Internal and External Influences on U.S. Courts of Appeals Panels in Administrative Agency Cases

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Abstract

Scholars have generally found evidence of deference to administrative agencies in the federal courts; however, the degree of deference and the circumstances under which deference is granted varies between levels of the courts and between different agency types. Given this variation, I examine agency cases in the U.S. Courts of Appeals in light of strategic theory, which posits that decisionmaking in the courts may be influenced by both intra-branch relationships (i.e. brethren on the court) and inter-branch politics (i.e. preferences of Congress and the executive) as well as more generally by public opinion. Using data on agency cases from four circuits across multiple years, I find that decisionmaking in the U.S. Courts of Appeals in agency cases is a mixture of both internal and external strategy, including considerations of overall circuit preferences as well as strategic considerations based on the ideological congruence or incongruence between the court and the president. Future research should concentrate on incorporating this strategic approach with possible legal influences.

Administrative law is about power. Like most judicial controversies involving the government as a litigant, those cases that deal with administrative agencies are often about the use or misuse of power. Similarly, the decisionmaking processes in administrative cases also revolves around power. The legal principles and standards surrounding administrative agencies are about power, namely, the power of judicial review and how the courts use or restrain from using their power to expand or restrict the power of agencies. Administrative law is also about the power of institutions and actors to constrain the behavior of others. Whether this includes the courts constraining agencies when they overstep congressional mandates or Congress and the executive constraining courts from engaging in more stringent oversight of agency action, all of administrative law is about power. The sharing of, or competition over, power is a central part of the democratic model in the United States. The Separation of Powers (SOP) doctrine suggests that the powers of each branch must be separate; however, administrative law is but one example of the unique mixing of powers that occurs in the federal government.

Administrative agencies, created by Congress and housed in the executive, must serve multiple masters. While agencies rely on Congress for their continued funding, they may also be policy agents of the president. Adding to this delicate relationship is the fact that the Administrative Procedures Act of 1946 statutorily commits the judiciary to review of agency action. As Section 702 of the APA states: "any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Thus, according to the APA, the courts are responsible for reviewing cases and controversies arising out of administrative proceedings; therefore, the courts are responsible for restricting agency discretion and exercising oversight of agency actions.

While the APA places much of the oversight burden on the courts, this does not mean that any court should "substitute its judgment for that of an agency," and as such courts are expected to play a more limited role in administrative law than they are in other types of cases (Pierce, Shapiro, and Verkuil 2004, 365). In fact, scholarship has shown that there is pattern of judicial deference to administrative agencies (see, for example, Canon and Giles 1972, Crowley 1987, Tanenhaus 1960). Thus, when it comes to cases where a federal agency is a litigant, judges are put in a difficult position. On the one hand, they have been statutorily charged with some oversight of agency action. On the other hand, they are to respect the decisions of other political branches unless legal error or constitutional infringement can be argued. In fact, major precedents such as *Chevron U.S.A., Inc. v. Natural Resources Defense Council* (467 U.S. 837, 1984) and *United States v. Mead Corporation* (533 U.S. 218, 2001) have limited the scope of judicial review while further institutionalizing a "preference" for deference. Hence, in administrative cases, judges must always balance their statutory duty of oversight with their long-standing policy of deference.

I examine the politics of this struggle. Specifically, I examine how the decisionmaking process of the U.S. Courts of Appeals may be influenced by both internal and external preferences of others in agency cases. The U.S Courts of Appeals are appropriate for this endeavor because they hear more administrative cases each term than the U.S. Supreme Court and for most litigants they will be the court of last resort as the U.S. Supreme Court accepts far fewer cases. My approach also conforms to a strategic view of judicial decisionmaking. Given that agency action may be the product of both congressional and executive policy preferences, I argue that one must consider preferences outside that of the decisionmaking court to best understand decisions in agency cases. While I agree, as many do, that the individual preferences of judges are of great importance in understanding judicial behavior, I argue foremost that one important way to further our understanding of judicial decisionmaking in administrative cases is to consider other possible influences on judges in these cases. Thus, I argue

along the same lines as other strategic or rational choice theories of judicial behavior: judges, in administrative cases, cannot always vote in accordance with their sincere preferences; rather, they may need to consider the preferences of other judges on their voting panels, circuits, or higher courts (if applicable) and the preferences of Congress and the president. Even the champions of the attitudinal model, who argue that judges vote their sincere policy preferences, admit that the patterns of ideological voting do not always hold for administrative cases (Segal and Spaeth 2002).[1] Ultimately, because administrative law represents a mixing of judicial, congressional and presidential power, it is ripe for an analysis using a strategic approach.[2]

Decisionmaking in Federal Administrative Cases

Most of the early and more recent scholarship on judicial deference to administrative agencies has focused on agency characteristics, political preferences, or some mixture of both. Additionally, most studies have focused on administrative law in the U.S. Supreme Court. The earliest, and possibly most widely cited, study of deference to agencies comes from Tanenhaus (1960).[3] Tanenhaus was one of the first to empirically demonstrate that the federal courts defer to agencies to a statistically significant degree. Studying agency cases in the U.S. Supreme Court across a ten-year period and using a method of counting cases that accounts for agreement and disagreement between the justices, Tanenhaus finds that not only does the Court defer to agencies to a significant degree, the individual justices on the

[1] While Segal and Spaeth (2002, 417) find pervasive evidence of the attitudinal model for the Burger Court in administrative cases, they readily admit that the "delineated pattern" was not apparent in the Rehnquist Court which overwhelmingly sided with agencies, whether conservative or liberal.

[2] This is not to argue that strategic theory is correct because it can be illustrated through administrative law. Certainly, we should not seek to prove theories where we would most likely find them to be true. My argument is the reverse: we need to understand more about the relationship between courts and agencies and considering internal and external influences outside of personal policy preferences is the best way to do so.

[3] Certainly, there are others; however, Tanenhaus's evaluation of agency success appears to be the most widely cited throughout. For others see Handberg (1979), Pritchett (1948), and Spaeth (1963). Unequivocally, though, all of these earlier studies find systematic deference to agencies.

Court also agree with one another more in agency cases.[4] Furthermore, for certain justices, their policy preferences guided their votes. For example, Justices Black and Douglas favored labor unions while Justice Vinson was hostile toward unions. Justices Black, Douglas and Frankfurter supported agencies less if there was a question of personal freedom in the case, while the rest of the court was relatively unaffected by the presence of a question of personal freedom. Finally, when questions of evidence are part of the case, the justices overall demonstrated a higher probability of deference. Thus, Tanenhaus (1960) produces evidence of deference and links these decisions to the substantive policy outcomes of the agency's action; however, Tanenhaus does not link this deference directly to the ideology of the justices.

Building on this line of thinking, Canon and Giles (1972) contribute to our understanding of deference by asking if certain agencies receive more favorable treatment than others. While Tanenhaus focused on the 1947-1956 terms of the Court, Canon and Giles examine the next ten years, the 1957-1968 terms. Focusing on six particular agencies, Canon and Giles find that, in fact, some agencies have fared better than others. The Federal Power Commission (FPC) and the Federal Trade Commission (FTC), for example, both won over 90% of the time during the period of study. On the opposite end, the Interstate Commerce Commission (ICC) and the Immigration and Naturalization Service (INS) only won 63.4% and 56.3% of the time respectively. Beyond simple summary statistics, Canon and Giles also test two competing models regarding the patterns of deference: the "Harmonic Attitudes" model and the "Dichotomized Attitudes" model. In the harmonic model, justices generally follow the same patterns of deference, regardless of other factors – specifically, their disagreement with other justices. Thus, in a harmonic model different levels of support for different agencies would simply reflect "common attitudes toward particular agencies held by the justices" (184).

[4] Tanenhaus (1960) counts a case once if all justices agreed on all issues, or if some dissented on all issues. If a justice dissented on one point, then it was counted twice. Using this multiple counting, Tanenhaus is able to account for all agreement, disagreement or non-commitment for all justices across multiple issues in a case.

Conversely, in the dichotomized model, justice's individual preferences may be at work in conditioning the support given to each agency. If this is the case, then the degree of support for an agency is merely "the outcome of factional disputes or at best the sum total of disparate, patternless attitudes" (1972, 185). Through the testing of bivariate variances, Canon and Giles find that there is significant variation between support for various agencies and conversely there is not significant variation between justices' support. Thus, Canon and Giles conclude that the Harmonic Attitudes Model is a better fit. Ultimately, they argue with Tanenhaus (1960) that justices, overall will favor those agencies whose substantive policies they approve of; however, neither Tanenhaus (1960) nor Canon and Giles (1972) account specifically for justice ideology.

Of the general studies of deference, those that address how different types of agencies and how judge ideology can affect the treatment of agencies have become increasingly more popular. Crowley (1987) specifically addresses Canon and Giles (1972) acceptance of the Harmonic Attitudes model, arguing that while Canon and Giles find uniform deference, or consensus, on the court, they do so by merely noting that the variance of support was greater when comparing across agencies then when comparing across justices. Crowley argues as well that if deference to agencies is conditioned by the court's agreement with substantive policies, then the newer social agencies created in the 1960s and 1970s might find less success in front of the more conservative Burger Court. Crowley purports that the "old style" economic agencies did not trigger the same "ideological passion" as these "new style" social agencies (265, 268). Hence, Crowley's research was one of the first to examine a typology of agencies as it relates to deference. Using Supreme Court data for the 1975-1983 terms, Crowley hypothesizes that conservative justices should be less likely to support social agencies than other agencies and that while conservative justices are more likely to "reject the decisions of both types of administrative agencies, this tendency is far more pronounced when a social agency is before the Court" (273). Accordingly,

Crowley finds some of the first evidence that individual judge ideology may influence the level of support given to agencies.

Sheehan (1990) advances the research on social versus economic agencies by examining cases from a longer time period (1953-1988) which allows for a more extensive analysis of how agency type can affect the level of deference afforded while also examining the influence the changing composition of the Court can have. Studying 435 cases involving an independent regulatory agency, Sheehan finds no difference in the level of support between economic and social agencies. He does find, however, that the ideological composition of Court and the ideological direction of the agency may impact how different agencies are treated. Sheehan finds that the more liberal Warren Court was "significantly more likely to support a social agency when the agency's decision was liberal" than the more conservative Burger Court (880). Thus, Sheehan was one of the first to consider how the ideological direction the agency is seeking effects deference.

Building on this, Sheehan (1992) adds to the social-economic dichotomy. While earlier study focused exclusively on independent regulatory agencies, this study also includes agencies that can be classified as executive-line. Therefore, Sheehan (1992) examines a four-part typology of agencies: independent-social, independent-economic, executive-social, executive-economic. Those agencies that are considered independent are ones that are farther removed from the president and White House politics and generally have in place some quasi-judicial practices for adjudicating disputes. Those agencies that are considered executive are ones that are charged with carrying out White House policies, including cabinet-level agencies. Thus, the Department of Health and Human Services (HHS) would be considered an executive-social agency while the Federal Deposit Insurance Corporation (FDIC) would be a good example of an executive-economic agency. On the other side, agencies such as the National Labor Relations Board (NLRB) and the Environmental Protection Agency (EPA) would be

considered independent-social agencies while the Interstate Commerce Commission (ICC), the Federal Trade Commission (FTC), and the Federal Energy Regulatory Commission (FERC) would all be considered independent-economic agencies.[5]

Sheehan (1992) examines the same years as previously (1990); however, with the addition of executive-line agencies this study uses over 1,300 cases. Discovering a similar level of deference to other studies (70.2%), Sheehan also finds that the Court is significantly more likely to defer to independent agencies than executive agencies, especially when the executive agencies are economic in nature. Sheehan's analysis also suggests, albeit not to a statistically significant degree, that the Burger Court supported executive-economic agencies less than the Warren Court. Additionally, the Warren Court was less likely to support executive-social agencies to a statistically significant degree. Both findings suggest that the ideological composition of the Court does affect the Court's relationship with particular agencies.

Beyond the offering a new typology of agencies, Sheehan importantly examines the directionality the agency is seeking in the case. As Sheehan (1992, 492) notes there is "no logical reason why the Court would support one particular type of litigant as opposed to another type," perhaps "one reason why the Court's support of agencies fluctuates is the ideological content of the agency's decisions." Across all three courts studied (the Warren Court, the Burger Court, and part of the Rehnquist Court), Sheehan finds that the Court rules in favor of agencies whose decisions are congruent with the overall ideology of the Court. Putting this all together, Sheehan finds that only executive-social and those classified as "other" still receive different levels of support when controlling for the ideological direction of the agency. Executive-social agencies that were conservative were supported more than those that were liberal. Taken together, then, we can view Sheehan's contribution to the

[5] For a full list of this categorization see Sheehan (1992, 498).

literature on deference as expanding not only on the typology of agencies, but also introducing and empirically illustrating the effect of the ideology and the court.

One glaring gap in the literature on judicial deference to agencies has been the relative dearth of scholarship beyond that of the U.S. Supreme Court. There are, however, a couple of key studies that have begun to examine how deference is different at lower court levels. Generally, in studies of the U.S. Courts of Appeals, agencies, or more generally the federal government, are still found to be favored litigants (Songer and Sheehan 1992); however, they receive less deference than they do at the Supreme Court, but with no difference in deference between agency types (Sheehan and McWilliams 1992). While more recent research has examined agencies in the U.S Courts of Appeals in terms of agency compliance (Hume 2009) or in terms of the use of gatekeeping mechanisms (Kaheny and Rice 2010) there is still a shortage of research on agencies in the circuit courts, save one broader empirical study.

Humphries and Songer (1999) examine over 700 agency cases from the U.S. Courts of Appeals from 1969-1988. Positing that these decisions are likely a mix of law and politics, they test whether the ideological direction of the court and the agency are significantly related to the chance of success. Additionally, to account for the impact of the law, Humphries and Songer examine if the substantial evidence standard, derived from the language of the APA requiring judicial deference if agencies fulfill the requirement of providing substantial evidence justifying their action. Moreover, they examine how deference is affected when the case includes a challenge to federal law. On all counts, Humphries and Songer find that their propositions regarding law and politics in agency cases successful. When the agency direction is more liberal and the judge's ideology is more liberal, the agency is significantly more likely to win, and vice versa. Additionally, if substantial evidence was in question, the panel was also more likely to side with the agency. Finally, if a federal law was being challenged in a case, the court was less likely to side with the agency. Ultimately, Humphries and Songer (1999) constitute the primary

broad study of administrative cases at the circuit court level. Still, their data end in 1988, which limits their conclusions in terms of more modern cases. Additionally, none of the studies mentioned above have explicitly examined how the preferences of other branches and actors can influence decisionmaking in these cases. Accordingly, one important contribution of the research reported here should be to continue the work started by Humphries and Songer by undertaking a broader analysis of agency cases in the U.S. Courts of Appeals. Thus, most of the research on deference to agencies, both at the U.S Supreme Court and the U.S. Courts of Appeals levels, has focused on agency characteristics or judicial policy preferences. The research reported here, however, deviates from this previous research by examining how the preferences of other branches or actors may influence decisionmaking.

A Strategic Approach to Administrative Law

In many ways, the strategic (or rational choice) model of judicial decisionmaking picks up where the attitudinal model leaves off. While attitudinalists primarily argue that judges vote their sincere policy preferences, those arguing from a strategic perspective note that this may not always be possible. Mainly, strategic theorists note that there is interdependency between the different branches and actors within the government and that decisionmaking based solely on one's personal policy preferences may not always yield that best possible outcome for any given decisionmaker. Thus, there may be circumstances and instances where a judge is constrained from voting their sincere policy preferences; therefore, the decisionmaker must strategically decide how to vote by considering the preferences of others. These "others" can include their brethren on their deciding panel, the entire court on which they sit, or a higher court in the judicial hierarchy. It may also be that judges are constrained by the preferences of actors outside of the judiciary, including Congress, the president, and even the public.

Murphy (1964) is often cited as the foundational work in strategic theories of judging. Murphy (1964), most importantly, establishes three assumptions that guide strategic theories of judging. The first is a policymaking assumption that, similar to the attitudinal model, assumes judges are policymakers. Because judges render decisions that affect the parties to the case while simultaneously establishing how similar cases will be treated, judges are policymakers. When a judge makes a decision, they allocate some resources or impose some sanctions. This use of power and the judgments that follow constitute policy. Thus, judges are policymakers (and by extension political in nature) (Murphy 1964, see also Segal, Spaeth, and Benesh 2005). Second, Murphy (1964) establishes an assumption regarding preference optimization. Here Murphy argues that the goal of judges is to make the best possible policy given their individual preferences. Hence, a judge will start with their optimal policy point and then strategize regarding the possibility of receiving their optimal policy given the preferences of others. Third, Murphy assumes that judges will not seek to harm the judicial institution. As such, judges will not make decisions that may make the judicial branch vulnerable to control or overruling by the other branches of government. The third assumption is critical to the idea of external influences: if voting sincerely might compromise the legitimacy of the judiciary by antagonizing the other branches, it may be most rational for judges and courts to constrain their individual preferences. In short, Murphy (1964) describes a strategic theory of judicial decisionmaking as one where policy-minded judges act strategically within the constraints of their political environment to choose the best possible policy outcomes without delegitimizing the judicial institution. Strategic theory can be considered as part of broader rational choice theory in that it is based on assumptions about preference ordering and optimizing choices. While this early work by Murphy lays out the foundations of a strategic theory, it was not until more recently that legal scholars and political scientists began to empirically test a strategic theory. Generally, there has been mixed empirical support for a theory of strategic decisionmaking in the federal courts.

Proponents of strategic theory in judicial decisionmaking are numerous. Evidence of strategic voting has been found in Supreme Court studies of constitutional interpretation (Gely and Spiller 1992), statutory interpretation (Gely and Spiller 1990), opinion writing and coalition forming (Wahlbeck, Spriggs, and Maltzman 1998), and even the choice to change a vote between the conference and the final announcement of the decision (Maltzman and Wahlbeck 1996). A strategic (or rational choice) approach has even been used to explain larger policy issues as well. Eskridge (1991), for example, traces the history of the civil rights debate from the 1960s into the 1990s and finds that there are marked periods of cooperation and conflict. Ultimately, Eskridge (1991) argues that the debate over civil rights can be traced to the changing dynamics between the Court, Congress, and the president. Futher, Eskridge (1991, 669) reasons that we should attribute the Burger Court's ultimate "softening" to civil rights issues as a reaction to the ideological composition of Congress. This historical analysis, then, suggests that the ideological composition of the Court, paired with the ideological composition of the other branches, may influence not only individual case outcomes, but broadly policy debates as well.

Additionally, some of the earlier work by Gely and Spiller (1990, 1992) and Spiller and Gely (1992) has found consistent evidence of strategic judging. Gely and Spiller (1990), specifically, investigate strategic influences on the relationship between agencies and the courts. Gely and Spiller (1990, 264) view "the Supreme Court as a self-interested, ideologically motivated institution, making its decisions subject to the traditional legal rules of precedent, but to the constraints arising from the political interests of other institutions of government." Gely and Spiller (1990, 1992) and Spiller and Gely (1992) develop a model of decisionmaking that places the Court, Congress, and the president on a unidimensional policy space. Thus, one can imagine a situation where the president and Congress are considerably more conservative or more liberal than the Court. According to Gely and Spiller (1990, 1992) and Spiller and Gely (1992), when other actors / institutions are ideologically distant from the Court, justices may feel constrained by these external influences and vote strategically rather than

sincerely. More recently Bergara, Richman and Spiller (2003) test strategic theory on a longer time period (1947-1992) of Supreme Court cases, finding that on average, the Court is constrained by Congress about one-third of the time.

According to many of these proponents of strategic theory, the further other institutions or actors get (ideologically) from judges, the more likely judges may feel pressure to constrain their individual policy preferences and adjust their decisionmaking to the preferences of others. On the other hand, most strategic theories also note that when other actors / institutions are ideologically close to judges and the court, judges can vote in an unconstrained manner consistent with the attitudinal model. In short, the preferences of other actors / institutions may pull justices, and ultimately court decisions, away from their policy ideal points. Why would justices or courts do this? For most empirical researchers studying strategic theory, the answer is institutional legitimacy. Thus, if a court is fearful that Congress will overturn the policy it sets in its decision, they are constrained and may vote or act strategically. Hansford and Damore (2000), for example, study Supreme Court decisions from 1963-1995 and find that there are some situations in which this fear manifests into strategic voting by justices. Specifically, when both chambers of Congress and the president are more conservative than a justice, that justice is considered an "outlier" justice and will be constrained, forcing them to vote more conservatively as well. Similarly, the president, with veto power, may also constrain court behavior. As Bergara et al. (2003, 248) note, justices will "consider the potential reactions of their policy competitors – namely Congress, the president, the agencies, and the lower courts." Conceiving of other branches, institutions, and actors as policy competitors places strategic theory in the debate surrounding inter-branch politics and the Separation of Powers more broadly. Thus, in a strategic approach, we can conceive of the courts, Congress, the president and others as all competing to acquire and maintain their most preferred policy point, to maintain power of policymaking. This competition, then, leads to strategic decisionmaking.

Also, widely cited research on the topic of strategic judging comes from Epstein and Knight (1998). Here, Epstein and Knight build directly from the theory built by Murphy (1964). Specifically, like Murphy, the authors argue that justices on the Supreme Court have policy motivations and a motivation to preserve institutional legitimacy. Strategy emerges as the balancing of these two motivations. Epstein and Knight (1998) test strategic theory by examining the 1983 term of the Supreme Court. Using Justice Brennan's conference memos and notes, Epstein and Knight (1998) find that in more than half of the cases at least one justice mentioned some beliefs about the preferences or possible actions of other actors / institutions. Therefore, in over half of the cases, there is some qualitative evidence that the justices are thinking outside of their own policy preferences. While other studies of strategic voting have used ideological positioning and mathematical distances, Epstein and Knight (1998) stand apart in their attempt to measure what the justices were thinking at the time of debate over a case. Thus, Epstein and Knight (1998) add to the case for strategic judging by investigating if there is qualitative evidence of strategy in the decisionmaking process of justices.

These relationships between branches can also be impacted by public opinion. As part of the investigation of external influences on the courts, studies of the effects of public opinion have become increasingly important to the discussion of judicial decisionmaking. Some, like Murphy (1964), in his early foundational work on the strategy of judging, saw how the influence of the public could be perceived as part of judicial strategy. On the one hand, judges are part of the public and their preference may "reflect the prevalent views of the day" (1964, 20). On the other hand, judges must be able to distinguish between "political fad and deeply felt – and more or less permanent – changes in social outlook" (1964, 20). Thus, the public can influence judging, but the extent to which it will depends on how judges view public opinion. Judges must consider public opinion because, while more politically insulated than other political actors, they can still be held accountable to the public. As Murphy argues, "a Justice must also realize that because judicial prestige is high does not mean that its

supply is inexhaustible" (1964, 20). If judges continually render decisions that are contrary to public will, the prestige and legitimacy of the judicial branch may be at risk.

Studies of the effect of the public opinion on judicial decisionmaking have become more popular in recent years. On one hand, it may simply be that the public indirectly effects judicial decisionmaking (Dahl 1957; Funston 1975). In this case, when a spot opens up on the federal courts, the president would appoint and the Senate would confirm. Given the highly political nature of these appointments, it stands to reason that the appointee would share a similar ideology with the president. Thus, the effect of the public would be viewed through the appointment made by president and confirmed by the Senate. Accordingly, if the public is more liberal, they are more likely to elect a Democratic president and vote in Democratic Senators who will then nominate and confirm a more liberal judge. Thus, the individual judge's ideology and how that ideology effects decision making (i.e. the attitudinal model) is the indirect result of public opinion.

Thus, a number of scholars argue that there is no support for a direct relationship between public opinion and court decisions (see, for example, Norpoth and Segal 1994; Segal and Spaeth 2002). On the other hand, many have found some direct effect of public opinion on judicial decisionmaking separate from the influence of the president in the appointment process (Fleming and Wood 1997; McGuire and Stimson 2004; Mishler and Sheehan 1993). Mishler and Sheehan (1993) constitute one of the most comprehensive studies of a direct effect of public opinion on courts. Using Stimson's (1991) measure of public mood that measures aggregate public liberalism, Mishler and Sheehan (1993) find evidence that in the aggregate, public mood and Supreme Court decisions follow similar patterns from the late 1950s into the early 1980s. Moreover, Fleming and Wood (1997), using a one-year lag of public mood, find substantial evidence that individual justices respond to changes in public mood as well. Given this debate over the indirect or direct effects of public opinion on courts then, I also consider the

public, alongside Congress and the executive, as a possible constraining force on judge's ability to vote their sincere policy preferences.

Another, more indirect, way that public opinion can influence judicial decisionmaking is through strategy that focuses on the role of the president. Scholars have argued that the president can use his or her control over the bureaucracy as a means of influencing policy (Cohen and Spitzer 1996a, 1996b; Smith 2007; Wood and Waterman 1991; Yates 1999) and that presidential approval can influence judicial decisionmaking more generally (Ducat and Dudley 1989; Yates and Whitford 1998). Therefore, when considering external influences on judicial decisionmaking in agency cases and when considering how the public can effect decisionmaking, it is possible that the popularity, or prestige, of the president may condition the effect of the president on the courts overall. Accordingly, I also consider this as part of a strategic approach to decisionmaking.

Some scholars studying strategy in judging find that the inter-branch relationships examined by strategic theory are especially important in agency cases. Specifically, Gely and Spiller (1990) and Spiller and Gely (1992) argue, as do I, that these relationships are particularly important when administrative agencies are involved. In their application of strategic theory to two landmark Supreme Court cases that dealt with agencies, Gely and Spiller (1990) found that the Court did adjust its position in response to the ideological composition of Congress and the presidency. Moreover, in their study of labor relations cases, Spiller and Gely (1992) found that the Court was constrained by congressional preferences over half of the time. Further, a more recent study by Carrubba and Zorn (2010) finds that the threat of noncompliance with Court rulings by the executive branch can influence judicial decisionmaking in cases where the U.S. government is a litigant. Carrubba and Zorn (2010) also find that this relationship is conditioned by public support for the executive. However, while there are multiple proponents of strategic theory, there are also a number of scholars who have found little or mixed evidence of strategy

in judging (see, for example, Howard and Segal 2004; Sala and Spriggs 2004; Segal 1997; Segal, Westerland, and Lindquist 2011).

Segal (1997), for example, in a study of statutory cases in the U.S. Supreme Court, finds overwhelmingly that justices vote sincerely, rather than strategically. Segal (1997) argues that the strategic model of judicial behavior is unlikely to be part of judicial decisionmaking because it presupposes that judges have perfect and complete information about the preferences of other actors. Therefore, strategic theory assumes that judges will be able to accurately place themselves and others in a dimensional space and correctly calculate how distant they are from one another and what distance would invite congressional or presidential action against the court. Segal et al. (2011), however, find mixed evidence of strategy – this time in cases dealing with constitutional questions. On one hand, Segal et al. (2011, 90-91) find little support that a "rational anticipation" model exists in reality where the Supreme Court would predict the likelihood of being overturned by Congress using different possible veto points in Congress and the presidency. On the other hand, Segal et al. (2011) do find that the Court is less likely to strike laws when it is ideologically distant from Congress. Overall, then, the results of empirical studies of a strategic model of judicial decisionmaking are mixed. It is the primary purpose of the research that follows to contribute to this debate by empirically examining how strategic theory can enhance our understanding of judicial decisionmaking in administrative cases. In doing so, I consider not only how distant a court is from the other branches, but condition this as well by the ideological congruence between the court and the agency.

Data, Methods, Hypotheses

As a means to examining the likelihood of strategic judging in administrative cases, I observe decisionmaking in the U.S. Courts of Appeals. It is important to examine administrative law in the U.S. Courts of Appeals as, contrary to the U.S. Supreme Court, the circuits lack a discretionary docket. Thus,

the circuits must deal with all cases that are properly before them and therefore provide a broader sample of cases. Moreover, given the low likelihood that one's case will be accepted by the U.S. Supreme Court, the circuit courts are the court of last resort from many litigants. In the overall U.S. Courts of Appeals Database, cases where an agency is one of the litigants account for over 50% of the data.[6] I began the empirical research by reading the opinions in those cases from the U.S. Courts of Appeals database where an agency is a litigant from 1953-1996 from the 2nd, 7th, 9th, and D.C. Circuits.[7] I then read over 1,000 circuit opinions to code for a new measure of deference, as is described below.

Dependent Variable: Ordinal Deference

The deference variable is specifically designed for case-level analysis although it could later be transformed to reflect individual judge votes. The deference variable is coded on a 5-part scale ranging from 0-4 where a 0 would indicate the agency lost on all points/issues and a 4 would indicate that the agency won on all points/issues. The agency lost outright in about 26% of cases and won outright in about 61% of cases, leaving about 13% of cases in the middle region of the deference variable.[8] Having an ordinal deference variable is important because oftentimes the court will rule in favor of the agency on some, but not all points. I coded this variable as follows:

4= court deferred to agency on all issues
3= court deferred to agency on most issues (greater than ½ of the issues raised in the case)
2= court split on issues (court deferred on half of the issues, did not defer on the other half)
1=court did not defer to agency on most issues (less than ½ of the issues raised in the case)
0= court did not defer to agency on any issue

A couple of examples from the data make this coding clearer. Consider first a case that would be coded as "3" on deference, *American Medical Association v. Federal Trade Commission* (638 F.2d 443,

[6] U.S. Courts of Appeals Data Base. Donald R. Songer, Principal Investigator. Available from the Judicial Research Initiative (JuRI) University of South Carolina at: http://www.cas.sc.edu/poli/juri/appct.htm.
[7] I chose circuits that heard plenty of agency cases, but that would also demonstrate some variance in general ideology of the circuit and in geographical representation across the U.S.
[8] Inter-coder reliability was measured using a 5% sample of cases and two coders. An acceptable Krippendorff's alpha of .941 was attained and there was 89% agreement.

2nd Circuit, 1980). Here the American Medical Association (AMA) was suing the Federal Trade Commission (FTC) over their issuance of a cease and desist order that forced the AMA to cease and desist from "from promulgating, implementing, and enforcing restraints on advertising, solicitation, and contract practices" contained in the AMA's ethical standards that the FTC ruled were in violation of Federal trade law (638 F.2d 443, at 446). The AMA argued that such an order constituted an abuse of discretion on the part of the FTC; however, the 2nd Circuit largely upheld the order. The majority made one modification, however. The majority modified the language of the FTC cease and desist order to protect legitimate medical practices from being unduly adversely influenced by the order. Thus, the FTC won on almost all counts, but since the court saw fit to slightly modify the order, it is coded as "3" for deference rather than "4." A deference level of 3 was found in 3.4% of cases.

A deference score of "2" indicates that the ruling court was evenly split on the issue so there is no clear winner or loser and thus deference is equally mixed. An example of this level of deference would include something like the case of *A.L. Pharma Inc. et al. v. Donna E. Shalala et al.* (62 F.3d 1484, D.C. Circuit, 1995). In this case, the Food and Drug Administration (FDA) was sued for permitting a drug producer to use the company's own study data as evidence of safety of the drug. Here, the majority of court agreed that while the FDA had the right to summary judgment and deference, they needed to provide a more adequate explanation of why they felt the data produced by the drug company was sufficient. Thus, the court argued that the FDA was within the bounds of its discretion to not withdraw its approval, but it needed to fully explicate why it was that the evidence presented by the drug company was sufficient. The court also gave the FDA 90 days to comply with this ruling. This is coded as a "2" because while the FDA must now explain its decision some, the court in no way overruled its ability to make such a decision or to use its discretion in such a manner. It is not coded as a "3" as the previous case was, however, because rather than changing one small point in a rule on its own, the court in this case is requiring that the FDA go back reconsider its decisionmaking process. Those cases that are

coded as "2" are often easily distinguishable as they result in an "affirmed in part, reversed in part" or "affirmed in part, remanded in part" outcome. A deference level of 2 was found in 7.16% of cases.

Finally are those cases where the agency loses on all but a few minor points. These cases are coded as "1" on the deference variable. The clearest example of this would be an Internal Revenue Service (IRS) case where six years of tax liability were in question (*Carl E. and Paula Koch v. United States* (457 F.2d 230, 7th Circuit, 1972). The tax court, ruling prior to the appeal, had found that the petitioners, the Kochs, were entitled to a refund for the years 1958, 1960, 1961, 1962, and 1963, but not for 1959. The IRS argued that the Kochs were not entitled to refunds for any years 1958-1963. The 7th Circuit upheld the tax court's ruling, agreeing that in 1959 property was sold in the course of business so no refund was due. Thus, out of six possible years, the IRS only won on one. A deference level of 1 was found in 2.6% of cases.

Independent Variables: Measuring Strategy

What does strategic judging look like? Following with those who have attempted to measure and test strategic theory, I also use ideological distances; however, I depart from previous literature by conditioning these distances with the ideological congruence or incongruence between the agency and the overall circuit panel. Given that my dependent variable is deference, and not the direction of the ideological outcome, it is not enough in these cases to propose that ideological distance effects prove strategy: these distances also need to be conditioned by the congruence between the court and the agency. Simply, I set up conditions of constraint so that the panel should be the least likely to defer to an agency. If the panel is still more likely to defer, even under these adverse ideological conditions, strategic judging is present. Thus, I include the following independent variables to test a strategic model of decisionmaking in agency cases.

Agency – Panel Congruence

I include a measure of agency – panel ideological congruence for two reasons. First, it is a constitutive term for the interaction terms described below. Second, if found significant, it would indicate sincere ideological voting because if the agency and panel are congruent and significantly raise the level of deference granted an agency, this indicates a genuine reliance on the ideology of the panel for decisionmaking. In short, a strategic model must also account for the possibility of an attitudinal model. Agency direction is the ideological direction the agency is seeking in the case and is coded -1 for liberal and 1 for conservative. Panel ideology is the median ideology and as is the case with all of the ideology measures, is from the Judicial Common Space (JCS) scores provided by Epstein, Martin, Segal, and Westerland (2007).[9] Each score can range from -1 (most liberal) to 1 (most conservative). Thus, by multiplying these scores by the direction the agency is seeking, a measure of ideological congruence is created similar to that of Kaheny (2010) and Kaheny and Rice (2010) where positive values indicate congruence (in that a negative multiplied by a negative makes a positive number) and negative values indicate incongruence. However, because I want to use incongruence as a condition on ideological distances, I recode this variable to indicate instances where the agency and the court are incongruent, thus setting up the likelihood of less deference if the court is behaving sincerely. Consequently, the congruence measure included in the models is coded 1 for incongruence between the agency and panel and 0 for congruence.

[9] The JCS scores are based on Poole and Rosenthal's (1997) NOMINATE and Common Space scores. For the U.S. Courts of Appeals, Epstein et al. use Giles, Hettinger, and Peppers (2001) scores. In a number of cases, there was a visiting judge on the circuit panel. This judge was usually a U.S. District Court judge from the same circuit. When these instances occurred, I followed the same coding procedure as Giles et al. (2001) where the ideology of the judge is equal to the appointing president's ideology as calculated by Poole and Rosenthal (1997) unless one or both of the U.S. Senators in the judge's home state are of the party of the president. If one senator is of the same party, that Senator's score is used. If both senators are of the same party as the appointing president, the two scores are averaged. Because I am interested in circuit-judge behavior, I use these district court judge scores only to measure the panel median. They should not be included in any future individual judge models. For the Supreme Court, Epstein et al. transform the Martin and Quinn (2002) scores to a -1 to 1 range.

Ideological Distances

Using the same JCS scores, I also include as constitutive measures the absolute distance between the panel and other branches or actors who might influence the court's decisionmaking. I use absolute distances because directional distances would indicate a liberal/conservative direction and my dependent variable is not an ideological variable. I am simply concerned with how distant the panel is from others. I include the distance between the panel and the overall circuit median, the Supreme Court median, the Senate, the House, and the president. If these distances are considered in the decisionmaking, this could indicate that the court is acting strategically by considering the preferences of others. However, as was indicated earlier, this must be conditioned by the ideological direction the agency is seeking.

Interactions between Congruence and Distance

The interactions between the ideological congruence of the panel median and the direction the agency is seeking are the critical independent variables for demonstrating strategic judging. Here I multiply the recoded congruence variable (again, 1 is equal to incongruent) with the ideological distances. Thus, I set up conditions wherein a panel, if acting sincerely, should be least likely to defer and a panel, acting in strategically, would constrain their ideological preferences and still defer to the agency. These interactions include the following variables with their associated conditional hypotheses.

*Congruence * Distance (Panel – Circuit Median)* = When the ideological distance between the panel median and the circuit median is large *and* the agency and panel are incongruent, a constrained panel will still vote for higher levels of deference in line with strategic behavior.

*Congruence * Distance (Panel – Supreme Court Median)* = When the ideological distance between the panel median and the Supreme Court is large *and* the agency and panel are incongruent, a constrained panel will still vote for higher levels of deference in line with strategic behavior.

*Congruence * Distance (Panel – Senate Median)* = When the ideological distance between the panel median and the Senate median is large *and* the agency and panel are incongruent, a constrained panel will still vote for higher levels of deference in line with strategic behavior.

*Congruence * Distance (Panel – House Median)* = When the ideological distance between the panel median and the House median is large *and* the agency and panel are incongruent, a constrained panel will still vote for higher levels of deference in line with strategic behavior.

*Congruence * Distance (Panel – President's Ideology)* = When the ideological distance between the panel median and the president's ideology (also NOMINATE) is large *and* the agency and panel are incongruent, a constrained panel will still vote for higher levels of deference in line with strategic behavior.

Public Opinion Variables

While many studies of public opinion's effects on court decisionmaking focus on public mood, measured through liberalism, this would be inappropriate for a study of deference – which inherently has no ideological direction. Thus, to account to the indirect influence of the public, I include a measure of presidential approval, using annual Gallup scores. However, to carve out actual strategic behavior, this too must be conditioned on ideology. Specifically, if courts are considering the external pressures of presidential approval, they would be more willing to defer when presidential approval is higher *and* when the agency is congruent with the president *but not* with the appeals panel. Thus, presidential approval is included as a constitutive term as is a measure of agency – president congruence where

congruence is equal to 1 and incongruence is equal to 0. I create an additional triple interaction so that the variable "approval interaction" is ultimately equal to presidential approval * agency – president congruence * agency – panel congruence. For this variable, positive values indicate that the agency and the president are congruent, the agency and the panel are incongruent and as the variable increases, presidential approval is higher. Additionally, for this variable, any cases coded as 0 did not fill one or both of the conditional requirements of agency – president congruence or agency – panel incongruence. Given these conditions, if the agency and panel are incongruent, the agency and president are congruent, and presidential approval is high, a strategic panel would render a higher level of deference to defer to the president's preferences over the court's ideological preferences.

Agency / Case Level Variables

Finally, I also control for some agency and case level variables.[10] I include measures of how old the agency in the case was at the time of the decision. While many agencies were created during the New Deal, before the start of my data range, there are some agencies – mostly executive departments – that are considerably older than the newer social agencies of the 1960s and 1970s. Agency age is based on the date of creation as was reported in the administrative history of each agency by the National Archives.[11] In general, older agencies should receive more deference as they have more experience generally, and more experience specifically in managing their relationship with the courts. The preceding history of the case in the lower courts may also influence the level of deference granted as the circuits have a pattern of deferring to agencies, but also a pattern of deferring to the lower courts (the U.S. District Courts). Thus, I include dichotomous measures for if the case was heard in a district court before the circuit appeal, as opposed to coming directly from an agency or administrative law

[10] Bivariate tests of Sheehan's (1990, 1992) classification yielded no results, thus I only include agency age. This, of course, does not mean that agency type is not related to deference, as my results are limited to the circuits of study.
[11] Available at http://www.archives.gov/research/.

judge. I also include a measure of if the agency was litigant petitioning the circuit in the case. Finally, I interact these two to account specifically for those instances where a case was heard by the lower court and, by extension that the agency is now the petitioner, the agency lost in the lower court. When the lower court heard the case and the agency is now the petitioner, one can hypothesize that the court will be less likely to defer to agency and more likely to uphold their brethren on the lower court's decision; however, if the opposite is true, this indicates a much stronger deferential relationship between the circuits and agencies in that they are willing to overrule the lower court to uphold the principle of judicial deference to agencies. Finally, I also include dummy variables for the 2nd, 7th, and 9th Circuits, leaving the D.C. Circuit out as the comparison group to determine if there may be circuit level differences in deference to agencies.

Results

Given that the dependent variable is an ordinal measure of deference, I employ an ordered-logit regression to test the effects of the variables. Table 1 illustrates the results of this regression. Many of the control variables dealing with the status of the case and the agency are significantly related to deference to agencies. Specifically, older agencies receive more deference and those agencies that were heard at the district court level first and were then petitioned to the circuit courts receive less deference. Thus, while older agencies may have built a reputation in the courts of professionalism, circuit panels are still more likely to rule with their lower court brethren than to defer to the agency.

[Insert Table 1 about here]

Of particular importance, however, is the absence of a significant relationship between agency and court ideology. Hence, there is no demonstrable relationship in this model between just the policy preferences of the agency and the panel. Had there been, this would indicate some level of sincere ideological outcomes, where a panel would be more likely to rule in favor of agencies that are seeking

ideological outcomes congruent with that of the panel's median. One explanation is that deference to agencies is so deeply institutionalized in the courts it supersedes ideological voting; however, as the interaction term that measures if the case went to the district courts first and the agency lost indicates, deference to agencies is not so ingrained as to supersede internal deference to the rulings of other courts. Ergo, unless there is some reason to believe that the U.S. Courts of Appeals places more emphasis on judicial deference to agencies than the U.S. District Courts, this is unlikely. The alternative explanation is that the court is considering the preferences of those outside of their immediate decisionmaking panel.

Moving to the variables of concern to strategic judging, two important interactions are found to significantly increase the probability of the panel granting higher deference. First, when the panel and the agency are ideologically incongruent *and* the panel and circuit court are ideologically distant, the panel will grant higher deference. This makes sense from the point of view of strategic theory as the panel does not want to be overruled or delegitimized by their brethren on the circuit by ruling in opposition of the circuit's overall ideology. This is especially illustrative as this occurs when the agency and panel are incongruent, thus the panel would have sincerely preferred, in ideological terms, to not defer. This can be further highlighted by some examples. Consider a case where the agency and panel are ideologically incongruent and the panel and circuit are ideologically close (i.e. distance between the panel and circuit is equal to .002 or the lowest distance). In this instance, the probability of full deference to the agency is 59%. When the ideological distance between the panel and the circuit rises from .002 to .503, about halfway, the probability of full deference to the agency increases to 71%. Finally, at the opposite extreme, when the ideological distance between the panel and the circuit is greatest, at 1.0 and the agency and panel are incongruent, the probability of full deference is around 82%. T

In addition to the relationship between the panel and the circuit, there is also some evidence of external strategy where the court considers the ideology of the president and, to a certain extent, the congruence between the president and the agency. As Table 1 demonstrates when the agency and panel are ideologically incongruent and the panel and president are ideologically distant, the panel is still more likely to defer to the agency. Again, some examples illustrate this relationship. When the panel and agency are incongruent, but the panel and president are ideologically close (.002 absolute distance), the probability of full deference is about 54%. When the panel and president are ideologically distant (at 1.0 absolute distance) the probability of full deference increases to 82%. As was the case with the overall circuit ideology, it is clear that these three-judge panels are considering their ideological placement to that of the president when determining the level of deference an agency will receive.

Finally, while the interaction between presidential approval, agency – presidential congruence, and agency – panel congruence is not statistically significant, the congruence between the agency and the president is. Given that this is a constitutive term, this indicates that when the agency and the president are incongruent (or 0), deference by the panel to the agency is less likely; however, this does not appear to be conditioned by the relationship between the agency and the panel.

Conclusions

This article has demonstrated that judicial deference to administrative agencies may be conditioned by more than court ideology or agency characteristics. This research exhibits, as Kaheny and Rice (2010, 201) note that "courts are in a precarious position where they are statutorily obligated to review administrative agency cases, but precedent directs the courts to defer to the agency in question." This difficult place for the federal courts in the Separation of Powers (SOP) scheme arguably leads to more intertwining between the branches when dealing with the expansion or restriction of administrative agency power and discretion. In summary, the model presented here finds evidence of

both internal and external strategy. Internally, circuit court panels do consider the ideology of the overall circuit median in their decisionmaking calculus, even if they would genuinely ideologically oppose the outcome the agency is seeking. Externally, circuit court panels consider the ideology of the president and as the panel moves farther, ideologically, from the president, they are more likely to defer even in the event of ideological incongruence with the agency.

Consequently, this research highlights some new avenues of research in both administrative law and strategic judging. Future research should seek to shift the unit of analysis to the judge, rather than the panel. It is possible that even on smaller collegial courts, like a three-judge panel, strategic voting on the individual level occurs in agency cases. More important to answer the substantive question of why courts systematically defer, future research should consider including measures of the impact of the law and precedent on administrative deference. Certainly, given the federal courts' history of precedent limiting judicial review of agency action (see, for example, *Chevron U.S.A., Inc. v. Natural Resources Defense Council* and *United States v. Mead Corporation*) it is likely that law and politics intertwine in the choice to follow or distinguish decisions from these cases.

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United States v. Mead Corporation (2001) 533 U.S. 218.

Table 1: Strategic Judging in the U.S. Courts of Appeals in Agency Cases
1953-1996

Variable	Coefficient (Robust SE)	Change in Predicted Probability[a]
Agency – Panel Congruence (1= incongruent)	-.38 (.43)	.04
Distance (Panel – Circuit)	-.22 (.32)	.02
Distance (Panel – Supreme Court)	-.53 (.69)	.04
Distance (Panel – Senate)	-.73 (1.30)	.05
Distance (Panel – House)	1.67 (1.23)	.16
Distance (Panel – President)	-.55 (.45)	.05
Congruence * Distance (Panel – Circuit)	**1.05 (.49)***	**.10**
Congruence * Distance (Panel – Supreme Court)	-.74 (1.02)	.07
Congruence * Distance (Panel – Senate)	-.31 (1.87)	.03
Congruence * Distance (Panel – House)	-54 (1.81)	.05
Congruence * Distance (Panel – President)	**1.40 (.66)***	**.13**
Presidential Approval	.002 (.006)	.00
Agency – President Congruence (1=congruent)	**-.63 (.28)***	**.06**
Approval Interaction	.000 (.007)	.00
Agency Age	**.003 (.001)****	**.00**
District Court First	-.18 (.15)	.02
Agency is Petitioner	.001 (.23)	.00
District First * Agency Petitioner	**-.39 (.15)****	**.04**
Second Circuit	.03 (.20)	.00
Seventh Circuit	.16 (.19)	.02
Ninth Circuit	.09 (.19)	.00
N= 1,071 Chi2 = 52.37 Prob < Chi2 = .000 % Correctly Predicted = 61.62% Proportional Reduction of Error = 1.67%	*= p<.05. **= p<.01 [a] marginal effect unless binary	