been reviewed by the Supreme Court – so I guess I would have to say it is pretty hard to predict when the Court will grant cert." Judge A agreed, saying "I have no idea what makes a case certworthy – it is just something I have never thought about; the chance of review of a case I'm working is simply irrelevant." Similarly, Judge O concluded that "Usually I can't predict what the Supreme Court is going to do on an issue." Finally, Judge I admitted, "I have no idea what the Supreme Court will review except for a very few high profile cases like *Padilla*."

The remaining 22 judges in our sample had some general ideas about either some of the types of cases that had moderately good chances of review or about which cases certainly would not be reviewed, but professed little ability to make predictions in a large number of cases they heard. Most of the judges indicated that for at least a majority of the cases they heard, they were confident that the Court would not grant cert; but for the remainder of their docket it was difficult to predict which cases would go up and which would not. Typical of these judges was the response of Judge B, "I am not able to predict which cases the Supreme Court will review, but in 60% or 70% of the cases one can be pretty sure they are not going to review." Similarly, Judge L told us that, "I'm not at all clear on what makes a case certworthy. I've never

paid much attention to what the Supreme Court will do in part because they take so few of our cases . . . . It is easy to identify many cases that you know will not go up, but it is very hard to tell whether a specific case will be taken." Judge N offered a variation on this theme. After earlier noting that perhaps a third or so of their decisions were "slam dunks" in which all of the judges easily reached agreement, Judge N offered, "I don't have a very good idea of what makes a case certworthy. Of course, it is pretty obvious that most of the cases we think are slam dunks are not going to go up." Other judges offered more specific ideas about the types of cases that would not be reviewed. Judge P admitted that he didn't know which cases would be reviewed but he was pretty confident about some of the types of cases that would not be reviewed. For instance, he said. "You know that criminal cases that turn on the facts won't go to the Court."

The other common theme, mentioned spontaneously by more than half (16 of 28) of the judges, was that decisions that create circuit conflicts had an increased chance of being reviewed by the Supreme Court. Typical is the assessment of Judge C, "The most obvious thing that will make it likely that the Court will grant cert is a conflict among circuits; if we get an issue that other circuits have already decided, we will take seriously what the other circuits have decided- we almost always talk about that in conference." He quickly added however, "But even with a conflict you can't be sure at all." Judge H concurred, suggesting that "I think that circuit splits, at least if it is an issue that they care about, is that thing that is most likely to lead to cert; other than that I'm not sure- it is just issues that they care about but those change, so I'm not always sure which ones those are …. so even if I was worried about reversal, I couldn't predict which cases they were likely to take well enough to do anything about it." Similarly, Judge J suggested that "It is very difficult to predict except you know that clear circuit splits are likely to lead to review" and his sentiments were echoed by Judge M who said, "Not really sure what makes a case certworthy besides circuit conflicts."

A couple of judges modified this assessment that circuit conflicts lead to Supreme Court review, noting that "big" or "important" cases are also likely to be reviewed. Typical of these judges, Judge E suggested "Circuit splits are probably the biggest factor in the Supreme Court deciding to review. Other than that it seems to be whether they think it is a big issue or an area of law that has not been addressed; but I don't think I am confident, except in a very few cases, what the Supreme Court would consider a big case – so most of the time there is no way to know if they are going to review your decision." Similarly, Judge K said, "It is very difficult to tell which cases are certworthy, it is very often a mystery to me. There are a few cases like *Padilla* where you know that cert will be granted, but a very few cases fall into a category like that . . . . generally whether they are going to take a case you have is a 'crap shoot' … you can be pretty sure most of the cases will not go up, but of course circuit conflicts are more likely to be reviewed." Overall, nine of the 18 judges formally interviewed cited national importance as a factor influencing a grant of cert, but interestingly, none of those nine felt confident that they knew precisely what made a case "important" in the minds of the justices.

While the judges said that in most cases they were unable to predict the chances of review, at the extreme margins, there apparently are a very small number of cases that the judges believe that they can predict quite confidently that the Supreme Court will review. For example, one clerk interviewed mentioned a death penalty case in which the Supreme Court had already reversed their circuit twice and now the case was before their circuit for a third time. The clerk indicated that he knew that facing the possibility of a third reversal in the same case that the judges on the panel had informally discussed what the Supreme Court might do as they discussed how to structure their opinion. However, the clerk noted that this type of situation was very rare; his judge had indicated that he had never had a similar situation in over thirty years on the bench. The same clerk noted that in an analogous death penalty case in the Fifth Circuit, the court of appeals was reversed on the third time the case went to the Supreme Court, suggesting that those

judges did not act strategically to prevent reversal even though they presumably knew that such reversal was possible.

Another type of case in which cert can be predicted is one whose national political importance is obvious. In an informal conversation with six judges, all agreed that there were always a very small number of cases, perhaps a half dozen to a dozen in the country in a given year, in which most judges as well as most other close observers of the legal system were pretty sure that the Supreme Court would ultimately review because of the very high political profile of the case. Cases mentioned in this category included *Padilla*, *Grutter*, and recent conflicts involving phone taps by the NSA and the national partial birth abortion law. But all of the judges agreed that it was the nature of the issue that guaranteed that Supreme Court would review these high profile cases. None of the six judges believed that there was anything that the court of appeals could do in such cases to influence whether or not the Supreme Court granted cert; thus, strategic action would be impossible they said. Moreover, several of the judges noted that even on some of those rare cases in which everyone assumed the case was going to the Supreme Court, when the case did in fact go up it was reversed by the Court, suggesting that either the appeals court panel decided not to worry about how the Supreme Court would react or were unable to accurately predict the Court's response.

In summary, the general view seems to be that all the judges know that review is very unlikely and they can often be highly confident that a given case will not be reviewed. But if a case passes some minimal level of difficulty or importance most judges claim that they are almost always unable to assess what the chance is that their decision, no matter which way they decide the case, will be reviewed by the Supreme Court.

An Empirical Assessment of the Probabilities of Review

Next we seek to determine whether cases judged by objective criteria to be the strongest candidates for review actually have a high likelihood of Court review. We ask whether it is possible to model

the likelihood that a given case will be reviewed by the Supreme Court using only the characteristics of the case that would be known to the judges on the panel at the time of their decision. In contrast, judges on the panel will not know (though they may suspect) whether the losing party in the case will ask the Supreme Court to review and if such an appeal is filed, they will not know what will be in the cert petition or whether the Solicitor General or other amici will file in support or opposition to the petition. Thus, appeals court judges cannot use such factors to decide whether or not to behave strategically.

The interviews described above indicate that appeals court judges tend to think about cert in terms of case characteristics. When asked what makes it likely that the Court will review their decision, judges tended not to talk about the nature of their decision or opinion, but instead talked about the nature of the case or issue, saying the Court might take it if it was a "big national issue" (Judge D) or if "it is an issue that they care about" (Judge H). In contrast they suggested review was unlikely if the precedent was so clear that it was a "slam dunk" (Judge N). Furthermore, a recent interview with a former Federal Appeals Court and Supreme Court law clerk confirmed this idea of judges viewing cases in terms of their characteristics rather than outcomes. This notion of case characteristics becomes important when assessing whether cases encompassing (or not) certain characteristics are certworthy or not. Perry (1991) has suggested that there exist certain case characteristics (both positive and negative) that Justices look for when determining whether to grant certiorari. By positive we mean case characteristics that will lead to cert being granted. Conversely negative characteristics are those which will lead to denial of cert.

The next prong of our analysis is to determine whether one can accurately predict which cases the Supreme Court will review based on objective case characteristics. To do this, we analyze the universe of appeals court opinions that have been reviewed by the Supreme Court during a three year period and a stratified random sample of appeals court opinions that have not been reviewed by the Supreme Court.

This allows us to straightforwardly evaluate the impact of characteristics of cases in the courts of appeals on the agenda of the Court. Only cases decided by three judge panels are included in the analysis.

Positive Indicators of Importance

Perry believes that the Court classifies importance in not only breadth but also depth of a case (1991, 254). This suggests that if the issue is broad and far reaching; if it has the potential to affect a large number of people; or if the outcome is vital for the polity as a whole, the Court is more likely to regard this issue as one that is important enough to grant cert (1991, 253-54; Zorn 2002; Giles, Walker, and Zorn 2006). Furthermore, a case may be considered important if the decision is essential to maintaining the uniformity in the law especially when there appears to be divergence over constitutional or statutory interpretation. This leads us to our first hypothesis regarding cases that have a broad impact:

H1: *Cases that involve the interpretation of the constitution or federal statute are likely to have broader impact than cases that simply resolve private disputes, so such cases will be more likely to be reviewed.*

There have been several studies that have found that the presence of amicus curiae increases the likelihood of Court review, especially given the rarity of an amicus briefs being filed in courts of appeals cases (Caldeira and Wright 1988). Moreover, amici curiae briefs suggest to the Court that an issue is of great societal importance (Hansford 2004). We create a variable that indicates whether or not amici are present at the courts of appeals proceedings. This variable is coded one if there was presence of one or more amicus curiae briefs and zero otherwise.

H2: *The presence of amicus curiae at the federal court of appeals proceedings should increase the likelihood of Court review.*

Perry found through his interviews that certain types of cases, namely death penalty cases, because of the severe nature of their effects are more likely to be reviewed by Court.   In order to test this hypothesis we include a variable that is given a one if there was a death penalty issues and zero otherwise.

H3:   *The likelihood of Court review will increase if there is a death penalty issue present.*

Moreover, there are specific issue areas that, while they may only affect a small number of people are viewed as so fundamental to the preservation of democracy that they also deserve special consideration from the Court.   One of these issues areas that have been suggested to embody this special significance are *First Amendment* rights and guarantees.   Here we have created a variable that indicates whether or not First Amendment issues are at stake; this variable is coded one if there is a First Amendment issues and zero otherwise.

H4:   *The likelihood of Court review will increase if there exists a First Amendment issue.*

Additionally, several empirical analyses of judicial voting behavior (Goldman 1969; Pritchett 1948; Schubert 1965; and Tate 1981) over the last sixty years have consistently assumed that unanimously decided cases are quite often characterized as either possessing clear-cut precedent or the straightforward application of the case facts to the constitutional or statutory provision (Goldman 1969).   Additionally, dissent may serve as a "whistle blowing" mechanism (Cross and Tiller 1998; Giles, Walker, and Zorn 2006).   Therefore, we conclude that it is quite reasonable to assume that cases with non-unanimous decisions are more likely to contain major jurisprudential questions than cases with unanimous decisions. As a result, we have created a variable, panel conflict, to assess whether the presence of a dissenting opinion in the courts of appeals increases the likelihood of review by the Court.

H5:   *Presence of a dissent in the court of appeal's opinion increases the likelihood of review by the Court.*

Finally, the most oft repeated finding of previous studies of cert, from our interviews, and one of the most frequently mentioned "signals" discovered by Perry (1991) is that the existence of a conflict among the circuits on a point of federal law is likely to increase the chances that cert will be granted. Thus, the final positive indicator of the likelihood of cert is hypothesized to be circuit conflict:

H6: *The likelihood of Court review will increase if there is a conflict among the circuits on a point of federal law or national constitutional interpretation.*

Negative Indicators of Importance

As previously mentioned, Perry (1991) has derived from his interviews of Supreme Court Justices and law clerks case characteristics that are deemed unimportant or "frivolous". Here we hypothesize that case characteristic from the appeals court decisions with negative indicators will be considered uncertworthy by the Court. We predict that these negative case characteristics will arise in a greater percentage of cases that are denied review than are granted review. Perry (1991) specifically points to two types of cases that are considered "frivolous": diversity cases and ineffective assistance of counsel. In particular, any court resolution coming from a diversity case only affects a single state and more importantly interpretations by federal courts of the state law issues involved are not binding precedent for state supreme courts. As a result any Supreme Court decision would have little jurisprudential significance. Therefore, we have created a variable that indicates the presence of a diversity issue in the court of appeals case. This variable is coded one if a diversity issue is present, and zero otherwise.

H7: *Presence of a diversity issue(s) in the court of appeals will decrease the likelihood of review by the Court.*

Cases involving questions of ineffective assistance of counsel are also considered to be in the category of frivolous cases. In order to test this assertion we have created a variable that indicates

whether or not ineffective assistance of counsel claims were present in the appeals court case. This variable was coded one if there exists such a claim and zero, otherwise.

H8: *Claims involving ineffective assistance of counsel will decrease the likelihood of review.*

Perry (1991) found that law clerks and Justices often mentioned that fact specific cases are quite often denied review. Perry states, "in most instances, the Court does not want to take a case when resolving it adds nothing to the doctrine, but turns on the facts of a particular case" (1991, 223). In order to test Perry's affirmations we created a set of variables that get at this idea of fact-specificity. In borrowing from Perry, we expect certain case characteristics to be negatively related to review. These include claims regarding weight of the evidence, cases involving the Substantial Evidence Doctrine, and sufficiency of the evidence. All of these evidentiary issues tend to be fact specific to the case at hand and as a result would not be associated with heightened Court review.

H9: *Cases involving issues regarding weight of evidence, substantial evidence and sufficient evidence will be negatively related to Court review.*

Outcome Measures

In order to sufficiently assess the relevance of positive and negative importance indicators it is imperative that we control for other factors that have often been found by research to influence the Court's decision to grant cert. One of the most important factors to control for is presence of the Solicitor General representing the United States when the U.S. is a litigant in the case. Given the Solicitor General's success in petitioning the Court for review, we believe that a government loss in the appeals court will be positively associated with review, while government success would be more apt to stand as is.

Lastly, congruence of the ideological direction between the lower court decisions and the Supreme Court seems to play a crucial role. That is to say, ideology matters in judicial decision making. Although we can not test directly whether the Court grants cert as a way to correct for the ideology of the lower court

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decision we indirectly test this assertion by controlling for the ideology of the appeals court decision. During the period studied (early Rehnquist Court), the Court is generally perceived to have been solidly conservative in its policy preferences. Such a conservative Court would presumably be more likely to overturn liberal than conservative decisions of the courts of appeals. That is to say, by coding the direction of the appeals court decisions as either conservative or liberal we are clearly able to analyze for instance, whether conservative decisions are less likely to be reviewed by a primarily conservative Supreme Court under review by this analysis.

Data and Methods

The case data comes from the Appeals Court Data Base, phase I and phase II.[7] Phase I involved the coding of a random sample of 30 cases from each circuit for each year from 1960-1996 in addition to smaller samples for the period 1925 to 1959. In Phase II, all appeals court cases reviewed by the Supreme Court from 1953 to 1988 were coded. From each of these databases, we selected all cases from three years in the beginning of the Rehnquist Court, 1986-1988. Duplicates from the two databases were eliminated. Thus, the data for analysis includes the universe of decisions reviewed by the Supreme Court and a sample of cases not reviewed. The data in model are weighted to reflect the sampling.

The dependent variable in our model is whether or not the Supreme Court reviewed the appeals court decision. This variable is coded one if the decision was reviewed, and zero if it was not reviewed. Since our dependent variable is dichotomous, ordinary least squares (OLS) regression is not suitable for this type of analysis; therefore, we instead use logistic regression.[8] (Aldrich and Nelson 1984; Long 1997).

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[7] United States Courts of Appeals Data Base, Donald R. Songer (Principal Investigator), NSF# SES-89-12678. This data and a detailed codebook can be found at: http://www.as.uky.edu/polisci/ulmerproject/databases.htm.

[8] Since certiorari is arguably a rare event we, as a check on robustness, also estimated the model in Table 1 using a rare event specification; those results are identical to those presented here.

Additional details of the coding and descriptive statistics for the variables in the model are provided in the Supplemental Materials.

Results from Case Characteristic Model

We move to the next phase of our analysis by examining whether or not the Supreme Court granted cert given the presence of positive or negative case characteristics. The results of our logit model are presented in Table 1. In general our model performed very well. The model is significant at the .0001 level and most of the independent variables have effects that are statistically significant. Overall we find that most of our case characteristics variables performed as expected.

Table 1 here

Most of the hypotheses are confirmed by the results of the logit model. Cases in which the US government wins in the courts of appeals are less likely to be reviewed than cases not involving the US. Additionally, as expected, ideology matters.   We find that the odds of granting cert decreases by approximately 55% when the lower court decision is conservative. Also as hypothesized, the chances of review are increased by the presence of our "positive indicators of importance, including the presence of a federal law or constitutional issue, the presence of a First Amendment issue, circuit conflict, or the participation of *amici curiae*. These results in general confirm the implications of the existing literature on certiorari.   Likewise we find support for hypotheses about cases that possess a negative indicator of importance; presence of such a negative indicator dramatically decreases the likelihood of review. To highlight, when the lower court interprets the Substantial Evidence Doctrine in agency cases the odds of the Court reviewing the case decreases by approximately 85%.

Our Findings in Perspective: How likely is Supreme Court Review?

Although we do find support for most of our hypotheses, it is imperative to put these findings in perspective. At first blush our model implies that appeals court judges can accurately predict the likelihood

of review. However given the knowledge that Supreme Court review is an unlikely event we delve further to explore how cases that possess several positive indicators of review stack up against the likelihood of review. That is to say, while we have a high degree of confidence (for many variables, the .001 level) that the presence or absence of these factors change the probability of review to a statistically significant degree, many of the variables might still lack substantive relevance to a strategically oriented judge. To demonstrate, we also calculated the probability that the Court would grant review given several selected combinations of positive case characteristics indicators and negative case characteristic indicators. These calculations are provided in the Supplementary Materials (see #4 and #5 respectively). For example, consider a case containing a combination of three characteristics all shown by the analysis above to strongly increase the chances of review. For an appeals court case, example "A", with a constitutional issue, an amicus brief filed, and dissent present, the probability that the case would be reviewed by the Court was approximately 0.11. It should be stressed that in fact, it is extremely rare for such a case to be heard by the courts of appeals. In fact, only seven-tenths of one percent of the cases in our sample had a probability of cert that was this high. Yet, even for such an out of the ordinary case, one might wonder whether any rational judge would worry about reversal if they perceived that the chance of review was only 11%, even if they assumed that a grant of cert was tantamount to reversal, unless the potential costs of reversal were very high.   Taking a hypothetical case with two other factors strongly related to the likelihood that cert would be granted, we found that the probability that an appeals court case with panel conflict (dissent) and circuit conflict, case type "B", would be reviewed by the Court was only 0.06. Even a case with five factors that were all found to significantly increase the chance for review (a conservative decision with amicus participation, a constitutional issue, dissent, and circuit conflict), the probability of the Court granting cert rose only to 0.18 (see case type C in #4 of the Supplementary Materials).

Overall, these results shows that even though the probability of review is higher when combinations of positive case characteristics are present compared to the negative case indicators, the actual chance that a given case with multiple positive indicators will actually be reviewed remains small. Thus, a rational judge on a panel who understood which cases were most likely to be reviewed still would conclude that even if he had a case that was one of the types of cases most likely to be reviewed, his particular case would in most instances not be reviewed.

The data in the Supplementary Materials (see #5) indicate that when several of the factors that have a negative impact on the likelihood of cert are present, the chances of cert are truly tiny. For instance, in hypothetical case B involving a diversity case turning on a weight of evidence issue, the chance of cert is a meager six one-hundredths of one percent.

To gain additional perspective on the rationality of strategic action to avoid reversal, we calculated the estimated probability of review for each individual case in our sample of over 1100 decisions by the courts of appeals. The findings were that the probability of review was less than one percent in 77% of all appeals court cases and less than five percent in more than 97% of the cases.[9] Even if a judge assumed that reversal was likely any time a case was reviewed (even though reversal actually occurs in only two thirds of the cases reviewed), these data suggest that judges rationally should have a very low fear of reversal for the overwhelming majority of cases they hear.

Finally we consider how the probability of cert might be affected by strategic decision making by the judges on the courts of appeal. The interviews with the judges revealed that the judges think that it is primarily the characteristics of the cases and their issues rather than the decisions of appeals court judges that have the greatest impact on whether or not cert is granted. And our case model confirms that many of the factors that have the greatest impact on the probability of cert (e.g., whether there is a constitutional or

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[9] The probability of cert reached 10% in only six-tenths of one percent of all cases.

statutory issue versus a weight of evidence or ineffective assistance of counsel issue) are beyond the control of even a judge who is inclined to act strategically. Thus, we focus on a couple of examples of the extent to which an attempt to act strategically to avoid reversal can actually affect those odds (see Supplementary Materials, #6). First it should be noted that in those 77% of cases in which the probability of cert is already below one percent, we believe it is most unlikely that any judge would act strategically in an attempt to reduce the chances of cert and possible reversal even further. So we limited our examples to cases involving some of the factors strongly and positively related in a statistical sense to the likelihood of cert being granted. Consider the first example, labeled Sincere 1, a criminal case involving a constitutional issue, the participation of an amicus and the US government as a party. Assume the judges all vote sincerely to support the criminal defendant (a liberal decision). The probability of cert is estimated to be five percent. Alternatively, the court might act strategically to change the outcome (i.e., making a conservative decision favoring the government). Such strategic action would only reduce the probability of cert from five percent to two percent (see Strategic 1a). Alternatively (see Strategic 1b) a judge wanting Supreme Court review might dissent, increasing the chances of cert from five percent to thirteen percent.

In the second example (see Sincere 2) consider an extreme case; once again with a constitutional issue and amicus participation in which the court unanimously and sincerely made a liberal decision that created a conflict with a prior decision of another circuit. The probability of cert in this case would be fourteen percent (more likely than in over 99.5% of our actual cases). If the court in this case instead decided strategically to change the outcome to a conservative decision that was consistent with the policies of other circuits, the chances of cert would be reduced to just one percent. This last example, labeled Strategic 2, appears to represent pretty close to the maximum marginal effect that strategic action by any appeals court panel could hope to achieve. Whether a court would act strategically even in this extreme situation might depend on the risk adverseness of the judges and their perception of the likelihood that cert

would lead to reversal and the cost of such reversal.[10]   Since the evidence presented in the next section

suggests that the cost of reversal is usually very low, even in this extreme illustration it is doubtful that a

rational judge would depart from their sincere preferences to avoid potential reversal.

The Costs of Reversal

As noted above, strategic theories usually assume that judges are primarily policy oriented actors

who want to maximize the extent to which legal policy is shaped by their personal political preferences. In

order to decide whether or not to act strategically to avoid reversal, a judge needs information to first

calculate the probability of review and reversal if the policy of the appeals court panel is set at her ideal

point. Next the judge needs to calculate the potential costs. Two alternative costs need to be considered:

first, the cost if the Supreme Court reviews and reverses to set policy at the ideal point of the median

Justice on the Supreme Court, and second, the loss if the judge moves the appeals court decision away

from his own ideal point and far enough towards the ideal point of the Supreme Court to avoid review. The

first loss (from reversal) may have two components: the policy loss from having a decision at some

distance from the preference of the judge and any additional more personal loss that may occur from the

fact of reversal. The second loss, when a judge acts strategically and avoids reversal, is only a policy loss.

On the surface, it appears that any non-policy costs from reversal are likely to be low. Judges on

the courts of appeals have substantial independence in both law and practice. Reversals do not lead to

any formal sanctions. Judges will not be removed from office nor have their pay affected even by high

rates of reversal. Nor will any of the other material perks of their office be affected (e.g., they will not lose

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[10] Of course, a judge might strategically decide to make some alternation in the wording of the opinion that would fall short of

changing the outcome to avoid review. Since such a minor change might be perceived as less costly to the judge, it might be

undertaken even when the probability of review was low. While this result is theoretically possible, no evidence that such action

was ever taken is evident in our interviews with the judges.

travel money nor choice office space nor assignment to panels considering interesting cases). If a reversal by the Supreme Court stigmatized appeals court judges to any substantial degree, that might provide a sufficient cost to induce strategic action to avoid reversal. But one recent study concluded that there is little evidence from existing studies that supports the existence of such a cost (Cross 2007). Moreover, Cross reports that there is no evidence that reversals adversely affect the chances of elevation for an appeals court judge (2007, 101). Additionally, the earliest comprehensive study of the courts of appeals concluded that the reputations of appeals court judges "appear to be independent of Supreme Court support" (Howard 1981, 139-140). Furthermore, Baum suggests that judges want to be respected by their colleagues and gaining that respect means maintaining a reputation as a professional who adheres to the norms of the job which include following clear law and making effective legal arguments on behalf of positions taken (2006, 54-55). But if a judge follows these professional norms and is still reversed that reversal is not likely to negatively affect their professional standing. In fact, Baum cites one Ninth Circuit judge who was frequently reversed yet received more than enough applause from his community for his principled stands to outweigh any cost from the fact of those reversals (2006, 112-113). These brief descriptions in the existing literature that suggest that the non-policy losses resulting from reversal are quite low are strongly supported by the evidence presented below from interviews with the judges. Before presenting that evidence in detail, we first discuss the potential policy losses.

To simplify discussion at this point, we consider potential policy losses under the assumption (which appears to be consistent with the evidence presented below) that there are no other significant losses that will accrue to judges who are reversed. To illustrate the nature of the choices facing a strategic judge, consider the following diagram in which COA represents the policy preference of the median judge on the appeals court panel, SCt represents the policy preference that will be adopted if the Supreme Court reviews and reverses, and SD represents the policy adopted by a strategic decision that is minimally close

enough to the preferences of the Supreme Court to avoid review. Note that it is assumed that an appeals court panel need not move policy all the way to the ideal point of the Supreme Court median to avoid reversal because review always entails some cost to the Supreme Court. Assume further that the policy loss to the appeals court of having the policy moved from COA to SCt is one.

Whether or not a rational appeals court median judge will write an opinion placing the policy at SD rather than at COA will be a function of the distance between COA and SD and the estimate of the judge of the probability of reversal at COA. That is, a rational judge must be able to estimate the probability of review of a decision at their ideal point and also be able to estimate how much of a change of policy will be required in order to avoid review.

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COA   SD   SCt

At one extreme of information, the appeals court judge will be unable to completely distinguish among cases; that is the judge will have no idea which cases have greater chances of review than others. In such an extreme situation (no knowledge by the judge), the judge will estimate that the probability of review is .001 (because only 1 of every 1000 decisions of the courts of appeals are reviewed by the Supreme Court). In such a situation, a rational appeals court judge will not act strategically even if the cost of adopting SD is quite small (e.g., even if the opinion must only be moved one-tenth of the distance between COA and SCt). In such a situation, the expected loss for acting sincerely in a given case will be estimated by the judge to be 1 (the cost of reversal) X .001 (probability of reversal) = 0.001. In contrast, to act strategically in the case will incur a cost of 0.1, 100 times as great as the expected cost of sincere action.[11]

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[11] It is theoretically possible that the policy cost for an appeals court judge might be somewhat higher than these figures indicate because a judge might consider that a reversal implies that the disfavored policy is now a national policy. However, none of the

At the other extreme, suppose a judge estimates that the probability of review is 90%. In that case, the judge will act strategically even if the cost of the strategic decision is quite high. For instance, even if the judge must move the policy three-fourths of the way from their own ideal point towards the preference of the Supreme Court in order to avoid review, the strategic decision will be adopted. In this scenario, the expected cost of sincere action is 1 (the cost of reversal) X 0.9 (probability of reversal) = 0.9. In contrast, to act strategically in the case will incur the smaller cost of 0.75. In summary, it appears that the policy costs of reversal are not sufficient to motivate strategic behavior except in possibly a very small number of cases. The only remaining question to be investigated is whether the judges perceive any substantial non-policy costs to potential reversal.

Results: The Cost of Reversal- the View of the Judges

Even if the likelihood of review is small, a rational, strategically oriented judge might modify their opinion to avoid review if the perceived cost of review was high enough. We argue above that the policy costs of reversal are not sufficient to motivate a rational judge to strategically modify her behavior and that there appears to be no substantial material costs to reversal. The only remaining possible cost is whether the reputation of judges is harmed by reversal. To assess this possibility, we asked the judges about the "cost" of being reversed. The consensus among our 28 judges was that the cost was insignificant.

In two different informal dinner conversations, all ten of the judges agreed with the sentiment expressed by some that the Founding Fathers had done a pretty good job of insulating them from political reprisals for their actions. Thus, they all agreed that even a string of reversals would not result in impeachment proceedings being brought against them, or having their pay reduced, or any kind of disciplinary action from the chief judge. Moreover, none of them could think of any appeals court judge whose chances of being "promoted" to the Supreme Court had been hurt by having been reversed a

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twenty-eight judges interviewed gave any indication that they thought in such terms.

number of times. In fact, a couple pointed out that being reversed for an opinion that supported the political preferences of a future president might actually improve your chances for elevation.

When asked about informal sanctions that might result from being reversed, not a single judge voiced any concern about the effect of a given reversal or a string of reversals. There appeared to be a consensus that one would be viewed negatively by their colleagues if they ignored the law or precedents or accepted canons of legal reasoning, but that any fear of such approbation was independent of any concern about reversal. Several judges argued that such a concern was just as great on cases like diversity cases in which there was no chance of review as on high profile cases likely to be granted cert.

The judges expressed these views in a variety of ways. For example, Judge C said, "if they do review and they see it differently, so be it – it is their job after all to make law. Why would I care – I can't be fired and it wouldn't even be embarrassing – the only thing that would embarrass me to my colleagues is if I hadn't done a good job – if my analysis were sloppy or if I had missed an important case – but if the Supreme Court simply wants to define the law in a different way, no one will blame me." The same point was made by Judge G, "if I am satisfied that I am doing my job, why should I be concerned if the Supreme Court reverses me. Of course I will follow precedent, but that has nothing to do with being reversed." Similarly, Judge H opined, "Why should I worry if I get reversed ? It is not very likely, but if it happens, so what?" As long as I'm convinced that I have the law right, reversal doesn't matter." And Judge O succinctly summed up the view he believed most of his colleagues shared saying he "didn't worry about reversal – everyone gets reversed."

Judge D specifically addressed the question of how his colleagues would respond, saying, "review is so rare that most of us don't worry about it; I don't think anyone is embarrassed by Supreme Court reversal." Judge J agreed, saying, "so if I'm reversed I feel bad for about an hour and then turn to my next project and don't worry any more."

One of the more academically inclined judges (Judge R) said that he was familiar with the strategic literature and had actually given the matter a good bit of thought. He said that he had concluded that if one thought a case was likely to go to the Supreme Court "our job – as an intermediate court is to present the Supreme Court with a menu of options and point out the consequences of taking one option rather than another. That is, our job is to make it easier for the Court to frame issues and focus on the important issues. Of course, we also tell the Court what we think the resolution should be – but that is not our main role because it is the Supreme Court that is ultimately going to make the policy; so in these cases there is no reason to "fear" reversal- the Court is going to make the policy regardless of what we do and regardless of what our preferences are. It is a fact of life, so no one worries about it – so our job is to do our best to insure that the Supreme Court's consideration of the alternatives is as rational as possible. I presented these views during a lunch conversation at the Second Circuit retreat and although a couple of the judges indicated that they didn't worry as much about laying out all the options as Judge R had suggested, they all agreed with the sentiments expressed about why no one worried about reversal.

From our interviews, the judges accept the conventional wisdom that no overt sanctions from the external world will be imposed on a judge who is reversed, even if those reversals are frequent. Additionally, none of the judges interviewed worried that informal sanctions from their colleagues might be a "cost" of reversal.

Conclusion

Strategic models that point to fear of reversal as a motivating force in courts of appeals decision making rely on several key assumptions. First they assume that judges have a good idea of what the Court will review. Next strategic models presume that cases that are the strongest candidates for review have a high probability of review. Lastly, strategic advocates assume that appeals court judges view reversal as costly. That is, for circuit courts of appeals judges to act consistently from a strategic perspective requires

not only that they can accurately predict which cases will be reviewed and overturned by the Court but also that they believe reversal will impose unacceptably high costs on them.

Our findings do not suggest that these conditions for strategic action exist. The interviews suggest that the judges do not believe that they can predict accurately which cases will be reviewed except possibly for a very small number of extraordinary cases. And although in our statistical analysis of cert decisions we find support for almost all of our hypotheses relating to the case characteristics that substantially affect the chances that a case will be reviewed, it is important to restate that our data show that the likelihood of review in the most positive cases is still marginal at best.[12] Moreover, the chances of reversal are actually lower than the chances of cert displayed in our tables because in fact only about two of every three decisions accepted for review are actually reversed. We do not know what the perception of judges is about the conditional probability of reversal given the assumption that a particular decision of theirs is reviewed. But even if they make the conservative assumption that every one of their decisions reviewed will be reversed, the probability of review is so low that a rational judge would perceive the probability of reversal as extremely low in almost all cases. Finally, objective factors, previous findings reported in the judicial literature, and the judges themselves all agree that the costs of reversal are quite low. Consequently, strategic theories that argue that rational appeals court judges can be expected to substantially modify their behavior to avoid reversal in any substantial number of cases have little support in the evidence. One might find anecdotal accounts that suggest a particular panel acted strategically in a given case, but the evidence presented above suggests that such strategic behavior will be relatively rare.

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[12] One might even suggest that if Supreme Court outcomes could easily be predicted, there would be very few cases that actually got to the Supreme Court. If prediction were easy litigants would rarely bring cases they knew would lose in the Supreme Court and appeals court judges would not make decisions that they knew would be reversed.

The results from the empirical analysis of case outcomes dovetailed very nicely with the results from the interviews of appeals court judges. Our case characteristics model indicated that it was possible to identify types of cases that had virtually no chance of review and our judges indicated that they were confident that they could also identify such cases. Moreover, the judges suggested that a substantial portion of all of the cases they decided fell into this category of cases with no realistic chance of review. The judges generally indicated that they had some rough ideas about broad categories of cases in which review was possible, and when they offered specific case characteristics those characteristics were similar to those that had positive effects in our statistical model. However, almost all of the judges interviewed indicated that they had little confidence in their ability to predict which of the cases in which review was possible would actually be reviewed. This seems consistent with the findings of our model that cases containing multiple indicators that enhance review still often have very low chances of review. Finally, the judges themselves agree with the conclusion of this analysis that strategic models are not very useful for understanding their behavior.

This study is limited in three noteworthy ways. First, our study is limited to only cases from the United States Court of Appeals. Secondly, our study is limited to an examination of the 1986-1988 time period. Lastly, our interview data only contain 28 appeals court judges from just over half the circuits. As a result, one should be watchful about generalizations to the behavior of all judges in all time periods. With that said, we believe our study provides compelling evidence that challenges the use of strategic theories when analyzing U.S. Circuit Courts of appeals decision making.

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Table 1

A Model of the Likelihood of U.S. Courts of Appeals Cases (1986-1988)
Making it to the Agenda of the Supreme Court

Case Characteristic	MLE	SE	Odds Ratio	Percentage Change
Outcome Variables-Prior Studies				
US Loser in Appeals Court	0.224	0.236		
US Winner in Appeals Court	-0.963***	0.282	0.381	-62%
Appeals Court Decision Conservative	-0.799***	0.282	0.450	-55%
Positive Indicators of Importance				
Federal Law Issue	0.625**	0.199	1.868	86%
Constitutional Issue	1.155***	0.247	3.174	217%
Amicus	0.899***	0.236	2.457	146%
Death Penalty	-0.151	0.691		
First Amendment Issue	0.724*	0.351	2.063	106%
Conflict on Panel (Dissent)	1.060***	0.203	2.886	189%
Circuit Conflict	1.393***	0.209	4.027	303%
Negative Indicators of Importance				
Diversity Case	-1.273*	0.526	0.280	-72%
Ineffective Counsel Issue	-1.247#	1.012	0.287	-71%
Weight of Evidence	-0.933***	0.291	0.393	-61%
Substantial Evidence	-1.912*	1.009	0.148	-85%
Sufficiency of Evidence	-0.195	0.533		
Constant	-5.203***	0.198		

Degrees of Freedom: 15
$P < .0001$
Gamma: 0.704
Number of Observations: 1176

#	Significant $\geq .10$
*	Significant at .05
**	Significant at .01
***	Significant at .001