2010

LAW AND IDEOLOGY IN THE U.S. COURTS OF APPEALS JUDICIAL REVIEW OF FEDERAL AGENCY DECISIONS

Jerry D. Thomas
University of Kentucky, jerrythomas100@gmail.com

ABSTRACT OF DISSERTATION

JERRY D. THOMAS

THE GRADUATE SCHOOL

UNIVERSITY OF KENTUCKY

2010

LAW AND IDEOLOGY IN THE U.S. COURTS OF APPEALS:
JUDICIAL REVIEW OF FEDERAL AGENCY DECISIONS

ABSTRACT OF DISSERTATION

A dissertation submitted in partial fulfillment of the
requirements for the degree of Doctor of Philosophy
in the College of Arts and Sciences
at the University of Kentucky

By Jerry D. Thomas
Lexington, Kentucky

Director: Dr. Ellen D. B. Riggle, Professor of Political Science
Lexington, Kentucky
2010

ABSTRACT OF DISSERTATION

LAW AND IDEOLOGY IN THE U.S. COURTS OF APPEALS:
JUDICIAL REVIEW OF FEDERAL AGENCY DECISIONS

The attitudinal model of judicial behavior dominates judicial politics scholarship, including studies of federal courts and agencies. Extant research finds limited support for legal constraints as determinants of judge behavior when agency decisions are under review. Attitudinal scholars suggest judges substitute their policy preferences in place of agency preferences. Contrarily, the legal model suggests judges defer to agencies because of procedures and doctrine rooted in the rule of law.

This study tests hypotheses predicting whether federal agency review decisions in the U.S. Courts of Appeals during 1982-2002 are a function of judges' attitudes, namely ideology, or a function of legal constraints, including agency adherence to legally prescribed procedures and agency passing standard-of-review muster. Using logistic regression, I examine the impact of legal and ideological variables on the outcome of judges' reviews of agency decisions.

Results support several hypotheses. Agency adherence to procedural standards, such as those outlined in the Administrative Procedures Act, increases the likelihood that a review panel will defer to the agency. If review panels and judges answer standard-of-review questions favorably toward agencies, review panels and judges are more likely to support agencies in final case outcomes. Individual judge votes to support agencies are influenced by the ideology of other judges on the review panel: if the ideology of the review panel is in agreement with the agency position, individual judges are more likely to support agencies in final case outcomes. Finally, a judge is more likely to dissent when he/she is in ideological (dis)agreement with the agency position.

In sum, results suggest that judges' regard for law and regard for their judge colleagues informs decisionmaking. Judges often defer to federal administrative agencies, even when their personal policy preferences are not found to be significantly associated with decisions. Judges' ideological preferences appear to be less important in the U.S. Courts of Appeals than previous scholarship indicates, but ideology may influence judges' decisions through the ideological composition of the review panel and in dissent

behavior. The implication is that the legal model of judicial behavior may be more prominent than the attitudinal model in the U.S. Courts of Appeals.

_____
Student's Signature

_____
Date

LAW AND IDEOLOGY IN THE U.S. COURTS OF APPEALS: JUDICIAL REVIEW
OF FEDERAL AGENCY DECISIONS

By

Jerry D. Thomas

_____
Director of Dissertation

_____
Director of Graduate Studies

_____

RULES FOR THE USE OF DISSERTATIONS

Unpublished dissertations submitted for the Doctor's degree and deposited in the University of Kentucky Library are as a rule open for inspection, but are to be used only with due regard to the rights of the authors.

Bibliographical references may be noted, but quotations or summaries of parts may be published only with the permission of the author, and with the usual scholarly acknowledgements.

Extensive copying or publication of the dissertation in whole or in part also requires the consent of the Dean of the Graduate School of the University of Kentucky.

A library that borrows this dissertation for use by its patrons is expected to secure the signature of each user.

Name   Date

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

DISSERTATION

JERRY D. THOMAS

THE GRADUATE SCHOOL

UNIVERSITY OF KENTUCKY

2010

LAW AND IDEOLOGY IN THE U.S. COURTS OF APPEALS: JUDICIAL REVIEW
OF FEDERAL AGENCY DECISIONS

_____

DISSERTATION

_____

A dissertation submitted in partial fulfillment of the
requirements for the degree of Doctor of Philosophy
in the College of Arts and Sciences
at the University of Kentucky

By Jerry D. Thomas
Lexington, Kentucky

Director: Dr. Ellen D. B. Riggle, Professor of Political Science
Lexington, Kentucky
2010

for my teachers and mentors

On a personal note, I owe special thanks to Kendra Stewart, who is not only a colleague at Eastern Kentucky University, but also a treasured friend and housemate. This dissertation could not have happened without her support. In addition to Kendra, a number of friends and family members regularly contributed to distracting me from the grind of research and helped me keep perspective on the important things in life—Jimmy Williams, Angie Parchment, Steve Parchment, Danny Hergott, and Matthew Reinhardt. I also extend special thanks to Joyce Hallenbeck for her excellent proofreading and editing and for her encouragement.

A number of scholars, several of whom I have not had the privilege of knowing, substantially contributed to bridging gaps between the legal and political science disciplines. Their pioneering scholarship shaped my view of judicial behavior and court-agency interactions. I am grateful for intellectual inspiration from Brad Canon, Frank Cross, Donald Songer, Harold Spaeth, and Cass Sunstein. Additionally, the legal and judicial politics disciplines advance considerably when the subjects of our study—judges—enter the academic conversation. For writing their insights into judicial behavior and court-agency relations in the U.S. Courts of Appeals, I am especially thankful to Judge Patricia Wald and Judge Harry Edwards.

I am fortunate to have had phenomenal teachers and mentors who molded me and inspired me. In my view, teachers never receive enough praise, so I take the opportunity here to mention a few of them. For paving the way and taking me under their wings, I especially thank Nancy McMakin, Michael Sitton, Robert Simpson, Dick Hubbard, Carolyn Shapiro, Felice Batlan and, again, Ellen Riggle.

TABLE OF CONTENTS

TABLES

FIGURES

CHAPTER 1: OVERVIEW AND INTRODUCTION

This is a study of judicial behavior in the U.S. Courts of Appeals. At its core, the study attempts to test whether decisionmaking is a function of judges' personal attitudes toward a particular policy or a function of deference to law. Using a sample of cases that are appealed to these courts from federal administrative agencies, this study finds that law is a strong determinant of judicial behavior. Judges' attitudes affect the outcome of their decisions only in limited circumstances.

These findings are important for two primary reasons—one substantive and one methodological. Substantively, these findings suggest that a significant portion of the third branch of government may be less political than has been portrayed by some judicial scholars in political science. That the judicial branch defers to the executive branch as prescribed by the legislative branch holds particular import not only for policymakers, but also for students of democratic institutions concerned with how well fragmented power structures actually work. The current study suggests that decisionmaking in the U.S. Courts of Appeals is more a function of law, deference and collegiality than it is a function of judges enacting their political preferences. This is a further suggestion that at least a portion of the judicial branch appears to stay within the confines of what is considered 'judicial' within the United States' fragmented power structure. This is to say that *if* judges encroach into legislative and executive functions (i.e., political policymaking and administration), it does not appear that this encroachment is pervasive, continuous, or systematic when judges review agency decisions in the U.S. Courts of Appeals.

Beyond shifting the emphasis toward law and away from political ideology in judicial decisionmaking, these findings are important because they incorporate the theoretical frameworks from both political science and legal scholars. Legal scholars have not fully embraced political science's findings for a number of reasons, one of which is that much of the political science research uses overly broad and reductive variables in conjunction with complex statistical tools. The result, legal scholars and judges argue, is a body of empirical scholarship that overemphasizes judges' political

orientations as predictors of judicial behavior and under-emphasizes elements of law that are either not measured or are inappropriately measured. Similarly, political science scholars have been reluctant to accept as true the findings of legal scholars who emphasize law and legal doctrine as primary determinants of judicial behavior.

It is not a new idea to suggest that the underlying cause of disagreement between these disciplines is because political scientists do not understand the nuances of law and legal scholars do not understand the nuances of econometrics. Indeed, entire conferences and symposia have been dedicated to resolving these concerns. Here, I take care not to suggest that political scientists lack the wherewithal to understand legal concepts nor to suggest that legal scholars lack the capacity to understand econometrics. In fact, the growing body of cross-pollinated scholarship suggests otherwise. I do, however, note that the substantive findings of the present study are rooted in an attempt to heed calls from both political science and legal scholars to incorporate the methods of both disciplines into studies of judicial behavior. Accordingly, I have tried to address in this empirical political science study some of the concerns of legal scholars by incorporating more nuanced measures of law, legal doctrine, and political ideology. I have also tried to incorporate legal concepts and language from actual cases, legal journals, and law reviews.

I am a student of political science. Hence, this study is a doctoral dissertation that requires me to document all of my assumptions and to explain in detail my methods. I am also a student of law, which means that this study is informed by rudimentary understandings of law and legal doctrine. It would be arrogant and naïve to suggest that because I am a student of both political science and law that I can single handedly bridge the gaps between the two disciplines that have existed for over half of a century, all within my first major research study. It may be fair, however, to say that surveying the legal scholarship alongside the political science scholarship gives me, and hopefully readers of this study, a better understanding of the complexities and misgivings of measuring judicial behavior than if I had surveyed only the political science literature. I suspect that this was the intent of the myriad scholars calling for interdisciplinary studies to judicial behavior. This study relies heavily on quantitative research methods of political science, but it is informed by and verified by qualitative research methods from

the legal discipline. I will leave it to the reader to decide whether I am successful in this approach and whether this approach yielded substantively different and defensible results.

As previously noted, the substantive results of the present study provide empirical support for law as an important informant of judicial behavior when agency decisions are under review. This study also suggests that the relationship between judges' political ideologies and their decisions to support agencies is not as evident in the U.S. Courts of Appeals as it may be in the U.S. Supreme Court. Finally, this study suggests that collegiality among judges, who typically review cases in panels of three on the U.S. Courts of Appeals, may temper judges' desires or abilities to substitute their preferences in place of agencies' preferences.

In Chapter Two, I examine theories of judicial behavior and focus on the competing attitudinal and legal models. The attitudinal model dominates the political science literature and asserts that judges decide cases based on their attitudes, most often measured by judges' political ideologies. The legal model suggests that judges decide cases based on law and legal principles rooted in constitutionalism.

Few scholars have reconciled the attitudinal and legal models, primarily because of measurement issues, but also because judicial behavior scholars focus on the U.S. Supreme Court. Much of the attitudinal research shows that the Supreme Court is a political entity, quite often dismissing law and legal doctrine as real constraints on justices' behavior. At best, some judicial behavior scholars suggest that while judges do vote according to their personal attitudes, the law may temper their ability to do so. Scholars heretofore have not sufficiently operationalized and subsequently measured the impact of the law on judges' votes and decisions. Further, few scholars have examined the attitudinal and legal models in courts other than the Supreme Court.

This study focuses on the U.S. Courts of Appeals and gives special attention to the D.C. Circuit. The courts of appeals are a particularly good place to examine judicial behavior, not only because they serve as the courts of first-level appeals for a vast number of litigants, but also because they essentially function as the courts of last resort for an overwhelming majority of legal conflicts in the federal system. Less than one

percent of cases heard in the U.S. Courts of Appeals go on to be reviewed by the U.S. Supreme Court.

In Chapter Two, I argue the case for why judicial review of agency actions is a particularly good focus for a judicial behavior study. There is a considerable body of law that requires federal courts to defer to federal agency decisions in certain contexts. These laws stand in sharp contrast to attitudinalist assertions that judges substitute their ideologically-based preferences in place of agencies' preferences. Therefore, judicial review of agency actions necessarily pits the legal model against the attitudinal model.

In Chapter Three, I use past studies of court-agency relations to form several hypotheses about judicial behavior in the U.S. Courts of Appeals. These hypotheses are concerned with federal agency success in court as a function of judges' ideological agreement with agencies and also as a function of judges' legally-prescribed deference to agencies. I hypothesize that behavior in the D.C. Circuit may be different from other circuits because of the disproportionately large number of administrative agency appeals that this circuit hears compared to other circuits.

Reconciling the legal and attitudinal models of judicial behavior has been discussed and examined rather extensively in the political science literature, but these studies generally fail to adequately conceptualize and measure elements of the legal model. Scholars have been much more successful at specifying attitudinal models using judge ideology as an indicator of judge preferences; few scholars have been able to specify quantitative models that capture legal and attitudinal variables in the same model.

In Chapter Four, I focus on building a model of judicial behavior. Here, I operationalize a number of legal variables based on legally-prescribed court deference to agencies, namely a number of standards of review that judges address when agency decisions are under review. Generally, these standards of review require judges not to set aside agency actions in favor of the courts' preferences. According to the legal model, agency decisions should remain intact so long as agencies: 1) provide substantial evidence to support their decisions, 2) do not abuse discretion, 3) do not act arbitrarily or capriciously, and/or 4) provide reasonable interpretations of statutes. I also examine several procedural questions pertinent to agency decisions, and specifically examine the relationship between agency adherence to prescribed procedures and judges' support for

4

agencies in final case decisions. I conclude Chapter Four by specifying several logistic regression models to test the hypotheses.

Using data from the U.S. Courts of Appeals Database, I test hypotheses in Chapter Five using these logistic regression models. I examine a sample of published cases in the U.S. Courts of Appeals reviewing federal administrative agency actions during the period 1982-2002. Results of the hypothesis testing strongly suggest that courts extend considerable deference to agencies where ideology yields to law in a great number of circumstances. This deference not only predicts behavior in the courts, but also helps explain why 90% of the agency-review decisions in the U.S. Courts of Appeals are unanimous and why agencies receive support in about two-thirds of appearances before these courts. Further, the results show that review panels and judges in the D.C. Circuit are generally no more or less political or deferential than their counterparts in other circuits.

While this study provides considerable support for the legal model and suggests that behavior in the courts of appeals is less political than past scholarship suggests, ideology does manifest in limited circumstances. Further analysis of the outputs of logistic regressions in Chapter Six suggest that the ideological composition of a review panel sometimes affects the behavior of individual judges and that judges' decisions to dissent may be a function of their ideological (dis)agreement with agencies.

The results of this study move the political science and legal disciplines closer to understanding more fully judicial behavior in the U.S. Courts of Appeals. Judges have often described in their opinions and academic commentaries the struggle of the courts to find balance between an almost obsequious deference to administrative agencies and an invasive, intense scrutiny of their actions. Striking a balance between these extremes and maintaining the integrity of a review function that is substantively meaningful is not only the concern of judges, but also the concern of Congress, the President, and citizens, the latter of which are intimately affected by these decisions. This study suggests that courts and judges do reasonably well finding this balance. Judges defer to agencies considerably, but only where agency decisions rest within the confines of reasonableness and consistency.

In Chapter Seven, I discuss the ramifications of law and politics in a comprehensive model of judicial behavior. A complete model of judicial behavior should not be defined by what judges ought to do; rather, what they actually do. However, to ignore normativity in these models is to discount structural and professional norms that may also constrain judicial behavior.

As do many studies in political science, this study probably raises more questions than it answers. I include in Chapter Seven a discussion of the limitations of this research, and I use the results of this research to frame areas for future inquiry. Neither the attitudinal model nor the legal model completely describe or predict judicial behavior in the U.S. Courts of Appeals. While this study brings law back into the study of judicial behavior and finds limited support for the role of politics in judging in the U.S. Courts of Appeals, future researchers must continue to bridge the theoretical and empirical divides between political science scholarship and legal scholarship. Doing so requires more extensive conceptualization and measurement of legal concepts, as well as finding new ways to measure and evaluate judges' normative philosophies of judging in practice.

CHAPTER 2: LAW AND IDEOLOGY IN JUDICIAL DECISIONMAKING

Court scholars, especially those trained in the political science discipline, have been greatly concerned over the past sixty years with how judges behave and why they behave as they do. Scholars as early as C. Herman Pritchett (1948) speculated on law and politics as informants of judicial behavior and developed a framework for political science scholars to conceptualize and operationalize elements of law and politics as determinants of court and judge decisionmaking. As Martin Shapiro noted in 1964, political scientists approached judicial decisionmaking with an eye toward power. They examined courts and judges as political entities concerned with wielding power against other institutions and in society more broadly (Shapiro 1964). The resultant body of political science literature framed courts as political institutions, with judges' decisions largely informed by their own personal attitudes and policy preferences.

Legal scholars approached American jurisprudence with emphasis on the law, with the concomitant body of legal scholarship placing great weight on rule of law and substantive elements of the law as determinants of judges' behavior. This body of scholarship is considerably broad, in part, because it examines many sources of law, including statutes, Congressional actions, executive orders, administrative decisions, rulings of other courts, and myriad state actions. The legal approach to judicial behavior often takes on a normative tone, but legal scholars support these normative conclusions with extensive analyses of court decisions and opinions about the law. Hence, the legal model of judicial behavior does not place nearly as much weight on courts and judges being political institutions as political science scholars do; instead, legal scholars acknowledge that law constrains judicial behavior. Disagreement continues over whether judges make decisions based on law or politics.

The differences in these two approaches are rooted primarily in epistemology. Political scientists draw heavily on econometrics and other social science research methods. The vast legal scholarship is rooted more heavily in individual case analyses and theoretical considerations for how judges ought to behave. As Shapiro noted, avoiding feuds between lawyers and political scientists, or among political scientists

themselves, is of little value, as all techniques for examining courts are meritorious (1964, p. 7). It is not the intention of the present study to take sides in the debates concerning the most appropriate approach to examining the courts. I tend to agree with Shapiro that all approaches offer value to our understanding of the judicial system and its myriad players. It is the intent of the present study, however, to investigate the extent to which decisionmaking in the federal courts is a function of politics or law or both.

THEORIES OF JUDICIAL BEHAVIOR

The judicial behavior literature in political science is rather prolific, with a number of competing and complementing approaches to judicial behavior emerging over the past half-century. James Gibson characterized judicial decisionmaking rather succinctly, "In a nutshell, judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do" (Gibson 1983, p. 9). Further, he noted, "Roughly speaking, attitude theory pertains to what judges prefer to do, role theory to what they think they ought to do, and a host of group-institution theories to what is feasible to do" (Gibson 1983, p. 9).

Among these various theories of judicial behavior, the attitudinal model emerged in the past several decades as the predominant one in political science. The attitudinal model posits that judges vote according to their attitudes or personal policy preferences. This model views courts and judges as political entities, rather than objective, disinterested interpreters of the law.

Among Gibson's host of group-institution theories is organization theory, which emphasizes the organizational constraints placed on various institutions such as public agencies, Congress and the courts. While not explicitly named so, organization theory is tangential to the legal model of judicial behavior, which emphasizes elements of the law as constraints on judges' actions. Within the framework of organization theory, the legal model suggests that Congress, the Presidency and public agencies constrain judge behavior. That is, courts do not substitute their policy preferences in place of other institutions' preferences, such as the preferences of Congress. Instead, courts interpret and apply laws created by these other institutions.

The current study examines two leading models of judicial behavior—the attitudinal model and the legal model. To be clear at the outset, there are a number of

8

competing and complementing models and theories of judicial behavior beyond these two, such as role theory, cue theory, strategic and historical-institutional models (for an expanded discussion of models of judicial behavior, see Gibson 1983; Maveety 2003). However, the present study does not address these other models and does not suggest they are inferior to the attitudinal and legal models. Rather, as I discuss later in this chapter, the attitudinal and legal models necessarily emerge as competing models of judicial behavior when examining the relationship between federal courts and administrative agencies. Thus, the attitudinal and legal models serve as the starting point of inquiry and are the focus of the present study. The next sections provide dimension to the attitudinal and legal models and discuss their respective scholarly strengths and limitations.

Attitudinal Model

In her discussion of *Pioneers of Judicial Behavior*, Nancy Maveety (2003) notes the influence of behavioral psychology as a fundamental tenet of the attitudinal model. Judges come to the decision-making table with attitudes already in place that inform their behavior. Motivations for judges' votes are best explained as products of these attitudes and personal policy preferences (Maveety 2003). In this regard, attitudinalists view courts and judges as political entities, where judges' decisions are best explained as a function of their predetermined policy preferences.

Attitudinalist research is characterized by a number of methods and assumptions that require it to focus on court decisions and outcomes. Since individual judge votes are the most basic components of court decisions, much of the judicial behavior research uses individual judge vote as the unit of analysis (e.g., Segal 1986). While a number of scholars have examined various background attributes of judges, such as race, gender, socioeconomic status, and party affiliation, the strongest predictor of individual judges' attitudes has been captured by judges' ideology. Using ideology as a proxy for attitudes, attitudinalists generally characterize judges dichotomously as either conservative or liberal (Segal and Cover 1989; Segal et al. 1995b; Segal and Spaeth 2002). By characterizing judges as either conservative or liberal, attitudinalist researchers use these ideologies to predict the ideological outcome of cases. This decision-based approach to

judicial behavior typifies the quantitative approach to research, which carries with it some advantages and disadvantages.

The greatest advantage lies in studies that have a large number of observations. By specifying quantitative models that articulate the relationships between judges' ideologies and their voting decisions and applying these models to large datasets over time, attitudinalists compellingly argue that judges are political. The landmark studies in political science show that conservative judges have policy preferences that are conservative and tend to vote accordingly. Similarly, liberal judges have liberal policy preferences and tend to cast votes in accordance with their liberal views. In sum, attitudinalists have found consistent evidence that conservative judges vote conservatively and liberal judges vote liberally, with little evidence of legal constraints.

Distinguishing judges as political players is not exclusive to attitudinalists in political science. Among law scholars, legal realists similarly argue that judges may not neutrally and objectively interpret and apply the law, but advance their own personal and political preferences in their decisionmaking (for a review of legal realism, see Leiter 1997).

There are several notable shortcomings in attitudinalist research. Attitudinalists tend, as Shapiro (1968) warned, to view the courts very narrowly in terms of yes-no votes. They tend to base their findings on the outcomes of cases and do not consider other elements, such as opinions and specific legal issues raised in cases. In this regard, attitudinalists do not capture in their analyses, for example, whether a conservative decision is broad, reaching far into a policy arena or affecting a large segment of society, or whether the same conservative decision is narrowly construed to limit the scope and reach of its impact. Focusing on broadly defined ideological directions of case decisions to the exclusion of the decisions' rationales and underpinnings risks overstating, understating, or incorrectly stating the impact of courts (see, for example, Carolyn Shapiro 2009, examining the limits of empirical research that overstates the impact of judge ideology when researchers code ideology too broadly without duly considering the substance of law).

Attitudinalists tend to focus on cases where disagreement exists among judges and justices, mostly because of the limitations associated with quantitative analysis tools

and the concomitant need for observable variation (for an expanded critique of attitudinal research and in particular, Segal and Spaeth's, "The Supreme Court and the Attitudinal Model Revisited," see Gerhardt 2003). For the U.S. Supreme Court, focusing on non-unanimous cases artificially inflates the percentage of time justices rely on their ideological preferences in decisionmaking. If justices are unanimous 25-40% of the time (Baum 2004), it is at least plausible that this agreement may be a functions of justices' adhering to clearly written law or to justices deferring to other authoritative entities including Congress, the President, states, and administrative agencies. Despite political scientists' assertions that unanimous decisions should not be construed as consensual based on legal clarity (Brenner and Arrington 1987; Songer 1982; Spaeth 1989), the extant literature on this matter has not effectively teased out whether unanimity in the courts is or is not a function of law.

Another limitation of the attitudinal model is the lack of studies examining a variety of policy areas. The hallmark attitudinal studies focus on civil liberties and economic issues (Segal et al. 1995a; Segal and Spaeth 2002). Civil liberties and economic issues are among the most politically salient, and judges may be more inclined to vote politically in these policy areas compared to other policy areas, such as utilities regulation or entitlements. Admittedly, all policy areas are arguably political, as any policy debate produces political proponents and opponents. However, my argument here is one of political magnitude. Civil liberties and economic cases may be more highly charged politically than cases in other policy areas. Hence, judicial behavior in civil liberties and economic cases may not be representative of judicial behavior more broadly.

Finally, most attitudinal research focuses on the U.S. Supreme Court and gives little attention to other courts. Attitudinalists themselves acknowledge that the structure, dynamics and norms of other federal courts is substantially different from the Supreme Court, sufficiently so to reasonably question whether attitudinalists' findings can be generalized to other courts. For example, lower federal courts', unlike the U.S. Supreme Court, are unable to control their own dockets. The Supreme Court, with few exceptions, chooses the cases it hears through granting writs of certiorari compared to lower federal courts, which are generally required to hear all cases that come before them. To assess the full nature of judicial behavior in mandatory review courts, such as the U.S. Courts of

11

Appeals, attitudinalists must evaluate whether the nature of the cases that these courts must hear is substantively different from that of cases granted certiorari in the Supreme Court. Further, because lower federal courts must dispose of all cases that come before them, attitudinalists should also consider whether the concomitant high-volume caseloads in lower federal courts impact the way judges behave. Beyond docket control, a number of other lower-court norms and processes may make the external validity of attitudinal findings suspect.

In sum, past attitudinal research produces compelling evidence using large-N quantitative studies showing a great propensity for judges to decide cases consistently with their ideologies. However, the results of these studies are limited. Specifically, attitudinal research may not fully capture the full scope of judicial behavior if these studies are based only on yes-no votes and broadly coded ideologies. Further, the results may apply only to certain policy areas and only to the U.S. Supreme Court.

Legal Model

The term "legal model" is an oft-used but ill-defined phrase that generally refers to judges adhering to the rule of law. As an empirical model of judicial behavior, political scientists have not specified, operationalized and measured the legal model to the same extent as the attitudinal model. Hence, the legal model has become an ill-defined term that is often defined only in terms of being the attitudinal model's nemesis. In the words of one scholar, "given comments of judges that they base their decisions on legal principles, we must continue to treat the legal model as an alternative to the attitudinal model" (Hagle 1993, p. 98).

A few scholars have tried to provide clarity to the legal model. For example, in their book chapter titled "The Legal Model," Segal and Spaeth suggest that the legal model ranges from mechanical jurisprudence to more sophisticated variants (2002, p. 48). Mechanical jurisprudence, which most modern scholars including Segal and Spaeth do not embrace, presumes there is a single correct answer to legal questions that judges must find (2002, p. 48 n. 11). Instead, the authors prefer a legal model with variants that are connected by the "belief that … the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent" (2002, p. 48). Segal and Spaeth continue

developing their legal model by discussing the problems associated with gleaning legislative intent from statutes, including some Justices approaches to jurisprudence such as originalism. While this legal model does hold some merit, some scholars view it as an ill-defined straw man whose primary purpose is to show that law is not a force that demonstrates that justices behave in any systematic way (Canon 1993).

The apparent problem with Segal and Spaeth's conception is that the elements of their legal model are, in part, justice's approaches to interpretation, which are not measurable elements of a model. Originalism, for example, is a jurisprudential approach that is not codified by Congress, nor is this approach dictated by common law in the form of Supreme Court precedent for lower courts to follow. It would not be valid to construct a legal model based on jurisprudential approaches to interpretation—these approaches speak more to judges' specific role perceptions and not to law or legal doctrines.[1] In this regard, the elements of Segal and Spaeth's legal model are overly broad and encroach into jurisprudential philosophies that the authors do not operationalize and measure.

Canon's criticism of Segal and Spaeth's conception of the legal model fairly summarizes the problems associated with conceptualizing and measuring the legal model in general (1993). He writes:

> Every fervent cause needs an enemy, so Segal and Spaeth create one by positing a so-called legal model as the only theoretical alternative to explaining the justices' behavior. They assert without references or follow-up discussion that "legalists do claim that their model not only should explain decisions, but also that it actually does do so." They then pose a test between the two models. But no test ever occurs. The legal model is too crippled to show up at the field and the attitudinal model wins by forfeit. The latter is a scientific model capable of being tested empirically. *The legal "model" is not scientific;* the authors concede that it cannot be empirically tested. *It is not a model at all in the research sense of the term. It is merely a list of things such as textual meaning, drafters' intent and precedent that judges are said to consider when making decisions.* Because no one can say what weight each of the legal components should contribute or how a judge should select the most

---

[1] To be clear, in the last chapter of the present study, I discuss role theory as an alternative to the legal model and the attitudinal model. There, I suggest that scholars can and should conceptualize and measure elements of judges' role perceptions as informants of judicial behavior. These elements include originalism and purposivism, as well as legal norms, such as canons of construction. Here, the point is, as Canon states, "Of course, there would be difficulties in comparing the predictions of role theory with those of the attitudinal model, but comparison would not be impossible as it is with [Segal and Spaeth's] unsubscribed and ill defined legal model" (Canon 1993, p. 99).

relevant precedent (or the most relevant evidence of intent, etc.) from among those urged upon him or her, it is impossible to assess the strength of the legal model. In fact, the authors are not clear about the boundaries of the legal model (Canon 1993, p. 99, emphasis added).

Defining the legal model in the legal discipline may also be as problematic as it is in political science. As Segal and Spaeth (2002) note, from the viewpoint of social scientists, a successful model validly and reliably explains and predicts behavior, and it does so parsimoniously. They go on to suggest that a model's explanatory ability must also be falsifiable or testable, which is to say that the model must be able to state *a priori* the conditions that, if observed, would refute the model. Based on this definition of a model, it is not the usual practice for legal scholars to build "models" or to speak in terms of "models" of judicial behavior.

However, this is not to say that legal scholars do not provide conceptual assistance upon which other scholars can build a legal model. Legal scholars frequently extol and criticize legal principles and legal doctrines upon which judges and justices base their decisions. The "model" that Segal and Spaeth developed is not entirely inaccurate. Legal theorists do emphasize legal constraints, such as *stare decisis*, statutory and constitutional language, legislative intent, and agency rules. In doing so, legal scholars also consider modes of interpretation, decisions of other courts and jurisdictions, and expertise of administrative agencies—all of which can be considered part of a legal model of judicial behavior.

Although they are often normative in nature, legal theories are rooted in analyses legal principles and legal doctrines frequently found in of judges' opinions. Whereas attitudinal analysts rely on models of judicial behavior that are tested using decision analyses, many legal analysts largely assume that law and legal principles are the motivating factors behind judges' decisions, and legal analysts shift their foci to judges' opinions. It is upon the legal principles and doctrines found in opinions that a legal model of judicial behavior can be defined.

While I agree with Canon that Segal and Spaeth fail to define a legal model because they fail to conceptualize its elements in measurable, testable terms, I disagree that "legal norms cannot be quantified" (Canon 1993, p. 99). It is possible to conceptualize and operationalize a legal model that falls between the overly simplistic

mechanical jurisprudence model that Segal and Spaeth criticize and the amorphous variant of precedent, plain meaning and intent that they create (see Segal and Spaeth 2002). Admittedly, however, the task of positioning a legal model between these extremes may mean positioning the model closer to the mechanical jurisprudence in order to operationalize, measure, and test legal concepts.

However ill-defined legal models may be, they also sustain other criticism. Most typically, legal models (loosely defined) are based on small-N case studies that are not generalizable beyond the specific set of facts at bar (see Segal and Spaeth 2002). This criticism notwithstanding, legal scholarship on a single topic is often extensive. For example, a cursory survey of "deference" in legal journals and law reviews reveals a plethora of scholarship (see, for example, Bradley 2000; Crawford 1994; Criddle 2003; Epstein 1982; Gibbs 1992; Gossett 1997; Leahy 1989; Lovejoy 2002; Manning 1996; Matsubara 1994; Merrill 1992; Molot 2000; Nichols 2003; Oldham 1995; Stefan 1992; Walker 1999; White 2000; Yavelberg 1992). Nonetheless, legal scholars do not often utilize econometric techniques that provide causal explanations of judge behavior using large-N studies across space and time (for notable exceptions, see Cross 2007; Revesz 1997; Sunstein et al. 2006).

In sum, the legal model is ill-defined in political science and, subsequently, poorly measured. Legal models are also ill-defined in the legal academy because they are not reliable, parsimonious, and falsifiable. Thus, there remains a need to clarify what a legal model actually is.

In this dissertation, I attempt to define a legal model of judicial behavior. It is my intent to use legal scholarship, including the writings of judges and justices in their opinions, to provide conceptual clarity for elements of *a* legal model. Here, I make special note that I am attempting to define *a* legal model, not *the* legal model, since the laws, legal principles, and legal doctrines informing a set of judicial decisions likely vary according to a number of criteria, including the type of institution being reviewed. For example, a legal model that explains and predicts judicial behavior when judges review agency decisions in administrative law may be different from a legal model that explains and predicts judicial behavior when judges review the U.S. District Courts' decisions in

criminal law. For the present study, I consider legal principles and legal doctrines associated with the judicial review of agency decisions.

Toward a More Comprehensive Model of Judicial Behavior

There is considerable concern in the political science discipline about the gap between theorists and empiricists. Although political scientists use sophisticated econometrics quite successfully, they often fail to produce theory in their research (Morton 1999). Bridging this divide is an important goal, and for judicial behavior, bridging the divide between empiricists and theorists may mean bridging research from the political science and legal disciplines.

Cass Sunstein underscores the need to bridge the empirical and theoretical divide when he calls for a "unified political economy of administrative law" (1990, p. 306). Where legal scholars attempt to reveal a "discernible logic behind otherwise mysterious developments in case law," political theorists explain court deference to agencies as failed attempts by non-agency participants in the legal system (Sunstein 1990, p. 306). For Sunstein, legal and political scholars have both failed to predict and explain judicial behavior in administrative law in part because the two disciplines do not recognize their own shortcomings and do not take advantage of the others' strengths (1990).

The disconnect between the attitudinal and legal models of judicial behavior is likely rooted in an epistemological debate. Attitudinalists, relying on statistical models that predict behavior, are necessarily limited to examining determinants of judicial behavior that can be quantified. Legal model proponents, who suggest that law is the primary determinant of judicial behavior, must use qualitative methods to understand the nuances, complexity and depth of legal issues that courts also consider. The latter is not as easily quantified. Where these legal concepts are quantified, the categorical classifications are often too broad to capture the complexities of the law (Shapiro 2009). Hence, the disconnect between the attitudinal and legal models may be a disconnect between quantitative and qualitative research approaches to studying law and courts (for a review of epistemological debates in political science, see Brady and Collier 2004; Gordon 1991; King et al. 1994; Monroe 2005).

The purpose of the present study is not to bring epistemological harmony to the study of judicial behavior, but it would be imprudent to ignore these differences and,

more importantly, it would be imprudent to ignore the contributions and strengths of each. I argue that neither the attitudinal model nor the legal model should be dismissed as readily as their respective critics are willing to do.

Without analyzing any data or cases, both the attitudinal and legal models are plausible models of judicial behavior. Given the independent nature of the judiciary, where judges are constitutionally guaranteed life tenure with no reduction in salary, judges are able to vote their personal preferences with relatively little repercussion. Conversely, existing law and political and legal norms require judges not to insert their personal preferences into decisionmaking. The latter is especially true in certain areas of law, such as administrative law.

Administrative law—in particular, review of administrative decisions in the federal courts—provides a unique set of cases in which to examine judicial behavior. In the following sections, I explain why this is so, and I review existing research that examines court reviews of agency decisions.

STUDYING ADMINISTRATIVE LAW

In *Who Guards the Guardians?*, Martin Shapiro (1988) asserts that the political science and public administration disciplines have taken wrong turns by omitting administrative law from their research programs. Shapiro makes the case for prudent students in these disciplines to study administrative law not only because administrative law is essential to understanding the policymaking process, but also because it is critical to understanding the substance of policy. I further add that studying administrative law can substantially broaden and deepen our understanding of judicial behavior.

Despite the advantages that studying administrative law provides, administrative law remains an inchoate subject. A cursory survey of administrative law scholarship in the social sciences reveals a relative dearth of studies examining court-agency relations, especially compared to other sub-disciplines in political science.[2] It is unclear whether

---

[2] Conducting a keyword search in top political science journals shows very little scholarship on administrative law. In the *American Journal of Political Science* during 1980-2004, only two articles contain "administrative" and either "law," "court," or "judicial" in the title or abstract of the article. Similar findings are true for the *Journal of Politics* (three articles) and the *American Political Science Review* (none). The *Public Administration Review* fares much better in a similar search (about 25 articles). Most of the *PAR* articles are either symposia or case studies focusing on a specific court decision and lack large-N empirical analysis.

this lack of research is because the subject matter of administrative law is difficult (Scalia 1989; Shapiro 1988) or for other reasons.

Administrative law is a broad field that includes a number of law-oriented matters related to public agencies. These matters include how agencies conduct their business in rulemaking, licensing, enforcement, and regulation. The substantive policy areas that administrative law touches are equally broad. For example, examining administrative law is essential to understand trade policy (Hansen et al. 1995) or budget decisions in prison reform (Harriman and Straussman 1983).

The present study focuses on one area of administrative law—judicial review of administrative agency actions. These decisions run the gamut of policy activities, including utilities regulation, environmental regulation, economic regulation, labor disputes, alien petitions, securities regulation, benefits eligibility, and a host of other policy areas. In its most simplified form, court review of agency decisions concerns the legality and constitutionality of these agency decisions.

The Review Process

Review of agency decisions occurs through appeals. U.S. citizens have a right to appeal administrative agency decisions and to have those appeals heard in a federal court. Congress established the right of citizens to have administrative agency decisions reviewed in federal court in the *Administrative Procedure Act* (APA),[3] which originally passed in 1946. The APA provides, "A 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." (*Administrative Procedure Act* 1946). The APA made all agency actions subject to review unless applicable statutes precluded judicial review or the action was not committed to agency action discretion by law (Wald 1996).

Cases are first heard in agencies, where the typical agency has multiple stages of review, such as lower supervisory review, administrative law judge review, executive review, and a number of other arrangements. Exhaustion of administrative remedies is a

---

[3] The Administrative Procedure Act (APA) was originally passed in 1946 and amended many times since then. APA provisions are codified in Title V of the U.S. Code, specifically at 5 USC §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, and 7521. In the present study, I refer to these sections of Title V collectively as the *Administrative Procedure Act*. Generally, I cite the APA as 5 USC §551 et seq.

legal doctrine that allows for court review of administrative decisions only after litigants have "exhausted" the various reviews, hearings and appeals avenues offered by the agency. These remedies may also include reviews conducted by administrative law judges and panels that are external to the agency.

Since the federal court system in the U.S. is an adversarial one, courts are limited to reviewing the real controversies that litigants bring before the courts. Courts are unable to review agency actions unless citizens or agencies themselves make an appeal to an appropriate reviewing court. While there are few real constraints on a federal court's ability to do so, there is little evidence that the Supreme Court strikes down agency actions *sua sponte* (of their own volition) without review being requested by litigants (Howard and Segal 2004).

While a handful of agency decisions are reviewed by special courts, such as the U.S. Court of Appeals for the Federal Circuit, or the U.S. District Courts, most agency decisions are reviewed by one of the twelve regional circuit courts, including the U.S. Court of Appeals for the District of Columbia Circuit. With some exceptions, the U.S. Courts of Appeals review first-level appeals, and at its discretion through *writs of certiorari*, the U.S. Supreme Court may hear second-level appeals.

Scope of Judicial Review

Inquiry into the relationships between federal courts and federal administrative agencies is a particularly good place to examine judicial behavior because of scope of review issues. Over the past half century, courts, agencies, academics, interested citizen groups, Congress and Presidents have all debated the appropriate scope of federal courts when reviewing agency actions (Wald 1996).

Judicial review of agency actions has undergone several transformations, vacillating between an almost obsequious deference and an intense, hard-look scrutiny, with many attempts to merge and balance the two extremes (Wald 1996). Deference to agency decisions was the norm for judicial review from the mid 1940s when Congress passed the Administrative Procedure Act until the early 1970s when courts placed considerable emphasis on agency expertise and specialization (Wald 1996). During the period 1965-1981, Congress tripled the number of regulatory statutes it passed as well as tripled the number of regulatory agencies it created compared to the 1946-1965 period

(Aman 1988). Along with this increase in regulatory activity, a growing skepticism toward agencies grew as critics accused agencies of pursuing the interests of the industries they regulated rather than pursuing public interests (Wald 1996). As courts became warier of agency motivations and, during this same period, as courts increased their actions to protect the individual rights of minorities, women and the disabled, the era of obsequious deference to agencies effectively ended and shifted toward enhanced scrutiny (Wald 1996).

The Supreme Court has made many attempts to clarify an appropriate standard of review when lower courts review agency actions. The least restrictive standard is *de novo* review, where courts examine agency actions and record development with no deference to the agency. Other, more restrictive standards include arbitrary and capricious, clearly erroneous, and substantial evidence. These standards afford agencies varying degrees of deference, provided the agency does not act arbitrarily or capriciously or with clear error, or where the agency provides substantial evidence to support its decisions.

While the courts have wrestled with defining various standards of review, including carving out exceptions to these standards, the application of the standards in the lower courts may not have been consistent (Wald 1996). For example, in the 1980s, the Supreme Court issued a series of administrative law rulings to clarify appropriate review standards. In *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto Insurance Co.* (1983), the Court adopted the hard-look approach to agency reviews to determine if the agency's actions were arbitrary and capricious, but emphasized that a court should not substitute its judgment for the agency's judgment (Wald 1996). Under the hard-look doctrine, an agency's action could be arbitrary and capricious if the agency: 1) did not consider all relevant factors, including those Congress deemed relevant, 2) offered an explanation that ran counter to the evidence or was implausible, or 3) failed to offer an explanation at all (Wald 1996). Applying *State Farm*, lower courts afforded little deference to agency actions compared to other standards, but applying the arbitrary-and-capricious standard under the hard-look doctrine remained an art subject to judicial interpretation rather than a hard and fast science, which left considerable room for inconsistent application of the arbitrary-and-capricious standard across and within circuits (Wald 1996).

Contrarily, in 1984, the Court defined a two-step review process in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* that created a more agency-friendly approach to review. Under the *Chevron* doctrine, courts are first required to examine agency fidelity to the plain text of the statute the agency administers. Here, the Supreme Court directed lower courts to extend deference to Congress, and to set aside agency actions that ran afoul of Congressional intent. Where the plain text of a statute is insufficient to guide agency actions, step two of the *Chevron* doctrine requires courts to determine only if an agency's interpretation of a statute is a *reasonable* (or *permissible*) one, and not necessarily an interpretation that the court would prefer. Under *Chevron* step two, the Supreme Court intended lower courts to defer to agency interpretations of statutes so long as the review court determined the interpretation was reasonable. The presumption in the *Chevron doctrine* is deference to Congress. That is, where a statute is ambiguous (i.e., where Congress has not clearly spoken in plain language to the case at hand, as evidence by examining the text of the statute in step one of the *Chevron* test), courts should presume that Congress intended administrative agencies to interpret the statute and courts should afford deference to agency decisions accordingly. The *Chevron* doctrine, then, is a common law manifestation of institutional deference, where courts defer to Congress's explicit preferences, and in the absence of express legislative intent, there is a presumption of deference to agencies.

Although *Chevron* appears to frame court-agency interactions rather succinctly, there has been considerable legal commentary and disagreement among judges about the precise boundaries of *Chevron* deference. For example, *Chevron*'s progeny clarifies that *Chevron* deference does not apply to informal rulemaking functions of agencies. Generally, in order to qualify for *Chevron* deference, agency rules must be made formally, through notice and comment procedures.

However, the Court verified in *U.S. v. Mead Corp.* (2001) that even if an agency does not qualify for *Chevron* deference, the court can still extend some level of deference to the agency based on the agency's experience. In essence, *Mead* reiterated that the Court's decision in *Skidmore v. Swift & Co.* (1944)[44] was still good law—agencies should

---

[44] The majority in *Skidmore* stated, "We consider that the rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of

be afforded some level of deference by virtue of their expertise. That is, their expertise should be highly persuasive to the courts.

Also in the 1980s, the Supreme Court clarified that certain agency actions are beyond the scope of any review. In *Heckler v. Chaney* (1985), the Court found that agency decisions not to act, namely non-enforcement decisions, are presumptively unreviewable (Wald 1996). Under *Chaney*, courts extend the greatest level of deference to agencies by virtue of their inability to review agency actions.

These cases illustrate not only the Supreme Court's attempt to marry and balance the requirements of scrutiny and due deference, but also the alleged inconsistency in lower courts' application of review standards as a result of the mixed signals sent by the Court (Wald 1996). I further discuss standards of review in Chapter Four. Here, however, I note three points concerning the scope of review.

First, federal courts have labored to clarify an appropriate scope of review for agency actions, and this labor reflects a desire to balance intense scrutiny with due deference. Second, Congress has also attempted to define an appropriate scope of review for the courts in its legislation, specifically with the passage of the Administrative Procedure Act in 1946. Finally, and perhaps most importantly for the present study of judicial behavior, courts and judges have consistently maintained that judges should not substitute their preferences in place of agencies' preferences when reviewing agency actions. As Judge Wald states:

> The contours of the debate about the appropriate role and scope of judicial review are remarkably unchanged. The concerns that animate the debate— the desire for a check on agency absolutism or arrogance and a means of insuring that laws are actually carried out as intended—are pitted against deep-seated conviction, rooted in our constitutional format of separation of powers, that the courts should not take control of public policy from the two political branches. This may result in an unavoidable and irreducible tension inherent in any attempt to accommodate deference and scrutiny in the same jurisprudential doctrine (1996, p. 229-230).

---

experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. 134, 140 (1944).

While judges, courts and legal scholars normatively note the desired goal for the judicial branch not to encroach into policymaking when agency decisions are under review, this prescription may or may not manifest in judicial behavior. However, in the face of such staunch insistence that judges and courts not substitute their preferences in place of agency preferences, there is ample plausibility that the legal model of judicial behavior may prevail over the attitudinal model in these cases. Hence, prescriptive scope of review in legal scholarship provides a foundation for a judicial behavior study if the prescribed standards of review are conceptualized and measured empirically in models that also measure judges' attitudes. That is, scope of review provides a theoretical foundation for how judges and courts should act, which should be analyzed with how judges and courts actually act.

Separation-of-Powers Issues and Administrative Law

The structure of the modern administrative state is the intersection of the three constitutionally defined branches of government, and left unchecked, there is considerable risk of bureaucracies abusing power. It is not uncommon for an executive agency charged with implementing a statute to engage in quasi-judicial adjudicatory functions over its own quasi-legislative rulemaking functions. This scenario substantially justifies the courts in taking hard-look approaches to reviewing agency actions, if the goal is to maintain a separation of powers among the executive, legislative and judicial branches.

Similarly, for courts that review agency actions, court decisions can encroach into administration when these decisions overturn agency procedures. Where courts engage in policymaking, the review function of the courts can become a legislative one. So, courts must find the right balance of checking the power of administrative agencies without encroaching into executive and legislative functions.

Few researchers have investigated the overlapping edges of these institutional boundaries, which ignores the realities of whether the concept of separation of powers has any actual meaning in American government and politics. Where scholars have examined court review of agency decisions, these studies have focused primarily on the Supreme Court. Little research examining the review of agency decisions in the U.S. Courts of Appeals exists.

To summarize, I argue that administrative law is a particularly good arena to examine judicial behavior for a number of reasons, one of which is because there are numerous Supreme Court precedents and Congressional acts that explicitly call on courts to defer to agencies under certain circumstances. Earlier in this chapter, I also discussed that legal models have been poorly defined in the literature. In the next section, I offer both a theoretical framework and pragmatic considerations for why the legal model should be considered more fully. I then discuss the concept of deference as an element of the legal model.

CONCEPTS OF A LEGAL MODEL

The purpose of this section is twofold. First, I discuss pragmatic and theoretical considerations in support of a legal model. These considerations suggest that despite judges' ability to vote their personal preferences in cases, their votes may be constrained or informed by a number of factors, including agency expertise and competency, judge workload issues, legislative and executive checks, Supreme Court precedent, and formal attorney training. Second, I argue that deference is inherently part of the legal model. I consider several dimensions of deference that are relevant to judicial review of agency decisions, some of which I use in later chapters to inform hypotheses and to construct variables.

Agency Expertise and Competency

The civil service system in the United States helps ensure federal agencies retain a competent workforce of experts, whether in marine biology, nuclear energy, or public personnel practices. It is not unreasonable to assume that agencies hold a higher level of subject-matter expertise and competence than judges in many policy areas. What is uncertain in the literature is whether levels of agency support are a function of judges' confidence in agencies. At least one scholar assumes that agency adherence to prescribed procedures is positively correlated with a court's opinion concerning the quality of agency decisionmaking (Stephenson 2006).

Whether agencies perform well is somewhat subjective and varies by agency (for an expanded discussion on the performance of federal bureaucracies and the public's opinion on federal agency performance, see Goodsell 2003). Nonetheless, accountability, equity, transparency, and sound discretion, all are themes of concern for modern

administrative agencies.[5] Given agencies' attention to these themes, some judges may be willing to acknowledge their own limited knowledge of a particular subject matter, such as marine biology eco-systems and, further, may be willing to defer to agency expertise on these matters (Wald 1996). While this argument may not always be true, especially as attitudinalists have shown substantial influences of judges' ideologies on their votes, it might sometimes be true and is plausible.

Judge Workload Issues

Workload issues in the federal courts are of great concern to judges and the justice community. In the past half-decade, the number of cases in the courts of appeals increased (Wald 1996). Federal court dockets are over-burdened, and these workload issues constrain judges. As a matter of efficiency, judges may be forced to defer to agencies out of necessity. Judges may not have enough time or resources to ensure that every case is decided according to his/her personal preferences, and even dissent writing in complex cases is virtually nil because of the amount of time and resources it takes to dispose of such cases (Wald 1996).

Legislative and Executive Checks

Courts are players in a democratic system that fragments power. Congress and the President both take actions to constrain the courts. With respect to court review of agency decisions, one way the legislative and executive branches constrain courts is by passing statutes that require courts to defer to administrative agencies, such as the Administrative Procedure Act (APA), which was originally passed in 1946. Specifically, section 706 of the APA states, "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." These standards—often referred to as the *arbitrary-and-capricious standard* and the *abuse-of-discretion standard*—extend considerable discretion to agencies. Agency action is presumed to be valid, and there must be a clear error before a court overturns agency decisions based on this standard

---

[5] The mission of the Government Accountability Office is, in part, "to help improve the performance and ensure the accountability of the federal government for the benefit of the American people" (see U.S. Government Accountability Office website at www.gao.gov/about). For a summary report of citizens' attitudes toward agency performance 1988–2000, see the Pew Research Center's study at www.people-press.org/reports/display.php3?ReportID=41.

(Hall 2002). In this regard, courts have a legislative mandate, signed by the President to defer to agencies. While the extant political science literature has not borne out empirically whether this type of deference exists, it is plausible that some judges may view these types of restraint as part of their roles.

Supreme Court Precedent and Stare Decisis

Inasmuch as we are concerned with review of agency decisions in the U.S. Courts of Appeals, we must also consider legal norms of *stare decisis* and precedents established by the Supreme Court. Several Supreme Court cases specifically require lower courts to defer to agencies in a number of circumstances. In *Bowles v. Seminole Rock & Sand Co*. (1945), deference meant that "an agency's interpretation of its own regulations are conclusive and binding on the courts, so long as the agency's interpretation is neither arbitrary nor capricious," (White 2000, p. 541). In the modern era, the Supreme Court continued to require court deference to agencies in cases such as *Chevron* (1984). The *Chevron* doctrine is summarized as, "When Congress delegates administrative authority over a particular statute to an executive agency, courts will defer to the agency's reasonable statutory interpretations if not contrary to Congress's unambiguous intent," (Criddle 2003, p. 1928).

Chevron creates a hierarchy of deference, first to Congress and then to the agency (Wald 1996). In the first step, courts must determine if a substantive question interpreted by an agency is answered in the language of the statute. In this instance, no deference is extended to agencies. Rather, using a textualist approach, courts defer to the preferences of Congress, as evidenced in the historical examination of intent of statutes' language (Wald 1996; White 2000). Step two requires that, in the absence of clear language from the legislature, courts should accept agencies' interpretations as long as they are reasonable, even if the courts disagree with those interpretations (Wald 1996; White 2000). If the rule of law and the norm of *stare decisis* have any bearing on lower federal courts at all, we would expect the U.S. Courts of Appeals would not substitute their preferences in place of those of Congress and agencies under the *Chevron* doctrine.

Judges as Formally Trained Attorneys

Although being an attorney is not a constitutional requirement before being appointed to the federal bench, as a matter of practice, all federal judges in the modern

era receive formal training in law before they are appointed to the bench. Legal training is influenced by the scholarship of legal academics, so it is plausible that attorneys and judges are influenced by the legal theories and normative arguments expounded in the legal literature. Formal legal training may constrain judges in two ways. First, judges may subscribe to the normative roles of judges as neutral appliers of the law. Second, judges know that the legal academy analyzes and writes prolifically about judges' decisions. Hence, judges may be less inclined to stray far from established principles of law if they know they must provide legal reasons for their decisions that legal scholars will accept as legitimate. If the legal training of judges influences at all the way judges conduct their business, then it behooves political scientists to embrace the legal literature as part of the scientific process. Thus, it is reasonable to assume that law and legal doctrine impacts the way the legal community views deference.

Given these plausible theories of judicial constraint, many of which explicitly call for courts to extend deference to agencies, I question whether the attitudinal model accurately describes and predicts judicial behavior in the courts of appeals when agency decisions are under review. From the pragmatic considerations of workload issues and the legal training judges receive to the normative considerations of checks and balances and Supreme Court precedent, we have considerable reason to suggest that judges extend at least some level of deference to agencies.

Nonetheless, these plausible considerations do little to advance the argument that judges and courts are constrained from voting their personal preferences unless we can measure and test these legal concepts. With an eye toward measurement, the next section focuses on conceptualizing deference with regard to court-agency relations and judicial behavior.

Conceptualizing Deference

My argument for adding structure to deference and a legal model is rooted in the same argument that Canon (1983) uses for providing structure to activism. Canon defines dimensions of activism and notes:

> If commentators have numerous and disparate concepts of activism and do not articulate them very well, serious general use of the term becomes difficult if not meaningless. Overall, we receive little more than a babel of loosely connected discussion; the utility of any particular idea is limited.

> Those wanting to understand the discussion are left pretty much to their
> own devices (1983, p. 239).

The same can be said for deference. While it is beyond the scope of the present study to outline fully the many dimensions of deference, especially as deference applies to entities other than administrative agencies, such as state governments, executive offices, legislative bodies, and other courts, several dimensions of deference are directly applicable to agencies.[6]

Heretofore, deference in the political science literature has received little attention. Where deference does appear in the scholarship, researchers sometimes operationalize it simply as support for an agency (e.g., Caruson and Bitzer 2004). In the legal literature, the legal rules associated with deference have been examined rather prolifically, especially those related to *Chevron*. Still, as Emerson Tiller and Frank Cross note, "positive political theory of legal rules … have received far too little attention," (Tiller and Cross 2007, p. 13).

The legal model is rooted in deference. Legal theorists and judges suggest that judges and courts make decisions based on neutral application of law. In doing so, they necessarily defer to the preferences of those who make the law. Deference manifests when courts, for example, apply legislative intent as expressed in the language of statutes, acknowledge the expertise of agencies, and uphold the authority of states. While the legal model may embody a number of caveats, deference is a clear indicator of the influence of legal factors.

Institutional deference suggests that judges and courts defer to the preferences of other entities, such as Congress, the President, agencies, states, or other courts. This is the broadest level of deference and is based on a normative argument that an appropriate role of the courts does not include policymaking, activism, or politics. In other words, if the appropriate role of the court is to apply laws and policies as developed by other institutions, then we would expect courts to defer to those institutions' preferences. However, this level of deference at its extreme undermines the most basic elements of the doctrine of judicial review. If courts afford blanket deference to the actions of other

---

[6] For theoretical considerations of deference beyond the scope of court-agency relations, see (Charney 1989; Delson 1972; Howard and Segal 2004; Kirby 1970).

government institutions, then there is no need for courts to review the actions of those institutions. While there is room for scholarly debate concerning the appropriateness of judicial review and institutional deference, the present study acknowledges that judicial review does, indeed, exist in the U.S. jurisprudential system and that courts do set aside actions of other institutions.

Procedural deference concerns the degree to which the courts defer to agency procedural actions such as notice, comment, inspections, subpoenas, and record development, as specified in statutes such as an agency's enabling legislation, the Administrative Procedure Act (1946), Freedom of Information Act (1966) and the Government in the Sunshine Act (1976). Deference to procedures may also include deference to fact-finding and evidence, which concerns the degree to which courts accept agency facts and evidence at face value. For example, should a court review a case *de novo*, arguably the courts show less deference than if they accept case facts as established by the agency.

Deference to procedures is different from institutional deference. Judges and courts that defer to a procedure may well choose not to support an agency in final case decisions if the agency did not follow procedure. In this example, judges or courts defer to procedure and not the agency.

Functional deference concerns the degree to which courts might show more or less deference to agencies depending on the function the agency is performing. More specifically, courts may be less inclined to defer to agency rulemaking as compared to other agency functions, such as ratemaking, licensing, or adjudication. Since rulemaking applies to categories of people instead of individuals, it verges on lawmaking—a task constitutionally reserved for Congress (Caruson and Bitzer 2004). One might then deduce that rulemaking may merit a higher level of court scrutiny (i.e., less deference). However, the Supreme Court clarified in *Chevron* (1984) and its progeny that courts should defer in the second-step of *Chevron* to agency's reasonable interpretations of a statute so long as the rulemaking was formal (i.e., made through notice and comments procedures). Generally, speaking, *Chevron* deference does not apply to informal rules, but informal rulemaking may still qualify for expertise deference as discussed below. Although I do

not address functional deference in the present study, I include it as a separate dimension for deference, which may be helpful to inform future research.

Expertise deference refers to the degree to which courts acknowledge the competency, proficiency and knowledge of agencies. It is conceivable that the higher the technical aspects of an agency's subject matter, the more willing courts might be to defer to agency expertise. As an extreme example, courts may defer to the National Marine Fisheries Service on highly technical questions related to marine biology and the ecosystems of the nation's fisheries (Nichols 2003). Under *Mead* (2001), which underscored *Skidmore* (1944), even if agencies are beyond the pale of *Chevron* deference, agency decisions and actions should still be afforded some level of deference. Under these cases, agency decisions and actions are viewed as highly persuasive.

As previously mentioned, it is beyond the scope of the present study to define and examine all dimensions of deference fully. However, since deference is so closely associated with the legal model, it is important to recognize these dimensions for greater conceptual clarity in measurement. Primarily, the present study is concerned with procedural deference and whether the U.S. Courts of Appeals defer to agencies if agencies follow procedures. This study also examines institutional deference inasmuch as the U.S. Courts of Appeals may or may not defer to agencies based on direction it received from other institutions—namely the U.S. Supreme Court in the form of case law and the U.S. Congress in the form of statutes.

Before specifying a model of judicial decisionmaking, I first summarize the literature that examines relationships between federal courts and agencies. After reviewing the literature, I use the concepts of a legal model discussed here as well as past research findings to form hypotheses about judicial decisionmaking in the U.S. Courts of Appeals when reviewing federal agency decisions.

PAST STUDIES OF COURTS AND AGENCIES

Review of federal administrative agency decisions occurs primarily in the U.S. Courts of Appeals and the U.S. Supreme Court. While other special federal courts also hear administrative appeals, such as the U.S. Court of Appeals for Veterans Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. District Courts, the majority of administrative agency decisions are reviewed by the U.S. Courts of Appeals.

Disproportionate to the volume of agency actions it reviews, the majority of political science scholarship examining reviews of agency decisions focuses on the Supreme Court.

<p align="center">*U.S. Supreme Court Review of Agency Decisions*</p>

Early studies of the Supreme Court's review of agency decisions show that agencies enjoy high rates of success in the Court. (Pritchett 1948). Pritchett devoted a chapter to the Court's treatment of agencies during the 1941-1946 terms in *The Roosevelt Court*, noting, "The generally favorable attitude of the Roosevelt Court toward administrative regulation is indicated by the fact that these agencies were successful in almost three-fourths of the appearances before the Court" (1948, p. 168).

During the decade of the 1940s, on the heels of a strained relationship between the President and the Supreme Court over the constitutionality of Roosevelt's New Deal programs, which significantly expanded the size of the federal bureaucracy, it is somewhat surprising that agencies enjoyed such a high rate of success. However, it is in this same decade that Congress unanimously passed the Administrative Procedure Act, indicative of the consensus that administrative procedure, rather than judicial review, was the best means of controlling agency discretion (Wald 1996).

While Pritchett only speculated the reasons for these high levels of success, other researchers established a more solid theoretical groundwork for the study of Supreme Court support for administrative agency decisions in this period (Tanenhaus 1960). Tanenhaus argued that with the passage of the Administrative Procedure Act in 1946, although it is well within the purview and responsibility of the Court to review administrative actions, the Court had little difficulty accepting the legitimacy of agencies' discretionary decisions. Also, given the highly technical nature of some administrative decisions, coupled with the high levels of subject matter and legal expertise retained by the agency, the Supreme Court was hard-pressed to find legal reasons to reverse agency decisions (Tanenhaus 1960). This resulted in a strong show of support for agencies from justices. Where justices render non-friendly decisions toward administrative agencies, it is because of disparities in justices' political and personal preferences over specific policy areas (Tanenhaus 1960).

Tanenhaus's research also suggests that how justices review matters of substantive policy may be different from how justices review procedural matters. Tanenhaus identified patterns in justices' votes for several substantive policy areas, including organized labor, restrictions on competition, freedom of person, and monetary gain/loss for the government, but he was unable to discern similar patterns in cases involving agencies' statutory authorities, procedures required by statute, or evidentiary questions (Tanenhaus 1960). This suggested that, in some instances, justices' attitudes toward administrative agencies might be guided by the justices' individual preferences for an agency's specific policies. However, for clearly legal matters that are procedural in nature, no identifiable patterns were present. While unable to show definitive causal mechanisms in these patterns of voting behavior, Tanenhaus' work suggests implicitly that justices treat matters of agency procedure differently from matters of substance.

Other scholars found similar results when examining administrative law issues in the Supreme Court. Canon and Giles (1972) examined the Court's review of cases from six different agencies during the 1957-1968 terms.[7] Here, they found disparities in levels of support the Court displayed for different agencies, where the level of support ranged from 50% to 90%. To explain these differences, Canon and Giles examined Court decisions using justices as the unit analysis. Initially, they examined whether justices displayed harmonic or dichotomized attitudes toward agencies. A harmonic attitude means that individual justices support agencies at roughly the same rate as the Supreme Court as a whole. Dichotomized attitudes suggest disparities in individual justice support for an agency compared to Court-level support. They concluded that justices largely have harmonic attitudes toward agencies. For example, if the Court as a whole ruled in favor of the National Labor Relations Board (NLRB) about 75% of the time, then individual justices should be supportive of the NLRB at about the same rate.

Given that justices might be harmonic in their decisions toward agencies, Canon and Giles (1972) explain differentials in support across agencies by showing that justices tend to support agencies more harmoniously on questions of procedure, and less so on

---

[7] Agencies examined were the Federal Power Commission (FPC), Federal Trade Commission (FTC), Interstate Commerce Commission (ICC), National Labor Relations Board (NLRB), Internal Revenue Service (IRS), and Immigration and Naturalization Service (INS).

substantive questions. Concerning cases involving procedural questions, Canon and Giles suggest:

> [A]gencies which meet certain criteria more or less traditionally associated with the concept of due process of law (e.g., proper notice, impartial hearing, decisions made in accordance with ascertainable evidentiary rules, etc.) are supported by the Court and those which often fail to meet such standards are not supported (p. 187).

Concerning cases that raise substantive questions—statutory or constitutional questions—Canon and Giles note, "the Supreme Court 'likes' or 'approves' the overall goals and the substantive policies of some administrative agencies while it is at best dubious about the general goals and implementing policies of other agencies." In sum, they conclude, "variance in the Court's willingness to support an agency as a recurring litigant stems largely from the justices' attitudes toward the agency's substantive policies rather than its procedural behavior" (1972, p. 190).[8]

Building on this research, Crowley (1987) concluded that support for agencies in the Supreme Court is a function of justices' ideological agreement with agencies (Crowley 1987). This is to say that conservative justices support agencies when agency policies are conservative and liberal justices support agencies when agency policies are liberal.

Similarly, in his examination of the Warren, Burger, and Rehnquist courts, Sheehan (1990) suggested that justices' deference to agency decisions largely occurs when the ideological preferences of justices are in agreement with agency positions. Sheehan's findings undermine scope-of-review doctrines, and, specifically, the *substantial-evidence doctrine*, which holds that courts will defer to agencies on matters of substance so long as agencies provide substantial evidence to support their decisions. If justices' votes are based on congruence with agency policy positions, then whether or not agencies provide substantial evidence to support their decisions is of little consequence. However, Sheehan operationalized deference to agencies only as a vote in support of

---

[8] Canon and Giles' use of "agency as a recurring litigant" in their conclusions can be misleading. In other research, recurring litigants refers to advantages associated with repeated appearances before federal courts. The repeat-player aspect of litigants is not borne out empirically in the Canon and Giles study. Instead, the scope of their research is limited to analyzing agencies that had a sufficiently large number of cases before the Supreme Court during the 1957-1968 terms. Canon and Giles exclude from their study agencies that did not have a large number of cases before the Court during this period.

agencies. This may be problematic, since a vote in support of an agency because a justice is in ideological agreement with the agency is not discernible from a vote cast in favor of an agency because of deference to the agency because it provided substantial evidence to support its decision. This observational equivalence is not borne out in Sheehan's study.

Not only did the Crowley (1987) and Sheehan (1990) studies conclude that justices vote consistently with their ideologies, establishing the attitudinal model as a prevailing model of judicial behavior in the Supreme Court, but, also, these studies concluded that disparities in agency support were not a function of agency type. For Crowley, the difference in how the Supreme Court treats economic agencies and social agencies was indiscernible (1987). Sheehan concluded that rather than focusing on differences in the types of agencies before the court, researchers would likely benefit from focusing on the substance of the policies before the court (Sheehan 1990). In a later study, Sheehan (1992) expanded agency typology and found that agency type does matter. Specifically, he found that the Supreme Court is more likely to support agencies that are independent in nature and perform a quasi-judicial role in the bureaucracy (Sheehan 1992 478). Overall, he showed that independent agencies enjoy more support in the Supreme Court than executive agencies.

More important than agency type, however, Sheehan's 1992 study found limited support for not only the attitudinal model of judicial behavior, but also the legal model. As in his earlier study, he concluded that variance in agency treatment is largely a function of justices' personal policy preferences (Sheehan 1992). However, support for the legal model was also present, suggesting that justices' votes are constrained, at least in part, by legal principles and not exclusively by their personal preferences (Sheehan 1992).

Different from other scholars, Horowitz (1994) brought an historical perspective to the study of judicial behavior and administrative law. He suggested that court-agency relations have undergone several shifts across time. Early courts up through the Progressive Era rejected administrative law *per se*, which essentially was a rejection of agency rulemaking and discretion. During the New Deal era and shortly thereafter, with the passage of the Administrative Procedure Act in 1946, courts began to view agencies as experts (Horowitz 1994). The concomitant Court decisions were ones of deference to

agency expertise. However, this era was short-lived, as the courts later viewed agencies as incompetent and engaging in clientelism, which was largely influenced by interest groups representing the industries the agencies regulated (Horowitz 1994). Several court opinions indicated courts struggling to define court-agency relations across the post-New Deal era and at least some judges indicated a collaborative effort between courts and agencies (Horowitz 1994). For example, courts' use of a reasonableness standard when evaluating agency decisions functionally meant courts would not substitute their own policy preferences over agencies' policies so long as the agencies' actions were reasonable (Horowitz 1994).

Horowitz's study raises two points of interest. First, if courts undergo shifts in agency support across time, then past judicial behavior studies examining the Court's review of agency decisions may not be applicable to modern courts. Second, if a reasonableness standard of review holds any weight in case outcomes, scholars should focus on conceptualizing and measuring these standards of review in order to test their impact on judicial decisions.

In summary, studies of Supreme Court behavior when agency decisions are under review all point to justices' voting according to their attitudes. Also, past scholarship suggests that justices tend to support agencies more on matters of procedure rather than matters of substance. Where justices support agencies on matters of substance, past scholarship suggests it is because of individual justices' ideological agreement with agency positions. Specifically, conservative justices support conservative agency decisions and liberal justices support liberal agency decisions.

What remains unclear, however, is whether justices are constrained by elements of the law or whether they also defer to agencies, as the legal model suggests. Judicial behavior studies of the Supreme Court have not fully conceptualized and measured elements of the legal model, and have, therefore, been unable to measure and test the impact of legal and attitudinal variables in a quantitative model, *ceteris paribus*.

U.S. Courts of Appeals Review of Agency Decisions

Where political science scholars have addressed court review of agency decisions, their attention has been largely on the Supreme Court (Canon and Giles 1972; Crowley 1987; Horowitz 1994; Jaffe 1965; Pritchett 1948; Shapiro 1964, 1968, 1988; Sheehan

1990, 1992; Tanenhaus 1960). Lower federal courts have received a modest nod in the literature (Caruson and Bitzer 2004; Haire and Lindquist 1997; Humphries and Songer 1999; Willison 1986). Addressing this lack of scholarship is important for at least two reasons. First, as Songer, Sheehan and Haire note, "appeals court judges must address every case in which the losing litigant in the … administrative agency decides to appeal" (2000, p. 8). Because of this mandatory review, we would expect the volume of the courts of appeals' reviews of administrative decisions to be substantial. Since the 1980s, about eight percent of the U.S. Courts of Appeals' dockets have been comprised of cases coming directly from administrative agencies (see Table 4.1 in Chapter 4).

Second, the courts of appeals functionally serve as the courts of last resort for the vast majority of cases heard in the federal courts. For the years 1925–1989, 99.7% of circuit court cases were left undisturbed by the Supreme Court (Songer et al. 2000, p. 17). In sum, as Humphries and Songer note, "if there is to be any legal check on abuse of discretion by administrative agencies, the courts of appeals are likely to have both the first and final word in the judicial arena," (1999, p. 208).

Given the substantive importance in the numerous policy areas where administrative law is present, understanding the relationship between the U.S. Courts of Appeals and federal agencies is warranted. If we are to understand the substance of policy and the policymaking process, as Shapiro (1968) suggests, further examination of the courts of appeals and federal agencies is likely not only warranted, but critical.

In his influential essay on why "haves" come out ahead in a legal system such as the American one, Marc Galanter (1974) developed a typology of parties before the courts and concluded that "repeat players" have an advantage over "one shotters." Among the repeat players is the federal government, which retains a relatively high level of litigating expertise and benefits from developing reputational relationships with the courts over a long period of time (Galanter 1974).

Under Galanter's influence, Songer and Sheehan (1992) examined litigant success rates in the U.S. Courts of Appeals. While not examining court review of agency decisions directly, they found that success in the U.S. Courts of Appeals is correlated with a continuum of litigants. This continuum is anchored on one end by "upperdogs" that, in addition to more resources, have repeat player status. In their study, the federal

government enjoyed the greatest success frequencies in the courts of appeals, followed by state and local governments, and large businesses and corporations. The opposite end of the continuum is anchored by underdogs, who may have fewer resources and may be akin to Galanter's "one-shotters." Smaller businesses and individuals experienced disproportionately lower levels of success in court (Songer and Sheehan 1992; Songer et al. 2000). Songer and Sheehan summarize:

> [T]he 'haves' will win more frequently both because they are likely to have superior material resources and because a number of advantages accrue to them as a result of their 'repeat player' status. Superior resources allow the 'haves' to hire the best available legal representation and to incur the expenses of extensive discovery, expert witnesses, and so forth, which may increase the chances of success at trial. In addition, as repeat players, they will reap the benefits of greater litigation experience, case-selecting ability, and the ability to develop and implement a comprehensive litigation strategy that may include forum shopping, informed judgments of their chances to win at trial or appeal, and the capability to accept moderate losses through settlements when the prospects for victory at trial or on appeal are small (1992, p. 235).

Accordingly, we would expect agencies to enjoy relatively high success rates in the circuit courts, since agencies have the benefits that come with repeat player status (cf. Sheehan et al. 1992a).

I am aware of only one study that exclusively examines agency success rates across all courts of appeals. Haire and Lindquist (1997) examine circuit court review of appeals from the Social Security Administration (SSA) across circuits. During 1982–1983, SSA success in court ranged from 22% in the Second Circuit to 65% in the Sixth Circuit (Haire and Lindquist 1997). While Haire and Lindquist found varying SSA success rates by circuit, their study does not address why this is so.

Humphries and Songer (1999) examined reviews of agency decisions in all circuits from 1969–1988 and found agencies were successful in about 62% of those cases. Humphries and Songer explained these levels of support using a model that integrates both legal constraints and personal preferences of judges. For legal constraints, they examined the presence of the *substantial-evidence doctrine* in a case, which mandates that the courts defer to agencies' assessments of fact provided there is substantial evidence to support their evaluation (Humphries and Songer 1999). They

37

hypothesized that if the substantial-evidence doctrine was present in a case, courts should show deference to agency decisions. Since interpretation of statutes is "at the heart of" what courts do, they also examined cases where agency interpretation of a federal law was present, with the expectation that courts would be less likely to show deference to agencies where interpreting federal law was a central question in the case (Humphries and Songer 1999). Both of these legal variables were statistically significant in their model. To measure the impact of judges' personal preferences on their votes, Humphries and Songer constructed an ideology index of each review panel. They found that higher ideological congruence between the ideology of the panel and the ideological direction of the agency decision was a statistically significant predictor of courts rendering a decision favorable to an agency. Hence, agency support is, in part, a function of judges' ideological or personal preferences (Humphries and Songer 1999).

Overall, Humphries and Songer concluded that judges "are much more likely to uphold the exercise of discretion by the agency when the policy implications of that exercise are consistent with the policy preferences of judges" (1999, p. 217). Their findings also suggest that legal considerations are at play in the courts of appeals, and we should not dismiss judges' regard for the law. Finally, they also found that agency type appears to be irrelevant to whether courts support agencies. Their findings, however, do not fully disentangle the legal-attitudinal debate. They acknowledge their variables are rough indicators of the legal and attitudinal models and suggest the discipline will benefit from finding better measures of these concepts.

Frank Cross (2003, 2007) examined decisionmaking more broadly in the U.S. Courts of Appeals from 1925–1996. While his examination was not exclusively focused on review of agency decisions, he found substantial support for legal determinants constraining judicial decisionmaking in the courts of appeals. Cross makes an important contribution to the literature on court-agency relationships, especially concerning the U.S. Courts of Appeals, by clarifying the concept of deference and testing deference in regression models alongside attitudinal variables. As an element of the legal model of judicial decisionmaking, deference appears prominently in various standards of review (Cross 2007). With respect to reviewing lower court or agency decisions, the circuit courts consider a number of standards of review (arbitrary and capricious, abuse of

discretion, clearly erroneous, substantial evidence, and *de novo*). In a regression model with attitudinal variables, Cross found that how courts answered standard-of-review questions with respect to agencies had a statistically significant impact on final case decisions (Cross 2003, 2007). For example, courts were more likely to support the agency in the final case decision if it found that the agency had not acted arbitrarily and capriciously. The opposite was also true. If courts found that agencies acted arbitrarily and capriciously in their decision, courts were less likely to support agencies in the final case decision.

What remains unclear in Cross' study is whether court answers to standard-of-review questions mask judges' ideological preferences (see Segal and Spaeth 2002). Attitudinalists would argue that judges have preferences for case outcomes that are formed in advance of the legal reasoning they express in their opinions. In this regard, how courts answer standard-of-review questions may be window dressing for their preferences, which Cross does not address in his study. This problem is not unique to Cross, since other researchers have been unable to effectively measure elements of the legal model that withstand this attitudinal scrutiny. If courts' answers to legal questions are, indeed, masks for their ideological preferences, then Cross' study may be tautological.

Judge ideology also mattered in Cross's studies. Studies of the impact of ideology on justices' voting in the Supreme Court have found that an individual judge's ideology predicts how an individual judge will vote in a final case decision (Segal and Cover 1989; Segal et al. 1995b; Segal and Spaeth 2002). Rather than individual judge ideology predicting that particular judge's vote in the final case decision, Cross pointed to the collegial nature of three-judge panels and the impact collegiality has on judicial decisionmaking in the courts of appeals. Cross found that the mean ideology of a three-judge panel significantly influenced the final case decision. This finding is consistent with other studies showing the ideological composition of a three-judge panel is a significant predictor of final case decisions (Humphries and Songer 1999; Sunstein et al. 2006).

Studies of judicial decisionmaking in the U.S. Courts of Appeals are less prolific than studies of judicial decisionmaking in the Supreme Court, especially studies

examining judicial review of agency decisions. There is consistent agreement among scholars that the U.S. Courts of Appeals support agencies in their final decisions in roughly 60-70% of published cases (Humphries and Songer 1999; Songer and Sheehan 1992; Songer et al. 2000). Studies that examined review of agency decisions in all circuits found substantial support for the attitudinal model, where the ideological composition of the review panel is a statistically significant predictor of agency support (Cross 2007; Humphries and Songer 1999). While these studies all point to ideology and politics influencing judge voting, these influences appear to be tempered by legal constraints (Cross 2007; Humphries and Songer 1999).

D.C. Circuit Review of Agency Decisions

A number of scholars have focused on judicial decisionmaking in the D.C. Circuit for several justifiable reasons. First, the geographical jurisdiction of the D.C. Circuit encompasses the federal seat of government, which means that for many administrative agency appeals, the D.C. Circuit has exclusive jurisdiction (Banks 1999; Caruson and Bitzer 2004; Edwards 1998). For example, the D.C. Circuit is an exclusive venue for reviewing certain cases involving environmental regulation (Revesz 1997, 1999). This contributes to the increased volume of agency appeals heard in the D.C. Circuit compared to the remaining circuits. Since the D.C. Circuit reviews more agency actions, it is reasonable to expect that judges in the D.C. Circuit develop greater expertise on administrative law issues compared to their counterparts in other circuits. It is also reasonable to expect judges in the D.C. Circuit to extend agencies greater or lesser deference based on this expertise.

Pierce (1988) argued that because of the large number of administrative law cases that D.C. Circuit judges must address, these judges develop a more sophisticated expertise on administrative law issues. Therefore, D.C. Circuit judges may be more inclined to scrutinize agency actions more thoroughly than judges in other circuits and less inclined to defer to agency decisions. Less deference to agencies results in lower rates of agency success in the D.C. Circuit. Other scholars echo D.C. Circuit judges' administrative law expertise, their propensity to take "hard-look" approaches to judicial review, and an overall inclination to scrutinize agency behavior more closely (Edwards 1998; Revesz 1997, 1999).

In addition to the relatively large volume of administrative law cases reviewed by the D.C. Circuit compared to other circuits, past research suggests at least one additional reason for examining the D.C. Circuit separately. Scholars identify the tendency of D.C. Circuit judges to be political in their decisionmaking, and suggest they may be more political than their counterparts in other circuits (Pierce 1988; Revesz 1997, 1999; Tiller and Cross 1999). Judges from the D.C. Circuit, however, dispute these findings as inaccurate and maintain that their decisions are driven by the rule of law and not by political preferences (Edwards 1998; Wald 1999).

Judges in the D.C. Circuit may be more political for two reasons. First, these judges are more likely to have been involved in politics than their counterparts in other circuits. "Before their appointment to the bench, a disproportionate number of [D.C. Circuit judges] serve in Congress or in political positions in the Executive Branch," (Revesz 1997, p. 1720). Second, there are no senators representing the D.C. Circuit, as in other circuits, to mitigate extremity in ideological appointing by the President. While D.C. Circuit judges must be confirmed by the Senate, the President has more leeway to appoint judges who are aligned with him politically without consideration of the preferences of senators from the states in a given circuit. In general, scholars disagree on whether judges in the D.C. Circuit exert their political preferences more prominently than judges in other circuits or whether D.C. Circuit judges apply legal standards more rigorously in their review of agency decisions.

In his examination of the history and development of the D.C. Circuit, Banks (1999) concluded that D.C. Circuit judges are political. While his analysis lacks substantive quantitative analysis, he makes compelling arguments for these judges voting according to their ideologies. Specifically, he notes the "polarizing" effect of Ronald Reagan appointees in the D.C. Circuit. In sum, Banks states:

> [M]uch of what the D.C. Circuit does in the federal judiciary is strongly
> influenced by political considerations. While the mythology of judging
> casts a long shadow over common perceptions of what courts do in theory,
> in reality circuit courts routinely face the prospect that their judicial
> function may be directly influenced by internal or external political forces,
> a fact that invariably reflects the full range of agenda opportunities and
> judicial philosophies that come to dominate local criminal appeals
> diminished by court reform in the 1970s, the court experienced another
> political change in the 1980s that fundamentally altered its bench and the

tenor of its judicial politics in a new era of deregulation. Whereas earlier court reform allowed the D.C. Circuit to redefine its judicial role and become a leader in administrative law through hard-look judicial review, Reagan's appointments to the D.C. Circuit polarized the liberal and conservative blocs on the court and brought into sharp relief the question of litigant access and judicial deference to agencies, two key issues in regulatory law. … Not only was the court willing to use substantive hard-look review at times and act as a trustee for ghosts of Congresses past, it also proved that its judges could politically manipulate the law under the *Chevron* deference principle and still remain a quintessential skeptic of agency action during a time of deregulation. Perhaps a primary lesson to be learned from the 1980s D.C. Circuit is that the judicial politics of the court did not diminish its capacity to assert its judicial will over agencies trying to fulfill their own statutory missions under broad grants of delegated legislative authority (Banks 1999).

Clearly, Banks found support for politics at play in the D.C. Circuit. However, he did not go so far as to suggest that politics is the only factor influencing judicial behavior in the D.C. Circuit.

[T]he decisions of the D.C. Circuit are not *solely* the product of judicial politics. Empirical analysis of the court's access decisions and its approach to judicial deference to agencies' cases … indicate that judicial behavior is more complex than that and is accordingly affected by a variety of nonideological factors. Social scientists studying courts sometimes fall into the trap of believing that political considerations exclusively drive court outcomes. This may not be true. Political ideology is an important, but not an omnipotent, element in affecting D.C. Circuit policymaking. Quite simply, the law counts, too (emphasis in original, p. 86).

Banks' analysis concludes that political ideology is important in judicial behavior, but that law is equally important. His comprehensive qualitative approach to studying the D.C. Circuit and these subsequent conclusions should serve as a theoretical foundation for future quantitative analysis.

There are a couple of notable quantitative studies examining judicial behavior in the D.C. Circuit. David Willison (1986) examined cases in the D.C. Circuit from 1981–1984 and found that the D.C. Circuit supported agency decisions in 66% of cases. Where there was variance in court support, Willison suggests the party of the judge is the most significant explanatory variable, with Republican judges supporting agencies more often than Democratic judges (1986). Willison's findings, however, are limited because he

examines only the D.C. Circuit over a relatively brief period and he does not explain why agencies receive the levels of support that they receive. As he acknowledges, "To assess fully the court's role as an activist policymaker, case outcomes would need to be compared against the direction of decisions made at the administrative level" (Willison 1986, p. 325).

Caruson and Bitzer (2004) examined the D.C. Circuit over the period 1985–1996 with findings similar to Willison's —court deference to administrative agencies is a function of both legal constraints and personal attributes of judges, namely judge ideology. While Caruson and Bitzer's comprehensive specification of a logistic regression model is useful for informing future statistical models, the researchers measured court deference only in terms of judges voting in favor of the agency. This one-dimensional characterization of deference is problematic since we are unable to distinguish between a judge supporting an agency because of some legal doctrine that compels judicial deference and a judge supporting an agency because he/she is in ideological agreement with the agency. Before accepting Caruson and Bitzer's findings —judges defer to agencies—one must effectively distinguish between these seemingly equivalent observations.

In summary, studies of judicial decisionmaking in the D.C. Circuit when agency decisions are under review generally have findings similar to studies of judicial decisionmaking in all circuits. D.C. Circuit judges vote according to their ideologies, but this ideological voting appears to be constrained by law (Banks 1999; Caruson and Bitzer 2004; Willison 1986). What remains uncertain is whether D.C. Circuit judges are any more political in their voting behavior than their counterparts in other circuits and whether judges are influenced by the ideology of their panel cohorts (Edwards 1998, 2003; Pierce 1988; Revesz 1997, 1999; Tiller and Cross 1999; Wald 1999). Studies of judicial behavior in the D.C. Circuit either improperly specify or do not specify at all models that include deference to agencies, other legal constraints, and panel ideology. Further, these studies have not tested attitudinal and legal theories of judicial behavior in the same empirical models.

Court-Agency Studies in Sum

While there is considerable agreement concerning federal courts' propensities to support agencies around 65–70% of the time, scholars do not agree on the causes of this support. Beginning with the earliest studies on the Supreme Court (Shapiro 1964) to more recent studies on the U.S. Courts of Appeals (Humphries and Songer 1999), the crux of the differences in these studies is whether law or politics is the driving factor behind court decisions. Most political science scholars agree that variation in support for agencies in both the Supreme Court and circuit courts is, in large part, a function of judges' personal preferences (Canon and Giles 1972; Caruson and Bitzer 2004; Crowley 1987; Humphries and Songer 1999; Shapiro 1964; Sheehan 1990; Tanenhaus 1960). However, a few scholars show that this imposition of personal preferences may be done within legal constraints, where courts and judges defer to agencies (Banks 1999; Caruson and Bitzer 2004; Cross 2007; Horowitz 1994; Humphries and Songer 1999; Sheehan 1992).

Most judicial behavior research finds only modest support for law as a determinant of judicial decisionmaking when agency decisions are under review, which reflects a general inability to effectively measure components of the legal model and to evaluate these components in statistical models with attitudinal variables. Recent research has made important advances on this front (see especially, Cross 2007), but measurement improvements are still needed, as are more focused studies on the courts of appeals in recent years.

Several Supreme Court researchers have examined differences in support based on agency adherence to procedures versus more substantive policy areas (Canon and Giles 1972; Tanenhaus 1960). The results of these studies suggested that how courts treat agencies on matters of procedure is different from how they treat agencies on matters of substance. These findings merit further empirical investigation using models that effectively measure procedures and other legal rules. Whether the substantive-procedural distinction manifests in disparate behavior in the U.S. Courts of Appeals remains unexamined.

Despite scholarly disagreement on the matter, there are considerable reasons to suggest that judges in the D.C. Circuit may behave differently from judges in other

circuits. These differences may be due to D.C. Circuit judges' relatively greater expertise in administrative law or because of their tendencies to be more political. There is disagreement in the literature over whether D.C. Circuit judges vote according to personal policy preferences, deference to administrative agencies, or a combination of these two.

The prevailing question in the extant literature centers on whether judges interject their personal preferences into their decisions or adhere strictly to the rule of law as defined by other policymakers, such as Congress or agencies. Political scientists have been largely concerned with the political dimensions of decisionmaking in the courts, sometimes to the detriment of the legal dimensions. This may be due to epistemological differences to studying the courts, or to difficulties in specifying and measuring legal concepts, or as Scalia (1989) notes, simply because studying administrative law and its legal concepts is difficult.

Among the weaknesses in past judicial behavior research when agency decisions are under review is scholars' inability to adequately develop construct validity in their quantitative models. That is, these studies do not fully conceptualize deference. In some instances, political science scholars have mischaracterized support for agencies as deference if the courts simply render a decision in favor of an agency (Caruson and Bitzer 2004).

Scholars, especially legal scholars, are quick to identify legal reasoning embedded in opinions as the motivations for judges' decisions. Legal principles, such as the *arbitrary-and-capricious standard of review* or the *substantial-evidence standard of review*, frequently typify judges' motivations to defer to agencies from a legal theorist's perspective. By broadening the role of the courts to include the substance of their opinions in addition to the outcome of their decisions, we can more effectively conceptualize, operationalize and measure deference. In this regard, drawing on the scholarship of both political theorists and legal theorists is particularly helpful for informing future judicial decisionmaking research. Where legal theorists tend to thrive in thoroughly analyzing cases, which produces thick, rich descriptions and theories, political behaviorists thrive on large-N studies producing broad trends with generalizable results. Both approaches can be incorporated in the study of judicial behavior by first looking to

45

the legal literature's theoretical descriptions of how judges behave, which can be modified into hypotheses that are testable using political science datasets and econometrics.

PLAN FOR RESEARCH

The present study attempts to address the dearth of scholarship examining court review of agency decisions and the even greater dearth of scholarship examining the review of agency decisions in the U.S. Courts of Appeals. Having provided a conceptual framework for procedural and institutional deference, in the next chapter I develop several hypotheses related to deference and the legal model, as well as the attitudinal model. I then test these hypotheses using data from the U.S. Courts of Appeals Database. More specifically, I test the extent to which judges and courts review agency actions based on attitudes and the law. Based on these results, I draw conclusions about how judges and courts behave in the U.S. Courts of Appeals when agency decisions are under review.

CHAPTER 3: HYPOTHESIZING DECISIONMAKING BEHAVIOR IN THE U.S. COURTS OF APPEALS

Judicial decisionmaking in the U.S. Courts of Appeals has not been studied extensively despite these courts functionally serving both as courts of first-level review and courts of last resort for the vast majority of appeals in the federal system, especially appeals from administrative agencies. It is, therefore, unsurprising that a great number of questions remain unanswered concerning how judges and courts behave in the U.S. Courts of Appeals.

The aim of the present study is to examine behavioral issues in these courts and, specifically, to determine the extent to which agency success rates in the U.S. Courts of Appeals are a function of deference to law and a function of judges' attitudes. The overarching research question guiding this study is, "When agency decisions are under review in the U.S. Courts of Appeals, what are the effects of law and ideology on judicial decisionmaking?" Based on this question, I developed eleven hypotheses related to the attitudinal and legal models.

I present hypotheses initially based on the substance of the topic they address. At the end of the chapter, I summarize the hypotheses and re-order them based on the unit of analysis necessary to conduct hypothesis testing. For ease of reference, I reference the final hypotheses numbers after each (e.g., H_1, H_2, etc.).

Judicial Decisionmaking based on Procedural Deference

As discussed in the previous chapter, procedural deference exists when courts acknowledge agency adherence to prescribed procedures and, accordingly, defer to agency decisions. Prescribed procedures come from several sources, the most fundamental of which is the Administrative Procedure Act (1946) (APA), which prescribes how agencies must conduct their business. The major administrative functions the APA addresses include licensing, formal and informal rulemaking, ratemaking, investigations and information collection, and adjudication. The APA is rather extensive and its provisions are often quite specific, as 5 U.S.C. §558(c) on licensing illustrates.

When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given:

1. notice by the agency in writing of the facts or conduct which may warrant the action; and

2. opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

In addition to procedures outlined in the APA, other statutes prescribe agency procedures, including the Freedom of Information Act and the Government in the Sunshine Act. Agencies must also adhere to procedures from sources unique to each agency, such as an agency's enabling legislation and an agency's own rules.

As Canon and Giles (1972) found in their Supreme Court study, "agencies which meet certain criteria more or less traditionally associated with the concept of due process of law (e.g., proper notice, impartial hearing, decisions made in accordance with ascertainable evidentiary rules or standards, etc.) are supported by the Court and those which often fail to meet such standards are not supported." I hypothesize that this is also true in the U.S. Courts of Appeals. The following hypotheses are based on procedural deference.

Agency adherence to procedural standards, such as those outlined in the Administrative Procedures Act and other related statutes, increases the likelihood that a *review panel* will defer to the agency. Agency non-adherence to procedural standards decreases the likelihood that a *review panel* will defer to the agency. (H_1)

Agency adherence to procedural standards, such as those outlined in the Administrative Procedures Act and other related statutes, increases the likelihood that a *judge* will defer to the agency. Agency non-adherence to

procedural standards decreases the likelihood that a *judge* will defer to the agency. (H$_6$)

Note that the above hypotheses are essentially the same. The only difference is that the first addresses decisionmaking of an entire review panel, and the second addresses individual judge decisionmaking.

Institutional Deference and Standards of Review

Institutional deference occurs when a review court preserves the integrity of the policy preferences of other branches of government, including Congress and administrative agencies. As mentioned in the previous chapter, a number of standards of review specifically require courts to defer to agencies under certain circumstances. As an indicator of the legal model, these standards of review suggest that judges and courts will not substitute their preferences in place of agencies' preferences and should not set aside agency actions, so long as courts meet minimum review requirements.

A standard of review defines the degree to which a reviewing court extends deference to the decision of a lower court or agency. In administrative law, there are many standards of review that courts of appeals use when reviewing agency decisions depending on several factors including the type of agency action reviewed, whether the review concerns facts or law, or whether a particular precedent or statute mandates a particular standard. These standards vary in degree of deference from the arbitrary-and-capricious standard, which extends the highest level of deference to agencies, to *de novo* review, which affords the least degree of deference (Cross 2007). Several other standards with varying degrees of deference exist between these two, including abuse of discretion, substantial evidence, and clearly erroneous.

Some standards not only prescribe that review courts defer to agencies, but also to Congress. Specifically, the *Chevron* doctrine requires courts to defer first to Congressional intent before deferring to the agency.

Where courts defer to other institutions and, specifically, to agencies, as a number of standards of review require, courts arguably exercise institutional deference. The following hypotheses concern institutional deference. As with procedural deference, I posit two hypotheses, one for review panels and one for individual judges.

If a court panel answers standard-of-review questions favorably toward an agency, the *review panel* is more likely to defer to the agency, resulting in support for the agency in the final case decision. (H_3)

If a court panel answers standard-of-review questions favorably toward an agency, a *judge* is more likely to defer to the agency and vote to support the agency in the final case decision. (H_8)

Inasmuch as standards of review are either prescribed by Congress, as in the arbitrary-and-capricious standard defined in the Administrative Procedure Act, or prescribed by the Supreme Court, as in *Chevron* deference, these standards are clear indicators of the legal model. If U.S. Courts of Appeals judges appropriately apply these standards without interjecting their personal policy preferences into the review process, these judges adhere to the legal model of judicial behavior.

Ideologically Driven Decisionmaking

Considerable research suggests that federal judges and justices decide cases according to their attitudes, and the best predictor of judge's attitudes is ideology (Canon and Giles 1972; Caruson and Bitzer 2004; Cross 2007; Crowley 1987; Humphries and Songer 1999; Segal and Spaeth 2002; Sheehan 1992; Tanenhaus 1960; Wilson 2006). Given the consistent findings of attitudinal research suggesting that liberal judges vote liberally and conservative judges vote conservatively, I posit the following hypotheses.

Court panels decide cases consistently with panel ideology. Liberal *panels* tend to support liberal agency decisions, and conservative *panels* tend to support conservative agency decisions. (H_4)

A *judge's* vote will be consistent with his/her ideology in a case. *Judges* will vote to support agencies if their ideology agrees with the agency position. Conservative *judges* will vote to support conservative agency decisions. Liberal *judges* will vote to support liberal agency decisions. (H_9)

Collegiality and Effects of Panel Ideology

Since cases in the U.S. Courts of Appeals are generally heard by panels of three judges, it is reasonable to assume that collegial and professional norms may influence judicial decisionmaking. Past studies show that the ideological composition of a panel is a statistically significant determinant for how individual judges and review panels decide cases (Humphries and Songer 1999; Sunstein et al. 2004). Sunstein et al. suggest that the

more ideologically conservative a review panel is, the more likely an individual judge will render a conservative decision (2004). Similarly, liberal panels tend to foster liberal decisions from individual judges (Sunstein et al. 2004). Accordingly, I posit the following hypothesis concerning panel composition.

> *Individual judge* votes to support agencies are influenced by the ideology of other judges on the reviewing panel. If the review panel is in ideological agreement with the agency position, *individual judges* are more likely to support agencies in final case decisions. (H_{11})

Support for this hypothesis lends support for the attitudinal model of judicial behavior. While the purpose of the present study is not to evaluate all models of judicial behavior, it is worth noting that these hypotheses also suggest that judicial behavior is influenced by non-attitudinal and non-legal factors. Professional norms in the U.S. Courts of Appeals suggest that judges may put their personal policy preferences aside to preserve the integrity of professional relationships they have with other judges in their circuits (Howard 1977). However, these hypotheses are based on the assumption that the ideological composition of a review panel influences judicial behavior and final case decisions. In this regard, support for these hypotheses suggests that judges' ideologies inform their decisionmaking.

Judicial Decisionmaking in the D.C. Circuit

Scholars disagree on whether judges in the District of Columbia Circuit behave differently from their counterparts in other circuits because they have greater expertise in administrative law or because they are more political (Edwards 1998; Pierce 1988; Revesz 1997, 1999; Tiller and Cross 1999; Wald 1999). If D.C. Circuit judges develop a greater understanding of administrative law issues because of the greater volume of agency cases they review, it is reasonable to assume that these judges may scrutinize agency actions more heavily and be less inclined to defer to agencies simply because agencies followed procedures. I hypothesize the following.

> D.C. Circuit *panels* are less likely than other circuit panels to defer to agencies based on agency adherence to procedures. (H_2)

> D.C. Circuit *judges* are less likely than judges in other circuits to defer to agencies based on agency adherence to procedures. (H_7)

Judges in the D.C. Circuit might also be more political than other circuit judges for two reasons. First, D.C. judges tend to have political professional backgrounds more than judges in other circuits (Revesz 1999). Second, during the appointment of D.C. Circuit judges, Presidents may not be tempered in their appointments by ideologically different Senators, as with other circuits. Senators who represent states in other circuits may moderate extreme ideological appointments during the advise and consent process (Revesz 1999). Therefore, it is at least plausible that judges in the D.C. Circuit may be more political than judges in other circuits. Hence, I hypothesize the following.

> D.C. Circuit *review panels* tend to decide cases more consistently with panel ideology than review panels in other circuits. (H_5)

> D.C. Circuit *judges* tend to decide cases more consistently with their ideologies than judges in other circuits. (H_{10})

SUMMARY OF HYPOTHESES

Based on my research question, I developed eleven hypotheses related to the attitudinal and legal models of judicial behavior. These hypotheses are divided into two categories that address the decisionmaking of courts (review panels) and the decisionmaking of individual judges. The court-level hypotheses are stated in terms of the typical review "panel" of three judges. However, cases reviewed en banc will also be analyzed.

For ease of reference and discussion in later chapters, I re-ordered and summarized the hypotheses below according to their respective units of analysis—court-level and judge-level. These two sets of hypotheses each have several subsets aimed at measuring the impact of judge attitudes and the law as informants of judicial decisionmaking. Each set also includes hypotheses concerning whether D.C. Circuit judges behave differently from judges in other circuits.

Court-Level Hypotheses

Hypothesis 1 (H_1): Agency adherence to procedural standards, such as those outlined in the Administrative Procedures Act and other related statutes, increases the

likelihood that a review panel will defer to the agency. Agency non-adherence to procedural standards decreases the likelihood that a review panel will defer to the agency.

Hypothesis 2 (H₂): D.C. Circuit panels are less likely than other circuit panels to defer to agencies based on agency adherence to procedures.

Hypothesis 3 (H₃): If a court panel answers standard-of-review questions favorably toward an agency, the review panel is more likely to defer to the agency, resulting in support for the agency in the final case decision.

Hypothesis 4 (H₄): Court panels decide cases consistently with panel ideology. Liberal panels tend to support liberal agency decisions, and conservative panels tend to support conservative agency decisions.

Hypothesis 5 (H₅): D.C. Circuit review panels tend to decide cases more consistently with panel ideology than review panels in other circuits.

Judge-Level Hypotheses

Hypothesis 6 (H₆): Agency adherence to procedural standards, such as those outlined in the Administrative Procedures Act and other related statutes, increases the likelihood that a judge will defer to the agency. Agency non-adherence to procedural standards decreases the likelihood that a judge will defer to the agency.

Hypothesis 7 (H₇): D.C. Circuit judges are less likely than judges in other circuits to defer to agencies based on agency adherence to procedures.

Hypothesis 8 (H₈): If a court panel answers standard-of-review questions favorably toward an agency, a judge is more likely to defer to the agency and vote to support the agency in the final case decision.

Hypothesis 9 (H₉): A judge's vote will be consistent with his/her ideology in a case. Judges will vote to support agencies if their ideology agrees with the agency position. Conservative judges will vote to support conservative agency decisions. Liberal judges will vote to support liberal agency decisions.

Hypothesis 10 (H₁₀): D.C. Circuit judges tend to decide cases more consistently with their ideologies than judges in other circuits.

Hypothesis 11 (H₁₁): Individual judge votes to support agencies are influenced by the ideology of other judges on the reviewing panel. If the ideology of the review panel is

in agreement with the agency position, individual judges are more likely to support agencies in final case decisions.

<div align="center">CONTRIBUTIONS TO POLITICAL SCIENCE</div>

The present study is a study of judicial decisionmaking. However, this study also contributes to several other areas within political science.

Concerning judicial decisionmaking, support for the ideology-based hypotheses I presented will provide further evidence of judges voting according to their attitudes in the U.S. Courts of Appeals. Support for these hypotheses will show that the attitudinal model applies not only to civil liberties and economic cases, but also to administrative law cases. Support for the law-based hypotheses will provide evidence for the legal model of judicial behavior in the U.S. Courts of Appeals, which heretofore has received little quantitative support in the political science literature.

Considered collectively, the attitudinal and legal hypotheses shed light on whether the judicial branch of government in the U.S. is a neutral, law-based one, a political one, or both. These hypotheses hold particular import in the U.S. Courts of Appeals, which functionally serve as the courts of first-level of appeals and also as courts of last resort for the vast majority of federal-level disputes.

Concerning political theory, support for these hypotheses holds important ramifications for inter-branch relations in a government concerned with power sharing and checks and balances. To the extent judges either defer to agency discretion or engage in policymaking in the face of executive actions, the U.S. Courts of Appeals may be strengthening or weakening judicial power and concomitantly strengthening or weakening the power of the executive branch. Courts extending greater deference to agencies theoretically create a stronger executive branch. Political decisionmaking in the courts broadens judicial power to the detriment of executive power and, perhaps, legislative power inasmuch as agencies may or may not carry out the intentions of Congress.

Support for these hypotheses also contributes to the public administration literature. Often, students of public administration have not been afforded the benefit of empirical studies examining the relationships agencies have with the courts. By understanding the complexities of public-sector decisions vis-à-vis the judicial branch of

government, students of public administration and public administrators themselves are better positioned to make decisions about their own actions and processes.

Finally, support for these hypotheses, especially those related to the D.C. Circuit, may contribute to studies of judicial process and constitutionalism. Specifically, if these hypotheses are true, then outcomes of cases may depend not only on the judges who hear a specific case, but also on the circuit that hears the case. This may bring into question equal application of the law in a democratic system based on the rule of law. If litigant success depends on the level of administrative law expertise retained by judges, panels and circuits, arguably the rule of law may not be applied uniformly. Similarly, if judges in the D.C. Circuit are more political, then changes in the processes of judge selection and case assignment may be warranted. If the outcome of a case depends on the circuit in which the case is heard, principles of constitutionalism may be undermined.

CHAPTER 4: BUILDING A MODEL OF JUDICIAL DECISIONMAKING—
DATA AND METHODS

In earlier chapters, I distinguished the strengths and limitations of attitudinal and legal research. Ultimately, I concluded that future researchers will benefit from acknowledging epistemological weaknesses associated with each approach and capitalizing on their strengths. This premise guides the remainder of this research.

The primary shortcoming of the legal model of judicial behavior is that it has been poorly specified, or not specified at all, which prevents researchers from creating objective models based on falsifiabilty. Models should be not only falsifiable but also based on a priori observations (Segal and Spaeth 2002). The primary limitation of the attitudinal research is that results are based on models that do not incorporate properly specified elements of law and other behavioral informants alongside attitudinal variables (e.g., Segal and Spaeth 2002). Hence, the results of attitudinal research may be overstated.

Roughly speaking, the strength of legal research is depth of knowledge, coupled with detailed conceptualization of legal principles and doctrine. The strength of attitudinal research is in the formal modeling of judicial decisionmaking based on falsifiable hypotheses using statistical analysis with large datasets.

Given these strengths and limitations, I attempt, in this chapter, to build a model of judicial decisionmaking for the U.S. Courts of Appeals when agency actions are under review. To do so, I specify regression models using variables informed by legal concepts and past attitudinal research.

Since the present study is concerned with both court-level and judge-level decisionmaking in the Courts of Appeals, I have two dependent variables in the research, each corresponding with the two units of analysis. The court-level dependent variable is dichotomous, and measures whether review panels in the courts of appeals support agencies in final case decisions.[9] The judge-level dependent variable is also dichotomous, and measures whether individual judges vote to support agencies in final case decisions.

---

[9] Includes cases reviewed en banc.

To test whether courts of appeals panels and judges extend deference to agencies in their decisionmaking, I construct several variables based on standards of review and agency adherence to procedures. To measure whether panel and judge votes in support of an agency are a function of judges' ideologies, I construct variables based on judge ideology scores developed by Giles, Hettinger and Peppers (2001; 2002).

In this chapter, I describe the data and the legal and attitudinal variables used in analysis. I conclude by specifying a logistic regression model to test my hypotheses.

DATA

My primary data source is the U.S. Courts of Appeals Database,[10] a stratified random sample of published cases for the years 1925–2002. For years 1925–1960, the sample consists of 15 randomly selected cases per circuit per year. For years 1961–2002, the sample consists of 30 randomly selected cases per circuit per year. The database also includes all U.S. Courts of Appeals cases that were eventually heard in the U.S. Supreme Court. In total, there are 20,355 cases in the database. Cases in the U.S. Courts of Appeals Database were coded for over 200 variables related to the case, litigants, judges, and votes. As frequent litigants in the U.S. Courts of Appeals, federal agencies are well represented in the dataset. Additionally, a number of administrative law variables pertinent to the research question and hypotheses in the present study are included in the database. Therefore, the U.S. Courts of Appeals Database is very useful in examining court-agency relations, and serves as the primary source of data for this study (for an expanded discussion of the U.S. Courts of Appeals Database, see George and Sheehan 2000; Songer et al. 2000).

Years of Study

I focus on the years 1982–2002 for three reasons. The Fifth Circuit Court of Appeals Reorganization Act (1980) divided the Fifth Circuit into two circuits effective October 1, 1981. I chose 1982 as the starting point for analysis, since this is the first full calendar year of the Eleventh Circuit's creation. This also allows for consistency in the

---

[10] The data and codebook for the U.S. Courts of Appeals Database are available through the University of Kentucky's S. Sidney Ulmer Research Project for Law and Judicial Politics at www.as.uky.edu/academics/departments_programs/PoliticalScience/PoliticalScience/FacultyResources/Resources/Ulmer/Pages/default.aspx. The database was funded by National Science Foundation grants, with Donald Songer as the principal investigator for data in the years 1925-1996, and Ashlyn Kuersten as the principal investigator for updates – years 1997-2002.

number of cases I examine per year, since there are a consistent number of circuits during the observation period. During this period, the U.S. Courts of Appeals Database consists of a random sample of 30 cases per circuit per year, which means that weighting cases in analysis is not necessary.

Prior studies of the circuit courts and their relationship to administrative agencies that used the U.S. Courts of Appeals Database were restricted to 1925–1988, which coincided with the years the data were collected originally (see for example, Humphries and Songer 1999). Phase three of the U.S. Courts of Appeals database updated the data through 1996. The last wave of data is updated through 2002. I end the date range to coincide with the most recent available data in the database.

Source of Cases Selected

I limit observations to cases that come to the U.S. Courts of Appeals directly from administrative agencies. These cases are based on the database's *source* variable, which indicates the court or agency that dealt with the case immediately before being received in the U.S. Courts of Appeals. A similar variable in the database, *origin*, indicates the court or agency that made the first decision in the case. In most instances, these two variables are the same. However, there are instances where the two variables differ. For example, if the Supreme Court remanded an agency review case to a circuit court, the source would be the Supreme Court, but the origin would be the administrative agency. Since I am more interested in the relationship between the U.S. Courts of Appeals and agencies, and less interested in the mediating effects other institutions may have between an agency's original decision and final courts of appeals disposition, I limit analysis to cases coming directly to the courts of appeals from administrative agencies.

For 1982–2002, the number of cases in the sample that came directly from an administrative agency is 553. I also include cases coming from administrative law judges, since these judges are part of the overall collective of federal government agencies and not part of the judiciary. The number of cases that come from an administrative law judge is 30. The total number of cases coming to the U.S. Courts of Appeals directly from federal agencies during this period is 583, which is 7.7% of the courts' docket of published cases. Table 4.1 shows the sources of cases heard and the respective percentages of the U.S. Courts of Appeals' collective docket from the database. A small

number of cases are omitted from this total for reasons I address later in this study. The actual number of cases used in analysis is 556, of which 28 come from administrative law judges. For purposes of determining the percentage of agency review cases, the higher number (583) is the accurate number of cases upon which to base this percentage.

About 86% of all cases come to the Courts of Appeals from the District Courts, but the next largest group of cases is from administrative agencies and administrative law judges—almost eight percent of the courts' docket of published cases. This suggests that, at least by volume, the number of cases from administrative agencies handled by the U.S. Courts of Appeals is not trivial. Table 4.2 shows the percentage of the caseload in the courts of appeals that comes from administrative agencies by year. There is considerable variation from year to year. The range is from 5.57% in 2002 to 12.5% in 1982. In most years, the percentage of agency cases handled by the circuit courts was between approximately six and nine percent.

Circuits of Study

Twelve courts are represented in the U.S. Courts of Appeals Database—the First through Eleventh Circuits and the District of Columbia Circuit. Table 4.3 shows the number and percentage of cases by circuit where the source is a federal agency. Unsurprisingly, of the total number of agency cases reviewed in the circuit courts, the D.C. Circuit reviewed 39.3 percent. The D.C. Circuit consistently reviews more administrative appeals than the other circuits because its geographical jurisdiction is the federal seat of government and because it is an exclusive venue for many policy areas, as previously noted (Revesz 1997, 1999).

This study distinguishes between the D.C. Circuit and all other circuits for two primary reasons. First, the volume of administrative law cases reviewed in the D.C. Circuit is considerably larger than any other circuit. Thus, judges may develop greater administrative law expertise compared to their counterparts in other circuits, and may subsequently behave differently because of this expertise. Second, some scholars suggest that D.C. Circuit judges may be more ideologically driven in their decisionmaking than other circuit judges (Pierce 1988; Revesz 1997, 1999; Tiller and Cross 1999). This distinction will ensure that all case types are included in the dataset and analysis, which

essentially allows for "controls" of any differences that may exist between D.C. Circuit and other circuits.

DEPENDENT VARIABLE—COURT SUPPORT FOR AGENCIES

There are two dependent variables in this study. **Court support** indicates whether a court supported an agency in the final case decisions, and **judge support** indicates whether an individual judge voted to support an agency in the final case decision. Both of these variables are dichotomous, where 1 indicates a supportive vote or decision and 0, otherwise. Support means that the outcome of the case is favorable to the agency, which most often means the court affirms the agency decision. Similarly, the most common non-supportive decision is a reversal of the agency decision. However, there are other dispositions besides affirm and reverse that I consider in this analysis.

To construct these dependent variables, I relied on the U.S. Courts of Appeals Database's *treat* variable. The *treat* variable indicates how the circuit courts treated the lower court or agency. The *treat* variable is coded for a variety of court actions, including reversals, remands, affirms, vacates, and so forth. Values for the *treat* variable are nominal, and are described in the U.S. Courts of Appeals Database codebook as shown in Table 4.4. Table 4.4 also shows the frequency and percent of each *treat* value in the sample.

As expected, one of the most common ways for courts to dispose of cases when reviewing agency decisions is by affirming the agency decision (about 21% of cases). These agency-supportive actions are coded as *treat* = 1 (affirmed, or affirmed and petition denied) or as *treat* = 11 [affirmed, vacated (with no mention of reverse), and remanded]. It is not uncommon, however, for courts to dispose of cases in ways that are not supportive to the agency. Non-support for the agency consists, generally, of cases where the court reversed, remanded, or vacated the case (*treat* = 2, 3, 4, or 7). Collectively, these non-supportive values comprise about 25% of court dispositions.

Coding for Denied Petitions and Dismissed Appeals

Other dispositions can also be considered supportive or non-supportive toward the agency, namely when courts deny petitions or dismiss appeals (*treat* = 8). A "petition" for review is the ordinary method for a party to have its case reviewed in the U.S. Courts of Appeals after an agency has made its final decision. Rule 15 of the Federal Rules of

Appellate Procedure states, "Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeal authorized to review the agency order" (see Fed. R. App. P. 15). Additionally, Rule 15 states, "'petition for review' includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute" (see Fed. R. App. P. 15). Although petitions are generally associated with discretionary review, such as petitioning the U.S. Supreme Court for a writ of certiorari, petitions for review of agency orders are not discretionary in the U.S. Courts of Appeals. Therefore, values for the *treat* variable coded as 8 (petition denied or appeal dismissed) have the same weight as other final dispositions coded in this variable. A case example taken from the sample illustrates.

In *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.* (1992), Liberty Mutual petitioned the court to review the Benefits Review Board's decision concerning which insurance company was liable for a worker's asbestosis disability claim. The First Circuit considered this case fully and responded in its opinion to the arguments in the litigants' briefs. After considering relevant facts and case law surrounding the case, including medical and administrative obstacles, and congressional intent, the court held, "the carrier which last insured the liable employer during the period in which the claimant was exposed to the injurious stimuli and prior to the date the claimant became disabled by an occupational disease arising naturally out of his employment and exposure is responsible for discharging the duties and obligations of the liable employer" (*Liberty Mutual* 1992, p. 756). Although the court gave full consideration to the case at bar, the judgment stated, in relevant part, "The petition to review is dismissed and the Board's decision is affirmed." In sum, petitions for review are not discretionary, and court decisions to deny petitions can be considered as either support or non-support for the agency, depending on the party that filed the petition.

Depending on whether the agency is the respondent or appellant in a case, a court's denial of a petition or dismissal of an appeal (*treat* = 8) can sometimes be supportive of the agency and sometimes not. Agencies are the respondent in about 86%

of the observations.[11] Where the agency is the respondent, a court's denial of a petition or dismissal of an appeal has the effect of leaving the agency decision in place, as illustrated in *Liberty Mutual* (1992). I equate these decisions with support for the agency. In about 14% of the observations where the courts deny petitions or dismiss appeals, the agency is the appellant. In these cases (generally, petitions to enforce agency actions) denial of a petition means the agency's decision is not enforced. Hence, where the agency is the appellant, denials of petitions are non-supportive decisions. In order to code the dependent variable, court support, accounting for when the agency is the appellant and the respondent in these cases, some recoding is necessary. I rely on two additional variables in the U.S. Courts of Appeals Database—*appfed* and *r_fed*.

The database codes the variable, *appfed*, indicating the number of appellants in the case that are federal agencies. All values greater than zero indicate that a federal agency in the case was an appellant. Therefore, when *appfed* is greater than zero, I assume if an agency is a party in the case, the agency is the appellant. In these instances, I recoded values of 8 in the *treat* variable as 18 (value chosen arbitrarily) to distinguish agencies as either appellant or respondent in cases where the petition was denied or the appeal was dismissed. To check this assumption, I also examined the database's *r-fed* variable, which indicates the number of respondents that are federal agencies. Table 4.4.5 is a cross-tabular presentation of the *appfed* variable and the *r_fed* variable when courts deny petitions or dismiss appeals (*treat* = 8). Generally, my assumption is accurate— where *appfed* is greater than zero, an agency is an appellant in the case. However, there are a handful of instances where an agency is not listed as either an appellant or a respondent (N=4), or an agency is an appellant and another agency is the respondent (N=3). There are also four cases where the number of agency appellants or agency respondents could not be determined (*appfed* = 99 (N=1) or *r_fed* = 99 (N=3)). For these anomalies, I examined the cases individually to determine how to code the dependent variable, court support. Appendix A documents the coding for these eleven exceptions.

---

[11] This figure is based on the *appfed* variable in the U.S. Courts of Appeals Database, which indicates the number of appellants that are federal agencies. This variable is coded as 0 in 86% of the observations, which means that an agency is not an appellant, and, therefore, a respondent.

Omitted Cases—Mixed Decisions and Non-final Agency Decisions

Two types of cases are excluded from analysis—those with mixed dispositions and non-final agency decisions. First, I exclude cases where courts rendered decisions that were mixed with respect to support for agencies (about 6.7% of cases). In these cases, courts affirmed part of the agency's decision and reversed part of the agency's decision (*treat* = 5 or 6). Researchers who have used the U.S. Courts of Appeals database in ways similar to the present study either exclude mixed cases without documenting their justifications for doing so (Humphries and Songer 1999; Kaheny et al. 2008)[12] or researchers inappropriately classify mixed-decision cases (Cross 2007). In their model of judicial review that tests for the possible joint influence of the law and judicial preferences, Humphries and Songer (1999) omit mixed decisions from analysis. In establishing values for their dependent variable, agency success, they simply state, "Mixed decisions, where the agency was supported in part and reversed in part, were excluded from analysis" (Humphries and Songer 1999, p. 214). They give no reasons to support their decision to exclude these observations, nor do they give an explanation for how this exclusion may bias the results of their study.

Alternatively, in his examination of the effects of law on court decisions, Cross (2007) groups mixed-decision cases with other cases where the courts affirmed the agency action. He states, "Although the database codes decisions for many judicial outcomes, I have reduced the codes to a simple binary value reflecting whether the lower court decision was at least in part affirmed or reversed" (Cross 2007, p. 48). Counting mixed decisions the same as decisions that fully affirm lower courts and agencies biases the results by overstating affirmance rates, but Cross does not address this bias.

I omit these mixed-decision cases based on the following analysis. I examined a sample of the mixed-decision cases to determine whether or not to include them and to assess how their inclusion or exclusion may bias the results of this study. At the outset, I reject coupling these observations with the group of affirmed cases. While the number of mixed decision cases is small, grouping them will overstate the level of support agencies

---

[12] These scholars include principal investigators for the U.S. Courts of Appeals Database. Donald Songer served as the principal investigator responsible for overseeing the original phases of the database coding. Susan B. Haire served as one of the principal investigators responsible for the latest updates to the dataset.

actually receive from courts. But this is not the only option available for keeping these cases in the dataset.

It might also be an option to have a dependent variable that is ordinal, based on three points—non-support, mixed support, and support. Although ordered regression models allow for analyzing dependent variables in this way, this is not methodologically desirable for two reasons. First, and perhaps most critically, the number of intermediate values (mixed cases) is small (N=37), which will cause an ordered regression model to fail to converge (see Long 1997, p. 125). This number further diminishes as I examine separately legal issues that are not present in every case. For example, as I explain later in this chapter, one of the legal variables I examine is the arbitrary and capricious standard of review. This standard occurs in only eight cases with mixed-decision dispositions. The alternative to working around these small numbers in an ordered regression model is to combine these observations with a neighboring category of observations. Since it is not appropriate to combine mixed-decisions with other observations and since such small numbers prevent ordered regressions from converging, I exclude these cases from analysis.

Alternatively, using an intermediate value in the dependent variable might also be misleading, since it implies incorrectly that a middle value for the dependent variable actually exists. Statistically, this implication is incorrect as in many single-issue cases where a mixed-support option does not exist. Mixed-decision cases contain more than one issue, docket or party that makes the case disposition separable. To construct a dependent variable with an intermediate value that is not an option for every observation makes interpreting results difficult or nonsensical. The following case helps explain.

In *Freeman United Coal Mining Co. v. Benefits Review Board, U.S. Dept. of Labor*, the only issue before the court was whether the Board provided substantial evidence to support its decision to award black lung benefits to a miner's surviving spouse. In this case, the court was asked to make a definitive decision about a single issue, which restricted the court to one of two outcomes—either the Board did or did not provide substantial evidence to support its decision. Here, it does not make sense for the court to affirm in part and reverse in part, because there was only one agency action to consider. While this case is not coded as having mixed dispositions, statistically, an

ordered regression model would assume that one exists. An ordered regression model, which is a maximum-likelihood model, computes an independent variable's impact on the dependent variable's probable change from the first cut point (non-support) to the second cut point (mixed support) and from the second cut point to the third cut point (support). This would not be a problem if there were multiple issues or multiple decisions being reviewed in every case. Mixed-decisions would always be interpretable. However, an ordered regression model would assume that an intermediate value existed for all observations, even when this value does not always make sense (for a fuller discussion of interpreting ordered regression models, see Long 1997, pp. 127-40). In *Freeman*, to suggest there is an intermediate value available to the court with respect to agency support would be the equivalent of the court nonsensically finding that the Benefits Review Board *sort of* provided substantial evidence to support its decision.

In addition to problems interpreting statistics, it is also misleading to construct an intermediate value for the dependent variable, court support, because there is no theoretical reason for doing so. I am unaware of a study that suggests a theoretical explanation for why courts of appeals would render a mixed decision. While this may be an interesting inquiry for future studies, extant research typically does not include mixed-decisions in analysis, much less provide theoretical explanations for their existence.

Neither does my analysis of other case attributes for mixed-decision cases readily reveal a plausible pattern suggesting a theoretical reason for why a court would render a mixed decision. For mixed-decision cases, I examined patterns by circuit, judge ideology, cross appeals, and parties (particular agencies). None revealed patterns in mixed-decision cases that were substantially different from the remaining cases. Although I did not conduct difference of means tests or other statistical tests for all variables, I examined two variables where intuitively one might expect to see differences in mixed-decision cases—dissents and multi-dockets.

One might expect there to be a relationship between mixed-decision cases and cases with a dissent. If a case contains multiple issues for which the majority of judges do not agree fully with the agency, then the case might also invite disagreement from one particular judge. The percentage of cases with a dissent is higher among mixed-decision cases (18.9%) compared to other cases (9.8%). When all cases are considered together,

the percentage of cases with a dissent is 10.5% (see Table 4.4.6). To test whether these differences may matter, I constructed an intermediate variable, **mixed**, indicating whether a case had a mixed-decision outcome (*treat* = 5 or 6). This variable is coded 1 if the final disposition is mixed and 0, otherwise. I also coded a variable, **dissent**, indicating whether a case has at least one dissenting judge (based on the U.S. Courts of Appeals Database's *dissent* variable, which indicates the number of judges who dissented in a case). Where *dissent* is greater than zero, **dissent** is coded as 1 and is coded as 0 otherwise. Table 4.4.6 shows the results of a chi-squared analysis between the mixed and dissent variables. The chi-squared value approaches conventional levels of statistical significance, but is only $p<0.084$. This suggests that the difference between dissent rates among mixed-decision and other cases may not be systematic, and the higher percentages of cases with dissents among mixed-decisions may be confined only to this sample.

Similarly, one might expect there to be more mixed decisions when the courts consider multiple dockets in the same case. A multi-docket case means that the legal issues and facts are sufficiently similar across more than one dispute, so the court considers these disputes dockets together in the same case, although parties filed their complaints with the court in separate dockets. This is not to say, however, that dockets decided in the same case are necessarily decided in the same way. The facts may be sufficiently different to warrant different outcomes for different dockets. Based on the database's *multdoc* variable, which indicates the number of dockets in a case, the percentage of mixed-decision cases with multiple dockets is 37.5%, compared to 9.8% for the remaining cases (see Table 4.4.7). To test whether these differences are significant, I created a **multiple dockets** variable, coded 1 if there was more than one docket in a case and 0, otherwise. I conducted a chi-squared analysis between mixed and multiple dockets as reported in Table 4.4.7. Although the chi-squared value is statistically significant ($p<0.001$), I hesitate to place much emphasis on the relationship between multi-docket cases and mixed-decision cases, since over one-third of the observations in question have no code for the *multdoc* variable. These missing data coincide with years 1982–1988, which are the years used in the present study from phase one of the U.S. Courts of Appeals Database. Apparently, the *multdoc* variable was not coded during the first phase of data collection for the database, but I can find no

documentation to support this assumption. Without more complete data, I can only say that this data indicates there may be a relationship between cases with mixed-decision and cases with multiple dockets.

As the previous paragraphs attempt to show, there is no theoretical reason to include mixed-decision cases as an intermediate value in the dependent variable. With the exception of a possible relationship between mixed-decision cases and multiple-docket cases, my examination of other case attributes, including dissents, does not reveal a justification for doing so.

Finally, another option for keeping mixed-decision cases in the present study might be to recode them. However, it is not methodologically acceptable to recode mixed-decision cases without recoding the remaining cases, since recoding would confound the unit of analysis. Currently, the unit of analysis is case. Recoding mixed-decision cases would mean that the unit of analysis in these cases would be an ill-defined smaller unit than case—generally, issue. Unlike the U.S. Supreme Court Database, the U.S. Courts of Appeals Database does not contain code all case attributes based on the separate issues in each case. In order to code accurately the dependent variable, court support, in mixed decision cases, it is necessary to split the observations into multiple observations based on different issues and their corresponding court decisions. A case example helps illustrate.

In *Illinois Central Gulf Railroad Co. v. Interstate Commerce Commission (ICC)*, (1983) the three-judge panel unanimously set aside and remanded one order of the ICC and affirmed three others. In this case, the railroad company applied for permission to abandon a portion of its railroad, which the ICC approved contingent on no offers to buy the land materializing during the required waiting period. During the waiting period, a grain company made an offer to purchase the railroad land. Since the two companies were unable to settle terms of the sale, the ICC, acting within its authority, intervened to help facilitate the real-estate transaction. The railroad challenged four ICC actions and orders related to this transaction. Based on the language in the opinion, the court found: 1) ICC did not act arbitrarily and capriciously when it established that the grain company was financially sound and its offer to buy the land was a bona fide offer, 2) ICC did not abuse its discretion by extending the closing date at the grain company's request, 3) ICC

did not violate the railroad's due process rights by treating its untimely-filed motion to dismiss as an appeal, and 4) ICC was arbitrary and capricious in setting the purchase price, since it based its decision on an erroneous reading of the record.

In order to code the decisions in this case, I would need to create four separate observations. The first observation would code the dependent variable as 1, indicating court support for the agency, but I would also need to code the reasons the court gave for support (e.g., ICC action was not arbitrary and capricious). The second observation would code the dependent variable as 1, but provide a different reason for the decision (i.e., ICC did not abuse its discretion). The third and fourth observations would follow similar coding patterns, except I would code the court support variable as 0 for the fourth observation, indicating the court's non-supportive position by remanding to the ICC the issue of the purchase price. Recoding would require a greater level of specificity, notwithstanding scholarly disagreements over appropriate issue coding (see Shapiro 2009, 2010 (forthcoming)).

Recoding mixed-decision cases with this level of specificity means that the unit of analysis for these cases is *issue*, while the unit of analysis for the remaining cases is *case*. Not only does this confound the unit of analysis, but this recoding scheme places undue weight on other variables in mixed-decision cases. For example, had the court decided the fourth issue in favor of the ICC in *Illinois Central Gulf Railroad*, all four issues would have been affirmed. Accordingly, the arbitrary-and-capricious legal issue would be coded only once (as opposed to twice), the court's support for agencies would be coded only once (as opposed to three times), and the judges' ideologies would be counted only once (as opposed to four times). Therefore, it is not an option to recode only the mixed-decision cases, since doing so would bias the data. To be clear, I can alleviate the measurement problems by recoding all of the cases based on issue, but this is not feasible since it would require not only recoding multiple variables for all issues in all cases, but also restructuring the architecture of the database to change the unit of analysis from case to issue.[13]

---

[13] For an example of database architecture that codes cases based a number of units of analysis including issue, case, legal provision, and disposition, see the U.S. Supreme Court Database and related documentation at http://scdb.wustl.edu/.

Keeping the mixed-decision cases in the analysis would require either 1) creating a theoretically unjustified intermediate value in the court support variable, the small number of which creates problems for ordered regression models or 2) compromising the integrity of the unit of analysis. Therefore, the best decision is to omit these 37 observations from analysis. As previously discussed, it is not apparent that excluding these cases biases the data, other than a likely concomitant exclusion of a disproportionate number of multi-docket cases, which is not central to the questions of the present study. This exclusion does not create any other apparent biases in the data, as discussed above.

The second category of cases I omit from analysis are cases that concern stays, petitions or motions, which generally occur before the agency's actions is final, such as interlocutory decisions. As shown in Table 4.4, these cases are coded as *treat* = 0, and make up about 15% of courts' dispositions when agency decisions are under review. While the courts' handling of non-final agency decisions does raise questions of interest to the legal community, such as when an agency's action constitutes finality (see, e.g., Curtiss 2007; Fowler 2004), many of these questions are beyond the scope of the present study. Therefore, I exclude them from analysis. Total, I exclude 81 observations where *treat* equals zero. This omission does not bias the results of this study, but it does place a caveat on its findings. Findings are based on court reviews of final agency actions.

Summary of Coding for Dependent Variable

In sum, the dependent variable, **court support**, asks whether the circuit court supported the agency in its final decision. Values are 0 for no and 1 for yes, based on the values for *treat*. Supportive decisions are those where the court affirms the agency (*treat* = 1 or 11) or when the court denies an appellant's petition to review the agency's action, decision, or order (*treat* = 8). These actions leave the agency action, decision, or order intact. Non-supportive decisions are those where the court reverses, vacates or remands the agency's decision (*treat* = 2, 3, 4, or 7), or denies the agency's petition to have its order reviewed (enforced) (*treat* = 8). Table 4.5 summarizes this coding.

Agencies enjoy support from the circuit courts in about 65% of cases, as shown in Table 4.6. In the D.C. Circuit, agency support is 66%, and in the remaining circuits, it is about 64%.

Notice, from Table 4.6, that administrative agencies enjoy a relatively high level of support from the circuit courts during the period 1982–2002. These figures are somewhat higher than the agency success rates of 58% reported by Humphries and Songer for the period 1969–1988 using the same database (1999, p. 215). These differences may be the result of the impact of a fuller manifestation of Supreme Court's 1984 *Chevron* decision requiring circuit courts to show agencies more deference. Or, these differences may reflect changes in the ideological composition of the courts, leadership in administrative agencies, or a number of other reasons heretofore indiscernible.

Up to this point, I have developed the dependent variable, **court support**, which indicates whether courts render decisions supportive to agencies. Later, I modify this variable to construct a judge-level variable that captures whether individual judges vote to support agencies in final case decisions. For now, however, I focus on court-level variables for ease of discussing research design and methods. The next section describes explanatory variables.

INDEPENDENT VARIABLES

This study is interested in the levels of support federal administrative agencies receive in the U.S. Courts of Appeals. Past scholarship has been concerned with whether judges, when reviewing agency decisions, make decisions based on personal preferences (attitudinal model) or whether judges defer to agencies based on law (legal model). Political science scholars have conducted considerable research on the attitudinal model, particularly but not exclusively, in the U.S. Supreme Court. Most often, these scholars use judge ideology as the best indicator of judge attitudes. Few political science scholars have been able to develop quantifiable measures for the legal model (for notable exceptions in the U.S. Courts of Appeals, see Cross 2007; Humphries and Songer 1999). Frank Cross (2007) suggests there are pragmatic issues that have prevented scholars from conceptualizing and objectively measuring legal and attitudinal elements. To distinguish and measure the competing attitudinal and legal theories of judicial behavior, I develop several categories of independent variables that inform judicial decisionmaking, and concomitantly, that influence whether courts support agencies in final case decisions. The three categories of independent variables are legal, attitudinal, and other controls. Legal

variables are further subdivided into two categories—standards of review and procedural. Appendix B summarizes dependent and independent variables used in this study and how they are coded.

<p style="text-align:center">LEGAL VARIABLES</p>

When the U.S. Courts of Appeals review agency decisions, judges consider a number of legal doctrines, many of which address whether courts should defer to agencies under certain circumstances. Several statutes explicitly call on the courts to extend deference to agencies. Likewise, several Supreme Court precedents direct lower federal courts to show deference to agencies under certain circumstances. As previously discussed, deference has many dimensions defined in specific legal terms.

As principal investigator for the original U.S. Courts of Appeals Database, Donald Songer coded various administrative law issues from the opinions of the cases in his dataset. The issues coded in the U.S. Courts of Appeals Database are coded from the West headnotes. While there are no studies that address the validity and reliability of the West headnote system, attorneys and legal scholars rely heavily on this system, and generally accept that the issues identified in the headnote system are reasonably accurate, complete and not based on *obiter dicta*[14] (for a discussion of systematic coding of judicial opinions in legal databases, see Hall and Wright 2008). From the administrative law variables coded in the Courts of Appeals Database, several are appropriate measures of deference and other legal principles pertinent to the present study. The following sections discuss these variables and their use as indicators of law and legal doctrine that may constrain or inform judicial decisionmaking.

The primary goal in specifying legal variables is to acknowledge the normative legal concepts established by Congress and the Supreme Court that lower federal courts should use when reviewing agency decisions. However, I am also mindful that critics of legal-reasoning-as-rationale for judicial behavior suggest that legal reasoning may be

---

[14] *Obiter dictum* is "a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Black's Law Dictionary, 8th ed. 2004 (Thompson-West).

nothing more than window dressing for judges' attitudes (Segal and Spaeth 2002). These critics argue that final case decisions occur before judges answer the legal questions that they include in their opinions. While this phenomenon may be true, I intend to construct tests to definitively show that it is true or not true. For now, however, I construct legal variables based on legal scholars' normative views of legal concepts.

Standards of Review

Remember from previous discussions that a standard of review is the degree to which a reviewing court extends deference to the decision of a lower court or agency. That is, standards of review are criteria that a court exercising appellate jurisdiction uses to measure the constitutionality or legality of an order, finding, or judgment entered by a lower court.

Courts use many different standards of review when reviewing agency actions. While there is a rather developed body of administrative case law discussing and debating the definition of and appropriate use of standards of review for agency actions, the Administrative Procedure Act is the statutory source for many standards. Section 706 of the APA addresses scope of review, and states that courts are permitted to find agency actions unlawful which are, among other things: 1) arbitrary and capricious, 2) an abuse of discretion, 3) unsupported by substantial evidence, or 4) unwarranted by the facts. In reliance on the APA, courts at times have struggled to choose an appropriate standard of review for agency actions. The application of a particular standard, and its accompanying level of deference to agency action, depends on whether the question before the court is a question of fact, question of law, or a mixed question of fact and law (Fox 2008). Specific statutes, including the agency's enabling legislation, might also delineate a specific scope of review, as might the type of agency action being reviewed. For example, the substantial-evidence standard generally applies only to agency adjudications.

These standards vary in degree of agency deference. Some scholars suggest that the arbitrary-and-capricious standard compels the highest level of deference to agencies, and *de novo* review affords the least degree of deference (Cross 2007). Several other standards with varying degrees of deference exist between these two, including abuse of discretion, substantial evidence, and clearly erroneous.

How a court answers standard-of-review questions may constrain judges'
behavior in the final outcome of the case, especially if the standard of review requires
judges to defer to agency decisions. Standards of review that require less deference may
leave more room for judges to support agencies based on other non-legal determinants,
such as judges' policy preferences. The less legal variables constrain judges, in theory,
the more latitude judges should have to interpret agency actions, which could open the
door wider for judges to substitute their policy preferences in place of agency
preferences. In general, courts may have less room to substitute their preferences in cases
involving factual questions than they do in cases involving mixed questions of law and
fact (Fox 2008).

Before discussing each of the standards of review specifically, I note a couple of
issues and coding conventions in the U.S. Courts of Appeals Database. Several legal
standards are included in the database, including arbitrary and capricious, substantial
evidence, clearly erroneous, abuse of discretion, *de novo*, and *Chevron* deference.[15]

These legal standards are coded in terms of court support for agencies, which is
not the same as the previously discussed dependent variable, **court support**. Instead,
support in the Courts of Appeals Database indicates whether courts supported agencies in
answering specific legal questions, but does not indicate court support for the agency in
final case decisions. In the database, standard-of-review questions are coded 1 if the court
answered the question negatively (i.e., did not support the agency), 2 if the court
answered the question affirmatively, and 9 if the court gave a mixed answer. I recoded
these values as 0 if the court answered the question negatively and 1 for questions
answered affirmatively.

The majority of these cases appear to be ones where the application of a particular
standard of review is separable, either because there are multiple counts in a case,
multiple parties or multiple dockets. In *National Labor Relations Board (NLRB) v.
Instrument Corp. of America*, the Fourth Circuit review panel determined that NLRB
provided substantial evidence to support its conclusion that Instrument Corp wrongfully

---

[15] Some of these standards appear under different names in the Courts of Appeals database, which I note
later in this research. I renamed the standards to comport with common legal references and for ease of
discussion in this research. Specifically, the abuse of discretion standards is referred to in the database as
"deference" and the *Chevron* standard is referred to as the "general standard."

terminated four of five employees who engaged in collective bargaining activities. As to the fifth employee, NLRB did not provide substantial evidence to support its position, and the court held, instead, that the employee had been rightfully terminated for poor performance. The database codes *Instrument Corp.* with a mixed response with respect to the courts answer to the substantial evidence question. Accordingly, the court granted in part and denied in part NLRB's petition to enforce its order.

Similarly, the database codes the court's answer to the substantial evidence question as mixed in *L.R. Willson & Sons, Inc. v. Donovan*.[16] In this case, a D.C. Circuit panel reviewed the Department of Labor's ruling that L.R. Willson & Sons violated the Occupational Safety and Health Act (29 U.S.C. §§ 651–678) when it failed to provide netting and temporary flooring during the construction of a building. The court found that the Department of Labor provided substantial evidence to support a violation finding with respect to temporary flooring, but not for the netting. The database codes *L.R. Willson & Sons* as a mixed decision with respect to the substantial evidence question. The database also codes this case as mixed final outcome (affirm in part and reverse in part). Hence, most of the cases when standard-of-review questions have mixed answers have already been omitted from analysis because they correspond with cases that have mixed-decision dispositions.

The remaining cases that are not already excluded are also omitted for reasons similar to the reasons for omitting other mixed-decision cases. Primarily, however, retaining these cases would require recoding them, and, subsequently, all other cases, according to issue in order not to confound the unit of analysis. Since this is not feasible, I omit the remaining cases from analysis where courts provide mixed answers to standard-of-review questions.

The number of mixed-answer cases omitted for each standard of review is relatively small for each standard of review and is summarized in Table 4.7. Omitting these twelve observations does not bias the data, since these cases are of the same general nature as the other cases as noted in *Instrument Corp.* and *L.R. Willson & Sons*. A final case demonstrates this similarity. In *Natural Resources Defense Council v. U.S. Environmental Protection Agency* (1990), a D.C. Circuit review panel found that the

---

[16] Raymond L. Donovan is the Secretary of the U.S. Department of Labor.

Environmental Protection Agency (EPA) was not arbitrary and capricious in its regulations governing injections of hazardous wastes into wells located thousands of feet beneath the surface of the earth. The court denied the petitions claiming that the EPA's regulations were too stringent. The exception is the court's finding that the EPA was arbitrary and capricious in promulgating rules governing hazardous waste dispose in geologic repositories (salt domes, salt beds, underground mines, and caves), for which the court remanded the case to the EPA.

In the following sections, I define and discuss the most common standards of review used in the federal courts when reviewing agency actions. I also conduct preliminary quantitative analyses of the frequency of each standard in the data sample.

Arbitrary-and-Capricious Standard of Review

Congress addresses the arbitrary-and-capricious standard directly in the Administrative Procedure Act, which states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

For example, in *Natural Resources Defense Council v. U.S. Environmental Protection Agency* (1992),[17] the Ninth Circuit denied the petitioner's request to have all municipalities on the same permitting schedule, a rule which was promulgated by the Environmental Protection Agency (EPA).

What constitutes arbitrary and capricious behavior is not clear-cut. Depending on whether a court takes a hard-look approach to reviewing agency actions, arbitrary-and-capricious behavior could mean an agency 1) did not consider all relevant factors Congress deemed relevant, 2) offered an explanation that was counter to evidence or was implausible, or 3) failed to offer an explanation at all (Wald 1996). In *Natural Resources Defense Council v. EPA* (1992), it is not apparent that the Ninth Circuit took a hard-look

---

[17] This case should not be confused with the case discussed in the previous section by the same name. The earlier case was decided in 1990 by the D.C. Circuit. When referring to these cases, I distinguish them by including the year they were decided.

approach to reviewing the EPA actions. Rather, the court found that the EPA's failure to include deadlines for permit approval was arbitrary and capricious. *Natural Resources Defense Council v. EPA* (1992) exemplifies instances when circuit court judges find fault in agency procedures under the arbitrary-and-capricious standard of review, but still uphold the agency's actions.

Under the legal model of judicial behavior, one would expect judges to show a relatively high level of deference to agencies using this standard. The arbitrary-and-capricious standard requires courts to defer to agency expertise and opinions so long as their decisions are not willfully or unreasonably in disregard of facts or law. We might also expect the converse: where agency actions are arbitrary and capricious, we would expect courts not to render agency-supportive decisions. However, as *Natural Resources Defense Council v. EPA* (1992) demonstrates, finding that an agency acted arbitrarily or capriciously is not sufficient to predict whether judges will support the agency overall.

The Courts of Appeals Database includes an **arbitrary-and-capricious** variable, which asks, "Did the court's use or interpretation of the arbitrary-and-capricious standard support the government?" I recoded this variable so that affirmative answers to this question are coded 1, and negative answers are coded 0. During the period under study, the arbitrary-and-capricious standard is raised in about 23% of cases in the D.C. circuit and about 10% of cases in the remaining circuits collectively.

If Chief Judge Wald of the D.C. Circuit is correct in suggesting that the courts of appeals at times have shown an almost obsequious deference to agencies (Wald 1996), then the mere presence of the arbitrary-and-capricious standard in a case may suffice to predict a supportive agency decision in the final case decision. A simple chi-squared analysis can test whether this is true.

Tables 4.8 and 4.9 show the results of a chi-squared analysis of court support for agencies if the arbitrary-and-capricious standard is raised in a case. These tables show there is no statistical difference in how courts treat agencies in cases where the arbitrary-and-capricious standard question is raised and in cases where this standard of review is not raised. This is true for the D.C. Circuit alone and the remaining circuits collectively. Neither of the chi-squared values is statistically significant. Therefore, it does not appear that the arbitrary-and-capricious standard is a proxy for obsequious court deference.

Normatively and according to the legal model of judicial behavior, how courts answer the arbitrary-and-capricious question should be an indicator of how the court will decide a case overall. Tables 4.10 and 4.11 show the chi-squared results of how courts answered the arbitrary-and-capricious question compared to support for the agency in final case decisions.

Here, we find preliminary support for the legal model. If courts find agencies did not act arbitrarily or capriciously, they support agencies overall in the final case decision 88.2% of the time in the eleven regional circuits and 100.0% of the time in the D.C. circuit. If courts find agencies acted arbitrarily and capriciously, the courts support agencies in only 28.6% of cases in the eleven regional circuits and 6.3% of cases in the D.C. circuit. Unsurprisingly, the court-support variable and the arbitrary-and-capricious variable are highly and positively correlated. For the eleven regional circuits, r = 0.60 (p<0.002), and for the D.C. Circuit, r = 0.95 (p<0.001).

Abuse-of-Discretion Standard of Review

The abuse-of-discretion standard is not a "standard of review" in a literal sense, but, in application, it serves the same function. Abuse of discretion is specifically mentioned in the Administrative Procedure Act as reason for courts to set aside agency actions. It is not always clear when a court uses the abuse-of-discretion standard instead of the arbitrary-and-capricious standard, but this standard suggests that courts should defer to agency decisions as long as their exercise of discretion is not clearly an abuse. An example of abuse of discretion could be when an agency acts *ultra vires*, outside its statutory limitations or outside the scope of law. Although the nuances of the abuse-of-discretion standard are not easily quantified, this question occurs regularly in court opinions. Abuse-of-discretion questions are raised in about 17% of cases in the eleven regional circuits. In the D.C. Circuit, this number is about 21%.

In *Gonzalez v. Reno* (2000), the Eleventh Circuit found that Immigration and Naturalization Service (INS) had not abused its discretion. Appellants claimed INS abused its discretion when it denied asylum based on the application of standards developed by the agency but not specified by Congress. The Eleventh Circuit ruled that INS had acted within the scope of its mandate and had not abused its discretion, and ultimately, the review panel supported the agency's decision.

Tables 4.12 and 4.13 compare levels of support an agency receives depending on whether the abuse-of-discretion standard is present in a case opinion using a chi-squared analysis. The presence of this standard in a case is not significantly associated with court support for agencies in the court's final decision, since the chi-squared values are not statistically significant ($p < 0.110$ for circuits 1-11 and $p < 0.272$ for the D.C. Circuit). This suggests that under this standard, court deference to agencies is not a rubber-stamp action.

In the Courts of Appeals database, the **abuse-of-discretion**[18] variable asks, "Did the court conclude that it should defer to agency discretion?" I recoded this variable so that a supportive answer to this question is coded as 1; otherwise, 0. Tables 4.14 and 4.15 show the chi-squared results of how courts answered the abuse-of-discretion test compared to agency support in final case decisions.

If courts find agencies did not abuse discretion, they support agencies in final case decisions 93.8% of the time in Circuits 1-11 and 100% of the time in the D.C. Circuit. If courts find agencies did abuse discretion, they support agencies in only 18.2% of cases in the eleven circuits and 16.7% of cases in the D.C. Circuit. As with the arbitrary-and-capricious variable, the abuse-of-discretion variable is highly, positively correlated with court support. For Circuits 1-11, $r = 0.76$ ($p < 0.001$), and for the D.C. Circuit, $r = 0.88$ ($p < 0.001$).

Substantial-Evidence Standard of Review

The substantial-evidence standard of review predates the Administrative Procedure Act (Wald 1996), but is also incorporated into the APA. The APA requires federal courts to defer to agency decisions so long as those decisions are supported by "substantial evidence."

Judges and scholars disagree on whether there is any meaningful difference between substantial-evidence and the arbitrary-and-capricious tests (Fox 2008). Antonin Scalia, when he was a judge in the D.C. Circuit, suggested in *Association of Data Processing Service Organizations, Inc. v. Federal Reserve Board* (1984):

---

[18] The U.S. Courts of Appeals Database names this variable "deference." For the present study, I rename this variable "abuse of discretion" for clarity.

[Substantial evidence] is only a specific application of [arbitrary and capricious] separately recited in the APA not to establish a more rigorous standard of factual support but to emphasize that in the case of formal proceedings, the factual support must be found in the closed hearing record as opposed to elsewhere (p. 683).

While judges do not apply this language consistently across the circuits, most agree with Scalia's basic message that these two tests are concerned with the *reasonableness* of agency actions (Fox 2008). Where agencies reasonably provide substantial evidence to support their decisions, courts should defer to those decisions; otherwise, courts should overturn agency actions. For example, in *Wilson & Sons Heating and Plumbing, Inc. v. National Labor Relations Board* (1992), the Board (NLRB) held that Wilson violated statute in refusing to comply with a union request to audit the company's books. The D.C. Circuit concluded there was "virtually no support for a finding essential to the Board's conclusion," and reversed the board for "want of substantial evidence."

For years 1982-2002, circuit courts addressed the substantial-evidence standard in about 36% and 18% of agency review cases in the eleven regional circuits and D.C. Circuit, respectively. Tables 4.16 and 4.17 show the results of a chi-squared analysis of court support for agencies if the substantial-evidence standard is used. In the eleven regional circuits, there is virtually no difference between levels of court support when the substantial-evidence standard is raised in a case and when this standard is not raised. Agencies enjoy support about 64% of the time irrespective of litigants invoking the substantial-evidence doctrine as a standard of review. In the D.C. circuit, courts support agencies in 12% more instances when the substantial-evidence standard is raised as a question in a case. The chi-squared values in these models are not statistically significant.

Normatively, the substantial-evidence test as a standard of review extends considerable deference to agencies. We would expect when courts answer substantial-evidence questions in favor of the agency, courts would also extend considerable deference to agencies in final case decisions.

In the Courts of Appeals Database, the **substantial-evidence** variable asks, "Did the court's interpretation of the substantial evidence rule support the government?" This variable is coded as 1 when courts answer this question favorably toward agencies and 0

otherwise. Tables 4.18 and 4.19 show the chi-squared results of how courts answered the substantial-evidence test compared to whether courts supported agencies in final case decisions.

Where review panels find agencies did not provide substantial evidence to support their positions, they support agencies 9.1% of the time in the eleven regional circuits and 11.1% of the time in the D.C. Circuit. Similarly, if courts find agencies did provide substantial evidence, they support agencies in final case decisions 94.7% of the time in the eleven regional circuits and 100% of the time in the D.C. Circuit. As we have seen with the other standard-of-review variables, the substantial-evidence variable is highly and positively correlated with the court-support variable. For the eleven regional circuits, the correlation is 0.86 (p<0.001). In the D.C. Circuit, r = 0.9 (p<0.001).

I make a special note here that testing this variable in a regression model may not be possible in the D.C. Circuit because of the lack of observable variation. Little or no variation also exists with other legal variables. Hence, as I discuss later in this chapter in the section, *Variables for the D.C. Circuit*, it is necessary to combine the observations for the D.C. Circuit with the remaining circuits and to include a dummy variable for the D.C. Circuit in each model. In some instances, it is not possible to test the effects of legal variables at all, such as the clearly erroneous standard of review.

Clearly-Erroneous Standard of Review

The clearly-erroneous standard of review finds its roots in civil litigation and civil rules of procedure. In civil litigation it generally applies to court reviews of lower tribunals' findings of fact. This standard of review is not often used in administrative law, but where it is used, it suggests that courts should defer to agency decisions unless there has been a clear error.

For example, in *Kentucky Utilities Company v. Federal Energy Regulatory Commission* (1985), Kentucky Utilities claimed that "to allow accounting rules to govern ratemaking is a classic example of unreasoned decision making." Here, Kentucky Utilities claimed that the Federal Energy Regulatory Commission (FERC) made a clear legal error in regulating energy rates, arguing that allowing accounting principles to govern whether ratepayers should share the cost of risk is unreasoned decisionmaking, since accounting principles, rather than policy, governed the agency's actions. The D.C.

Circuit review panel found that FERC's accounting principles were rooted in policy, and denied Kentucky Utilities' petition. The court concluded, "In light of well-established principles of utility rate regulation, we discern no error in the Commission's decision. Application of the settled accounting principle that accrual of AFUDC must cease once the new plant is put into service furthers the substantive policy with respect to risk allocation which informs the principles governing the establishment of new wholesale rates."

Use of the clearly-erroneous standard occurs less frequently than the other standards previously discussed. In the eleven regional circuits, only 3.2% of cases raised the clearly-erroneous standard, compared to 14.4% in the D.C. Circuit. Like other standards I have examined, raising the clearly-erroneous question in a case is not sufficient to increase the likelihood that courts will support an agency in final case decisions. Tables 4.20 and 4.21 report the results of chi-squared analyses for the presence of the clearly-erroneous standard and court support for an agency. In neither the D.C. Circuit nor the remaining circuits are the chi-squared values statistically significant. This suggests court deference is not automatically compelled simply because the clearly-erroneous standard of review is used in a case.

In the Courts of Appeals Database, the **clearly-erroneous** variable asks, "Did the court's use of the clearly-erroneous standard support the government?" This variable is coded 1 where courts answer this question favorably toward agencies and 0 otherwise. As we have seen with the other standard-of-review variables and as *Kentucky Utilities* illustrates, how courts answer the clearly-erroneous question should be an indicator of how the court will decide a case overall. Tables 4.22 and 4.23 report the results of chi-squared analyses for the clearly-erroneous and court-support variables. These data show the relationship between how courts answer the clearly-erroneous test and how courts decide final case outcomes.

Although the number of cases in the eleven regional circuits is small, the results point consistently in the same direction as the other standards of review. If courts find agencies did not act clearly erroneously, they supported agencies in 100% of final case decisions in the eleven regional circuits and in 89.5% of cases in the D.C. Circuit. If

courts found agencies acted clearly erroneously, the courts supported agencies in only 50.0% of cases in the eleven circuits and 0% of cases in the D.C. Circuit.

The chi-squared values for the relationship between court support and the clearly-erroneous test are statistically significant at $p < 0.064$ in the eleven regional circuits and $p < 0.001$ in the D.C. Circuit. The correlation between the court-support variable and the clearly-erroneous variable is 0.86 ($p < 0.001$) in the D.C. Circuit and 0.65 ($p < 0.078$) in the remaining circuits.

Although discussing this variable here clarifies instances where the U.S. Courts of Appeals may extend deference to agencies, I exclude the clearly-erroneous standard from further investigation. Given the very small number of observations for the clearly-erroneous standards in circuits 1-11 (N=8) and the small number (N=28) and lack of variation in the D.C. Circuit, examining the clearly-erroneous variable in logistic regression models is not possible.

De Novo Standard of Review

De novo review is the most restrictive standard of review in terms of deference the circuit courts extend to agencies. No deference is given to the factual findings of an agency. Instead, courts review agency findings of fact anew.

De novo review occurs in about 2% of cases in all circuits combined. In the D.C. Circuit, the *de novo* standard was addressed only once, which was in 1990. *Alvarez-Flores v. Immigration and Naturalization Service* (1990) illustrates the infrequent use of the *de novo* standard of review in the U.S. Courts of Appeals. Alvarez-Flores petitioned the court to review his case *de novo* after the Board of Immigration Appeals (BIA) denied his asylum request. The opinion of the court states:

> Asylum requires a showing that the applicant has a well-founded fear of persecution. Although we have yet to define the "final contours" of the "well-founded fear" standard, the BIA requires that an applicant show that a "reasonable person in his circumstances would fear persecution." We review findings of fact by the BIA under a deferential "substantial evidence" standard. Moreover, given the BIA's Congressional mandate and the legal requirement that we show its decisions of this sort considerable respect, we will not reverse simply because we disagree with the BIA's evaluation of the facts. Petitioner argues that the BIA has misstated and misapplied the law. Yet, even accepting petitioner's suggestion that questions of law, such as whether the BIA applied the

appropriate legal standard, are reviewed *de novo*, we are cautioned that
when Congress, implicitly or explicitly, leaves gaps in a statutory
program, the courts must respect the interpretation of the agency to which
Congress has delegated the responsibility for administering the …
program. Although questions of statutory interpretation are reviewed *de
novo*, the court is obliged to defer to the BIA's interpretation of the
applicable statute if that interpretation is reasonable. Deference to the
agency's interpretation is called for particularly when Congress
incorporates into the statute terms of some ambiguity like 'well-founded
fear' which can only be given concrete meaning through a process of case-
by-case adjudication. Thus, whether or not review is termed *de novo*, we
are required to respect the Board's *legal* decision as to whether the facts,
as found, fall within the scope of the relevant statutory authority"
(emphases in original).

This case illustrates the court's deferential position toward the Board of
Immigration Appeals. It also illustrates reasons for the infrequency of *de novo* review as
an appropriate standard in the U.S. Courts of Appeals.

Since there is only one case in the D.C. Circuit, I include it with the other circuits
in the chi-squared analysis examining the relationship between the presence of *de novo*
review and court support for agencies in final case decisions. Table 4.24 reports these
results. Notice that there is no statistically significant difference ($p<0.409$) in court
support for agencies whether or not the *de novo* standard is raised in a case.

In the Courts of Appeals Database, the ***de novo*** variable asks, "Did the court's use
of the standard of review, '*de novo* on facts,' support the government?" As with other
standards of review, this variable is coded 1 if courts answer this question in support of
the agency and 0 otherwise.

Table 4.25 shows the results of how courts answered the *de novo* question with
respect to agency support. Although the number of cases is small, the chi-squared results
are statistically significant at $p<0.003$. If courts answer *de novo* questions in support of
the agency, courts support the agency 100% of the time in the final case dispositions.
Similarly, in the two cases where the court did not answer the *de novo* test in favor of the
agency, the courts did not support the agency in the final case decision. The correlation
between the court-support variable and the *de novo* variable is perfect—$r = 1.00$
($p<0.001$). Since the *de novo* standard of review is raised so infrequently in the courts of
appeals, further analysis of the *de novo* standard in this study is not beneficial, especially

83

since the *de novo* and court-support variables are perfectly correlated, which is problematic for regression analysis.

<center>*Chevron Review and Institutional Deference*</center>

The last standard of review I examine, *Chevron* deference, is not a standard of review *per se*. However, this Supreme Court precedent requires courts to defer to other government institutions and not to substitute their policy preferences when reviewing agency action. Recall that the *Chevron* decision is a two-step process where courts first look to the plain language of the statute an agency implements to determine whether agency action adheres to Congressional intent. Second, where statutes are ambiguous, courts should defer to agencies' interpretations of those statutes so long as the interpretations are reasonable (Crawford 1994).

Institutional deference refers to the extent courts defer to the preferences of other institutions, such as Congress and administrative agencies. The *Chevron* doctrine is a good example of institutional deference, since the doctrine prescribes courts to defer, first, to Congress, and, second, to agencies.

The Courts of Appeals Database does not specifically code cases for *Chevron* deference. However, one of the database's variables does code cases concerned with whether agencies interpreted statutes correctly. This variable, *genstand*, codes for the "rational basis test, plain meaning, reasonable construction of the statute, Congressional intent, etc." While not stated as such in the codebook, this variable is akin to the *Chevron* doctrine, and I, therefore, use it as a rough proxy for *Chevron* deference as the following case examples help illustrate.

In many instances it is clear from the case opinions that coding for this variable is based on a *Chevron* analysis. In *Molina v. Immigration and Naturalization Service* (1992), for example, the First Circuit reviewed the interpretation by Immigration and Naturalization Service (INS) of the word "conviction," an ambiguous term that Congress did not explicitly define in the relevant statute. Molina unsuccessfully argues that INS lacks the legal power to provide an interpretation of the word. The court disagrees, relying on *Chevron* deference logic, which presumes that Congress delegated administrative agencies the authority to interpret vague statutes, to which courts should extend deference. The opinion states:

<center>84</center>

The application of the immigration term "conviction," at least in the context of varying state "expungement" laws and practices, raises issues that involve administration of the statute, that demand administrative expertise … That being so, one would expect courts to hold that Congress has delegated a degree of legal power to the INS, the agency charged with enforcing the statutory scheme, to provide a reasonable interpretation of the word "conviction." *See generally Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984) (citation included in original).

As *Molina* shows, the database's *genstand* variable includes issues directly related to *Chevron* deference. This variable becomes murky as a proxy for *Chevron* for two reasons. First, scholars and judges do not always agree when *Chevron* deference should apply. Second, this variable contains instances of courts reviewing agencies' interpretations that fall into other categories of deference that are stronger and weaker than *Chevron* deference. Further, these two reasons are sometimes intertwined.

There is disagreement among scholars, judges and justices on the exact parameters to which *Chevron* deference applies (see Eskridge and Baer 2008). For example, Eskridge and Baer find that the Supreme Court is not consistent in the level of deference extended to agencies when the Court reviews agency interpretations of its own regulations (2008, p. 1103-05). When an agency interprets its own rules, the Supreme Court has invoked different authorities to support its reasoning to either defer (or not to defer) to agencies. These authorities are its own precedents, including *Seminole Rock* (strong deference if an agency interprets its own rules), *Chevron* (deference if agency interpretations are reasonable), and *Skidmore* (weak deference based on agency's persuasiveness, which is rooted in agency expertise and experience) (Eskridge and Baer 2008, p. 1103-05). The Court of Appeals Database's *genstand* variable includes reviews of agency interpretations of its own rules and regulations. In *Exportal Ltda. v. U.S. and Clayton Yeutter, Secretary of Agriculture* (1990), the D.C. Circuit reversed the Department of Agriculture because the agency's decision "is contrary to the agency's own regulations." In this case, a Chilean fruit producer challenged a DOA bond requirement. In relevant part, the D.C. Circuit review panel said:

Department of Agriculture (DOA) regulations provide that the bond requirement "shall be waived" if a foreign complainant can show that its nation does not require a United States complainant to file a bond in a proceeding against a citizen of that nation. Exportal's request for a waiver

of the bond requirement was denied because, according to the Secretary, such waivers remain discretionary even when a foreign complainant makes the requisite showing pursuant to agency regulations. *We find this decision to be flatly inconsistent with the plain terms of DOA's regulations*. Accordingly, we reverse and remand for further proceedings … W*e hold that the petitioner's challenge must be upheld because the Secretary's decision is contrary to the plain language of the agency's own regulations* (emphasis added).

The relevant point for the present study is that application of the *Chevron* doctrine is inconsistent when the Supreme Court reviews agency interpretations of its own rules and regulations. Some scholars and judges view this as falling within the purview of *Chevron* and some do not, as Eskridge and Baer note. There may be similar inconsistent applications of the *Chevron* doctrine in the U.S. Courts of Appeals. Hence, the database's *genstand* variable is a rough proxy for *Chevron* deference, since this variable includes the gamut of interpretation issues, including agency's interpretations of its own regulations that may merit greater or lesser *Chevron* deference, depending upon the judge reviewing the case. Nonetheless, the *genstand* variable is an appropriate variable to include in the present study, since generally, it is an indicator of deference and captures the essence of whether courts support agencies based on interpretation issues. Broadly speaking, issues of plain meaning, Congressional intent, and reasonable construction of statutes are encapsulated in either step one or step two of *Chevron*. As a proxy for *Chevron*, the *genstand* variable measures agency deference more broadly than *Chevron* and captures the essence of court deference to agencies quite similar to *Chevron*.

For ease of discussion, I refer to this variable as **Chevron** (also, **Chevron deference** and **Chevron doctrine**). *Chevron*-type review occurs in over one-third of cases in the D.C. Circuit (38.6%) and in about one-fourth of cases (24.4%) in the remaining circuits.

Since this type of review deals with substantive interpretations of law more than the other standards of review, it is unsurprising that the mere presence of *Chevron*-type review in a case has no statistically significant relationship with whether or not a court supports an agency in final case decisions. That is, it appears that *Chevron* review is not synonymous with obsequious deference, but appears to be a meaningful review of agency

action. See Tables 4.26 and 4.27, which report the results of the chi-squared analysis of court support for agencies when ***Chevron*** is used.

The ***Chevron*-deference** variable is coded 1 if courts answered interpretation questions favorably toward agencies and 0 otherwise. Tables 4.28 and 4.29 show cross-tabulations of how courts answered *Chevron*-deference questions and whether courts supported agencies in final case decisions. As with the other standards of review, if courts answer *Chevron*-deference questions in support of the agency, courts generally support the agency in the final case disposition. Correlations between the court-support variable and the *Chevron*-deference variable are almost perfect in the D.C. Circuit, r = 0.97 (p<0.001). For the remaining circuits, the correlation is positive and very high, r = 0.84 (p<0.001).

Standards of Review—Summary

Standards of review are good indicators of the legal model of judicial behavior, since they prescribe that courts defer to agencies under certain circumstances. Normatively and as hypothesized, how courts answer standard-of-review questions with respect to agencies should predict how courts treat agencies in final case decisions. As the data in the preceding sections indicate, there is a high, positive correlation between courts' answers to standard-of-review questions and how courts treat agencies in final case decisions. This is true for all six of the standards examined—arbitrary and capricious, abuse of discretion, substantial evidence, clearly erroneous, *de novo*, and *Chevron* deference.

Court review of agency decisions appears to be a meaningful review in the sense that courts do not simply rubber stamp agency decisions. Some scholars have noted periods when the circuit courts extended an almost obsequious deference to agencies, such as in the 1940s (Wald 1996). However, for the period 1982-2002, such a high degree of deference does not appear to be the case, since conventional levels of statistical significance are not met for correlations between the mere presence of a particular standard in a case and agency support in final case decisions. In other words, no particular standard of review commands automatic deference to agencies.

Further, the data suggest that when a court evaluates agency actions, these reviews are substantive and non-trivial. For example, in 37% of the cases where the

87

substantial-evidence standard was used in circuits 1-11, courts determined that agencies did not provide substantial evidence to support their decisions (see Table 4.18). Similarly in the D.C. Circuit, 27% of substantial-evidence cases resulted in courts answering this question unfavorably toward agencies (see Table 4.19). Thus, the mere presence of certain legal standards in a case does little to advance our understanding of the levels of support agencies receive in the courts of appeals.

Contrarily, how courts answer standard-of-review questions does provide insights into agency success rates in the courts of appeals. Table 4.30 summarizes the percentages of agency support when standard-of-review tests support the agency. Notice that in the D.C. Circuit, if agencies receive favorable answers in standard-of-review tests, they receive support in a court's final decision in more than nine out of ten cases. In circuits 1-11, these success rates range from 88-100%.

Although the relationship between courts' answers to standard-of-review questions and courts' final case dispositions is highly and positively correlated, a correlation analysis is insufficient to establish a causal direction between the two. One cannot yet conclude, for example, that so long as an agency provides a reasonable interpretation of a statute under the *Chevron* doctrine, that courts will indeed defer to agencies and render a case disposition supportive to the agency. As attitudinalists note, judges decide cases according to their ideological preferences, and then find legal rationales to support these preferences (Segal and Spaeth 2002). If attitudinalists are correct, final case decisions will predict how courts answer standard-of-review questions, and not the other way around. Further inquiry is necessary to resolve causality.

Standards of Review Are Highly and Positively Correlated

Before moving on to specify the remaining legal and attitudinal variables, a few words about the correlations between the standard-of-review variables are necessary. It is not uncommon for a court to address more than one standard in a case. For example, a case might contain more than one legal question, each question requiring a different standard of review. Tables 4.31 and 4.32 show frequencies of different standards of review raised in a case. About 30% of cases in the sample raise no legal questions concerning standards of review. Of the cases where a standard of review is raised, almost half (48.4%) raise only one in the eleven regional circuits, and 40.8% in the D.C. Circuit

raise only one question. In the D.C. Circuit and the remaining circuits, the respective percentages of cases with more than one standard-of-review question raised are 30.6% and 21.3%.

Since a substantial number of cases address more than one standard of review, I examined the correlations between these variables, anticipating their use in a regression model to predict court support. These variables are highly and positively correlated with each other, as shown in Tables 4.33 and 4.34. In several instances, such as substantial evidence and arbitrary and capricious, these variables are perfectly correlated. Perfect correlation ($r = 1.00$) means that when two standards are addressed in a case, courts either answer both questions favorably toward the agency or answer both questions unfavorably toward the agency. These correlations are expected if legal scholars and judges are correct that there are many overlapping edges between these standards (Wald 1996) and that the common thread that runs through them, as then-Judge Scalia suggests, is reasonableness (Fox 2008). What is unfortunate for quantitative analysis is that collinearity among these independent variables prevents their being used in the same statistical models either because the models fail or because it skews the model's results. In either case, this may mean examining these standards of review separately in different models. I revisit this point at the end of this chapter in the section, *Specifying Regression Models*.

Procedural Variable

Past scholarship has examined whether court support of agencies is a function of procedure rather than substance (see, for example, Canon and Giles 1972), but procedural distinctions have been merely generalized. Standards of review, which are concerned with degrees of deference courts should extend to agencies, are arguably procedural in nature. One could reasonably say, for example, that an agency acting *ultra vires* not only abuses its discretion, but also violates established procedures. In the present study, I distinguish standards of review from routine agency procedures and refer to the latter as "procedures" or "procedural" for clarity.

Agency procedures are defined broadly by statute. An agency's primary law of governance is its enabling legislation, which, at a minimum, includes the legislation that created the agency. Many statutes specific to a particular agency address the procedures

administrative agencies must follow in their rulemaking and adjudicatory functions. However, the Administrative Procedure Act governs administrative functions more broadly, and therefore serves quintessentially as the statute governing how agencies conduct their business.

Congress passed the Administrative Procedure Act, in part, as a measure to ensure that agencies followed due process requirements in their adjudicatory functions. However, the act details procedures that all federal government agencies, unless otherwise exempted, must follow in carrying out their day-to-day functions, including promulgating rules, adjudication, hearings, and appeals. When agencies do not adhere to these prescribed procedures, citizens have grounds for appeal. Typically, an agency has several levels of internal review to address citizen concerns. Many agencies use administrative law judges to adjudicate citizens' appeals. If citizens have exhausted administrative remedies, they can then appeal agency decisions in the federal courts. Quite often, appeals are concerned with the agency procedures. These procedural variables are not standards of review, though each one may entail judges' deciding (or not) to extend agencies some sort of deference.

Beyond the Administrative Procedure Act, a number of other statutes govern agency procedures. In an effort to promote accountability in government, Congress passed statutes governing the "openness" of federal agencies. These statutes include the Freedom of Information Act (1966) and the Government in the Sunshine Act (1976).

The U.S. Courts of Appeals Database includes a number of procedural variables relevant to the present study. Like the standard-of-review variables, procedural variables are coded based on how courts answered specific questions raised in a case. Each procedural variable poses a question about whether the court ruled in favor of the agency. I recoded the variables so 0 represents a negative response to the question. Questions answered in the affirmative are coded 1, and represent an answer supportive of the agency. As with the standard-of-review variables, the database includes coding for mixed answers to procedural questions, meaning that a review panel supported an agency only

in part. Since I am unable to determine from the data which part of the case the court supported, I exclude mixed answers from analysis (N=3).[19]

The following sections describe the procedural variables I use from the U.S. Courts of Appeals Database. In general, procedural questions are raised relatively infrequently, which prevents analyzing them separately. I combine these variables into one **procedural-adherence** variable. The following sections discuss the specific procedures that are included in the procedural-adherence variable.

The **information-acquired** variable asks, "Did the court rule for the government in an issue related to agency acquisition of information, such as physical inspections, searches, subpoenas, and records?" Similar to the exclusionary rule used in criminal law cases, the APA and other statutes define the rules agencies must follow in the acquisition of information. When these rules are not followed, information obtained may not be used against citizens. Cases where the court answered this question favorably toward agencies are coded 1 and 0 otherwise. Questions regarding agency acquisition of information are raised very infrequently in the courts of appeals. There are only two instances in this sample, once in the D.C. Circuit in 1997 and once in the Tenth Circuit in 1982.

The **information-provided** variable asks, "Did the court rule in favor of the government when the administrative action in question related to the agency's providing information to those who request it?" This variable is related to several public acts requiring public agencies to provide information to citizens, including the Freedom of Information Act and Government in the Sunshine Act. Similar to agencies acquiring information, questions related to agencies providing information are raised infrequently in the courts of appeals. In the current sample, the D.C. Circuit addressed these issues in only six cases. The Fifth Circuit and the Ninth Circuit addressed agencies providing information once each, and the remaining circuits did not deal with cases where issues of providing information were raised.

The **notice** variable asks, "Did the agency give proper notice?" Generally, agencies are required to give ample notice to any rulemaking actions it intends to take. Notice requirements are specified in the APA. A related variable, **comment**, asks, "Did

---

[19] In circuits 1-11, I exclude one case related to agency acquisition of information and one related to record development. In the D.C. Circuit, I exclude one case related to notice requirements.

the agency give proper opportunity to comment?" Also according to the APA, agencies are required to provide ample time for public comment on any proposed rules. Similar to the procedural variables already discussed, agency adherence to notice and comment procedures are not questioned with any regularity in the courts of appeals. This may suggest that agencies follow these procedures fairly well.

The **record** variable, asks, "Did the agency fail to develop an adequate record?" This question is concerned with whether the courts are able to determine the doctrine or reasoning the agency used as the basis for its decision. While this variable is related to certain standards of review, the issue coded here is one of administrative record-keeping. Section 552(a) of the Administrative Procedure Act gives agencies detailed instructions for records development and management. Since the question in this variable is worded negatively compared to the other procedural variables, I recoded it to be consistent with other procedural variables for ease of analysis. I recoded this variable so that 1 represents an answer supportive to the agency and 0 otherwise.

Procedural Variable—Summary

These procedural variables provide an important test of courts' support for agencies. Normatively, according to the legal model, these questions, when answered negatively with respect to supporting agencies, should be perfectly correlated with courts' final decisions to support agencies overall. If an agency does not follow procedure, courts should not rule in favor of the agency. This is not to say, however, that if agencies do follow procedures, courts vote in favor of agencies. Other legal factors, such as standards of review, must be considered once these rudimentary procedural questions are affirmed. These questions, then, serve as thresholds through which agencies must pass in order to be successful in court.

Table 4.35 summarizes the frequencies with which these procedures are raised in cases. The relative infrequency with which procedural questions are raised, especially in circuits 1-11, prevents meaningful analysis of them individually. Table 4.36 shows the combined frequency of procedural questions raised in cases. In circuits 1-11, procedural questions are raised in 6.6% of cases at least once, and in 5.4% of cases exactly once. In the D.C. Circuit, procedural questions are raised in 17.8% of cases at least once, and in 16.4% of cases exactly once.

Since the frequency of these individual procedures is relatively low, I combine them into one variable—**procedural adherence**. Through a simple summation, procedural adherence equals the sum of the following variables: information acquired, information provided, notice, comment, and record. Coding for this variable is 1 if courts determined agencies followed procedures and 0 otherwise.

Procedural adherence is highly and positively correlated with the dependent variable, court support. In circuits 1-11, this correlation is 0.72 ($p<0.001$), and in the D.C. Circuit, it is 0.83 ($p<0.001$). Tables 4.37 and 4.38 report the results of chi-squared analyses for these variables. In circuits 1-11, if the courts found that agencies followed procedures, they supported agencies overall in their final decisions in 91.7% of cases. Similarly, in the D.C. Circuit, this figure is 91.3%.

Where courts do not answer procedural questions in support of agencies (i.e., agencies do not follow procedures), courts support agencies in only 20.0% of their final decisions in circuits 1-11, and 7.1% of cases in the D.C. Circuit. What is apparent is the court's tendency to support agencies when agencies do follow procedures.

These correlations lend preliminary support to the hypothesis that adherence to procedure matters in final case decisions when agency decisions are under review in the courts of appeals. However, correlation analysis is insufficient to establish causation. Attitudinalists would argue that final case decisions are decided based on judges' ideological preferences and before judges articulate legal reasoning to support these decisions. Thus, one cannot say from this analysis that how courts answer questions related to procedural adherence is an a priori indicator of agency support in final case decisions.

ATTITUDINALIST CHALLENGES TO THE LEGAL MODEL

Showing causality between decisions and opinions is problematic. Attitudinalists argue that court reasoning on legal matters in their opinions is mere window dressing for judges' ideological preferences (see Segal and Spaeth 2002). That is, judges base their decisions on ideology, and then write opinions to match those ideologically-based decisions. This may be one reason the standard-of-review variables previously discussed are highly and positively correlated with each other. If all these variables are proxies for the personal preferences of judges, it is not unreasonable that standard-of-review tests

will be answered in the same way—either both supporting the agency or both not supporting the agency.

Legal proponents argue that judges are constrained by the law, and although judges may prefer a certain outcome, they are bound by decisions such as *Chevron*, which requires judges not to superimpose their policy preferences on agencies so long as agencies provide a reasonable interpretation of a statute. The preliminary analyses heretofore support the legal model. However, to claim that law matters in the courts of appeals when agency decisions are under review, these legal issues must be squared with attitudinalists' challenges that opinions are merely window dressing. The next sections operationalize and make preliminary assessments of the attitudinal model. This includes developing measures to examine the impact of judge ideology on decisionmaking. I revisit the window-dressing argument in the results chapter.

<div align="center">CHANGING THE UNIT OF ANALYSIS</div>

Up to this point, I have used court-level decisions as the unit of analysis. In order to develop a court-level measure of ideology, I need to examine the ideologies of individual judges on each panel and then create a court-level ideology index. Bear in mind, however, that I have two sets of hypotheses—a set that is court-based and a set that is judge-based. Therefore, the following discussion is pertinent to both sets of analyses. While some scholars argue that decisions of a court are the most appropriate unit of analysis for certain issues, such as panel effects (Cross 2007), many judicial behavior scholars argue that analyzing individual judge votes is necessary to understand the behavior that drives decisionmaking (Gibson 1983; Maveety 2003; Segal 1986). These scholars argue that individual judge votes are the smallest components of court decisions, and predicting case decisions requires analyzing these individual votes.

Changing the unit of analysis from case to judge is relatively simple using the U.S. Courts of Appeals Database. For an explanation of the steps required to change the unit of analysis from case-centered to judge-centered, see the U.S. Courts of Appeals Database codebook (for step-by-step instructions to change the unit of analysis using Stata, see Collins 2008). In sum, these steps create a line of code for each judge variable in the dataset, which are then stacked atop one another. There are sixteen sets of judge variables in the dataset for each case, to allow for coding up to sixteen judges who hear

cases en banc. The final steps clean up the data by eliminating unnecessary lines of code where cases were not heard en banc. Using these steps, I created a unique identifier for each line of code, since the unique identifier in the unmodified database (*casenum*) is no longer unique.

Changing the unit of analysis in the dataset roughly triples the number of observations, since each case is generally heard by a panel of three judges. To be clear, a unique observation in the dataset is not individual judge; rather, it is individual judge *vote* for each case. Each observation is based on an individual judge who voted in a particular case, but an individual judge can, and frequently does, appear more than once in the dataset. Table 4.39 shows the number of judge votes by circuit when agency decisions are under review for years 1982-2002. The total number of judge votes in the sample is 1,296, which takes into account missing data and omitted observations described in the dependent variable section.[20]

Judge votes from all circuits are well-represented in the sample, but there is considerable variation by circuit. About 44% of the votes come from D.C. Circuit judges (N=570). Each of the remaining circuits has an average of 5.1% of the votes in the sample. The mean number of judge votes per circuit is 66, not including the D.C. Circuit. The Eighth and Eleventh Circuits have the fewest number of judge votes in the sample, 2.9% and 1.9%, respectively. By comparison, the percentage of judge votes in the Ninth Circuit is well above this mean, at 8.5%.

DEPENDENT VARIABLE—JUDGE SUPPORT FOR AGENCIES

To test the hypotheses that are based on individual judge decisionmaking, I construct my second dependent variable, **judge support**, which indicates whether an individual judge voted to support an agency in final case decisions. I construct this variable using the **court-support** variable, which indicates the level of agency support received by the court as a whole. A simple comparison of the court-support variable to other information in the U.S. Courts of Appeals Database indicates whether individual judges voted with the majority or dissented.

---

[20] This total also reflects three cases omitted from the sample because of inconsistent ideology coding, which I address later in the section on attitudinal variables.

I initially set **judge support** equal to **court support**. The first judge coded in each case is the opinion author, and I therefore safely assume, in accord with the codebook, that the first judge voted with the majority. This means that if the court supported the agency, then the first judge on the panel also supported the agency. So, for the first judge, **judge support** equals **court support**.

For subsequent judges on the panel, I examine whether they voted with the majority or dissented. I do not distinguish whether judges joined a majority opinion or wrote a separate concurring opinion (or joined a concurring opinion in en banc cases). If a judge voted with the majority, then judge support equals court support. If a judge dissented in a case where the majority supported the agency, I changed the code for this judge to 0, indicating a non-supportive vote. If a judge dissented in a case where the majority did not support the agency, I changed the code for this judge to 1, indicating a supportive vote.

En banc cases are also included in the sample. In smaller circuits, en banc generally means that all judges in the circuit review the case. In larger circuits, such as the Ninth Circuit, en banc may mean only eleven of the judges heard the case, rather than all the judges in the circuit. Using the same comparisons described above, I include all judge votes in the sample irrespective of whether the case was heard by a panel of three judges or by the entire circuit of judges.

In sum, the dependent variable, **judge support**, is a dichotomous variable indicating whether an individual judge's vote supports the agency in final case decisions. Values are coded 0 for a non-supportive vote and 1 for a supportive vote. Table 4.40 shows the frequency of supportive and non-supportive judges votes by circuit. Agencies receive roughly the same level of support from judges in the D.C. Circuit (64.6%) as they do from judges in the remaining circuits (65.6%).

ATTITUDINAL VARIABLES

Judge Ideology

Judicial behavior researchers generally agree that ideology is the best indicator of judges' attitudes (Caruson and Bitzer 2004; Cross 2007; Humphries and Songer 1999; Segal and Cover 1989; Segal et al. 1995a; Segal and Spaeth 2002). For example, in his study of decisionmaking in the U.S. Courts of Appeals, Frank Cross (2007) considers

several background characteristics of judges, including race, gender, religion, prior professional experience, and wealth as proxies for judges' attitudes. Consistent with other attitudinal research, he concludes that ideology is the best proxy for measuring judge attitudes (Cross 2007). Accordingly, I use judge ideology as a proxy for judge attitudes in the present study.

Similar to Cross (2007), I use the common-space scores for U.S. Courts of Appeals judges developed by Giles, Hettinger and Pepper (2001), hereinafter referred to as the Giles measure. These scores are based on Poole and Rosenthal's (1997) common-space policy scores for the U.S. Senate and Poole's (1998) common-space estimates for policy preferences of the President (for an expanded discussion on the predictive validity of this measure, see Giles et al. 2001). Each judge ideology score considers the scores of senators from the home state of the judge nominee when these senators are in the same party as the President. While the notion of senatorial courtesy is most prominent in the selection of U.S. District Court judges, "seats on the Courts of Appeals in fact are often associated with a particular state, giving senators of the President's party a claim to influence if not control of the appointment. Even when the allocation of a circuit seat is unclear upon vacancy, senatorial claims apply once the seat is assigned," (Giles et al. 2001, pp. 628-629). Rather than traditional, dichotomous measures for ideology, these scores are continuous, ranging from −1 for the most liberal judges to +1 for the most conservative judges. The Giles scores are updated to include all U.S. Courts of Appeals judges for the period under study in the present research.

The ideological composition of judges in the sample is well-balanced. Table 4.41 summarizes the ideological composition of judges in this sample using the Giles measure. In total, there are 283 unique judges in the sample, of which 33 are in the D.C. Circuit. The mean ideology score of D.C. judges is −0.012, and the mean is 0.024 in the remaining circuits. This suggests that the ideological composition of judges in the sample is relatively balanced.

Table 4.42 shows the number and percentage of judges based on their ideology scores. There are no judges in the sample who have extreme ideology scores; the range of scores is from −0.623 to 0.581. Within this range, there is an even spread of liberal and conservative judges in the sample. In circuits 1-11, liberal judges make up 46.6% of the

sample and conservative judges make up 53.4% of the sample. In the D.C. Circuit, 51.4% of judges in the sample are liberal, and 48.5% are conservative. In all circuits, liberal judges make up about 47% of the sample, and conservative judges, 53%. Overall, the mix of votes cast by liberal and conservative judges in the sample is sufficiently varied for quantitative analyses.

Judge Ideological Agreement with Agency Position

Past studies of judicial behavior when agency decisions are under review in the federal courts all indicate that support for agencies is, at least in part, a function of judge ideological agreement with an agency's position (Canon and Giles 1972; Caruson and Bitzer 2004; Humphries and Songer 1999; Sheehan 1992; Sheehan et al. 1992b; Tanenhaus 1960). Attitudinalist researchers, however, have not used direct measures for this concept. For example, Humphries and Songer (1999) use an interactive variable to get at this information. They multiply their ideology variable with their agency direction variable, and assume that a review panel's ideological agreement with the agency position is a product of the two. This is unnecessary, since judge ideological agreement with the agency position (and as I discuss later, panel ideological agreement with the agency position) can be derived by simple comparison outside a regression model. Doing so means that the variables used to construct this measure must not be included in the regression model, which produces a more parsimonious model of judicial decisionmaking that is simpler to interpret.

Fortunately, the U.S. Courts of Appeals database contains several variables, which when used collectively and recoded, allow me to construct a measure of judges' ideological agreement with agency positions. In his study of decisionmaking in the U.S. Courts of Appeals, Frank Cross (2007) uses a similar method to derive judges' ideological agreement with agency positions. The following sections describe the construction of the ideological agreement variable, using several intermediate variables.

The U.S. Courts of Appeals Database codes the ideological direction of case decisions using liberal and conservative conventions developed by Harold Spaeth. By and large, I agree with these coding conventions, with a couple of exceptions. First, "attorney cases" concern attorney disbarment, and coding these as either liberal or conservative is inappropriate. I therefore omit two attorney cases from analysis. Second, "other national

security" cases are coded as liberal if the final case decision supports the government. In recent national security debates involving the federal government's wiretapping practices, a decision in support of the government would be a conservative position. Therefore, I question the correctness of this coding convention and omit the one case dealing with this issue.[21]

Next, I develop a dichotomous variable called **ideological direction of case decision**, where 0 indicates a liberal direction and 1 indicates a conservative direction. This variable is based on the database's *direct1* variable, which is nominal and coded as follows. A value of 3 is assigned if the overall decision of the case produced a liberal decision. A value of 1 is assigned if the overall decision of the case is conservative. Mixed and intermediate decisions are coded 2.

I exclude "mixed" decisions from analysis. While it is arguable that agencies could have a moderate position on certain issues, "mixed" ideological values in the U.S. Courts of Appeals Database do not indicate a moderate position. These values are mixed because part of the decision is liberal and part of the decision is conservative, which is not the same as a moderate ideological position from the standpoint of the agency. For example, in *International Brotherhood of Teamsters, etc. v. United States* (1990), the D.C. Circuit concluded:

> Agency action comes before us for review accompanied by a presumption of regularity, and we hesitate to overturn it because an agency has published an unartful statement of basis and purpose in the Federal Register. Particularly with respect to relatively minor changes like those made by the agency in this case, we would not interfere with the agency's decision where its course "may reasonably be discerned." We therefore uphold the agency's modification of the recordkeeping requirement to permit drivers to use their own forms. However, the agency has failed to demonstrate that it engaged in reasoned decision-making or that it had any basis at all for its decisions to omit the seven items of information and expand the exemption from the recordkeeping requirement. For this reason, we hold that the agency acted arbitrarily and capriciously in adopting the new rules to the extent that they omit the seven items of

---

[21] Other questionable coding conventions are those surrounding admiralty, patents and Indian cases. However, none of these types of cases is included in my sample. I also reviewed immigration (N=6) and alien petition (N=59) cases, which are sometimes questioned under the Spaeth coding conventions. I determined that decisions supporting government regulation in the immigration cases coded as liberal are consistent with other notions of government regulation in general. Alien petitions are coded liberal if they support the petitioner, which I also view as appropriate.

information from the recordkeeping requirement and to the extent that they expand the exemption from the recordkeeping requirement.

In this particular case, the D.C. Circuit affirmed the agency decision in part and vacated it in part. The panel reviewed two agency procedural actions with two different outcomes. One outcome is viewed as a conservative and the other liberal. The U.S. Courts of Appeals database does not distinguish the ideological direction of various parts of cases. Instead, these cases are coded simply as "mixed." Therefore, I am unable to determine the ideological direction of the case decision, and so exclude cases with "mixed" decisions from analysis. For the years 1982–2002, the number of cases with mixed decisions is relatively small (N=52), compared to liberal decisions (N=266) and conservative decisions (N=226).

I assign binary values to the intermediate variable, **ideological direction of case decision**, so that liberal decisions are coded 0, and conservative decisions are coded 1. Table 4.43 summarizes coding and recoding values for this variable.

Next, I construct an intermediate variable called **ideological direction of agency position**. This variable indicates whether the agency's position is liberal or conservative. Although based on a comparison of the **ideological direction of case decision** variable and the **court-support** variable, which is the dependent variable in the present study, the new variable is independent and *a priori*. Humphries and Songer (1999) include an agency direction variable in their research, which they develop by examining and coding all of the cases directly. This is unnecessary, since, as Cross (2007) notes, the U.S. Courts of Appeals Database includes sufficient data to make these determinations.

Four if-then statements determine the ideological direction of the agency's position. If the ideological direction of a case decision is conservative and a court supports the agency, then the ideological direction of the agency position is conservative. If the ideological direction of a case decision is liberal and a court supports the agency, the ideological direction of the agency position is liberal. Using similar logic, if the ideological direction of a case decision is conservative and a court does *not* support the agency, then the ideological direction of the agency position is liberal. Likewise, if the ideological direction of a case decision is liberal and a court does *not* support the agency, then the ideological direction of the agency position is conservative. Table 4.44

summarizes the values for **ideological direction of agency position**, which I derived by comparing **court support** and **ideological direction of case decision**.

In sum, **ideological direction of agency position** is coded 0 if the agency position is liberal and 1 if it is conservative. These conservative and liberal positions are based on the coding conventions used in the U.S. Courts of Appeals Database, which mirror the conventions developed by Harold Spaeth for the U.S. Supreme Court Database. I re-emphasize that while I use the dependent variable, **court support**, to determine the ideological direction of the agency position, the ideological direction of agency position is determined before a case is considered by the courts of appeals, and is therefore *a priori* and truly independent (see Cross 2007).

Since I know the ideological direction of the agency position for each case and since I have a measure of judge ideology for each judge, I develop a new variable indicating the degree to which a judge's ideology is in agreement with an agency's position. This variable, **judge ideological agreement**, is operationalized as follows.

If the ideology of the agency position is conservative, then judges' ideological agreement is equal to judge ideology, where lower values (−1) indicate less agreement with the agency, and higher values (1) indicate more agreement with the agency. So, where **ideological direction of agency position** is equal to 1, ideological agreement is equal to **judge ideology**. For example, if the ideological direction of the agency position is conservative, the judges who will be in most ideological agreement with the agency position are those whose ideology scores are closest to 1 (on a scale from −1 to 1).

Where **ideological direction of agency position** is equal to 0, **judge ideological agreement** is equal to *negative* **judge ideology**. This means that when the ideological direction of the agency position is liberal, the judges in most ideological agreement with this position are the ones closest to −1 on the Giles scale. In order to have consistency in the ideological agreement measure, I multiply this score by −1, so the liberal judges' scores are now positive and the conservative judges' scores are now negative.

In sum, I constructed a variable indicating **judge ideological agreement** with an agency's position. The values of this variable are continuous from −1 to 1, where values of −1 indicate the least amount of agreement and values of 1 indicate the most agreement.

101

Since I am only interested in testing if a judge's ideological agreement with an agency position predicts whether the judge votes to support an agency, **judge ideological agreement** is the only attitudinal measure I need. The other variables used to construct this variable are not needed in any regression models, since the variable is not an interactive one. This single variable will indicate whether a judge makes a decision based on ideological agreement with the agency.

Judge Ideological Agreement with Agency Predicts Judge Support

Judge ideological agreement with agency position may predict the dependent variable, judge support. As a preliminary test of the attitudinal model, I used the judge-ideological-agreement variable as an independent variable in a bivariate logistic regression model to predict whether judges support agencies in final case decisions. The results of these models are mixed. Table 4.45 summarizes these results, and reports only relevant and key statistics for the bivariate models.

In the D.C. Circuit, judge ideological agreement is statistically significant at $p<0.130$, which approaches conventional levels of statistical significance. In circuits 1-11, this variable is significant at $p<0.001$. Substantively, this means that judges who are more ideologically aligned with the ideological direction of the agency's decision are more likely to support the agency in the final case decision. For conservative agency positions under review, this means the more conservative a judge is, the greater the probability that he/she will support the agency's decision. The more liberal a judge, the greater the probability that he/she will *not* support the agency's conservative decision.

Results of bivariate logistic regressions find preliminary support for the attitudinal model, but I note from Table 4.45 that the model pseudo R^2 values are very small. While I am most concerned with whether the judge-ideological-agreement variable is statistically significant in these models, the pseudo R^2 values may indicate that ideology substantively may not weigh heavily in a judge's decision-making calculus.

Examining individual judge ideological agreement with agency positions, however, is not the only method for examining the impact of judge ideology on judicial voting behavior. The next section constructs a variable that can be used to assess the impact of the ideological composition of the entire review panel.

Panel Ideology

Recent studies examining decisionmaking in the courts of appeals have shown that the collegial nature of a three-judge panel in the courts of appeals may be more important in predicting the outcome of cases than individual judge ideology (Cross 2007; Sunstein et al. 2006). These "panel effects" indicate that judges' votes may be influenced more by the ideological composition of fellow panel members than by judges' own ideologies (Cross 2007; Humphries and Songer 1999; Sunstein et al. 2006). Whether the collegial nature of panels on the U.S. Courts of Appeals has a substantive impact on judge's votes is controversial, especially among judges who insist that their decisions are guided only by law and legal doctrine (for a review of these issues, see Edwards 1998, 2003). However, given the empirical findings of recent scholars on the impact of panel effects, the issue is worth investigating to see if these findings are also true when circuit courts review agency decisions.

The argument for panel effects is simple. Judges may prefer to join majority opinions, rather than to dissent and write a separate opinion, if they are able to influence breadth and scope of case outcomes. For example, a conservative judge on a panel with two liberal judges could conceivably convince his/her colleagues to write a narrower liberal opinion, or a more moderate opinion overall, in exchange for not dissenting. Considering the large volume of cases in the circuit courts, it is rational for individual judges not to write separate opinions if only to reduce personal workload. Further, since judges work with the same set of judges on a number of different cases, individual judges may join fellow judges on the panel in order to maintain professional relationships. By design, the courts of appeals are courts of compromise and reasonableness, normatively speaking, where decision occurs only if at least two judges agree on the outcome.

Professional relationship and workload issues notwithstanding, past studies show that the ideological composition of a panel affects the outcomes of cases (Cross 2007; Humphries and Songer 1999; Sunstein et al. 2004). Cass Sunstein (2006) and his colleagues found that the ideological composition of a panel, more than a judge's own ideology, influences whether an individual judge will vote ideologically. More specifically, they found that Democratic judges—those appointed by Democratic presidents—are most likely to vote liberally when they are on a panel with two other

Democratic judges. Similarly, Republican judges are more likely to vote conservatively when they are on a panel with two other Republican judges. They also found that Democratic judges who vote conservatively are more likely to do so when they are on a panel with two Republican judges. Republican judges who vote liberally are more likely to do so when they are on panels with two Democratic judges.

There are a number of methods for evaluating panel effects. One can assign judges a party affiliation based on the party of the appointing president. If this is done, it is relatively easy to evaluate the voting patterns based on the number of Democratic and Republican judges on a panel. However, rather than assigning binary figures to judges based on party affiliation, I prefer to use Giles' ideology scores, since they are more nuanced. Using these scores, however, still leaves a few options. Frank Cross (2007) examines panels based on the sum of judges' ideology scores and also on the median ideology score, both of which perform reasonably well in his models predicting case decisions. For the present study, the median voter approach is better since it allows me to keep en banc cases in the analyses. Relying on the total ideology measure would exclude en banc cases, since the total ideology of a three-judge panel would not be comparable to the total ideology of an eight-judge panel.

The following example demonstrates the utility and logic of the median judge approach. Assume that on a particular panel there is a conservative judge, a moderate judge and a liberal judge. If the moderate judge leans left, then he/she forms a majority with the liberal judge. The conservative judge can choose either to join the majority or to dissent and write a separate opinion. Likewise, if the moderate judge leans right, he/she forms a majority with the conservative judge, and the liberal judge is faced with the same two options. In either situation, whether a court chooses to support an agency decision hinges greatly on the ideology of the median judge.

What the median voter measure may fail to capture is the magnitude of judges' ideologies. By examining only the median judge on a panel, we cannot assess, for example, whether a moderately conservative judge is any more or less able than an extremely conservative one to sway moderate judges on the panel. Examining the panel mean ideology, then, accounts for the impact of the ideology of all judges on the panel. Examining means, as opposed to medians, may indicate the pull that extreme judges have

on their panel cohorts. As one might expect, median panel ideology and mean panel ideology are correlated (r = 0.88). However, rather than speculating on which measure is best, as the next section discusses, I ran models for both measures to determine which one best predicts agency support.

Panel Ideological Agreement with Agency Predicts Judge Support

Similar to how I constructed a variable indicating individual judges' ideological agreement with agency positions, I construct median and mean panel-ideological-agreement variables. Based on each judge's ideological agreement with the agency, I determined the mean and median ideologies for each panel. Tables 4.46 and 4.47 compare mean panel ideology with median panel ideology as predictors of the dependent variable, judge support. Note that these tables report coefficients and key statistics for two separate regression models.

Both sets of models predict judge support, which suggests that the ideological composition does impact how individual judges vote in final case decisions. This is consistent with past research showing that individual judges' votes are influenced by the ideologies of their cohorts on the review panel (see Cross 2007; Humphries and Songer 1999; Sunstein et al. 2006).

The panel mean coefficients are larger than panel median coefficients. This is true for the D.C. Circuit, as well as the combined remaining circuits. This may suggest that the magnitudes of judges' ideologies are also important. Hence, I use the mean panel-ideological-agreement variable for the remainder of this study.

Panel Ideological Agreement does not Predict Court Support

Since the ideological composition of a review panel appears to influence individual judges' decisions to support or not support agencies in final case decisions, it is reasonable to assume that panel ideology also influences court decisions. Tables 4.48 and 4.49 report the results of bivariate regressions predicting court support using the panel-ideological-agreement variable. Quite unexpectedly, the ideological composition of a review panel does not predict agency support. The panel ideology variable approaches statistical significance at conventional levels ($p<0.059$) in circuits 1-11, but not in the D.C. Circuit ($p<0.211$).

105

These results challenge all past studies of court-agency relations, many of which find that court support for agencies is a function of the court's ideological agreement with agencies (e.g., Humphries and Songer 1999). It is unlikely, if the panel ideology variable is not statistically significant in bivariate regressions, that it will be significant in multivariate regressions. Since there is a healthy body of literature suggesting that conservative panels support conservative agency decisions and liberal panels support liberal agency decisions (Humphries and Songer 1999), I continue examining the effects of panel ideology in this study.

Ideology as a Predictor of Support for Agencies—Summary

Preliminary analyses indicate that ideology influences judge voting when agency decisions are under review. At a minimum, the above analyses indicate a positive association between an individual judge's ideological agreement with an agency and the judge's support for the agency in final case decisions. Similarly, there is a positive relationship between an individual judge's support for an agency and whether the review panel is in ideological agreement with the agency.

Curiously, however, the ideological composition of a review panel appears not to be associated with court support. That is, it does not appear to be true that the likelihood of courts supporting an agency in final case decisions increases as the ideological agreement between the review panel and the agency increases. However, the panel ideology variable approaches statistical significance in circuits 1-11 and reaches conventional significance levels when all circuits are combined. This warrants further investigation.

VARIABLES FOR THE D.C. CIRCUIT

There is disagreement in the extant literature concerning D.C. Circuit proclivities to be more political in their decisionmaking compared to other circuits. There is also disagreement over whether D.C. Circuit courts and judges retain greater administrative law expertise, which may result in different behavior when agency decisions are under review. With such, I posited several hypotheses concerning decisionmaking in the D.C. Circuit.

As noted in the *Standards of Review* section in this chapter, standard-of-review variables lack sufficient variation in the D.C. Circuit, which prevents running regression

106

models separately for the D.C. Circuit. For example, there are no instances in the D.C. Circuit when a court panel answered the arbitrary-and-capricious test in favor of an agency *and* did not support the agency in the final case decision (see Table 4.11). To test the D.C. Circuit hypotheses, I combine the D.C. Circuit with all other circuits for analysis and included a dummy variable for the D.C. Circuit. This dummy variable, **DC**, is coded 1 if the circuit is D.C. and 0, otherwise. This variable allows me to test whether judges in the D.C. Circuit behave differently from the remaining circuits. However, this variable cannot indicate whether these differences are based on law or ideology; this variable only indicates individual judges' and review panels' tendencies to support an agency.

As an indicator for whether these differences (if they exist) may be because of ideology or law, I also include two types of interactive terms. The first type interacts the D.C. Circuit dummy with legal variables, and the second with ideology variables. These interaction terms will be particularly useful to determine whether D.C. judges may be ideological or deferent in their decisionmaking. They will allow me to test whether judges in the D.C. Circuit are more (or less) inclined to be ideological or deferent compared to review panels and judges in other circuits. In sum, the interactive terms indicate whether differences in behavior that may exist in the D.C. Circuit are because of law or ideology. They also indicate whether judges and review panels in the D.C. Circuit are any more or less ideological or deferent than their cohorts in other circuits. These interactive terms are used in both judge-level and court-level models as I later describe.

CONTROLS FOR TIME AND PRESIDENTIAL INFLUENCE UNNECESSARY

Controls for time and presidential influence are unnecessary in the present study because of the way I constructed the judge- and panel-ideological-agreement variables. Past scholarship shows public agencies and courts behaving more conservatively or liberally during certain periods than in others (e.g., Horowitz 1994). This is almost intuitive if U.S. Presidents have any influence over agency head appointments and judicial appointments. For example, Ronald Reagan appointed more conservative judges than other presidents, and Bill Clinton appointed more moderate and liberal judges (Cross 2007). It might be prudent, then, to include a variable that controls for judicial behavior over time. Scholars who have done so rightly assume that agencies and courts behave differently because of influences from the Chief Executive. However, past scholarship

107

has controlled for different periods of agency and court liberalism and conservatism out of necessity due to how they construct their models and ideology measures. In order to determine if conservative judges vote conservatively, scholars needed to compare judges' ideologies to sets of cases coming from agencies they assumed were more conservative or liberal in nature because of the influence of the Chief Executive.

While there may be other reasons to examine conservative and liberal periods in federal agencies and in the courts of appeals, the aim of the present study is concerned with the extent to which judges and courts vote according to law or ideology. Since I have constructed a variable that captures the ideological agreement of judges and courts with agency positions, it is unnecessary to analyze sets of cases separately by year or other time-bound periods to determine patterns of liberalism and conservatism. Further, it is not necessary to assume that particular sets of decisions from specific agencies are liberal or conservative, since I have considered the liberal-conservative nature of each case separately. The legal and attitudinal variables already included in the study are sufficient to test all hypotheses.

SUMMARY OF VARIABLES

There are two dependent variables in this study—**court support** and **judge support**. Both are dichotomous and measure whether courts (judges) supported agencies in final case decisions. There are three categories of independent variables—legal, attitudinal, and DC. Appendix B summarizes these variables, including how they are used and coded. Appendix C summarizes the correlations among these variables.

A JUDICIAL DECISIONMAKING MODEL SHOULD COMPORT WITH DESCRIPTIVE DATA

A model of judicial decisionmaking in the U.S. Courts of Appeals should account for the high number of unanimously decided cases and the high success rates of agencies. In the present study, I examine a sample of cases coming to the U.S. Courts of Appeals directly from federal administrative agencies over the 20-year period, 1982-2002 (N = 437). In these cases, the courts of appeals support federal agencies about 65% of the time (see Table 4.6). Also, courts decide about 90% of cases unanimously; only 10% of cases contain dissents.

These data suggest that any plausible explanation for judicial decisionmaking in the U.S. Courts of Appeals must acknowledge two notions. First, a judicial

decisionmaking model should account for courts' proclivities to render decisions supportive to agencies. Second, a judicial decisionmaking model must explain that ideological voting gives way to law, collegiality, or other factors that promote unanimity among judges.

The ideological composition of judges in this sample is roughly equal among liberals and conservatives (See Table 4.42). In circuits 1-11, liberal judges make up 47% of the sample, and conservative judges, 53%. In the D.C. Circuit, liberal judges comprise 51% of the sample, and conservative judges, 49%. This makeup suggests that judges do not vote along ideological lines with any great frequency, since 90% of the cases are unanimous.

In order for judges to vote ideologically *and* to decide 90% of cases unanimously, a judge must always, or nearly always, sit with two ideologically like-minded judges on a panel. This is not the case, since circuits assign cases to judges randomly, with scant few exceptions (Tiller and Cross 1999; Wald 1999). It is impossible for conservative judges to vote in accord with their ideology and also to agree with liberal judges 90% of the time. Likewise, liberal judges cannot simultaneously vote their liberal preferences and be in agreement with conservative judges 90% of the time.

Therefore, any explanation of judicial decisionmaking in the U.S. Courts of Appeals necessarily must acknowledge that ideological voting gives way to law, collegiality, or something else in order to garner such high levels of unanimity in case decisions. Additionally, any accurate model of judicial decisionmaking should also account for courts' tendencies to render decisions supportive to agencies.

On its face, the legal model comports with both of these requirements. If judges decide cases according to law, then it is not paradoxical that 90% of the decisions will be unanimous. Further, since both statutory law and case law require courts to defer to agencies under prescribed circumstances, we would expect courts to decide a relatively high number of cases in support of agencies.

Alternatively, the attitudinal model could account for the high levels of agency success, but may not be able to account for the high levels of unanimity. This is not to say that ideology cannot contribute to either of these phenomena, but it does suggest that

ideology cannot account for all judicial decisionmaking in the U.S. Courts of Appeals when agency decisions are under review.

Logistic Regression for Dichotomous Dependent Variables

Having established indicators for the legal and attitudinal models, I can now assess the impact of law and politics in regression models, *ceteris paribus*. I specify two sets of regression models. The first set uses court decisions as the unit of analysis. The dependent variable for this set is **court support**, which indicates whether a review panel supported an agency in its final decision. The second set uses individual judge as the unit of analysis. The dependent variable is **judge support**, which indicates whether an individual judge votes to support an agency in the final case decision. Since both dependent variables—**court support** and **judge support**—are dichotomous, logistic regression is an appropriate statistical estimation tool to analyze the data (Long 1997; Long and Freese 2006).

Legal Variables Examined in Separate Models

Each regression model examines only one legal issue at a time. Remember that about 40%-50% of cases contain only one standard of review, which means that a logistic regression model with more than one standard of review accounts for only cases where both standards are present in a particular case. Even in cases that raise multiple standard-of-review questions, the standard-of-review questions are highly and positively correlated with each other. These correlations range from 0.79 to 1.00, which present multicollinearity problems in regression models.

Since I am interested in all cases where a particular standard is present, not only cases where more than one exists, I examine each standard-of-review variable in a separate model. The standards of review I examine are limited to the ones with sufficient observations for logistic regression analysis—substantial evidence, arbitrary and capricious, abuse of discretion, and *Chevron* deference. Because of insufficient observations in the sample, I do not examine the *de novo* and clearly-erroneous standards of review.

Like standard-of-review variables, I examine the procedural-adherence variable apart from other legal variables. Remember that procedural questions are raised relatively infrequently as legal questions in the courts of appeals. Therefore, as a practical matter, the small number of cases that raise both procedural and standard-of-review questions, coupled with the lack of observable variation among these variables, prevents examining the procedural variable with any other legal variable. Therefore, I also examine procedural adherence separately from other legal variables.

Legal Variables Are Court-based

All of the legal variables discussed in this chapter are based on questions that the reviewing court answered. That is, standard-of-review questions and procedural-adherence questions are coded based on how the court answered those questions. The courts of appeals database does not code these questions based on how individual judges answered these questions. Generally, the case opinions do not indicate whether an individual judge disagreed with the majority on a particular legal question, unless the judge dissented in the case, which is rare, and unless the judge also spoke to the particular legal question as part of the dissent.

For court-based analyses, using the court-level legal variables is not an issue. For judge-based analyses, using court-level legal variables is also not an issue; however, I note that legal variables in the judge-centered models suggest that how a court answers legal questions predicts whether individual judges vote to support agencies in final case decisions. There is no way to determine whether a specific judge agreed or disagreed with a particular legal question in these models.

At the outset, I assume, based on normative notions of the legal model, that court panels decide these legal issues before they decide case outcomes. Once the analysis is complete, this assumption will either become apparent as a reasonable one, or the assumption will be undermined. If the assumption is true, then the answers to legal questions should inform individual judges' decisions to support agencies in final case decisions. However, this argument is circular—one cannot show that the assumptions of a legal model are true based on models that assume the legal model is true. What is not circular, however, is prescribing and testing a priori the conditions under which the assumption is false.

The attitudinal model assumes that judges have ideological preferences that inform their decisions, and the opinions judges write are masks for this ideology. Thus, decisions to support an agency necessarily come *before* judges' write the rationales for those decisions (i.e., before they answer the legal questions in opinions). Therefore, if the attitudinal model is correct, decisions come before opinions. This undermines a critical component of the legal model—that legal reasoning and laws inform decisions, not the other way around. I revisit this point in Chapter Five, in the section titled, *Case Opinions as Masks for Ideology*, which further tests this assumption.

Attitudinal Variables Examined in Separate Models

To test the attitudinal model, I use two variables. First, I use the panel mean ideology variable since it performed slightly better than the panel median ideology variable, as shown and discussed in the section, *Panel Ideology*, earlier in this chapter. Hereafter, I refer to this variable as **panel ideological agreement**. This variable can be used in both court-level and judge-level analyses. In court-level analyses, this panel ideological agreement is simply a measure of ideology. However, in judge-level analyses, this variable speaks not only to ideological influences on individual judge decisionmaking, but also to the effects that judging on a collegial court has on individual judge decisionmaking.

The second attitudinal variable is **judge ideological agreement**. This variable will be used only in judge-level analyses. The correlation between these two variables is high (r = 0.60), which presents multicollinearity problems in logistic regressions. Therefore, to insure that neither masks the other's effects, I test the ideology variables in separate models. Doing so does not undermine the purpose of the present study, which is to test between the competing attitudinal and legal models.

Models of Court Decisionmaking

As discussed in the hypotheses chapter, I developed two sets of hypotheses for the present study. The first set (H_1–H_5) concerns decisionmaking of courts. To test these hypotheses, I use court decision as the unit of analysis, and I use **court support** for agency as the dependent variable. The general model for court support includes a legal variable, the panel-ideological-agreement variable, and variables for the D.C. Circuit. The basic model is expressed as follows.

Court Support for Agency = $\beta_0 + \beta_1$ (legal variable) + β_2 (panel ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x panel ideological agreement) + e, where, β_0 is the constant and e is the error term.

Models of Judge Decisionmaking

The second set of hypotheses (H_6–H_{11}) is judge-centered. Therefore, I use individual judge votes as the unit of analysis and **judge support** for agencies as the dependent variable to test these hypotheses. I specify two sets of judge-level models that include a legal variable, an ideology variable, and variables for the D.C. Circuit. As discussed in earlier sections of this chapter, the legal variables are court-based. While judge-level data would have been preferred, the U.S. Courts of Appeals Database does not code how each judge answers these legal questions. As an acceptable alternative, I hypothesized that individual judges' decisions to support agencies in final cases decisions are influenced by how the review panel answered these legal questions, irrespective of how the individual judge would have answered the questions. As hypothesized, if the review panel answers legal questions in support of agencies, individual judges are more likely to support agencies in final case dispositions. Therefore, it is appropriate to include the court-level legal variables in a model predicting individual judge decisionmaking. The two sets of judge-level models are identical except for the ideology variables.

The first model examines the impact of judge ideological agreement with the agency as an informant of individual judges' votes to support agencies in final case decisions. This model is expressed as follows.

Judge Support for Agency = $\beta_0 + \beta_1$ (legal variable) + β_2 (judge ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

The second judge-level model is the same as above, except it includes the influence of the ideological composition of the review panel as an informant of individual judge decisionmaking, rather than a judge's own ideology. In this model, I test *Hypothesis 11* (H_{11}), which states that an individual judge votes to support agencies are influenced by the ideology of other judges on the reviewing panel. If the ideology of the review panel is in agreement with the agency position, individual judges are more likely

to support agencies in final case decisions. Thus, it is appropriate to include this court-level independent variable in models predicting individual judge decisionmaking. This model is expressed as:

Judge Support for Agency = $\beta_0 + \beta_1$ (legal variable) + β_2 (panel ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x panel ideological agreement) + e, where, β_0 is the constant, and e is the error term.

TESTING HYPOTHESES

To test my hypotheses, I used the Stata statistical package and data from the U.S. Courts of Appeals Database to run and analyze logistic regression models. The next chapter presents these models and the results of hypotheses testing.

Table 4.1   Sources of Cases in the U.S. Courts of Appeals, 1982–2002

Source	No. of Cases	% of Docket
District Court	6,515	86.19
Administrative Agency/ALJ	583	7.72
Bankruptcy	22	0.29
Federal Magistrate	75	0.99
Court of Customs & Patent Appeals	33	0.44
Court of Claims	1	0.01
Court of Military Appeals	1	0.01
Tax Court or Tax Board	84	1.11
U.S. Supreme Court (remand)	61	0.81
Special D.C. Court (not Dist. Ct. for D.C.)	1	0.01
State Court	26	0.34
Earlier Appeals Court Panel	118	1.56
Other	21	0.28
Not Ascertained	18	0.24
Total	7,559	100.00

Table 4.2   Percent of U.S. Courts of Appeals Caseload from Administrative
             Agencies, 1982–2002

Year	% of Docket	Year	% of Docket
1982	12.5	1993	6.11
1983	5.84	1994	8.61
1984	8.62	1995	7.23
1985	7.78	1996	6.39
1986	6.95	1997	7.77
1987	8.89	1998	8.05
1988	8.06	1999	8.34
1989	7.50	2000	5.84
1990	8.61	2001	8.61
1991	6.94	2002	5.57
1992	7.78		

Mean   7.70
S.E.   0.33

Table 4.3   Number and Percent of Agency Cases by Circuit, 1982–2002 (Database Sample)

Circuit	No. of Cases	Percent
D.C.	229	39.3
1	33	5.7
2	35	6.0
3	39	6.7
4	48	8.2
5	28	4.8
6	46	7.9
7	30	5.2
8	17	2.9
9	48	8.2
10	21	3.6
11	9	1.5
Total	583	100.0

Table 4.4   Frequency and Percent of Values for the U.S. Courts of Appeals
            Database's *Treat* Variable, 1982–2002

Value	Description	Frequency	%
0	stay, petition, or motion granted	81	14.57
1	affirmed; or affirmed and petition denied	111	19.96
2	reversed (includes reversed and vacated)	22	3.96
3	reversed and remanded (or just remanded)	76	13.67
4	vacated and remanded (also set aside and remanded; modified and remanded)	36	6.47
5	affirmed in part and reversed in part (or modified or affirmed and modified)	15	2.70
6	affirmed in part, reversed in part, and remanded; affirmed in part, vacated in part, and remanded	22	3.96
7	vacated	7	1.26
8	petition denied or appeal dismissed	182	32.73
9	certified to another court	0	0.00
10	not ascertained	1	0.18
11	affirmed, vacated (with no mention of reverse), and remanded	3	0.54
Total		556	100.0

Table 4.4.5   Cross Values for *Appfed* and *R_fed* when *Treat* = 8

R_fed (No. of federal agencies as respondents)	*Appfed* (No. of federal agencies as appellants)				
	0	**1**	**2**	**99**	**Total**
0	4	10	0	1	15
1	121	2	1	0	124
2	37	0	0	0	37
3	2	0	0	0	2
4	1	0	0	0	1
99	3	0	0	0	3
Total	168	12	1	1	182

Table 4.4.6   Mixed-Decision Cases and Dissent Cases, All Circuits, 1982–2002

Mixed-Decision in Case?	Dissent in Case? N (expected N)		Total	% Dissent
	No	**Yes**		
No	394 (390.9)	43 (46.1)	437	9.8%
Yes	30 (33.1)	7 (3.9)	37	18.9%
Total	424	50	474	10.5%

Pearson Chi^2 = 2.98
Chi^2 p < 0.084

Table 4.4.7   Mixed-Decision Cases and Multiple Docket Cases, All Circuits, 1989–
               2002

| | **Multiple Dockets in Case?** N (expected N) | | | |
Mixed-Decision in Case?	**No**	**Yes**	**Total**	**% Mult. Dockets**
No	259 (252.9)	28 (34.1)	287	9.8%
Yes	15 (33.1)	9 (3.9)	24	37.5%
Total	274	37	311	11.9%

Pearson Chi^2 = 16.26
Chi^2 p < 0.001

Table 4.5   Coding for Dependent Variable: Court Support

Value	**Based On**	**Interpretation**	**N**
0	*Treat* = 2, 3, 4, 7, 18	Court does not support agency	154
1	*Treat* = 1, 8, 11	Court supports agency	283
.	*Treat* = 0, 5, 6, 9, 10	Support not determinable (recoded as missing data)	119
Total			556

Table 4.6   Circuit Court Support for Agencies, 1982–2002

Circuit	Total No. of Cases	Agency Support (N)	Agency Support (%)
D.C. Circuit	186	123	66.1
Circuits 1-11	251	160	63.8
All Circuits	437	283	64.8

Table 4.7   Mixed-Answer Standard-of-Review Cases Omitted from Analysis

Standard of Review	No. of Cases in Sample	No. of Mixed-Answer Cases Omitted
Arbitrary and Capricious	68	2
Substantial Evidence	127	3
De Novo	9	0
Clearly Erroneous	36	0
Abuse of Discretion	86	4
Chevron	135	3
Total	461	12

Table 4.8   Court Support if Arbitrary-and-Capricious Question Raised, Circuits 1–11

Arbitrary & Capricious in case?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	82 (80.4)	142 (143.6)	224	63.4
Yes	7 (8.6)	17 (15.4)	24	70.8
Total	89	159	248	64.1

Pearson Chi^2 = 0.52
Chi^2 p < 0.470

Table 4.9   Court Support if Arbitrary-and-Capricious Question Raised, D.C. Circuit

Arbitrary & Capricious in case?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	46 (47.1)	96 (94.9)	142	67.6
Yes	15 (13.9)	27 (28.1)	42	64.3
Total	61	123	184	66.8

Pearson Chi^2 = 0.16
Chi^2 p < 0.688

Table 4.10   Court Support if Arbitrary-and-Capricious Test Supports Agency, Circuits 1–11

Arbitrary & capricious test supports agency?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	5 (2.0)	2 (5.0)	7	28.6
Yes	2 (5.0)	15 (12.0)	17	88.2
Total	7	17	24	70.8

Pearson Chi^2 = 8.54
Chi^2 p < 0.003

Table 4.11   Court Support if Arbitrary-and-Capricious Test Supports Agency, D.C. Circuit

Arbitrary & capricious test supports agency?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	15 (5.7)	1 (10.3)	16	6.3
Yes	0 (9.3)	26 (16.7)	26	100.0
Total	15	27	42	64.3

Pearson Chi^2 = 37.92
Chi^2 p < 0.001

Table 4.12   Court Support if Abuse-of-Discretion Question Raised, Circuits 1–11

| | Did court support agency? N (expected N) | | | |
Abuse of Discretion in case?	No	Yes	Total	% Support
No	80 (75.4)	128 (132.6)	208	61.5
Yes	11 (15.6)	32 (27.4)	43	74.4
Total	91	160	251	63.7

Pearson Chi^2 = 5.56
Chi^2 p < 0.110

Table 4.13   Court Support if Abuse-of-Discretion Question Raised, D.C. Circuit

| | Did court support agency? N (expected N) | | | |
Abuse of Discretion in case?	No	Yes	Total	% Support
No	50 (47.1)	93 (95.9)	143	65.0
Yes	10 (12.9)	29 (26.1)	39	74.4
Total	60	122	182	67.0

Pearson Chi^2 = 1.21
Chi^2 p < 0.272

Table 4.14   Court Support if Abuse-of-Discretion Test Supports Agency, Circuits 1–11

| | Did court support agency? N (expected N) | | | |
Abuse of disc. test supports agency?	No	Yes	Total	% Support
No	9 (2.8)	2 (8.2)	11	18.2
Yes	2 (8.2)	30 (23.8)	32	93.8
Total	11	32	43	74.4

Pearson Chi^2 = 24.56
Chi^2 p < 0.001

Table 4.15   Court Support if Abuse-of-Discretion Test Supports Agency, D.C. Circuit

| | Did court support agency? N (expected N) | | | |
Abuse of disc. test supports agency?	No	Yes	Total	% Support
No	10 (3.1)	2 (8.9)	12	16.7
Yes	0 (6.9)	27 (20.1)	27	100.0
Total	10	29	39	74.4

Pearson Chi^2 = 30.26
Chi^2 p < 0.001

Table 4.16   Court Support if Substantial-Evidence Question Raised, Circuits 1–11

Substantial Evidence in case?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	56 (56.8)	103 (102.2)	159	64.8
Yes	33 (32.2)	57 (57.8)	90	63.3
Total	89	160	249	64.3

Pearson Chi^2 = 0.05
Chi^2 p < 0.819

Table 4.17   Court Support if Substantial-Evidence Question Raised, D.C. Circuit

Substantial Evidence in case?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	55 (51.8)	97 (100.2)	152	63.8
Yes	8 (11.2)	25 (21.8)	33	75.8
Total	63	122	185	65.9

Pearson Chi^2 = 1.72
Chi^2 p < 0.189

Table 4.18   Court Support if Substantial-Evidence Test Supports Agency, Circuits 1–11

Substantial evidence test supports agency?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	30 (12.1)	3 (20.9)	33	9.1
Yes	3 (20.9)	54 (36.1)	57	94.7
Total	33	57	90	63.3

Pearson Chi^2 = 66.02
Chi^2 p < 0.001

Table 4.19   Court Support if Substantial-Evidence Test Supports Agency, D.C. Circuit

Substantial evidence test supports agency?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	8 (2.2)	1 (6.8)	9	11.1
Yes	0 (5.8)	24 (18.2)	24	100.0
Total	8	25	33	75.8

Pearson Chi^2 = 28.16
Chi^2 p < 0.001

Table 4.20   Court Support if Clearly-Erroneous Question Raised, Circuits 1–11

Clearly Erroneous in case?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	90 (88.1)	153 (154.9)	243	63.0
Yes	1 (2.9)	7 (5.1)	8	87.5
Total	91	160	251	63.7

Pearson Chi^2 = 2.02
Chi^2 p < 0.155

Table 4.21   Court Support if Clearly-Erroneous Question Raised, D.C. Circuit

Clearly Erroneous in case?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	52 (53.5)	106 (104.5)	158	67.1
Yes	11 (9.5)	17 (18.5)	28	60.7
Total	63	123	194	63.4

Pearson Chi^2 = 0.4943
Chi^2 p < 0.511

Table 4.22   Court Support if Clearly-Erroneous Test Supports Agency, Circuits 1–11

| | Did court support agency? N (expected N) | | | |
Clearly erroneous test supports agency?	No	Yes	Total	% Support
No	1 (0.3)	1 (1.8)	2	50.0
Yes	0 (0.8)	6 (5.3)	6	100.0
Total	1	7	8	87.5

Pearson Chi^2 = 3.42
Chi^2 p < 0.064

Table 4.23   Court Support if Clearly-Erroneous Test Supports Agency, D.C. Circuit

| | Did court support agency? N (expected N) | | | |
Clearly erroneous test supports agency?	No	Yes	Total	% Support
No	9 (3.5)	0 (5.5)	9	0.0
Yes	2 (7.5)	17 (11.5)	19	89.5
Total	11	17	28	60.7

Pearson Chi^2 = 20.50
Chi^2 p < 0.001

Table 4.24   Court Support if *De Novo* Question Raised, All Circuits

	Did court support agency? N (expected N)			
De novo in case?	No	Yes	Total	% Support
No	152 (150.8)	276 (277.2)	428	64.5
Yes	2 (3.2)	7 (5.8)	9	77.8
Total	154	283	437	64.8

Pearson Chi^2 = 0.68
Chi^2 p < 0.409

Table 4.25   Court Support if *De Novo* Test Supports Agency, All Circuits

	Did court support agency? N (expected N)			
De novo test supports agency?	No	Yes	Total	% Support
No	2 (0.4)	0 (1.6)	2	0.0
Yes	0 (1.6)	7 (5.4)	7	100.0
Total	2	7	9	77.8

Pearson Chi^2 = 9.00
Chi^2 p < 0.003

Table 4.26   Court Support if *Chevron* Review Used, Circuits 1–11

Chevron Review in case?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	66 (68.0)	123 (121.0)	189	65.1
Yes	24 (22.0)	37 (39.0)	61	60.7
Total	90	160	250	64.0

Pearson Chi^2 = 0.39
Chi^2 p < 0.531

Table 4.27   Court Support if *Chevron* Review Used, D.C. Circuit

Chevron Review in case?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	39 (37.5)	74 (75.5)	113	65.5
Yes	22 (23.5)	49 (47.5)	71	69.0
Total	61	123	184	66.8

Pearson Chi^2 = 0.24
Chi^2 p < 0.621

Table 4.28   Court Support if *Chevron* Test Supports Agency, Circuits 1–11

	Did court support agency? N (expected N)			
	No	Yes	Total	% Support
Chevron test supports agency?				
No	22 (9.8)	3 (15.2)	25	12.0
Yes	2 (14.2)	34 (21.8)	36	94.4
Total	24	37	61	60.7

Pearson Chi^2 = 42.02
Chi^2 p < 0.001

Table 4.29   Court Support if *Chevron* Test Supports Agency, D.C. Circuit

	Did court support agency? N (expected N)			
	No	Yes	Total	% Support
Chevron test supports agency?				
No	21 (6.5)	0 (14.5)	21	0.0
Yes	1 (15.5)	49 (34.5)	50	98.0
Total	22	49	71	69.0

Pearson Chi^2 = 66.42
Chi^2 p < 0.001

Table 4.30   Percent Court Support when Standard-of-Review Tests Support Agencies

	Court Support Percent (N)	
	---	---
Standard of Review	Circuits 1-11	D.C. Circuit
Arbitrary & Capricious	88.2 (15)	100.0 (26)
Abuse of Discretion	93.8 (30)	100.0 (27)
Substantial Evidence	94.7 (54)	100.0 (24)
Clearly Erroneous	100.0 (6)	89.5 (17)
Chevron	94.4 (34)	98.0 (49)

Table 4.31   Standards of Review Raised in a Case, Circuits 1–11

No. of Standards	Frequency	% of Cases
0	96	30.2
1	154	48.4
2	54	17.0
3	10	3.1
4	4	1.2
Total	318	99.9*

*Total percent does not equal 100 due to rounding.

Table 4.32   Standards of Review Raised in a Case, D.C. Circuit

No. of Standards	Frequency	% of Cases
0	59	28.6
1	84	40.8
2	44	21.4
3	14	6.8
4	4	1.9
5	1	0.5
Total	206	100.0

Table 4.33   Correlation Matrix of Support and Standard-of-Review Variables, Circuits 1–11

Variable	Court Support	Substantial Evidence	Arbitrary & Capric	Abuse of Discretion	*Chevron* Deference
Court Support	1.00				
Substantial Evidence	0.86*** (0.001)	1.00			
Arbitrary & Capricious	0.60** (0.002)	1.00*** (0.001)	1.00		
Abuse of Discretion	0.76*** (0.001)	0.79*** (0.001)	1.00*** (0.001)	1.00	
Chevron Deference	0.83*** (0.001)	0.75*** (0.001)	0.60 (0.089)	0.87*** (0.001)	1.00

* $p<0.05$, ** $p<0.01$, *** $p<0.001$
Numbers in parentheses are significance levels.

Table 4.34   Correlation Matrix of Support and Standard-of-Review Variables, D.C. Circuit

Variable	Court Support	Substantial Evidence	Arbitrary & Capric	Abuse of Discretion	*Chevron* Deference
Court Support	1.00				
Substantial Evidence	0.92*** (0.001)	1.00			
Arbitrary & Capricious	0.95*** (0.001)	0.84*** (0.001)	1.00		
Abuse of Discretion	0.88*** (0.001)	1.00*** (0.001)	0.66 (0.052)	1.00	
Chevron Deference	0.97*** (0.001)	1.00*** (0.001)	1.00*** (0.001)	0.89*** (0.001)	1.00

* p<0.05, ** p<0.01, *** p<0.001
Numbers in parentheses are significance levels.

Table 4.35   Type and Frequency of Procedural Questions Raised in Cases

Procedure	Circuits 1-11		D.C. Circuit	
	Frequency	Percent	Frequency	Percent
Info Acquired	1	0.3	1	0.5
Info Provided	2	0.6	6	2.7
Notice	11	3.3	15	6.8
Comment	7	2.1	7	3.2
Record	7	2.1	15	6.8

Table 4.36   Frequency of Procedural Questions Raised in a Case

No. of Procedures	Circuits 1-11		D.C. Circuit	
	Frequency	Percent	Frequency	Percent
0	311	93.4	181	82.3
1	18	5.4	36	16.4
2	3	0.9	1	0.5
3	1	0.3	2	0.9
Total	333	100.0	220	100.1*

*Total does not equal 100 due to rounding.

Table 4.37   Court Support if Procedural Questions Support Agency, Circuits 1–11

Procedural Question supports agency?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	4 (1.5)	1 (3.5)	5	20.0
Yes	1 (3.5)	11 (8.5)	12	91.7
Total	5	12	17	70.6

Pearson Chi^2 = 8.73
Chi^2 p < 0.003

Table 4.38   Court Support if Procedural Questions Support Agency, D.C. Circuit

Procedural Question supports agency?	Did court support agency? N (expected N)		Total	% Support
	No	Yes		
No	13 (5.7)	1 (8.3)	14	7.1
Yes	2 (9.3)	21 (13.7)	23	91.3
Total	15	22	37	59.5

Pearson Chi^2 = 25.57
Chi^2 p < 0.001

Table 4.39   Frequency of Judge Votes in Sample by Circuit

Circuit	No. of Judge Votes	% of Judge Votes
D.C.	570	44.0
1	75	5.8
2	57	4.4
3	77	5.9
4	92	7.1
5	63	4.9
6	75	5.8
7	65	5.0
8	37	2.9
9	110	8.5
10	51	3.9
11	24	1.9
Total	1,296	100.1*
Circuit Mean (without D.C.)	66	5.1

* Total does not equal 100 due to rounding.

Table 4.40   Frequency of Judge Support for Agencies, All Circuits

Circuit	Total Votes	Supportive Votes		Non-Supportive Votes	
		No.	Percent	No.	Percent
D.C.	570	368	64.5	202	35.4
Circuits 1-11	726	476	65.6	250	34.4
Total	1,296	844	65.1	452	34.9

Table 4.41   Ideological Composition of Judges in Sample, 1982–2002

Circuit	N	Mean	SD	Min	Max
D.C.	33	−0.012	0.491	−0.623	0.567
1-11	255	0.024	0.348	−0.684	0.581
All Circuits	283	0.024	0.367	−0.684	0.581

Table 4.42   Frequency of Judges in Each Ideology Range

Ideology Range	D.C. Circuit		Circuits 1−11		All Circuits	
	N	%	N	%	N	%
Liberal Range						
−1.0 to −0.75	0	0.0	0	0.0	0	0.0
−0.75 to −0.5	8	24.2	10	3.9	18	6.4
−0.5 to −0.25	8	24.2	63	24.7	69	24.4
−0.25 to 0.0	1	3.0	46	18.0	46	16.3
Total in Liberal Range	17	51.4	119	46.6	133*	47.1
Conservative Range						
0.0 to 0.25	2	6.1	55	21.6	55	19.4
0.25 to 0.50	3	9.1	51	20.0	54	19.1
0.50 to 0.75	11	33.3	30	11.8	41	14.5
0.75 to 1.00	0	0.0	0	0.0	0	0.0
Total in Conservative Range	16	48.5	136	53.4	150	53.0
Grand Total	33	99.9*	255	100.0	283	100.1**

*   The total number of unique judges in all circuits does not equal the total of unique judges in the D.C. circuit plus the total in the remaining circuits because of judges hearing cases in more than one circuit.

**   Totals do not equal 100.0 due to rounding.

Table 4.43   Coding Values for Ideological Direction of Case Decision

Description	Value for Direct1	Value for Ideological Direction of Case Decision
Liberal	3	0
Conservative	1	1

Table 4.44   Derived Values for Ideological Direction of Agency Position

	Ideological Direction of Case Decision	
Court Support	Liberal (0)	Conservative (1)
Supports agency (0)	0	1
Does not support agency (1)	1	0

Table 4.45   Judge Ideological Agreement and Judge Support for Agencies—Model Summaries

Model (Circuit)	Judge Ideological Agreement Coefficient	Coef. SE	p	Model Pseudo R^2	Model N
D.C.	0.25	0.17	0.130	0.003	570
1-11	0.73	0.22	0.001	0.012	721

Table 4.46   Panel Ideological Agreement Predicting Judge Support, Circuits 1–11

Model	Regression Model Coefficient	Coef. SE	P	Model Pseudo R^2	N
Panel Median Ideology	1.27	0.29	0.001	0.022	726
Panel Mean Ideology	1.83	0.37	0.001	0.028	726

Table 4.47   Panel Ideological Agreement Predicting Judge Support, D.C. Circuit

Model	Regression Model Coefficient	Coef. SE	P	Model Pseudo R^2	N
Panel Median Ideology	0.33	0.17	0.055	0.005	570
Panel Mean Ideology	0.78	0.30	0.009	0.010	570

Table 4.48   Panel Ideological Agreement Predicting Court Support, Circuits 1–11

Independent Variable	Logistic Regression Model Coef (S.E.)	p
Panel Ideology Agree	1.09 (0.58)	0.059
Constant	0.57*** (0.13)	0.001
Log Likelihood	−162.56	
N	251	
LR Chi2	3.63	
Prob > Chi2	0.057	
Pseudo R2	0.01	

* p<0.05, ** p<0.01, *** p<0.001

Table 4.49   Panel Ideological Agreement Predicting Court Support, DC Circuit

Independent Variable	Logistic Regression Model Coef (S.E.)	p
Panel Ideology Agree	0.64 (0.51)	0.211
Constant	0.69*** (0.16)	0.001
Log Likelihood	−118.28	
N	186	
LR Chi2	1.59	
Prob > Chi2	0.207	
Pseudo R2	0.01	

* p<0.05, ** p<0.01, *** p<0.001

CHAPTER 5: RESULTS

In the preceding chapter, I conceptualized, described, and operationalized variables related to the attitudinal and legal models of judicial behavior. In this chapter, I use these variables, along with data from the U.S. Courts of Appeals Database, to test attitudinal and legal hypotheses in logistic regression models. I first address court-level behavior, followed by individual judge behavior.

IS COURT BEHAVIOR DEFERENTIAL?

As previously discussed in the data and methods section, there is a positive correlation between how courts answer legal questions with respect to agencies and whether courts support agencies in final decisions. There is also a positive correlation between a panel's ideological agreement with agency positions and whether a court supports an agency. The following sections report the results of logistic regression models predicting court support for agencies when both legal and attitudinal variables are included in the same model. These models include the panel-ideological-agreement variable, a legal variable, and variables for the D.C. Circuit. The equation for this model is as follows:

Court Support for Agency = β_0 + β_1 (legal variable) + β_2 (panel ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x panel ideological agreement) + e, where, β_0 is the constant and e is the error term.

Models are named for the unique legal variable used in each—procedural adherence, substantial evidence, arbitrary and capricious, abuse of discretion, and *Chevron* deference. The results of these models are presented in Tables 5.1 through 5.5. Subsequent sections address whether these results support the court-level hypotheses.

Courts Support Agencies that Follow Procedures

The probability that a review panel will support an agency in final case decisions increases substantially if agencies follow prescribed procedures. Hypothesis 1 states, "Agency adherence to procedural standards, such as those outlined in the Administrative

Procedures Act and other related statutes, increases the likelihood that a review panel will defer to the agency. Agency non-adherence to procedural standards decreases the likelihood that a review panel will defer to the agency." Results of the logistic regression of the procedural-adherence model reported in Table 5.1 support this hypothesis. Courts' views of agency adherence to procedures are significantly associated with agency success in the courts. If a court panel determines an agency adhered to procedures, the probability the court will support the agency in the final case decision is 0.75 higher than if agencies do not adhere to procedures.

Review panels in the D.C. Circuit appear no more and no less prone than panels in other circuits to support agencies based on an agency's adherence to procedures. Notice that the DC dummy variable is not statistically significant in Table 5.1 Hypothesis 2 states, "D.C. Circuit panels are less likely than other circuit panels to defer to agencies based on agency adherence to procedures." The results of the logistic regression of the procedural-adherence model (Table 5.1) do not support this hypothesis, since the interactive variable, **DC x procedural-adherence**, is not statistically significant at conventional levels. This may have ramifications for scholars' assertions that the D.C. Circuit is less likely to defer to agencies because of the greater administrative law expertise that judges in the D.C. Circuit develop as a result of reviewing a greater number of agency decisions (Pierce 1988). I revisit this point in the discussion chapter, but note here that court decisionmaking in the D.C. Circuit is not statistically different from court decisionmaking in the remaining circuits.

Courts Support Agencies that Pass Standard-of-Review Muster

Review panels tend to support agencies in final case decisions where courts also determine that agencies meet minimum thresholds for each standard of review. This support suggests that courts defer to agencies as legally prescribed by these standards of review. Hypothesis 3 states, "If a court panel answers standard-of-review questions favorably toward an agency, the review panel is more likely to defer to the agency, resulting in support for the agency in the final case decision." To test this hypothesis, I examine four standards of review in logistic regression models that predict court support for agencies in final case decisions. Tables 5.2 through 5.5 report the results of the four standard-of-review models, all of which support this hypothesis.

145

Based on the results in the *substantial-evidence* model (Table 5.2), if an agency provides substantial evidence to support its decision, the probability of a court supporting the agency in the final case decision increases by 0.87 compared to when agencies do not provide substantial evidence. The *arbitrary-and-capricious model* (Table 5.3) shows that when an agency does not act arbitrarily or capriciously, the probability of a court supporting the agency increases by 0.83. Similarly, when court panels determine agencies do not abuse discretion, the probability of court support increases by 0.81 (see *abuse-of-discretion model* in Table 5.4). Finally, the *Chevron*-deference model (Table 5.5) indicates that when an agency articulates a reasonable interpretation of a statute, the probability of courts supporting the agency in final case decisions increases by 0.91.

Based on these results, if an agency passes the minimum threshold of deference requirements established in each standard of review, courts are more likely to support agencies in final case decisions. Furthermore, the results of these models do not support the attitudinalists' idea that courts substitute their ideological preferences in place of agency's preferences. The panel ideology variable is not statistically significant at conventional levels in any of the four models. Thus, it appears that courts defer to agencies where agencies pass muster on these standards of review.

Review panels in the D.C. Circuit also support agencies when agencies pass standard-of-review muster. Since the DC control variable is not statistically significant in any of these models, we can reject any hypothesis suggesting that courts in the DC Circuit behave differently from courts in other circuits. Further, notice that in all four of the standard-of-review models, the interactive variable, DC x Legal, is not shown. This is because values of 1 for this variable predict success perfectly; therefore, these observations were dropped from the models. Substantively, this means that there were no instances in the D.C. Circuit where a review panel answered standard-of-review questions favorably toward the agency but chose not to support the agency in the final case decision.[22] That is, if D.C. Circuit review panels determined that agencies provided substantial evidence to support their decisions, agencies were not arbitrary or capricious, agencies did not abuse discretion, or agencies reasonably interpreted statutes, the review

---

[22] There is one exception to this proposition. There is one case in the *Chevron deference* model where the review panel supported the agency in the review question, but not in the final case decision. However, one observation is insufficient variation to keep Stata from dropping this variable for want of perfect prediction.

panel always supported the agency's decisions. While I did not hypothesize D.C. Circuit court decisionmaking based on standard-of-review questions, I would have been inclined to hypothesize behavior opposite to these results based on scholarly assertions that the D.C. Circuit is less deferential to agencies because of its hard-look approaches to judicial review of agency decisions (Edwards 1998; Revesz 1997, 1999; Wald 1996). On the other hand, the lack of observable variation in these standards is noted in Chapter Four, where I examined correlations between these legal variables and the court-support variable in the D.C. Circuit apart from the other circuits. Nonetheless, it appears from these results that review panels in the D.C. Circuit, are at a minimum, just as deferential to agencies as review panels in other circuits, and, at a maximum, D.C. review panels may be more deferential.

Ideological Composition of Panels

The ideological composition of a review panel does not appear to affect decisions of the entire court. Hypothesis 4 states, "Court panels decide cases consistently with panel ideology. Liberal panels tend to support liberal agency decisions, and conservative panels tend to support conservative agency decisions." To test this hypothesis, I used the panel-ideological-agreement variable in a regression model to predict support for agencies in final case decisions. If this hypothesis is true, the panel-ideological-agreement variable coefficient will be positive, indicating that as panel ideological agreement increases so does the probability of court support for agencies. Results reported in Tables 5.1 through 5.5 do not support this hypothesis. In all models, panel ideology is never statistically significant. This suggests that the ideological composition of a review panel has little import in judicial decisionmaking when legal variables are also considered.

Review panels in the D.C. Circuit do not appear to be any more or less ideological in their decisionmaking than panels in other circuits. Hypothesis 5 states, "D.C. Circuit review panels tend to decide cases more consistently with panel ideologies than review panels in other circuits." To test this hypothesis, I examine the DC x panel ideology variable in all five of the models reported in Tables 5.1 through 5.5. Since these variables are not statistically significant in any of the models, this hypothesis is not supported.

These results reiterate the bivariate regression results, where there is nto a statistically significant association between panel ideological agreement with agency positions and court support for agencies (see Tables 4.48 and 4.49 in Chapter 4). Even when all circuits are combined into the same model, once a legal variable is introduced into the model, the panel-ideological-agreement variable is not significant. But as attitudinalists assert, this may indicate that these legal variables are masks for ideology. This contrast merits further investigation.

<center>Case Opinions as Masks for Ideology</center>

Attitudinalists argue that opinions are window dressing for judges' policy preferences (Segal and Spaeth 2002). This suggests that courts decide cases based on ideological preferences and then craft opinions to support those ideological decisions. This argument is reasonable for two reasons. First, as noted in the data and methods chapter, all standard-of-review variables are highly and positively correlated with each other, many of them perfectly so. When two standards-of-review questions are raised in a case, if a court answers one of those questions favorably toward the agency, the court generally answers the second question favorably toward the agency as well. One might conclude that standard-of-review questions are answered in the same manner because they are all window dressing for ideology. If courts have an ideological predisposition or preference to support an agency, it is reasonable to expect their answers to legal questions in their opinions to also support the agency.

Second, in bivariate regression models, panel ideological agreement approaches statistical significance when predicting court support for agencies. This stands in contrast to panel ideological agreement not being statistically significant in models with standard-of-review variables, *ceteris paribus* (see Tables 5.2 through 5.5). Attitudinalists might reason that these standard-of-review variables mask the effects of the panel-ideological-agreement variable because they themselves are proxies for ideology. This claim is, prima facie, reasonable and feasible. To test it, I use another set of logistic regression models.

If standard-of review variables are proxies for ideology, then panel ideological agreement with agency positions should predict how courts answer standard-of-review

<center>148</center>

questions with respect to agencies. Tables 5.6 through 5.10 report the results of logistic regression in these models, which also include variables for the D.C. Circuit.

The panel-ideological-agreement variable is not statistically significant in any of the models, nor is the interactive variable, DC x panel ideology. Therefore, attitudinalist assertions that legal reasoning in opinions is window dressing for ideological preferences do not appear to be supported when agency decisions are under review in the U.S. Courts of Appeals.

Summary of Court Decisionmaking

Court decisionmaking in the U.S. Courts of Appeals when agency decisions are under review appears to be driven by procedural and institutional deference. Where agencies follow prescribed legal procedures in carrying out and documenting their decisions, courts support agencies' decisions, even if agency decisions do not mirror the ideological preferences of review panels. Similarly, courts tend to defer to agency decisions so long as agencies provide substantial evidence to support their decisions, do not act arbitrarily or capriciously, or do not abuse their discretion. Further, as the *Chevron* doctrine prescribes, the results suggest that courts may defer to agencies' interpretations of statutes, so long as these interpretations are reasonable. There is little evidence suggesting that courts substitute their policy preference in place of agency decisions based on the court's ideological composition and its concomitant ideological agreement with the agency.

The results presented in Tables 5.6 through 5.10 strengthen the tests and findings for the court-level hypotheses. These findings generally support the legal model, and there is little evidence to support the attitudinal model. These results show that courts' answers to standard-of-review questions and procedural-adherence questions are not statistically associated with judges' ideological preferences. I, therefore, argue that answers to these legal questions are not proxies for judges' ideologies. Instead, these variables appear to be independent legal questions that courts answer according to criteria other than ideology.

The results presented in Tables 5.6–5.10 provide insights into the direction of the causal arrows in the models presented in Tables 5.1–5.5. Attitudinalists would argue that the decision to support an agency comes first, and opinions that support those decisions

follow. Legal model proponents would argue that legal reasoning dictates case decisions. Since panel ideology does not predict answers to legal questions used in this study, the attitudinalist argument is not supported. Therefore, these results suggest that courts' decisions to support (or not support) an agency are guided more by legal doctrine, and less by judges' attitudes. If agencies follow procedures—broadly speaking, this includes providing substantial evidence to justify actions, not acting arbitrarily or capriciously, not abusing discretion, and reasonably interpreting statutes—then there is a high tendency for courts to defer to agencies. Where agencies do not follow procedures, courts are less likely to do so. However, these results do not suggest that the U.S. Courts of Appeals rubber stamp agency decisions. As discussed in the data and methods chapter, the presence of a particular legal question in a case is not sufficient to predict court support for an agency. Remember, that agencies receive support in the circuit courts in about 65% of cases, but these courts also render non-supportive decisions in 35% of cases.

Finally, I note that most attitudinalist research is based on the behavior of individual judges. That is, attitudinalists suggest that an individual judge will vote consistently with his or her ideology. Where scholars extend attitudinalists' findings to entire courts, as I do here, there is an assumption that courts behaving ideologically is the cumulative result of judges behaving ideologically. In past research, this assumption is implicit, rather than explicit (e.g., Humphries and Songer 1999). I am careful, however, not to extend the court-level results to individual judge behavior. Hence, I posited separate hypotheses for individual judge behavior. The next section discusses the results of the tests for hypotheses related to individual judge decisionmaking.

IS JUDGE DECISIONMAKING DEFERENTIAL OR IDEOLOGICAL?

Since individual judge decisions are the basic components of court decisions, the following sections examine individual judge decisionmaking when agency decisions are under review. The dependent variable, **judge support**, in the following logistic regression models measures whether a judge voted to support an agency in the final case decision. All models include one legal variable, an ideology variable and controls for the D.C. Circuit. The names of the models indicate the legal variable being tested in each. The equations for the models being tested are as follows. Note that all the equations are the same except for the specific legal variable being tested.

Procedural Adherence Model

Judge Support for Agency = β_0 + β_1 (procedural adherence) + β_2 (judge ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

Substantial Evidence Model

Judge Support for Agency = β_0 + β_1 (substantial evidence) + β_2 (judge ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

Arbitrary & Capricious Model

Judge Support for Agency = β_0 + β_1 (arbitrary & capricious) + β_2 (judge ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

Abuse of Discretion Model

Judge Support for Agency = β_0 + β_1 (abuse discretion) + β_2 (judge ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

***Chevron* Deference Model**

Judge Support for Agency = β_0 + β_1 (*Chevron* deference) + β_2 (judge ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

The U.S. Courts of Appeals Database does not include data for how individual judges answered standard-of-review and procedural questions. However, since the court-level analyses show that answers to standard-of-review questions and procedural-

adherence questions are probably not significantly associated with ideology, and likely occur before final case decisions are made, I use these court-level answers as predictors of how judges will vote in final case decisions. For example, in the procedural-adherence model, I examine whether a court's determination that an agency adhered to procedures has a statistically significant relationship with whether individual judges' votes for the agency in final case decisions. As I note in the chapter describing these variables, it would have been better to have individual judge-level data for the legal variables. However, as I note in the final chapter, it is unlikely that the results would be markedly different with more specific data since 90% of cases in the U.S. Courts of Appeals are unanimous. This means that in 90% of cases, how an individual judge answers a legal question will be the same as how a court answers a legal question. It would not be correct to assume that this congruence is always true. Therefore, I note that the answers to legal questions are based on court answers, not individual judge answers. Tables 5.11 through 5.15 report the results when the ideology variable in each model is individual judge ideological agreement with the agency.

Judges Support Agencies that Adhere to Procedures

Individual judge support for agencies is statistically associated with whether agencies adhere to procedures. Hypothesis 6 states, "Agency adherence to procedural standards, such as those outlined in the Administrative Procedures Act and other related statutes, increases the likelihood that a judge will defer to the agency. Agency non-adherence to procedural standards decreases the likelihood that a judge will defer to the agency." The procedural-adherence model (Table 5.11) supports this hypothesis. Agency adherence to procedures, as determined by the review panel, has a statistically significant association with judge support. The probability of a judge supporting an agency in final case decisions increases by 0.75 when the agency follows procedures.

Concerning adherence to procedures, judges in the D.C. Circuit do not appear to behave differently from judges in other circuits. Hypothesis 7 states, "D.C. Circuit judges are less likely than judges in other circuits to defer to agencies based on agency adherence to procedures." To test this hypothesis, I included two variables in the procedural adherence model—the dummy variable, **DC**, and the interactive variable, **DC x procedural adherence** (Table 5.11). The results of this test do not support this

hypothesis, since neither variable is statistically significant at conventional levels. This may suggest that if judges in the D.C. Circuit retain greater administrative law expertise than their counterparts in other circuits, this expertise does not manifest in diminished levels of agency support because of greater scrutiny of agency procedures.

Judges Defer to Agencies as Prescribed by Standards of Review

Regardless of the standard of review addressed in a case, the probability of individual judges supporting agencies in final case decisions increases when the review panel determines the agency met the minimum requirements for deference defined by the standard. Hypothesis 8 states, "If a court panel answers standard-of-review questions favorably toward an agency, a judge is more likely to defer to the agency and vote to support the agency in the final case decision." I test this hypothesis with four logistic regression models—substantial evidence, arbitrary and capricious, abuse of discretion and *Chevron* deference (Tables 5.13 through 5.16). Logistic regression results for these four models all support this hypothesis, since the standard-of-review variable in each model is statistically significant.

In all models, the probability of individual judge support increases if review panels answer standard-of-review questions favorably toward agencies. When agencies do not act arbitrarily or capriciously, the probability of judge support increases 0.44. When agencies do not abuse discretion, the probability of judge support increases 0.49. When an agency provides substantial evidence to support its position, the probability of a judge supporting the agency increases 0.63, compared to instances when the agency does not provide substantial evidence. Similarly, under the *Chevron*-deference model, the probability of judges supporting agencies increases 0.70 if agencies articulate a reasonable interpretation of a statute.

Judges in the D.C. Circuit generally appears to be as deferential to agencies as judges in other circuits. The interactive DC variable (**DC x Standard of Review**) was statistically significant in only the substantial-evidence model. In this model, if review panels determine agencies provided substantial evidence, the probability of support from individual judges increases 0.30 in the D.C. Circuit. I consider these results more fully with the results of other models in the section titled, *Judicial Decisionmaking in the D.C. Circuit*, later in this chapter.

Individual Judge Ideology is of Little Consequence

Whether an individual judge is in ideological agreement with an agency has no statistically significant impact on whether the judge votes to support the agency in the final case decision. Hypothesis 9 states, "A judge's vote will be consistent with his/her ideology in a case. Judges will vote to support agencies if their ideology agrees with the agency position. Conservative judges will vote to support conservative agency decisions. Liberal judges will vote to support liberal agency decisions." I tested this hypothesis by including the judge-ideological-agreement variable in the regression models reported in Tables 5.11 through 5.15. In all models, the judge-ideological-agreement variable is not statistically significant at $p<0.05$, so there is no evidence to support this hypothesis.

Similarly, individual judge votes to support an agency do not appear to be affected by an individual judge's ideological agreement with the agency. Hypothesis 10 states, "D.C. Circuit judges tend to decide cases more consistently with their ideologies than judges in other circuits." The results reported in Tables 5.11 through 5.15 include the interactive variable, **DC x judge ideological agreement**. This variable is not statistically significant in any of the models, so hypothesis 10 is not supported.

Panel Ideology May Influence Individual Judge Decisionmaking

The ideological composition of a review panel may, in some instances, influence whether individual judges support agencies in final case decisions. Hypothesis 11 states, "Individual judge votes to support agencies are influenced by the ideology of other judges on the reviewing panel. If the mean ideology of the review panel is in ideological agreement with the agency position, individual judges are more likely to support agencies in final case decisions." To test the influence of the ideological composition of a review panel on an individual judge's decisionmaking, I ran all of the above judge-level models, replacing the judge-ideological agreement variable with panel ideological agreement. As with the other models, the dependent variable is **judge support**, which measures whether a judge voted to support an agency in the final case decision. All models include one legal variable, an ideology variable and variables for the D.C. Circuit. The names of the models indicate the legal variable being tested in each. The equations for the models being tested are as follows. Note that all the equations are the same except for the specific legal variable being tested, and that the only difference between these models and the

154

ones presented earlier in this section is that the judge ideological agreement variable is replaced with the panel ideological agreement variable.

Procedural Adherence Model

Judge Support for Agency = $\beta_0 + \beta_1$ (procedural adherence) + β_2 (panel ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

Substantial Evidence Model

Judge Support for Agency = $\beta_0 + \beta_1$ (substantial evidence) + β_2 (panel ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

Arbitrary & Capricious Model

Judge Support for Agency = $\beta_0 + \beta_1$ (arbitrary & capricious) + β_2 (panel ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

Abuse of Discretion Model

Judge Support for Agency = $\beta_0 + \beta_1$ (abuse discretion) + β_2 (panel ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

Chevron Deference Model

Judge Support for Agency = $\beta_0 + \beta_1$ (*Chevron* deference) + β_2 (panel ideological agreement) + β_3 (D.C. Circuit dummy) + β_4 (D.C. Circuit dummy x legal variable) + β_5 (D.C. Circuit dummy x judge ideological agreement) + e, where, β_0 is the constant, and e is the error term.

Tables 5.16 through 5.20 report these results. Support for Hypothesis 11 is mixed. In the procedural-adherence model (Table 5.16), substantial-evidence model (Table 5.17) and arbitrary-and-capricious model (Table 5.18), the panel-ideological-agreement variable is not statistically significant at $p<0.05$. However, panel composition appears to have an impact on individual judges' votes in the abuse-of-discretion model and *Chevron*-deference model (Tables 5.19 and 5.20). In the latter two models, the probability of judge support increases 0.50 and 0.49, respectively, as panel ideological agreement moves from its minimum to maximum. Remember that the panel ideological agreement variable is a continuous variable, so minimum ideological agreement is the observed values closest to negative one, and maximum ideological agreement is the observed value closest to positive one.

It appears that support for Hypothesis 11 depends on the nature of the legal questions courts address. As noted in Chapter Four, abuse of discretion and *Chevron* deference are not "standards of review" in the strictest sense of the term. Although they function as such, these two "standards" examine more substantive interpretations of agency actions, especially *Chevron* deference. Unlike the substantial-evidence test and the arbitrary-and-capricious test, in *Chevron*-type cases judges first evaluate whether agencies provided a reasonable interpretation of statutes based on Congress' intent. Where statutes are ambiguous, judges then evaluate whether agencies provided a reasonable interpretation of statutes. While the levels of deference due to agencies is not always clear from one standard to the next, it is at least plausible that more substantive reviews of agency actions, such as evaluating whether agencies exceeded their Congressionally-granted discretion or whether agencies reasonably interpreted statutes, these judgments may leave more room for ideological interpretations.

Curiously, however, the probability of individual judge support in the D.C. Circuit *decreases* by 0.69 as panel ideological agreement moves from minimum to maximum in the *Chevron*-deference model. This finding is not in the expected direction. In substantive terms it means that, in the D.C. Circuit, as panels become more ideologically unaligned with agency positions, individual judges are more likely to support agencies in final case decisions. I consider these points later in the next chapter.

Procedural-Adherence and Standard-of-Review Hypotheses Revisited

How judges answer legal questions with respect to agencies has a statistically significant impact on whether individual judges vote to support agencies. In all models, the probability of a judge voting to support an agency increases significantly if the review panel answers procedural-adherence and standard-of-review questions favorably toward the agency. This is true in all models irrespective of the ideology measures used in the model. In the models testing the influence of panel ideological agreement on individual judge decisionmaking, the legal variables were all statistically significant.

These results lend further support to Hypotheses 6 and 8. Hypothesis 6 states, "Agency adherence to procedural standards, such as those outlined in the Administrative Procedures Act and other related statutes, increases the likelihood that a judge will defer to the agency. Agency non-adherence to procedural standards decreases the likelihood that a judge will defer to the agency." As shown in the procedural-adherence model (Table 5.16), the probability of judge support for agencies in final case decisions increases by 0.72 when agencies adhere to procedures. Hypothesis 8 states, "If a court panel answers standard-of-review questions favorably toward an agency, a judge is more likely to defer to the agency and vote to support the agency in the final case decision." All four of the standard-of-review models support this hypothesis. Where panels answer standard-of-review questions favorably toward agencies, the probability of judge support in final case decisions increases as little as 0.43 to as much as 0.72.

In sum, the results reported here suggest that individual judges, like entire review panels, appear to be deferential toward agencies based on law and legal doctrine. Unlike courts, however, individual judges appear to be influenced by the ideological composition of review panels when making these decisions. Remember, the court-level results suggest that court decisions to support an agency may not be influenced by the ideological composition of the review panel. A judge's individual ideological agreement with an agency, on the other hand, has no statistically significant impact on whether a particular judge votes to support agencies. In the next section, I analyze the results to see if these generalizations may also exist in the D.C. Circuit.

Scholars disagree on whether judges and review panels in the D.C. Circuit are more political or more deferent than their counterparts in other circuits (Banks 1999; Caruson and Bitzer 2004; Edwards 1998; Pierce 1988; Revesz 1999; Willison 1986). Court-level analyses suggest that review panels in the D.C. Circuit do not behave differently than panels in other circuits. That is, review panels are not any more or less political in the D.C. Circuit, nor are they any more or less deferent to agencies. Judge-level analyses suggest that individual judges in the D.C. Circuit are less likely to support agencies in final case decisions. In some instances, these judges appear to be influenced by the ideological composition of the review panel and, perhaps other factors, such as greater administrative law expertise.

D.C. Circuit Review Panels Not More Ideological, Maybe More Deferential

In the present study, sample data show that agencies receive support in the D.C. Circuit in about 66% of cases, compared to 64% in the remaining circuits (see Table 4.6 in Chapter Four). I included a dummy variable for the D.C. Circuit in all of the logistic regression models predicting support for agencies. In all of the court-level models, the DC variable was never statistically significant. This suggests that review panels in the D.C. Circuit are not any more or less inclined to support agencies in final case decisions than are review panels in other circuits.

Hypothesis 5 stated that D.C. Circuit review panels tend to decide cases more consistently with panel ideology than review panels in other circuits. To test this hypothesis, I included an interactive variable, **DC x Panel Ideology**, in all the models. This variable was never statistically significant in any model. Therefore, I conclude that panels in the D.C. Circuit are no more and no less ideological in their outcomes than panels in other circuits.

The variables that measure the interactive effects of the D.C. Circuit and standard-of-review variables were dropped from each model because they predicted agency support perfectly. Recall that there were no observations in the dataset when review panels in the D.C. Circuit answered standard-of-review questions favorably toward agencies and did not support agencies in final case decisions. While I am unable to evaluate whether this behavior is statistically different from review panels in other

circuits, it does suggest that D.C. Circuit panels may be more deferential to agencies so long as agencies meet the minimum thresholds of deference prescribed by law.

In the procedural-adherence model, the interactive term, DC x Procedural adherence, is not statistically significant. This suggests that review panels in the D.C. Circuit are no more and no less inclined to support agencies in final case decisions compared to panels in other circuits based on whether an agency followed procedures. Again, this suggests that the D.C. Circuit is no more deferential to agencies than other circuits.

Agencies Receive Less Support from Individual Judges in the D.C. Circuit

I included a dummy variable for the D.C. Circuit in all of the judge-level models. Here, the results are surprising. First, in all of the models, coefficients for the D.C. variable are always negative. This suggests that D.C. Circuit judges are less inclined to support agencies in final case decisions than their counterparts in other circuits. Further, the D.C. dummy variable is statistically significant in two of the four standard-of-review models—abuse of discretion ($p<0.036$) and *Chevron* deference ($p<0.027$). In the abuse-of-discretion model, the probability of judge support decreases 0.23. For the *Chevron*-deference model, this probability decreases 0.16. The D.C. dummy variable was not statistically significant in the substantial-evidence and arbitrary-and-capricious models, and neither was it significant in the procedural-adherence model.

It is unlikely that this decreased probability is due to either ideology or deference, since neither of the DC-interactive variables in these models is statistically significant. This alternative influence on individual judge decisionmaking may be due to judges in the D.C. Circuit developing and retaining greater administrative law expertise, which could lead to increased scrutiny of agency actions and less support in final case decisions, as some scholars suggest (Banks 1999; Revesz 1997, 1999).

Are D.C. Circuit judges more ideological?

Judges in the D.C. Circuit do not appear to be more ideological than judges in other circuits. Hypothesis 10 states that D.C. Circuit judges tend to decide cases more consistently with their ideologies than judges in other circuits. To test this hypothesis, I included in all models an interaction term, **DC x judge ideology**. This variable was never statistically significant in these models. Thus, I conclude that individual judges are no

more or less prone to vote according to their ideological preferences than judges in other circuits.

I further tested this hypothesis by including an interactive variable, **DC x panel ideology**, which indicates if individual judge decisionmaking is influenced by the ideological composition of the review panel. This interactive term was statistically significant in only one model—*Chevron* deference. Counter-intuitively, however, the coefficient for this interactive term is negative. This means that as the panel ideological agreement with the agency position increases, the probability of a judge supporting the agency decreases. More specifically, as panel ideological agreement moves from its minimum (least agreement) to its maximum (most agreement), the probability of a judge in the D.C. Circuit voting to support the agency in the final case decision *decreases* by 0.69.

Is the D.C. Circuit less deferential to agencies?

Scholars suggest that judges in the D.C. Circuit are less deferential to agencies because these judges have more administrative law expertise and, therefore, take hard looks at these cases (Banks 1999; Revesz 1997, 1999). This study provides limited support for such a conclusion.

First, there is no support for Hypothesis 7, which states that D.C. Circuit judges are less likely than judges in other circuits to defer to agencies based on agency adherence to procedures. The **DC** variable is not statistically significant in the procedural-adherence model. Therefore, it does not appear that judges in the D.C. Circuit are any more or less inclined than other circuits to defer to agencies based on agency adherence to procedures. Second, the dummy variable, **DC**, is negative in all of the standard-of-review models. This suggests an overall disinclination for judges in the D.C. Circuit to support agencies, which further suggests that these judges may be less deferential to agencies than judges in other circuits.

D.C. Circuit Decisionmaking—Summary

D.C. Circuit review panels behave essentially the same as review panels in other circuits. That is, support for agencies in the D.C. Circuit is a function of deference to agencies based on prescribed law. The ideological composition of a review panel appears to have no influence on whether agencies receive support.

160

Individual judge behavior in the D.C. Circuit is less clear than panel behavior. Overall, D.C. Circuit judges are less inclined to support agencies in final case decisions than judges in other circuits in cases where an agency's abuse of discretion and interpretation of statutes are in question.

An individual judge's decision to support an agency in the D.C. Circuit does not depend on whether the judge agrees ideologically with the agency. However, individual judges are influenced by the ideological composition of review panels in *Chevron*-type questions, but the relationship is not as expected. In the *Chevron*-deference model, as the panel's collective ideological agreement with the agency position increases, the probability that an individual judge will vote to support an agency in final case decisions decreases. This means that liberal judges tend to support conservative agency decisions, and conservative judges tend to support liberal agency decisions. This is counter-intuitive, and may suggest that the measure actually captures a judge's inclination to join in unanimous opinions more than it suggests that judges are swayed by ideology.

Finally, D.C. Circuit judges are no more or less likely to support agencies whether or not agencies follow procedures. Agencies that follow procedures can expect support from judges in the D.C. Circuit as much as they can expect support from judges in other circuits. Likewise, agencies that do not follow procedures are just as likely to receive votes of non-support from judges in the D.C. Circuit as they are in other circuits.

SUMMARY OF RESULTS AND HYPOTHESES TESTS

The central research question in the present study asks, "When agency decisions are under review in the U.S. Courts of Appeals, what are the effects of law and ideology on judicial decisionmaking?" Based on this question, I developed hypotheses aimed at testing the extent to which decisionmaking is the U.S. Courts of Appeals is a function of law, political ideology, or both. The results of these tests suggest that law matters, to the exclusion of judge's ideological preferences. In limited circumstances, the ideological composition of a panel may also influence case decisions, but never to the exclusion of law.

Agency Adherence to Procedures is Paramount to Court Support

As hypothesized, agency adherence to procedural standards increases the likelihood that individual judges and review panels will support the agency in final case

decisions, and agency non-adherence to procedural standards decreases that likelihood (see Hypotheses 1 and 6). If a review panel determines that an agency adhered to procedures, the probability of the panel supporting the agency in the final case decision increases by 0.75 over instances in which the agency did not follow procedures (see Table 5.1). Similarly, the probability of an individual judge voting to support an agency in final case decisions increases by 0.75 when agencies adhere to procedures (see Table 5.11).

In the procedural adherence models, the ideological composition of the review panel does not affect the final outcome of the case. Neither does individual judge ideology affect how judges vote in final case decisions. Procedural adherence, then, approximates a litmus test for whether individual judges and courts support agencies in final case decisions.

Judges and Courts Defer to Agencies—Standards of Review

The legal model presupposes certain levels of deference to agencies, depending on the standard of review the court uses. As hypothesized, if a court panel answers standard-of-review questions favorably toward an agency, individual judges and the review panel as a whole are more likely to support the agency in the final case decision (see Hypotheses 3 and 8). In all models testing these hypotheses, how courts answered standard-of-review questions has a statistically significant association with whether court panels support agencies in final case decisions. Where agencies pass standard-of-review tests, the probability of courts supporting agencies in final case decisions increases as much as 0.81–0.88, depending on the standard of review. For individual judges, this probability of support increases as much as 0.44–0.63 when agencies pass standard-of-review muster.

Table 5.21 summarizes the probabilities of increased support for agencies for each standard of review I examined.[23] These figures show the change in probability of support when a judge (or review panel) answers standard-of-review questions favorably toward an agency compared to when a judge (or review panel) answers questions unfavorably.

If agencies provide substantial evidence to support their decisions, the probability of court support increases 0.87. The probability of courts supporting agencies increases

---

[23] Data for Table 5.21 compiled from Tables 5.2–5.5, 5.12–5.15, and 5.17–5.20.

0.88 if agencies are not arbitrary and capricious in their actions and 0.81 if agencies do not abuse discretion. When agencies provide reasonable interpretations of statutes, the probability of court support increases 0.91.

For individual judges, the probability of support for agencies in final case decisions also increases when agencies pass these standard-of-review tests. The probability of judge support increases as little as 0.63 and as much as 0.72 if agencies provide substantial evidence to support their actions. When agencies do not act arbitrarily or capriciously, the probability of judge support increases about 0.44. This probability of support increases about 0.49 if agencies do not abuse discretion and 0.70 if agencies interpret statutes reasonably.

Ideology Yields to Law

Unlike studies of the Supreme Court showing that support for agencies is a function of a justice's ideological agreement with agency positions, the present study suggests that judge ideology in the circuit courts is not a significant determinant of agency support. There is no support for the hypothesis that judges' votes will be consistent with their own ideologies (see Hypothesis 9). There is little evidence to suggest that conservative judges support conservative agency positions and liberal judges support liberal agency decisions. While the judge-ideological-agreement variable is always statistically significant in bivariate logistic regression models predicting judge support for agencies, this ideology variable is never statistically significant in multivariate models that contain a legal variable.

The same is true for courts as a whole. I hypothesized that court panels decide cases consistently with the mean ideology of the panel (see Hypothesis 4). However, this study does not support that hypothesis. The panel-ideological-agreement variable is never statistically significant in logistic regression models when one of the legal variables is also present (see Tables 5.1–5.5). Thus, it appears not to be true that liberal panels tend to support liberal agency decisions and conservative panels tend to support conservative agency decisions.

In sum, an individual judge's ideological agreement with an agency does not predict whether the judge will support the agency in final case decisions. Similarly, a

panel's ideological agreement with an agency does not predict whether a panel will support an agency in final case decisions.

This is not to say, however, that ideology never has any effect on individual judge decisionmaking. In two regression models, abuse of discretion and *Chevron* deference, the ideological composition of the review panel affected whether individual judges voted to support agencies in final case decisions. In the next chapter, I further examine the influence of panel composition on individual judge decisionmaking.

Copyright © Jerry D. Thomas 2010

TABLES REFERENCED IN CHAPTER FIVE

Table 5.1   Court Support for Agencies: Procedural-Adherence Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Procedural Adherence	3.89* (1.60)	0.015	0.75
Panel Ideology Agree	−1.58 (3.36)	0.639	−
DC	−1.06 (1.59)	0.506	−
DC x Procedural Adherence	0.99 (2.05)	0.629	−
DC x Panel Ideology	1.87 (3.98)	0.639	−
Constant	−1.45 (1.15)	0.207	
Log Likelihood	−16.22		
N	54		
LR Chi^2	38.75		
Prob > Chi^2	0.001		
Pseudo R^2	0.54		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.
−   ΔPr not calculated since variable is not statistically significant at $p<0.05$.
* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.2   Court Support for Agencies: Substantial-Evidence Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Substantial Evidence	5.59*** (0.83)	0.001	0.87
Panel Ideology Agree	1.17 (2.08)	0.402	–
DC	0.86 (0.98)	0.379	–
DC x Panel Ideology	–2.11 (3.94)	0.593	–
Constant	–2.55*** (0.63)	0.001	
Log Likelihood	–25.24		
N	123		
LR Chi^2	106.10		
Prob > Chi^2	0.001		
Pseudo R^2	0.68		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

– ΔPr not calculated since variable is not statistically significant at p<0.05.

* p<0.05, ** p<0.01, *** p<0.001

Table 5.3   Court Support for Agencies: Arbitrary-and-Capricious Model
_____

Independent Variable	Coef. (S.E.)	p	Δ Pr
Arbitrary & Capricious	5.78*** (1.29)	0.001	0.88
Panel Ideology Agree	7.78 (4.43)	0.079	–
DC	0.12 (1.01)	0.907	–
DC x Panel Ideology	–8.31 (5.30)	0.117	–
Constant	–2.30* (0.96)	0.016	
Log Likelihood	–15.47		
N	66		
LR Chi^2	53.09		
Prob > Chi^2	0.001		
Pseudo R^2	0.63		

_____

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.4   Court Support for Agencies: Abuse-of-Discretion Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Abuse Discretion	5.23*** (1.06)	0.001	0.81
Panel Ideology Agree	4.32 (3.15)	0.170	–
DC	0.69 (0.94)	0.467	–
DC x Panel Ideology	–4.24 (3.89)	0.276	–
Constant	–2.01* (0.82)	0.014	
Log Likelihood	–18.12		
N	82		
LR Chi^2	57.06		
Prob > Chi^2	0.001		
Pseudo R^2	0.61		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.5   Court Support for Agencies: *Chevron*-Deference Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Chevron Deference	6.12*** (0.91)	0.001	0.91
Panel Ideology Agree	2.18 (2.65)	0.410	–
DC	–0.51 (0.90)	0.571	–
DC x Panel Ideology	–1.92 (3.20)	0.547	–
Constant	–2.44*** (0.68)	0.001	
Log Likelihood	–23.60		
N	132		
LR Chi^2	123.48		
Prob > Chi^2	0.001		
Pseudo R^2	0.72		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at p<0.05.

* p<0.05, ** p<0.01, *** p<0.001

Table 5.6   Court Support for Agencies in Procedural-Adherence Questions

Independent Variable	Coef. (S.E.)	p
Panel Ideology Agree	0.32 (1.95)	0.868
DC	−0.02 (0.60)	0.978
DC x Panel Ideology	1.15 (2.31)	0.620
Constant	0.75 (0.46)	0.105
Log Likelihood	−38.02	
N	60	
LR Chi^2	1.65	
Prob > Chi^2	0.648	
Pseudo R^2	0.02	

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.7   Court Support for Agencies in Substantial-Evidence Questions

Independent Variable	Coef. (S.E.)	p
Panel Ideology Agree	0.24 (0.86)	0.778
DC	−0.20 (0.37)	0.586
DC x Panel Ideology	−1.62 (1.41)	0.248
Constant	0.69*** (0.19)	0.001
Log Likelihood	−109.18	
N	171	
LR Chi^2	2.00	
Prob > Chi^2	0.573	
Pseudo R^2	0.01	

* p<0.05, ** p<0.01, *** p<0.001

Table 5.8   Court Support for Agencies in Arbitrary-and-Capricious Questions

Independent Variable	Coef. (S.E.)	p
Panel Ideology Agree	−1.94 (2.62)	0.460
DC	−0.64 (0.54)	0.235
DC x Panel Ideology	2.61 (2.80)	0.351
Constant	1.02* (0.44)	0.022
Log Likelihood	−46.64	
N	74	
LR Chi^2	2.67	
Prob > Chi^2	0.446	
Pseudo R^2	0.03	

* p<0.05, ** p<0.01, *** p<0.001

Table 5.9   Court Support for Agencies in Abuse-of-Discretion Questions

Independent Variable	Coef. (S.E.)	p
Panel Ideology Agree	1.45 (1.40)	0.298
DC	−0.29 (0.46)	0.528
DC x Panel Ideology	−1.55 (1.91)	0.416
Constant	1.06*** (0.32)	0.001
Log Likelihood	−55.96	
N	95	
LR Chi^2	1.49	
Prob > Chi^2	0.685	
Pseudo R^2	0.01	

* p<0.05, ** p<0.01, *** p<0.001

Table 5.10   Court Support for Agencies in *Chevron*-Deference Questions

Independent Variable	Coef. (S.E.)	p
Panel Ideology Agree	1.16 (0.88)	0.191
DC	0.16 (0.33)	0.624
DC x Panel Ideology	−2.04 (1.19)	0.088
Constant	0.47* (0.23)	0.038
Log Likelihood	−102.67	
N	159	
LR Chi^2	3.30	
Prob > Chi^2	0.348	
Pseudo R^2	0.02	

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.11   Judge Support for Agencies: Procedural-Adherence Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Procedural Adherence	4.07*** (0.99)	0.001	0.75
Judge Ideology Agree	–0.60 (1.35)	0.658	–
DC	–0.22 (0.91)	0.807	–
DC x Procedural Adherence	–1.26 (1.13)	0.263	–
DC x Judge Ideology Agree	0.83 (1.42)	0.556	–
Constant	–1.71* (0.77)	0.027	

Log Likelihood	–77.63
N	165
LR Chi^2	71.29
Prob > Chi^2	0.001
Pseudo R^2	0.31

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.12   Judge Support for Agencies: Substantial-Evidence Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Substantial Evidence	3.14*** (0.35)	0.001	0.63
Judge Ideology Agree	–0.56 (0.49)	0.250	–
DC	–0.76 (0.67)	0.263	–
DC x Substantial Evidence	2.16* (0.97)	0.025	0.30
DC x Judge Ideology Agree	0.38 (1.00)	0.706	–
Constant	–1.29*** (0.26)	0.001	

Log Likelihood	–130.97
N	349
LR Chi^2	184.62
Prob > Chi^2	0.001
Pseudo R^2	0.41

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.13   Judge Support for Agencies: Arbitrary-and-Capricious Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Arbitrary & Capricious	1.92** (0.61)	0.002	0.44
Judge Ideology Agree	–0.12 (0.83)	0.881	–
DC	–1.26 (0.67)	0.059	–
DC x Arbitrary & Capricious	1.02 (0.79)	0.199	–
DC x Judge Ideology Agree	0.21 (0.92)	0.821	–
Constant	–0.69* (0.50)	0.172	

Log Likelihood	–105.23
N	200
LR Chi^2	63.91
Prob > Chi^2	0.001
Pseudo R^2	0.23

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.14   Judge Support for Agencies: Abuse-of-Discretion Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Abuse of Discretion	2.32*** (0.47)	0.001	0.49
Judge Ideology Agree	0.90 (0.72)	0.208	–
DC	–1.19* (0.57)	0.036	–0.23
DC x Abuse of Discretion	1.17 (0.73)	0.108	–
DC x Judge Ideology Agree	–0.70 (0.88)	0.425	–
Constant	–0.43 (0.35)	0.214	

Log Likelihood	–104.75
N	241
LR Chi^2	87.76
Prob > Chi^2	0.001
Pseudo R^2	0.30

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.15   Judge Support for Agencies: *Chevron*-Deference Model

Independent Variable	Coef. (S.E.)	p	Δ Pr
Chevron Deference	3.84*** (0.54)	0.001	0.70
Judge Ideology Agree	1.09 (0.69)	0.111	–
DC	−1.04* (0.47)	0.027	−0.16
DC x *Chevron* Deference	0.86 (0.75)	0.248	–
DC x Judge Ideology Agree	−1.52 (0.84)	0.071	–
Constant	−0.92*** (0.27)	0.001	

Log Likelihood	−116.28
N	376
LR Chi^2	236.84
Prob > Chi^2	0.001
Pseudo R^2	0.50

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.16   Judge Support for Agencies: Procedural-Adherence Model (Panel
             Ideology)

Independent Variable	Coef. (S.E.)	p	Δ Pr
Procedural Adherence	3.72*** (0.91)	0.001	0.72
Panel Ideology Agree	−1.38 (2.00)	0.490	–
DC	−0.52 (0.82)	0.530	–
DC x Procedural Adherence	−0.96 (1.06)	0.363	–
DC x Panel Ideology Agree	2.24 (2.16)	0.301	–
Constant	−1.31* (0.66)	0.047	

Log Likelihood	−78.86
N	167
LR Chi^2	71.14
Prob > Chi^2	0.001
Pseudo R^2	0.31

ΔPr   Change in probability that a court will support an agency when the independent variable moves from
      its minimum to maximum, with all other variables held constant at their means.
–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.
* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.17   Judge Support for Agencies: Substantial-Evidence Model (Panel Ideology)

Independent Variable	Coef. (S.E.)	p	Δ Pr
Substantial Evidence	3.15*** (0.35)	0.001	0.72
Panel Ideology Agree	1.41 (0.78)	0.072	–
DC	–0.50 (0.69)	0.472	–
DC x Substantial Evidence	2.75* (1.20)	0.022	0.32
DC x Panel Ideology Agree	3.91 (2.45)	0.111	–
Constant	–1.31*** (0.26)	0.001	
Log Likelihood	–127.51		
N	350		
LR Chi^2	192.36		
Prob > Chi^2	0.001		
Pseudo R^2	0.43		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.18   Judge Support for Agencies: Arbitrary-and-Capricious Model (Panel Ideology)

Independent Variable	Coef. (S.E.)	p	Δ Pr
Arbitrary & Capricious	1.86** (0.65)	0.004	0.43
Panel Ideology Agree	–0.80 (1.96)	0.682	–
DC	–1.28 (0.67)	0.057	–
DC x Arbitrary & Capricious	1.06 (0.82)	0.193	–
DC x Panel Ideology Agree	1.12 (2.10)	0.596	–
Constant	–0.65 (0.51)	0.204	
Log Likelihood	–105.35		
N	201		
LR Chi^2	64.83		
Prob > Chi^2	0.001		
Pseudo R^2	0.24		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.19   Judge Support for Agencies: Abuse-of-Discretion Model (Panel Ideology)

Independent Variable	Coef. (S.E.)	p	Δ Pr
Abuse of Discretion	2.30*** (0.48)	0.001	0.48
Panel Ideology Agree	2.40* (1.20)	0.045	0.50
DC	−1.25* (0.57)	0.029	−0.24
DC x Abuse of Discretion	1.23 (0.74)	0.095	–
DC x Panel Ideology Agree	−1.54 (1.59)	0.333	–
Constant	−0.39 (0.35)	0.263	
Log Likelihood	−103.62		
N	244		
LR Chi^2	92.21		
Prob > Chi^2	0.001		
Pseudo R^2	0.31		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

– ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 5.20   Judge Support for Agencies: *Chevron*-Deference Model (Panel Ideology)

Independent Variable	Coef. (S.E.)	p	Δ Pr
Chevron Deference	3.90*** (0.56)	0.001	0.70
Panel Ideology Agree	2.78* (1.14)	0.015	0.49
DC	−1.12* (0.48)	0.019	−0.17
DC x *Chevron* Deference	0.82 (0.77)	0.283	–
DC x Panel Ideology Agree	−3.96** (1.40)	0.005	−0.69
Constant	−0.88** (0.28)	0.002	
Log Likelihood	−113.75		
N	378		
LR Chi^2	243.42		
Prob > Chi^2	0.001		
Pseudo R^2	0.52		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

–   ΔPr not calculated since variable is not statistically significant at p<0.05.

* p<0.05, ** p<0.01, *** p<0.001

Table 5.21   Change in Probability of Agency Support if Court Panels Answer
Standard-of-Review Questions Favorably toward Agencies

Standard	Individual Judge* Δ **Pr**	Court (Panel) Δ **Pr**
Substantial Evidence	0.63 – 0.72	0.87
Arbitrary & Capricious	0.43 – 0.44	0.88
Abuse of Discretion	0.48 – 0.49	0.81
Chevron Deference	0.70 – 0.70	0.91

ΔPr   Change in probability that a judge/court will support an agency when standard-of-review questions are answered favorably toward the agency compared to the probability of support when these questions are not answered favorably, while all other variables are held constant at their means.

*   Values are presented as a range based on the results in two sets of models using different ideology measures—judge ideological agreement and panel ideological agreement.

CHAPTER 6: WHERE IDEOLOGY MANIFESTS

The results of this study provide support for the legal model, and there is little support for judges and courts voting consistently with their ideologies. It is not accurate, however, to dismiss ideology entirely as an informant of judge decisionmaking. In the last chapter, I noted instances where ideology may impact judicial decisionmaking when agency decisions are under review in the U.S. Courts of Appeals. Specifically, two models show that the ideological composition of a review panel may influence individual judge decisionmaking. In this chapter, I examine further the influence of ideology on individual judge decisionmaking in the models where panel ideology influences individual judge decisionmaking.

I also consider one additional instance where ideology might manifest—in dissent behavior. Although I did not originally hypothesize a relationship between dissent behavior and ideology, the results of this research suggested that judges' decisions to dissent may be ideological decisions. I conclude with two additional hypotheses about the relationship between judges' political ideologies and their decisions to support (or not support agencies) through dissent. These results suggest a statistically significant relationship between judges' ideologies and judges' decisions to dissent.

PANEL COMPOSITION MAY INFLUENCE INDIVIDUAL JUDGE VOTES, BUT WITHIN LEGAL CONSTRAINTS

The ideological composition of a review panel may affect individual judges' votes, but it appears that these effects are constrained by law. I hypothesized that individual judges are more likely to support agencies in final case decisions where the mean ideology of the review panel is in agreement with the agency position. Results for this hypothesis are mixed.

Panel composition does not affect individual judge votes in three models— procedural adherence, arbitrary and capricious, and substantial evidence. However, panel composition appears to affect individual judge votes in the abuse-of-discretion and *Chevron*-deference models. As noted in Chapter Four, abuse of discretion and *Chevron* deference are not "standards of review" in the strictest sense of the term. Although they

function as such, these two "standards" examine more substantive interpretations of agency actions, especially *Chevron* deference. Unlike the substantial-evidence test and the arbitrary-and-capricious test, in *Chevron*-type cases judges first evaluate whether agencies provided a reasonable interpretation of statutes based on Congress' intent. Where statutes are ambiguous, judges then evaluate whether agencies provided a reasonable interpretation of statutes. While the levels of deference due to agencies is not always clear from one standard to the next, it is at least plausible that more substantive reviews of agency actions, such as evaluating whether agencies exceeded their Congressionally-granted discretion or whether agencies reasonably interpreted statutes, these judgments may leave more room for ideological interpretations. The next sections further illustrate the extent to which the ideological composition of a panel influences individual judge votes in the abuse-of-discretion and *Chevron*-deference models.

Panel Ideology in the Abuse-of-Discretion Model

In the abuse-of-discretion model predicting individual judge support for agencies, both the abuse-of-discretion variable and the panel-ideological-agreement variables are statistically significant in the logistic regression model (see Table 5.19 in Chapter Five). This suggests that the ideological composition of the review panel may influence how an individual judge votes. It also suggests that judges are likely to support agencies that do not abuse discretion and the converse—judges are not likely to support agencies that abuse discretion. This underscores that "abuse of discretion" is a term of art, rather than a rigid test, such that there is space within the standard for ideology to manifest.

Figure 6.1 shows the impact of an agency abusing discretion and the ideological composition of the review panel on the probability of a judge supporting the agency in final case decisions. The y-axis indicates the probability of a judge supporting the agency, so the scale is zero to one. The x-axis shows the level of agreement between the panel and the agency position. Recall that the variable, panel ideological agreement, is a continuous variable ranging from negative one (least agreement) to the positive one (most agreement). However, the scale for the x-axis is based on observed values, not potential values. Therefore, negative one and positive one do not actually appear on x-axis.

The top line of the graph shows the probability of judge support when agencies do not abuse discretion. The bottom line shows the probability of judge support when agencies abuse discretion.

When the review panel is in least ideological agreement with the agency position, the probability that an individual judge will support the agency if it abused discretion is 0.12, compared to 0.59 when the agency did not abuse discretion. When a panel is in greatest ideological agreement with the agency position, the probability of a judge supporting an agency is 0.68 or 0.96, depending on whether the agency abused its discretion.

The bottom line in Figure 6.1 also shows that when agencies abuse discretion, judges may still support agencies in final case decisions. This could mean, for example, that although an agency abused discretion, the judge reached the same conclusion as the agency. In instances where agencies abused discretion, the probability of individual judges ranges from 0.12 to 0.68, depending on the ideological composition of the panel. That is, as panel ideological agreement moves from its minimum to its maximum, the probability of an individual judge supporting an agency increases by as much 0.56.

The top line in Figure 6.4 shows that the probability of judge support can also vary when agencies do not abuse discretion. When agencies do not abuse discretion, the probability of an individual judge supporting an agency when the review panel is in least ideological agreement with the agency position is 0.59. When the review panel is in most ideological agreement with the agency, this probability is 0.96. Stated differently, as ideological agreement of the panel moves from minimum to maximum, the probability of an individual judge supporting the agency increases as much as 0.37.

The most influence that panel ideology can have on an individual vote is 0.37, when agencies do not abuse discretion, compared to 0.59 when agencies abuse discretion. This suggests that when agencies do not abuse discretion, there is less space available for the ideological composition of the review panel to influence individual judge votes. That is, the ideological composition of a review panel may have greater potential to influence individual judge decisionmaking when an agency abuses discretion than when an agency does not abuse discretion.

In sum, panel ideology as an informant of individual judge decisionmaking appears to be constrained by the abuse-of-discretion test. If agencies abuse discretion, the ideological composition of the panel can potentially have more influence over individual judges' final votes. The potential for this influence is less when agencies do not abuse discretion.

Panel Ideology in the Chevron-Deference Model

Similar to the *abuse-of-discretion* model, the panel-ideological-agreement variable is statistically significant in the *Chevron*-deference model. Recall that the *Chevron*-deference variable captures several legal elements related to how agencies interpret statutes. This includes whether agencies applied correct versions of statutes to a case or whether agencies interpreted these statutes correctly, according to the text or plain meaning of the statute. While the Administrative Procedure Act and the *Chevron* decision require U.S. Courts of Appeals to extend deference to agencies depending on the reasonableness of agency interpretations, there is room for disagreement in interpretation. How panels answer these questions with respect to agencies has a statistically significant association with individual judges' support for agencies, as does the ideological composition of the panel (see Table 5.20 for results of the *Chevron*-deference model).

Figure 6.2 illustrates the impact of law and panel ideology on the probability of individual judges supporting agencies in the *Chevron*-deference model. Again, the x-axis shows the probability of an individual judge supporting an agency, with values ranging from zero to one. The y-axis shows the degree of agreement between the mean ideology of the review panel and the ideological direction of the agency position. Possible values range from negative one to positive one, but the scale of the x-axis represents observed values. Negative values indicate less agreement, and positive values indicate more agreement. The top line of Figure 6.2 shows the probability of individual judge support when review panels answer *Chevron*-type questions favorably toward agencies. The bottom line shows the probability of support when panels answer these questions unfavorably toward agencies.

The top line in Figure 6.2 shows that in cases when courts answer *Chevron*-type questions favorably toward agencies, the probability of an individual judge supporting an agency is between 0.77 and 0.99, depending on whether the review panel is in ideological

agreement with the agency position. The difference between these two numbers suggests that the ideological composition of a review panel can affect the probability of an individual judge supporting an agency by as much as 0.22.

The bottom line in Figure 6.2 also shows that when review panels answer *Chevron*-type questions favorably toward agencies, the probability of individual judge support for agencies varies depending on how much ideological agreement there is between the review panel and the agency decision. Where panels are in least ideological agreement, the probability of judge support is 0.06, compared to 0.62 when panels are in most ideological agreement. Stated differently, when agencies do not pass *Chevron* muster, the probability of an individual judge supporting an agency increases as much as 0.56 if review panel are more ideologically aligned with agency positions.

Where review panels are in least ideological agreement with agencies, the probability of judge support when agencies do not pass *Chevron* tests is 0.06 compared to 0.77 when agencies do pass *Chevron* tests. Similarly, when review panels are in greatest ideological agreement with agencies' positions, the probability of judge support when agencies pass *Chevron* muster is 0.62 compared to 0.99, otherwise.

In sum, the *Chevron* model suggests that there is more room for ideology to manifest when agencies do not meet this standard of review. The ideological composition of a review panel can influence an individual judge's decision as much as 0.56 when agencies do not meet *Chevron* muster, compared to 0.22 when agencies do. This suggests that law constrains ideology.

The Effects of Panel Ideology—Summary

The effects of panel ideology on individual judge decisionmaking are inconsistent. The panel ideology variable is statistically significant in two models, but not in three of them. In the two models where this variable is statistically significant—abuse of discretion and *Chevron* deference—the relationship between panel ideological agreement with an agency and the probability of a judge supporting the agency in final case decisions is a positive one. That is, as a review panel's mean ideology becomes more aligned with the ideological direction of the agency position, individual judges are more likely to support the agency in final case decisions. This is consistent with past research showing that the more ideologically conservative a review panel is, the more

190

likely an individual judge will render a conservative decision; and liberal panels tend to foster liberal decisions from individual judges (Sunstein et al. 2004).

Unlike past research, however, these results suggest that where ideology does manifest, it is constrained by law. In the abuse of discretion and *Chevron*-deference models depicted in Figures 6.1 and 6.2, the ideological composition of the review panel can influence individual judge votes more when agencies do not pass standard-of-review tests. The converse relationship is more revealing: it appears that panel ideology is less able to influence judges when agencies pass *Chevron*-type tests. Ideology appears to yield to law and manifests only when there is sufficient space within the law for it to do so.

Remember, however, the ideological composition of a review panel does not appear to influence individual judge decisionmaking in three models, including the procedural-adherence model. In all models, an agency's adherence to procedures and meeting minimum thresholds of deference, as prescribed in standards of review, have statistically significant associations with individual judges voting to support agencies in final case decisions. These finding provide further support for the legal model of judicial behavior.

Consider these findings with the broader perspective of other findings in the present research. Panel ideology does not appear to affect court decisions to support an agency. Too, an individual judge's ideology does not appear to affect his/her decision to support an agency. However, in some circumstances, the collective ideology of a review panel may influence whether an individual judge supports an agency.

DOES IDEOLOGY PREDICT DISSENT BEHAVIOR?

In the data and methods chapter, I noted several descriptive behavioral patterns in the U.S. Courts of Appeals when agency decisions are under review. Ninety percent of court decisions are unanimous. Also, 53% of the judges in the sample are conservative and 47% are liberal. It is not feasible for judges to vote consistently with their ideologies and to achieve unanimity in 90% of cases. This suggests that ideology yields to other factors in individual judges' decision-making calculi. Results of the analysis support this conclusion and suggest that these other factors are legal factors—legally prescribed procedural adherence and standards of review.

It is feasible, however that ideology could manifest in the 10% of non-unanimous cases. To provide context for this proposition, consider the results discussed in the previous sections of this chapter. The ideological composition of a review panel has no statistically significant relationship to whether the review panel decides to support an agency in final case decisions. Similarly, a judge's own ideological agreement with an agency is not a statistically significant predictor of whether that judge supports the agency in final case decisions. In some circumstances, however, the ideological composition of a review panel may influence individual judge decisionmaking. The latter point may suggest that in addition to ideology, there may be norms of collegiality in the U.S. Courts of Appeals that fuel consensus and unanimity in decisionmaking. In the ten percent of cases where a judge deviates from these norms, it may be because of a judge's ideological disagreement.

Although ideology does not appear to account for a substantial portion of judicial decisionmaking in the U.S. Courts of Appeals, there may be a relationship between ideology and judges' decisions to dissent. That is, if judges have an overall inclination to support agencies based on legally prescribed deference, it could still be that a decision to dissent from the majority is an ideological decision.

Rather than leaving this to speculation, I posit two additional hypotheses, notwithstanding their ad hoc nature. These hypotheses are based on a judge's decision to dissent with respect to supporting agencies. I argue that a judge's dissent from the majority suggests one of the following: the judge prefers to support the agency when the majority does not support the agency, or the judge prefers not to support the agency when the majority prefers otherwise. This leads to the following hypotheses.

> *Hypothesis 12*: A judge is more likely to dissent from majority support for agencies when he/she is in ideological *dis*agreement with the agency position. (H_{12})

> *Hypothesis 13*: A judge is more likely to dissent from majority non-support for agencies when he/she is in ideological agreement with the agency position. (H_{12})

At the risk of stating the obvious, dissent, by its nature, is an individual judge behavior. Therefore, the unit of analysis for testing these hypotheses is individual judge. Using variables already coded in the U.S. Courts of Appeals Database, I constructed a

dichotomous dependent variable, **judge dissent**, which is coded as one if the judge dissented and zero, otherwise.[24]

To test Hypotheses 12 and 13, I developed a simple regression model with two independent variables that predict dissent. The first variable, **judge ideology agree**, is the same variable I used in the previous chapters. It is a continuous variable, ranging from negative one to positive one. Negative values indicate the least amount of agreement between the judge and the ideological position of the agency; positive values indicate the most agreement. Second, I include a dummy variable for the D.C. Circuit, since other scholars have suggested that judges in the D.C. Circuit may be more political than judges in other circuits. The dissent model is as follows.

Judge Dissent = $\beta_0 + \beta_1$ (judge ideological agreement) + β_2 (D.C. Circuit dummy) + e, where, β_0 is the constant and e is the error term.

Depending on whether the majority supports the agency's position, a judge's dissent can mean one of two things. Either it means that the judge is in ideological disagreement with the agency if the majority supports the agency, or it means that the judge is in ideological agreement with the agency if the majority does not support the agency. Since dissent can mean these two different things, I examine cases when the majority supported the agency separately from cases when the majority did not support the agency. Since the dependent variable is dichotomous, logistic regression is an appropriate tool to estimate the models. Again, I use data from the U.S. Courts of Appeals Database from 1982–2002. Table 6.1 reports the results of the regression model in cases where the majority supported the agency. This model corresponds to and tests Hypothesis 12. Table 6.2 reports the result of the logistic regression model in cases where the majority did not support the agency. This corresponds to and tests Hypothesis 13.

As hypothesized, it appears that ideology affects a judge's decision to dissent. In both of the models reported in Tables 6.1 and 6.2, the judge ideological agreement variable is statistically significant at conventional levels. The D.C. Circuit variable is not statistically significant in either model.

---

[24] I coded this variable based on the jXmaj1 variables in the in the U.S. Courts of Appeals Database, where X indicates whether the judge was number 2, 3, … ,16 on the review panel. A value of "2" for these variables indicates that a judge dissented from the majority.

Hypothesis 12 states, "A judge is more likely to dissent from majority support for agencies when he/she is in ideological disagreement with the agency position." Results in Table 6.1 support this hypothesis since the judge ideological agreement variable is statistically significant at 0.003 and since the coefficient for this variable is negative. A negative coefficient means that the probability of a judge dissenting *decreases* as his or her ideological agreement with the agency *increases*. Stated differently, the negative coefficient means that in cases where the majority supported the agency, the probability of a judge dissenting increases when the judge is in least ideological agreement with the agency position. This relationship is expected. If the attitudinal model is correct, we would expect judges to vote with the majority when the majority supports the agency and when the judge is in ideological agreement with the agency. We would expect a judge to dissent in these cases only if the judge were in ideological disagreement with the agency. As ideological agreement moves from its minimum (least agreement) to its maximum (most agreement), the probability of a judge dissenting decreases by 0.06 (PrΔ = –0.06).

Hypothesis 13 is also supported. Where the majority does not support the agency (Table 6.2), the judge ideological agreement variable is positive and significant at $p<0.001$. As judge ideological agreement moves from its minimum (least agreement) to its maximum (most agreement), the change in the probability that a judge will dissent is 0.13. That is, the probability of dissent increases as much as 0.13 when the judge is in ideological agreement with the agency. This supports Hypothesis 13.

Influence of Ideology on Dissent Behavior is Minimal

Results of testing Hypotheses 12 and 13 suggest that ideology may influence judges' decisions to support or not support agencies through dissent. These results, however, appear to have minimal influence on a judge's decisionmaking. The maximum influence in the probability of dissent is only 0.06 in cases where the majority supports agencies and 0.13 in cases where the majority does not support agencies.

These results may also be limited, since the specified regression model does not include a legal variable. The above hypotheses suggest that the reason for a judge's dissent is because of ideological (dis)agreement with the agency, or lack thereof. If the legal model is true, a judge's reason for dissenting might also be based on disagreement with the majority on an interpretation of law. Given the nature of the data in the U.S.

194

Courts of Appeals Database, I am unable to test the effects of law on a judge's decision to dissent. The legal variables used in this study, procedural adherence and standards of review, are coded only at the court level. The abuse-of-discretion variable, for example, indicates only how the court answered the question of agency abuse of discretion. There is no variable in the database indicating how individual judges answered these legal questions. Therefore, I am unable to test the legal implications that may inform an individual judge's decision to dissent. This means that the influence of ideology on dissent behavior may be overstated, since there are no legal variables in the models.

WHERE DOES IDEOLOGY MANIFEST?

Results of this study show that judicial decisionmaking in administrative law questions in the U.S. Courts of Appeals is largely informed by law and legal standards. In limited circumstances, ideology may affect individual judge decisionmaking. Specifically, a judge may be swayed by the ideologies of his/her fellow judges on a review panel. This occurs in only two types of cases—*Chevron* deference and abuse of discretion, both of which are standards of review that may leave more room for reasonable judges to disagree. This reasonable disagreement may be based on judges' political ideologies. Thus, two ideologically like-minded judges on the same panel may be able to persuade the third judge to put aside his/her ideology in order to form a unanimous decision. In this regard, the ideology of two judges influences the behavior of a third judge.

An individual judge's ideological agreement with an agency's position may influences whether a judge will dissent in a case. Where the majority on a review panel supports an agency, judges in most ideological disagreement with the agency are 0.05 more likely to dissent. Where the majority does not support an agency, the probability of a judge dissenting (i.e., supporting the agency) increases by 0.12. These changes in probability are statistically significant, but substantively small.

While it may be intuitive that a judge in ideological disagreement with other judges on the review panel is more likely to dissent, the results of this study suggest that the ideological composition of a review panel sometimes may influence individual judges to depart from their own ideological preferences. The models testing judge dissent do not include legal variables to test whether a judge disagreed with fellow judges because of a

point of law. Therefore, I am cautious not to overstate the influence of ideology on dissent behavior.

Finally, in all models predicting individual judge support for agencies, the legal variables are always statistically significant. Even in the two models where the ideology variables are statistically significant, the legal variables are also significant. Further, the magnitudes of the legal variable coefficients are much greater than the ideology variable coefficients. In sum, it appears that ideology manifests minimally in judicial decisionmaking in the U.S. Courts of Appeals when agency decisions are under review. This minimal manifestation may be due to legal constraints and, perhaps, collegial norms of consensus, both of which appear to contribute to the large number of unanimously decided cases in the U.S. Courts of Appeals.

Table 6.1   Judge Dissent from Majority Support for Agencies

Independent Variable	Coef. (S.E.)	p	Δ Pr
Judge Ideology Agree	−1.33** (0.45)	0.003	−0.06
DC	0.07 (0.37)	0.853	−
Constant	−3.40 (0.26)	0.001	
Log Likelihood	−130.76		
N	838		
LR Chi^2	10.21		
Prob > Chi^2	0.006		
Pseudo R^2	0.04		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

−   ΔPr not calculated since variable is not statistically significant at $p<0.05$.

* $p<0.05$, ** $p<0.01$, *** $p<0.001$

Table 6.2   Judge Dissent from Majority Non-Support for Agencies

Independent Variable	Coef. (S.E.)	p	Δ Pr
Judge Ideology Agree	2.06*** (0.63)	0.001	0.13
DC	–0.26 (0.46)	0.574	–
Constant	–2.96 (0.31)	0.001	
Log Likelihood	–82.13		
N	417		
LR Chi^2	13.73		
Prob > Chi^2	0.001		
Pseudo R^2	0.07		

ΔPr   Change in probability that a court will support an agency when the independent variable moves from its minimum to maximum, with all other variables held constant at their means.

– ΔPr not calculated since variable is not statistically significant at $p < 0.05$.
  * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

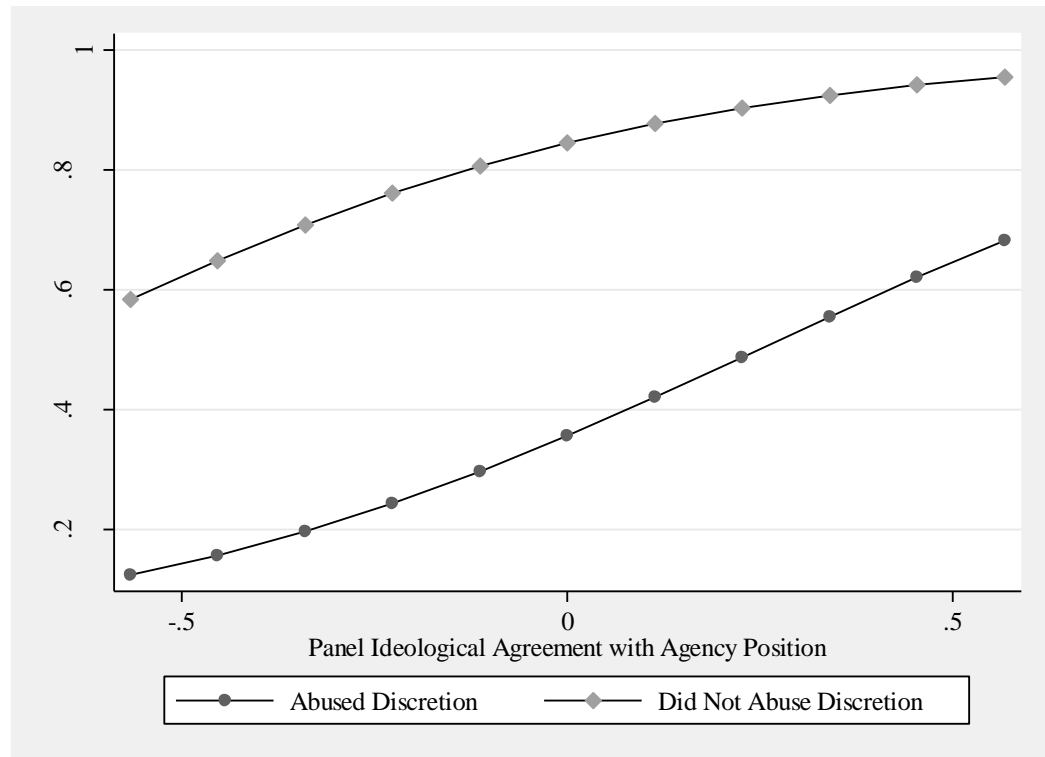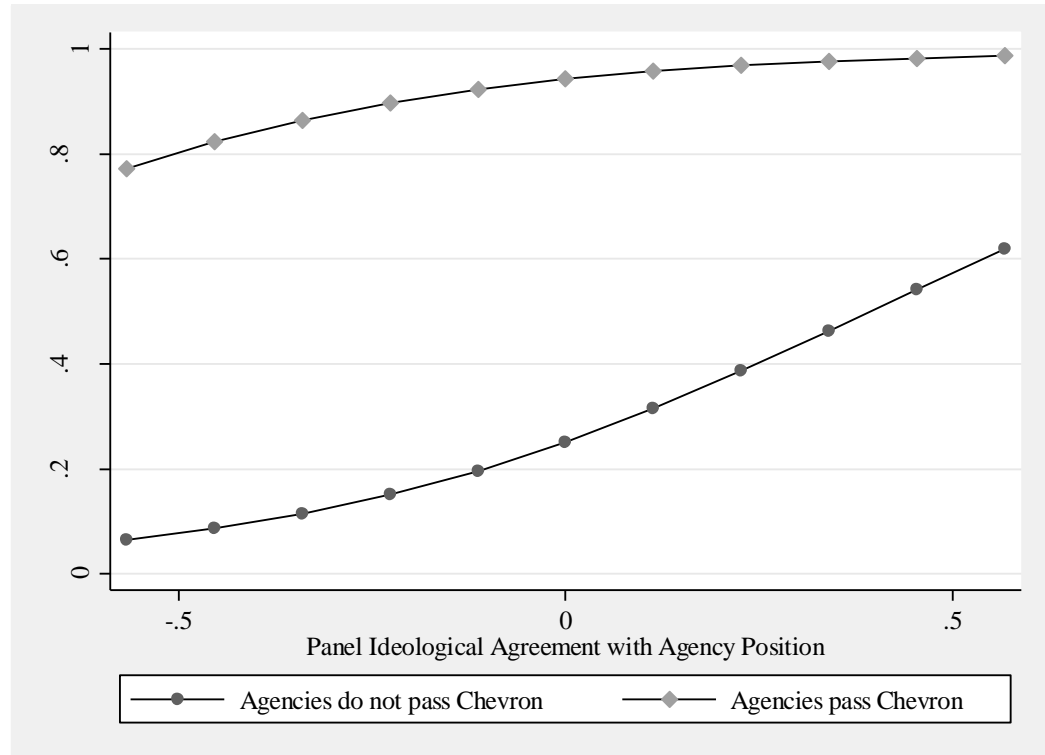Figure 6.1   Effects of Panel Ideology on Judge Vote: Abuse-of-Discretion Model

Figure 6.2   Effects of Panel Ideology on Judge Vote: *Chevron*-Deference Model

CHAPTER 7: TOWARD A MORE COMPLETE MODEL OF JUDICIAL DECISIONMAKING IN THE U.S. COURTS OF APPEALS

The aim of this research is to determine the extent to which support for federal agencies in the U.S. Courts of Appeals is a function of deference, as prescribed by law, and a function of judges' ideological agreement with agency positions. As a study of judicial decisionmaking, the primary research question asks, "When agency decisions are under review in the U.S. Courts of Appeals, what are the effects of law and ideology on judicial decisionmaking?" Beyond the research question, this study is concerned with constructing a more accurate model of judicial decisionmaking in the U.S. Courts of Appeals.

CONSTRUCTING A MODEL OF JUDICIAL DECISIONMAKING IN THE U.S. COURTS OF APPEALS

Any accurate model of judicial decisionmaking should assess the effects of both law and politics in judges' decision-making calculi. A model of judicial decisionmaking in the U.S. Courts of Appeals must also account for the high number of unanimously decided cases and the high success rates of agencies. In the present study, the Courts of Appeals support federal agencies about 65% of the time. Also, courts decide about 90% of these cases unanimously; only 10% contain dissents. The latter statistic necessarily limits quantitative analyses because of the concomitant need for observable variation in statistical models. Constructing a model that accounts for unanimity 90% of the time is simple, but testing these models becomes difficult without considerable observational variation.

Legal Model Prescribes and Explains Judicial Decisionmaking

A legal model requires particular specification. That is, there is no single legal model; rather, there are many legal models, which should be specified according to different elements of law. For some researchers, the elements of law could be, for example, stare decisis (see Segal and Spaeth 2002). In the present study, I specify a legal model of the U.S. Courts of Appeals' reviews of federal agency decisions, which focuses on legally prescribed agency procedures and legally prescribed deference through various standards of review. As a normative model, this legal model prescribes that judges and

courts defer to agencies under certain circumstances. As an empirical model, this legal model also explains why agencies receive high levels of support in the courts of appeals and also why the vast majority of cases are decided unanimously. Further, this legal model may predict case outcomes since over two-thirds of cases result in support for agencies' decisions.

As the results of this study suggest, agency adherence to procedures appears to be a litmus test for agency support. The probability of circuit courts and judges rendering agency-favorable decisions increases by 0.75 where agencies adhere to procedures, such as notice and comment requirements, acquiring information, providing information, and adequately developing a record upon which the agency's decision is based. Where agencies adhere to procedures, courts support agencies in 91% of final case decisions, and judges vote to support agencies 83% of the time.

In addition to agency procedural adherence, legally prescribed standards of review also appear to serve as a mechanism for U.S. Courts of Appeals to defer to agencies. Depending on the standard of review used in a case, agencies that successfully pass the court's tests for these standards can expect to receive support in final case decisions from 88%–100% of the time. In this regard, the U.S. Courts of Appeals are akin to the U.S. Supreme Court. As Canon and Giles found in their Supreme Court study, "agencies which meet certain criteria more or less traditionally associated with the concept of due process of law (e.g., proper notice, impartial hearing, decisions made in accordance with ascertainable evidentiary rules or standards, etc.) are supported by the Court and those which often fail to meet such standards are not supported" (1972).

Attitudinal Model Predicts Decisionmaking Only Minimally

It is not apparent from this study that the attitudinal model predicts court decisionmaking very well, but judges' attitudes, namely their political ideologies, may influence individual judge decisionmaking, especially judges' decisions to dissent in a case. Unlike the results in Supreme Court studies, it does not appear that judges' ideological agreement with agency positions is a precursor to agency support in final case decisions on questions of substance (cf. Crowley 1987; Sheehan 1992).

While some scholars argue that court answers to legal questions (i.e., the language in their opinions) rationales for the courts' policy preferences, and, subsequently, that

courts answer legal questions according to the review panel's ideological preferences (Cross 2007; Humphries and Songer 1999), the results of this study suggest otherwise. The mean ideology of a review panel is statistically related to how courts answer these procedural and standard-of-review tests. It does not appear that passing these legal tests is a function of judge's ideological preferences. Similarly, where courts examine more substantive legal questions—for example, if agencies applied an appropriate interpretation of a statute, as in *Chevron*'s step two—these court decisions appear to turn on questions of law and not on judges' ideological predilections.

Similarly, in judge-level analyses, whether a judge votes to support an agency in legal questions does not appear to depend on whether the judge is in ideological agreement with the agency. However, an individual judge may be swayed, in limited circumstances, by the ideological preferences of fellow judges on a review panel. There is limited support in the present study and I argue that this sway may represent the collegial nature of the U.S. Courts of Appeals, where judges set aside their own ideological preferences in favor of norms of professional harmony and clarity of law. Alternatively, judges may set aside ideology in compromise; a judge who may prefer a different outcome may choose to join the majority in exchange for a more narrowed scope in the opinion. Although the results of this study cannot conclusively explain why an individual judge is sometimes swayed by other judges' ideologies, this research does suggest, in nearly all empirical tests, where individual judges may be influenced by fellow panel members, the influence is appears to constrained by law—agency adherence to procedures, legal standards requiring judicial deference, and agencies correctly applying and interpreting law. In short, the instances of ideology influencing individual judge decisionmaking are minimal when agency decisions are under review, and these instances are tempered by what the law allows.

Panel Effects and Role Theory

The results of this study suggest that individual judge decisionmaking may be influenced by fellow judges on the review panel. The ideological composition of a review panel sometimes influences the direction of an individual judge's vote; however, whether this influence is a function of ideology or other panel influences is not borne out in the present study. Future studies should examine not only the ideological influence of panel

composition, but also professional norms and role perceptions, such as the desire for unanimity, that inform judicial decisionmaking.

Results in the present study suggest that agreement by two judges on a review panel compels agreement by the third judge, en banc cases notwithstanding. Also, judges dissent in only 10% of cases. This study did not explore whether the high levels of unanimity are a function of clear law or other reasons. It is plausible that where two judges agree, the third judge's decision to join the majority may not be for ideological reasons. Three of the five judge level models suggest that this may be true. The third judge 1) may defer to his/her cohorts on the panel out of professional courtesy or 2) may desire to join his/her cohorts to form a unanimous decision in order to promote greater court legitimacy. These notions are not tested in the present study, but these ideas suggest that the roles individual judges adopt for themselves may influence their decisions. This is role theory.

Role theory has fallen out of vogue in the judicial behavior literature, and this is likely because of the difficulty in empirically measuring judge's role perceptions. J. Woodford Howard suspected that the attitudinal model is oversimplified because it does not account for intuitional constraints and judges' own role perceptions (Howard Jr. 1973, 1977, 1981). For similar reasons, the legal model in the present study may also be oversimplified. The assumption in the present study is that judges defer to agencies according to prescribed legal doctrine; however, this deference may be overstated, depending on how judges view their judicial roles. Future scholars should explore new ways to measure elements of role theory in an effort to understand more fully the effects of judges' role perceptions, including collegiality in three-judge review panels.

Deference as Part of the Legal Model

Deference is an inherent part of the legal model, since both statutes and common law prescribe deference. Prescribed law comes from statutes that conditionally require courts to defer to agencies, such as in the Administrative Procedure Act. Prescribed deference also comes from the Supreme Court, such as in *Chevron*, which essentially requires courts to defer to agencies so long as agency actions are reasonable. These legal prescriptions suggest that the U.S. Courts of Appeals should defer to the policy

preferences of other institutions, including Congress, the Supreme Court, and federal agencies. This is institutional deference.

Institutional deference not only accounts for the high levels of success agencies have in the U.S. Courts of Appeals, it also accounts for the high levels of unanimous decisions in these courts. Thus, models of judicial decisionmaking should account for institutional deference. The present study does not precisely distinguish the specific institutions to which the U.S. Courts of Appeals defer. In the *Chevron*-deference models, one might argue that support for agencies is a function of judges deferring to the Supreme Court, as measured by courts observing the principle of *stare decisis*. One might also argue that support for agencies in these cases is a manifestation of courts deferring to Congress, where courts preserve Congressional intent based on evaluations of the plain meaning of statutory text. Further, in these same sets of cases, agency support could be deference to agencies if agency actions are reasonable ones. Future scholarly inquiry into institutional deference should examine case opinions more closely and code more specifically the institutions to which courts do or do not defer.

This study measures only institutional deference, but further inquiry into other dimensions of deference should be explored. For example, not only do courts defer to agencies' reasonable interpretations of vague statutes, as prescribed by *Chevron*, but courts might also defer to agencies based on agencies' technical expertise. While the distinction between institutional deference and expertise deference is subtle, the former *requires* deference based on agency authority, and the latter *persuades* deference based on agency expertise. Future inquiry may also want to further conceptualize and measure other types of deference.

Balancing Obsequious Deference and Intense Scrutiny

Judges in the U.S. Courts of Appeals comment on the balance that judges must find between adhering to legally prescribed deference to agencies and making their reviews of agency actions meaningful and substantive ones (Bazelon 1976; Edwards 1998, 2003; Scalia 1978, 1989; Wald 1996). In her assessment of judicial review of agency actions under the first fifty years of the Administrative Procedure Act, Patricia Wald, Chief Judge of the D.C. Circuit from 1986-1991, acknowledged the courts' struggles to meaningfully scrutinize agency actions without encroaching into the

policymaking functions of the two political branches of government (1996). Regardless of the standard of review that courts use, Wald suggests that judges should provide meaningful scrutiny without acting like bulls in the agency china shop (1996). The results of this study suggest that judicial decisionmaking in the U.S. Courts of Appeals may be a manifestation of judges balancing obsequious deference and overreaching into executive administration.

Regardless of the standard of review used in a case—substantial evidence, arbitrary and capricious, abuse of discretion, or *Chevron* deference—there is little evidence to suggest that courts' decisions are driven by judges' ideological preferences. Rather, it appears that judges and courts review agencies' actions based on prescribed law and legal doctrine. While scholars, judges and other players in the administrative process may continue to debate whether the appropriate scope of review is extreme deference or intense scrutiny, it appears that judges find this balance without interjecting their personal policy preferences into the equation, at least as much as personal policy preferences are represented by judges' ideologies.

JUDICIAL DECISIONMAKING IN THE D.C. CIRCUIT

As the circuit that reviews about 40% of federal agency actions, the D.C. Circuit does not appear to be any more or less deferential or ideological than other circuits. This is not to say, however, that judges in the D.C. Circuit do not defer to agencies and are not political. Instead, the results of this study underscore Banks' conclusion:

> [T]he decisions of the D.C. Circuit are not *solely* the product of judicial politics. Empirical analysis of the court's access decisions and its approach to judicial deference to agencies' cases … indicate that judicial behavior is more complex than that and is accordingly affected by a variety of nonideological factors. Social scientists studying courts sometimes fall into the trap of believing that political considerations exclusively drive court outcomes. This may not be true. Political ideology is an important, but not an omnipotent, element in affecting D.C. Circuit policymaking. Quite simply, the law counts, too (Banks 1999, p. 86).

The results of this study differ from Banks' conclusion only in the emphasis placed on the role of ideology and the role of law in judicial decisionmaking. Banks suggests that *political ideology* is important but not omnipotent. The results of the present study support this conclusion, but go further: political ideology may be important, but not

as important as law in certain kinds of cases. The results from this study may merit an alternate conclusion: *law* is important but not omnipotent. Political ideology manifests only where there is sufficient room in the law for it to do so. Contrarily, law is statistically significant in all regression models, and none of the analyses in this study suggest that law yields to ideology.

Even in cases where ideology does manifest, law is the predominant predictor of whether courts and judges support agencies in final case decisions. In the D.C. Circuit, as in other circuits, the probability of agency support increases substantially when judges perceive that agencies adhere to procedures and prescribed law. Comparatively, agency support is substantially less based on a judges' ideological agreement with agencies. This suggests that law plays a more prominent role in judicial decisionmaking than past scholars, including Banks, suggest.

Hard-Look Approaches to Judicial Review in the D.C. Circuit

The results of the present study cannot rule out the existence of hard-look approaches to judicial review in the D.C. Circuit; however, the data suggest that if hard-look review occurs, judges' final outcomes are not markedly different from agencies' outcomes. There are no instances in which a D.C. Circuit panel answered standard-of-review questions favorably toward an agency but did not support the agency in final case decisions. This suggests that if hard-look criteria exist in the D.C. Circuit, as scholars suggest is true in certain periods (Wald 1996), these hard-looks may not result in decreased support for agencies in final case decisions.

The hard-look approach to judicial review and institutional deference are at odds. The hard-look approach suggests that if courts arrive at the same outcome as agencies, it is because of independent scrutiny that compels such a result. Institutional deference, on the other hand, suggests that courts should arrive at the same outcome as agencies because prescribed standards of review, such as *Chevron* deference, compel judges to leave agency decisions intact so long as the agency is acting reasonably.

D.C. Circuit review panels did not support agencies 33% of the time. But, when review panels determined agencies did not meet procedural or standard-of-review muster, support for agencies in final case decisions still occurred in as much as 16% of cases, depending on the standard of review used. Where D.C. Circuit panels determined

agencies did not follow procedures, support for agencies in final case decisions still occurred in 7% of cases.

These results suggest that if deference exists in the D.C. Circuit, it may not be obsequiously extended. However, these results cannot fully disentangle hard-look approaches from institutional deference. Future scholars may want to consider more fully whether hard-look approaches exists in the U.S. Courts of Appeals, especially the D.C. Circuit, and if so, whether these approaches results in reversals of agency decisions.

TOWARD A MORE COMPLETE MODEL OF JUDICIAL DECISIONMAKING IN THE U.S. COURTS OF APPEALS

At the beginning of this chapter, I noted that any model of judicial decisionmaking in the U.S. Courts of Appeals must account for the great percentage of unanimous cases and the relatively high rates of agency success in these courts. The legal model satisfies these requirements. The law explicitly calls for deference to agencies. In limited circumstances, such as the decision to dissent, the attitudinal model may also help predict judicial decisionmaking. The present study focuses on two models of judicial behavior—attitudinal and legal—but there are other models that contribute to the judicial behavior literature.

Future studies of judicial decisionmaking in the U.S. Courts of Appeals will benefit from continued examination of other models. Nancy Maveety summarizes the importance of historical-institutionalist approaches by suggesting "institutionally constituted norms, powers and preferences matter because they inform behavior, but they also reconstitute the institutional context in which actors act," (2003 285). Further, she suggests:

> Informed by the ways in which past actions and institutions constitute the powers and preferences of agents in contemporary politics, this approach seeks to discern patterns of historical evolution and political development that demonstrate that conscious, jurisprudential decisions of judicial actors matter, that they can reshape structural contexts and thus shape future decisions (2003 285).

The strategic model, as an extension of the attitudinal model, suggests that judges act strategically to achieve their policy preferences. The most prominent strategic studies examine the Supreme Court and suggest that justices' decisions to grant or deny certiorari

are made strategically based on justices preferred policy positions (Epstein and Knight 1998). For example, a justice may vote to deny certiorari for a particular case if he/she believes a majority of justices may decide the case on the merits in a way not preferable to him/her.

Neither legal theorists nor political theorists entirely abandon historical-institutional factors or strategic ones as important to judicial research. Instead, many political science scholars couch their research in these perspectives (Dahl 1957; Epstein and Knight 1998; Pritchett 1948; Shapiro 1964, 1968, 1988). It may be true, however, that legal scholars do a somewhat better job than political scientists at capturing the nuances of court norms and the impact of other branches of government in the judicial process (see, for example, Molot 2000). Therefore, not only should future judicial behavior studies consider these competing models, but they should also continue to look to legal scholarship to conceptualize elements of these models more fully.

The Breadth and Depth of Court Actions—Beyond Yes and No

As Martin Shapiro warned, "The persistent tendency of American political analysis to either view the courts as a great dictator or dismiss them as powerless, or do both at once, is partly due to a failure to appreciate that the courts are not confined to a simple yes or no," (Shapiro 1968). At best, the present study may inch the discipline beyond considering only the dichotomous yes-no outcomes of court decisions, but it still falls short of considering the full extent of court power and authority. Courts can exercise considerable or little influence over agencies simply through the timing, breadth, and ambiguity of their actions (Shapiro 1968, pp. 269-70). If we are to understand fully the nature of the relationship between courts and agencies, future scholars will benefit from examining the range of tools that courts *and* agencies have at their disposal to wield authority.

Shapiro and earlier court scholars moved the study of courts further out of the realm of public law and into politics, and concomitantly toward quantitative measurement. The attitudinalists systematically developed methods to measure political influence. In the debate over the best approach to scientific inquiry, Shapiro suggested the legal community would embrace any useful information about its profession regardless of whether the method of inquiry were qualitative or quantitative, or whether

this information were informed by political scientists or other social science professionals (Shapiro 1964, p. 7). The present study quantifies some of the content of court opinions as an indicator of the influences on judicial decisionmaking, but these efforts still lack the breadth of consideration that Shapiro suggested is needed. Moving beyond dichotomously coded variables, such as support and nonsupport for agencies, is still needed. This may mean further embracing mixed methods to court inquiry, which should include developing new methods of measuring the impact of court opinions.

Court-Agency Partnerships

The legal model suggests that courts defer to agencies. The attitudinal model suggests courts do not consider agency preferences in their reviews. Extant judicial behavior scholarship, including the present study, has not considered fully, however, the degree to which courts may be interacting with agencies in a collaborative sense, as Horowitz (1994) suggests. Political science scholars as early as Pritchett framed the relationship between courts and agencies as a partnership (Pritchett 1948). He notes, "A controlling philosophy which sees 'court and agency' as coworkers for the attainment of a common aim requires that the courts limit themselves to those functions which they are better fitted than the agencies to perform" (p. 172). Pritchett goes on to underscore the Roosevelt Court's acknowledgement of agency expertise and competence that the Court does not have. (p. 172). One opinion authored by Justice Harlan Stone particularly summarizes Pritchett's assessment of this court-agency relationship:

> In construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end … neither can rightly be regarded as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim (Justice Harlan Fiske Stone quoted in Pritchett 1948, p. 172).

Further, Pritchett concludes:

> In comparison to its predecessors, then, the Roosevelt Court has been responsible for markedly a different attitude toward administrative agencies, which are no longer treated as "alien intruders" in the courts. …

210

The Court appears conscientiously to have attempted to follow its announced polity of serving as "co-worker" with the administration in the attainment of legislative goals. It may have swerved now to this side and now to the other side of that line. There may have been on occasions immoderate exaltation of the administrative agency and undue deprecation of judicial authority. But on other occasions, the worm has turned, producing decisions which have expanded judicial authority in entirely new directions. In a recent decision the Court thought it well to give notice that it does not intend to become a mere junior partner with the bureaucracy, reminding that "Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes."[25] Left and right may disagree as to the public purposes in behalf of which the courts should intervene, but both agree that judicial powers must be maintained adequate to protect their respective values against administrative attack (pp. 196-97).

The relationship that Pritchett describes between the Roosevelt Court and federal agencies may also exist between modern U.S. Courts of Appeals and federal agencies. Circuit court judges also speak in the language of partnership. Judge Bazelon, in reference to a "new partnership," called for agencies and the courts to work collaboratively in their joint endeavor to provide fair implementation of public policies (1976). Judge Wald comments that the D.C. Circuit is sensitive to the impact of its decisions on administrative issues and, in particular, budget issues (1996).

Other scholars—in particular, public administration scholars—note the tendency of courts to be sensitive to the flexibility that is required by agencies to make their routine complex decisions (Cooper 1985; Melnick 1985; O'Leary and Wise 1991; Yarbrough 1985). One view, in light of the present study, could be to view this sensitivity to flexibility as a form of deference. Deference may be a part of partnership, but it is not the entire story. Some scholars view this partnership in a positive light, suggesting that although a natural tension exists between courts and agencies, it is unfair to assume that judges are not concerned about the negative impact of their decisions on agencies (Cooper 1985). Other scholars view the courts in a less positive light in the partnership, suggesting that courts may overstep their boundaries into administration and legislation (O'Leary and Wise 1991; Yarbrough 1985).

---

[25] Quoting *Scripps-Howard Radio v. Federal Communications Commission* (1942).

However much or little the attitudinal and legal models predict judicial behavior, a model of judicial decisionmaking in the U.S. Courts of Appeals cannot be a comprehensive one unless it accounts for courts' roles in the administrative law partnership with agencies. The dynamics of this relationship may be too complex to capture in a quantitative study such as the present one. Future studies of judicial decisionmaking should examine further the notions of court-agency partnerships to which political scientists, public administration scholars, and judges allude.

DATA AND METHODOLOGICAL LIMITATIONS

Judicial Decisionmaking beyond Administrative Agencies—External Validity

The U.S. Courts of Appeals' reviews of agency decisions is a particularly good place to examine the often competing legal and attitudinal models of judicial behavior, since explicit law exists requiring judges and courts to defer to agencies. Extant law, such as the *Chevron* decision and the Administrative Procedures Act, explicitly directs judges not to substitute their personal policy preferences in place of agency preferences. In the face of such prescribed law, it is counterintuitive to suggest that politics is as prolific in all areas of judicial decisionmaking as political scientists suggest. Arguably, the results of this study may not be generalizable to decisionmaking in the U.S. Courts of Appeals outside of courts' reviews of agency actions. Future inquiry is merited to determine if the U.S. Courts of Appeals similarly defer to other entities, such as the U.S. District Courts, where legal standards of deference are not the same as with agencies. Further, the results of the present study focus on civil law; the results may not be the same for criminal law.

Which comes first—the decision or the reasoning?

Attitudinalists argue that judges make decisions based on their policy preferences, and then craft legal reasoning to support those decisions. That is, legal reasoning for decisions serves as window dressing for ideological decisionmaking. This research suggests this may not be true in the U.S. Courts of Appeals when agency decisions are under review. If it were true, then the ideologies of judges would not only predict final case decisions, but these ideologies would also predict how courts answer legal questions in their opinions. Results of this study show that a court's ideological agreement with an agency does not predict how courts answer standard-of-review and procedural questions.

212

Therefore, it does not follow, as attitudinalists argue, that ideologically based decisions are formed before the ideologically formed opinions.

Although this study shows that neither the decisions nor the opinions of courts are based on a court's ideological agreement with the agency, it remains unclear whether courts and judges form their decisions in advance of their reasoning. The results of the present study do not show unequivocally that legal reasoning occurs in advance of final case decisions. How courts answer legal questions about deference is highly and positively correlated with whether courts support agencies in final case decisions. Based on the results and analyses of numerous logistic regressions, it appears that legal reasoning in opinions occurs before final case decisions. However, these results and are not borne out fully. As a test, I ran all court-level regressions again, using the legal variables (how courts answer standard-of-review and procedural-adherence questions with respect to agencies) as the dependent variable. I used the court-support variable as an explanatory variable, and retained all other control variables as described. In every model, the court-support variable predicted how courts answered legal questions and was statistically significant at $p<0.001$. The panel-ideological-agreement variables are not statistically significant in any of the models, nor are the DC control variables. This suggests that the direction of the causal arrow in these models is not definitive. Inferring causality should continue to be a concern for judicial behavior scholars.

It may be a common practice in American judging to look toward a preferred case outcome and then to craft legal reasoning to support those preferences (Burton 1992; Warner 1989). This may be true in a number of areas of law, such as contract law, where outcomes based on fairness may drive the legal remedy that judges choose to apply to a particular set of facts. For example, judges and courts acting in equity may decide the outcome before crafting law around their opinions, where the only law supporting their decisions is *equitable estoppel*. Again, it is not uncommon for preferred outcomes to precede legal reasoning.

That the present study does not show definitive causality between legal opinions and legal decisions, however, does not undermine the central purpose of this study. Whether legal decisions or legal opinions come first is a question separate from whether either of these two is determined based on ideology. Future studies of judicial behavior

may benefit from considering and testing whether decisions or opinions occur first in judges' decision-making calculi or whether they occur simultaneously.

Published and Non-published Cases

The U.S. Courts of Appeals Database is a sample of published cases with opinions—full, memoranda, or *per curium*. Unpublished cases are not represented in the sample. Unpublished cases may have particular importance for studies examining court-agency relations, especially if these cases are unanimously decided. It is plausible that unpublished cases, compared to published ones, are easy or trivial cases, which could further suggest that decisions in unpublished cases are made through routine processing based on clear-cut legal doctrines devoid of ideological disagreement. There may be a greater number of unanimous cases among unpublished cases, but future scholars may want to include unpublished cases in their analysis to check this and other assumptions (for a comparison of published and unpublished cases in the U.S. District Courts, see Songer 1988). Further, the notion of published cases and unpublished cases continues to diminish in some circuits because of the electronic accessibility of "unpublished" cases in searchable databases such as LexisNexis and Westlaw. One of the rationales for excluding unpublished cases from early quantitative studies may have been the inaccessibility of these cases. Modern technology may be changing the way we should view unpublished cases. Nonetheless, the present study uses the data from the U.S. Courts of Appeals Database, which is a sample of only published cases. Caution should be exercised in extending this study's findings to unpublished cases.

Data Limitations

The results of this study should also be considered in light of other methodological and data limitations. Specifically, I omitted "mixed" cases from analysis. These are either cases where the ideological direction of case outcomes was mixed or cases where court support for agencies was mixed (i.e., affirmed in part and reversed in part). There were no obvious differences between these cases and other cases, but systematically excluding mixed cases may bias the data. One possible bias is that mixed cases may reflect compromise positions among judges on a review panel, or they may reflect a compromise position between courts and agencies. Future scholars may want to

consider alternative coding structures for databases, so these cases can more easily be included in quantitative analyses.

There is no individual, judge-level data in the U.S. Courts of Appeals Database for how judges answered legal questions. In all of the judge-level models presented in this study, the legal variables are based on how the court answered legal questions. Judge-level data would have been preferable, but was not available. While judge-level data would have been preferable, it is not apparent that the results of the present study would be substantively different if these data were available. First, there is a high level of unanimity in the U.S. Courts of Appeals—90% of cases are unanimous. This means that 90% of the time an individual judge's answers to a legal question will be the same as the court's answer.

Second, if a judge disagrees with his or her panel cohorts about how a legal question is answered and if this disagreement is substantial, the judge's disagreement would likely appear in the dissent. As the results in the present study suggest, decisions to dissent may be ideological. However, the magnitudes of the ideology coefficients are small in the dissent models, which suggest that the influence of ideology may not be substantive. If data were available for individual judges' answers to legal questions, it is unlikely that these answers would strengthen the effects of ideology. However, judge-level data for the legal variables could show that a judge's decision to dissent is based on disagreement over a legal issue. Judge-level data for these legal variables may strengthen the results of the legal model. For models predicting dissent, this level of coding specificity may afford future scholars leverage in analyzing judicial decisionmaking.

U.S. Courts of Appeals for the Federal Circuit

The data in the U.S. Courts of Appeals database do not represent cases heard by the U.S. Courts of Appeals for the Federal Circuit, which was created by the Federal Courts Improvement Act (1982). The Courts of Appeals for the Federal Circuit merged the former Court of Customs and Patent Appeals and a portion of the U.S. Court of Claims. This accounts for the relatively low number of custom and patent appeals cases, claims cases, and military appeals heard in the remaining circuit courts. Since a large portion of the Federal Circuit's docket deals with administrative law cases, future

research may benefit from examining the relationship between this court and federal administrative agencies.

CONCLUSION

The results of this dissertation provide insights into judicial decisionmaking and court-agency relations in several important ways. First, judicial behavior literature in political science is replete with studies of the U.S. Supreme Court. This study adds to the limited, but growing, body of literature on the U.S. Courts of Appeals.

Second, this study also contributes to the even more limited body of empirical administrative law literature in the disciplines of political science, public administration, and law. As an empirical study of administrative law concepts, I hope that this study helps readers understand the relationships between federal courts and federal administrative agencies. At a minimum, it underscores the complexity of a system of government where the judicial branch is charged with reviewing decisions of administrative agencies, which often engage in quasi-legislative and quasi-judicial activities. Judicial review of such actions is not simple to characterize and measure. Judges juggle myriad considerations, including different standards of review, agency adherence to procedures, agency expertise, statutes and precedents prescribing deference, their own policy preferences, collegiality, and numerous other variables that are not the focus of the present study—namely a unique set of facts for each case they review. I hope this study provides students of the courts and administrative law a more informed view of the juggling act that judges on the U.S. Courts of Appeals must perform.

Although court-agency relations may be complex, I hope that this study helps dispel Justice Antonin Scalia's decree that "[a]dministrative law is not for sissies"(Scalia 1989, p. 511). Studying administrative law need not be as daunting as Justice Scalia suggests. Perhaps this study will help de-mystify a few administrative law concepts or serve as springboard for future administrative law studies.

This dissertation also contributes to the study of judicial behavior. I spent considerable time throughout the study framing research questions, hypotheses, and empirical tests in terms of two models of judicial behavior—the legal model and the attitudinal model. The results suggest that we should give law its due—perhaps a

renewed place in studies of judicial behavior. Renewing law's place in judicial behavior studies includes continuing to find better ways to conceptualize and measure elements of a legal model. We should also continue looking for better ways to measure non-legal concepts, including political ideology and judges' role perceptions.

This study illuminates the continued need to bridge epistemological and interdisciplinary approaches to studying judicial decisionmaking, law, and the courts. As Frank Cross concluded in his study of decisionmaking in the U.S. Courts of Appeals:

> Existing legal research has too often ignored the results, and the methods, of the very valuable social scientific examination of judicial decision making. Social scientists, though, have too often used cramped and inaccurate models of how the law is meant to work and consequently demeaned its role. Joint efforts can overcome these shortcomings and provide a much truer picture of judicial decision making (Cross 2007, p. 231).

I could not agree more. Cross also concludes his study of judicial decisionmaking by calling for deeper analyses for the role of law, smaller samples, interaction variables, and more rigorous and detailed theoretical examples (pp. 230-31). This dissertation attempts to do these things.

Finally, this dissertation likely raises more questions about judicial decisionmaking in the U.S. Courts of Appeals than it actually answers. Nonetheless, I will view this study as a successful one if it encourages others (including me) to build on its shortcomings—to conceptualize, construct, measure and test better, more complete models of judicial behavior.

APPENDIX A: DEPENDENT VARIABLE (SUPPORT) CODING EXCEPTIONS BASED ON *TREAT* VALUES EQUAL TO EIGHT (8)

Coding for the dependent variable, **support**, is based on the *treat* variable in the U.S. Courts of Appeals Database. As discussed in Chapter Four, court support for an agency when a court denies a petition or dismisses an appeal (*treat* = 8). Where treat=8, I must distinguish whether the agency is the appellant or the respondent, in order to determine whether the court action is supportive or non-supportive to the agency. Generally, agencies are the respondent in these cases, so where the database's *appfed* variable (indicating the number of appellants that are federal agencies) is greater than zero, I coded the agency as the appellant. I checked this coding convention using the database's *r_fed* variable, which indicates the number of respondents that are federal agencies. Table 4.4.5 in Chapter Four shows a cross-tabulation of *appfed* and *r_fed*, and also identifies eleven anomalies. I examined these cases individually. This appendix documents the anomalies and how I coded them for the dependent variable, support.

Cases Coded with Number of Agencies as Respondents Undeterminable (N=3)

I examined these three cases to make sure that there is at least one agency as a respondent. The exact number of agencies as respondents is unimportant for purposes of coding the support variable. All three cases have at least one agency as a respondent.

Casenum	Case Name (Citation)	Support Code
17450	*Action on Smoking v. Dept. of Labor, et al.* (28 F.3d 162) [26]	1
357	*Center for Auto Safety v. Thomas* (EPA administrator) (856 F.2d 1557)[27]	1
1438	*Eagle-Picher Industries, Inc. v. E.P.A.* (759 F.2d 922)[28]	1

---

[26] The U.S. Department of Labor is a respondent.
[27] The Environmental Protection Agency is a respondent.
[28] The Environmental Protection Agency is a respondent.

Cases Coded with Number of Agencies as Appellants Undeterminable (N=1)

I examined this case to make sure there is at least one agency as an appellant. The exact number of agencies among appellants is unimportant for purposes of coding the support variable. This case is incorrectly coded in the U.S. Courts of Appeals Database as noted.

Casenum	Case Name (Citation)	Support Code
15646	*Telestar, Inc. v. FCC and the United States of America* (888 F.3d 132)[29]	1

Cases Coded with Agencies as both Appellant and Respondent (N=3)

All three cases deal with federal agencies appealing decisions of the Federal Labor Relations Authority (FLRA). In all three cases, the court reviews FLRA actions and FLRA is the respondent. I retained all three cases and coded the support variable with respect to FLRA.

Casenum	Case Name (Citation)	Support Code
20116	*U.S. Dept. of Interior v. Fed. Labor Rel. Authority* (132 F.3d 157)[30]	0
17028	*U.S. Dept. of Interior v. Fed. Labor Rel. Authority* (1 F.3d 1059)[31]	0*
17107	*U.S. Dept. of Commerce, National Oceanic and Atmospheric Admin., National Weather Svc. V. Fed. Labor Rel. Authority* (838 F.2d 93)[32]	0*

* These observations are coded incorrectly in the present study. The support variable should have been coded as zero for these cases, but instead was coded as one. These two incorrectly coded observations do not affect the findings in this dissertation.

---

[29] This case is incorrectly coded as *appfed* = 99 (should be 0) and *r_fed* = 0 (should be 1). In a per curiam opinion the D.C. Circuit dismissed the case because the petition as pre-maturely filed (before the vase was ripe). I, therefore, coded the support variable in accordance with the FCC's decision remaining intact.

[30] Case involved an FLRA action and whether the court should extend *Chevron* deference. The judgment states, "We grant the petition for review and deny enforcement of the Authority's decision." This case is probably miscoded as *treat* = 8, but since I am able to discern whether the court did or did not support the agency, I retain it and code the support variable consistent with the judgment.

[31] The FLRA action under review was deemed "unreviewable" by the court for lack of jurisdiction. The court's action has the effect of leaving the FLRA action in place, and the support variable should be coded as 0 (non-support).

[32] Case coded incorrectly for *r_fed*. The Environmental Protection Agency is obviously the respondent.

Cases Coded with Agencies as neither Appellant nor Respondent (N=4)

In three of these cases, the *r_fed* variable was incorrectly coded in the U.S. Courts of Appeals database, since federal agencies were clearly respondents in the case. The remaining case did not cite a federal agency as a party, but the nature of the case was whether the court would honor the agency's request not to interfere in the case. All four cases are coded 1 for the support variable.

Casenum	Case Name (Citation)	Support Code
489	*In re Willy* (831 F.2d 545) [33]	1
16405	*Liberty Mutual Ins. Co. v. Commercial Union Ins. Co. et al.* (978 F.2d 750) [34]	1
76	*Ausimont USA, Inc. v. E.P.A.* (838 F.2d 93) [35]	1
1878	*Burroughs of Ellwood ... v. Fed. Energy Regulatory Com.* (701 F.2d 266) [36]	1

---

[33] A specific agency is not named as a party in the case, but the case is a petition for mandamus asking the court of appeal to make a final ruling on whether evidence was discoverable based on attorney-client privilege. An Administrative Law Judge for the Department of Labor ordered the evidence discoverable, and the Secretary of the Department of Labor asked the court to stay its hand. The Court denied the petition for mandamus, citing the parties' failure to exhaust administrative remedies and not wanting to interfere with the administrative process. This case is likely miscoded as treat = 8, since it is interlocutory in nature. However, since the court's decision showed deference to agency processes, I retained the case and coded the support variable as 1 (support).

[34] Case coded incorrectly for *r_fed*. Benefits Review Board is part of the "et al." The judgment states, "The petition to review is dismissed and the [Benefits Review] Board's decision is affirmed."

[35] Case coded incorrectly for *r_fed*. The Environmental Protection Agency is obviously the respondent.

[36] Case coded incorrectly for *r_fed*. FERC is obviously the respondent.

APPENDIX B: DEPENDENT AND INDEPENDENT VARIABLES USED

Variable	Type	How used	Description	Values
abuse of discretion	dichotomous	independent variable	Did the court conclude that it should defer to agency discretion?	0=no 1=yes
arbitrary & capricious	dichotomous	independent variable	Did the court's use or interpretation of the arbitrary-and-capricious standard support the government?	0=no 1=yes
Chevron deference	dichotomous	independent variable	Did the court conclude that the agency provided a reasonable interpretation to statutes?	0=no 1=yes
court support	dichotomous	dependent variable	Did the court support the agency?	0=no 1=yes
DC	dichotomous	independent variable	Dummy variable indicating the DC circuit	0=all other circuits 1=DC Circuit
Dissent	dichotomous	dependent variable	Did an individual judge dissent in the case?	0=no 1=yes
judge ideological agreement	continuous	independent variable	Judge ideological agreement with agency position	-1=least agreement 1=most agreement
judge support	dichotomous	dependent variable	Did the judge vote to support the agency?	0=no 1=yes
panel ideological agreement	continuous	independent variable	Ideological agreement with agency position based on mean panel ideology	-1=least agreement 1=most agreement
procedures	dichotomous	independent variable	Did courts determine agencies followed procedures (notice, comment, record, etc.)?	0=no 1=yes
substantial evidence	dichotomous	independent variable	Did the court's interpretation of the substantial evidence rule support the government?	0=no 1=yes

APPENDIX C: VARIABLE CORRELATION MATRICES

Tables B.1 and B.2 show correlations between all dependent and independent variables used in logistic regression models. Statistical significance levels are in parentheses below each correlation.

Table C.1   Variable Correlation Matrix: Judge Support

Variable	Judge Support	Subst. Evidence	Arbitrary & Capric	Abuse of Discr	*Chevron* Deference	Proced.	Judge Ideology Agree	Panel Ideology Agree
Judge Support (DV)	1.00							
Substantial Evidence	0.70 (0.001)	1.00						
Arbitrary & Capricious	0.54 (0.001)	0.86 (0.001)	1.00					
Abuse of Discretion	0.59 (0.001)	0.88 (0.001)	0.79 (0.001)	1.00				
Chevron Deference	0.76 (0.001)	0.85 (0.001)	0.88 (0.001)	0.88 (0.001)	1.00			
Procedures	0.59 (0.001)	0.87 (0.001)	0.73 (0.001)	0.40 (0.002)	1.00 (0.001)	1.00		
Judge Ideology Agree	0.09 (0.002)	−0.03 (0.518)	−0.01 (0.998)	0.05 (0.404)	0.00 (0.955)	0.08 (0.261)	1.00	
Panel Ideology Agree	0.15 (0.001)	−0.05 (0.279)	−0.01 (0.967)	0.09 (0.134)	0.01 (0.893)	0.14 (0.056)	0.60 (0.001)	1.00

Table C.2   Variable Correlation Matrix: Court Support

Variable	Court Support	Subst. Evidence	Arbitrary & Capric	Abuse of Discr	*Chevron* Deference	Proced.	Panel Ideology Agree
Court Support (DV)	1.00						
Substantial Evidence	0.87 (0.001)	1.00					
Arbitrary & Capricious	0.83 (0.001)	0.87 (0.001)	1.00				
Abuse of Discretion	0.82 (0.001)	0.88 (0.001)	0.79 (0.001)	1.00			
Chevron Deference	0.90 (0.001)	0.82 (0.001)	0.83 (0.001)	0.88 (0.001)	1.00		
Procedures	0.80 (0.001)	0.87 (0.001)	0.72 (0.001)	0.37 (0.123)	1.00 (0.001)	1.00	
Panel Ideology Agree	0.10 (0.030)	−0.04 (0.593)	0.03 (0.797)	0.07 (0.500)	0.00 (0.971)	0.15 (0.246)	1.00

Copyright © Jerry D. Thomas 2010

224

WORKS CITED

Aman, Alfred C. Jr. 1988. "Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency." *Cornell Law Review* 73.

Banks, Christopher P. 1999. *Judicial Politics in the D.C. Circuit Court*. Baltimore: Johns Hopkins University Press.

Baum, Lawrence. 2004. *The Supreme Court*. Eighth ed. Washington, D.C.: CQ Press.

Bazelon, David L. 1976. "The Impact of the Courts on Public Administration." *Indiana Law Journal* 52 (1):101-110.

Bradley, Curtis A. 2000. "Chevron Deference and Foreign Affairs." *Virginia Law Review* 86 (4):649-726.

Brady, Henry E., and David Collier. 2004. *Rethinking Social Inquiry: Diverse Tools, Shared Standards*. Lanham, MD: Rowman & Littlefield.

Brenner, Saul, and Theodore S. Arrington. 1987. "Unanimous Decision Making on the U. S. Supreme Court: Case Stimuli and Judicial Attitudes." *Political Behavior* 9 (1):75-86.

Burton, Steven. 1992. *Judging in Good Faith*. Cambridge, UK: Cambridge University Press.

Canon, Bradley C. 1983. "Defining the Dimensions of Judicial Activism." *Judicature* 66 (6):236-247.

———. 1993. "Review of The Supreme Court and the Attitudinal Model." *Law and Politics Book Review* 3:98-100.

Canon, Bradley C., and Micheal Giles. 1972. "Recurring Litigants: Federal Agencies Before the Supreme Court." *Western Political Quarterly* 25 (2):183-191.

Caruson, Kiki, and J. Michael Bitzer. 2004. "At the Crossroads of Policymaking: Executive Politics, Administrative Action, and Judicial Deference by the DC Circuit Court of Appeals (1985-1996)." *Law & Policy* 26 (3-4):347-369.

Charney, Jonathan I. 1989. "Judicial Deference in Foreign Relations." *The American Journal of International Law* 83 (4):805-813.

Collins, Paul M. Jr. 2008. "Transforming the United States Courts of Appeals Databases in Stata." *Law & Courts: Newsletter of the Law & Courts Section of the American Political Science Association* 18 (1):19-22.

Cooper, Phillip J. 1985. "Conflict or Constructive Tension: The Changing Relationship of Judges and Administrators." *Public Administration Review* 45:643-652.

Crawford, Quincy M. 1994. "Chevron Deference to Agency Interpretations That Delimit the Scope of the Agency's Jurisdiction." *University of Chicago Law Review* 61 (3):957-983.

Criddle, Evan. 2003. "Chevron Deference and Treaty Interpretation." *Yale Law Journal* 112 (7):1927-1934.

Cross, Frank B. 2003. "Decisionmaking in the U.S. Circuit Courts of Appeals." *California Law Review* 91 (6):1457-1515.

———. 2007. *Decision Making in the U.S. Courts of Appeals*. Stanford, CA: Stanford University Press.

Crowley, Donald W. 1987. "Judicial Review of Administrative Agencies: Does the Type of Agency Matter?" *Western Political Quarterly* 40 (2):265-283.

Curtiss, Sarah Stauffer. 2007. "The Ninth Circuit's Interpretation of the Administrative Procedure Act's Final Agency Action Requirement: *Oregon Natural Desert Asscoiation v. U.S. Forest Service*." *Lewis & Clark Law Review* 11 (3):781-807.

Dahl, Robert. 1957. "Decision Making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6:279-295.

Delson, Robert. 1972. "The Act of State Doctrine--Judicial Deference or Abstention?" *The American Journal of International Law* 66 (1):82-93.

Edwards, Harry T. 1998. "Collegiality and Decision Making on the D. C. Circuit." *Virginia Law Review* 84 (7):1335-1370.

———. 2003. "The Effects of Collegiality on Judicial Decision Making." *University of Pennsylvania Law Review* 151 (5):1639-1690.

Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.

Epstein, Richard A. 1982. "Not Deference, but Doctrine: The Eminent Domain Clause." *Supreme Court Review* 1982:351-380.

Eskridge, William N., Jr., and Lauren E. Baer. 2008. "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*." *Georgetown Law Review* 96:1083-1226.

Fowler, Jason. 2004. "What Constitutes Final Agency Action? The Practical Implications of the D.C. Circuits Ruling in *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*." *Journal of the National Association of Administrative Law Judges* 24 (2):311-50.

Fox, William F. 2008. *Understanding Administrative Law*. 5th ed. Newark, NJ: Matthew Bender & Co., Inc.

Galanter, Marc. 1974. "Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9 (1):95-160.

George, Tracey E., and Reginald S. Sheehan. 2000. "Circuit Breaker: Deciphering Courts of Appeals Decisions Using the U.S. Courts of Appeals Data Base." *Judicature* 83 (5):240-247.

Gerhardt, Michael J. 2003. "Attitudes about Attitudes." *Michigan Law Review* 101 (6):1733-1763.

Gibbs, Margaret R. 1992. "Eighth Amendment. Narrow Proportionality Requirement Preserves Deference to Legislative Judgment." *Journal of Criminal Law and Criminology* 82 (4):955-978.

Gibson, James L. 1983. "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior." *Political Behavior* 5 (1):7-49.

Giles, Micheal W., Virginia A. Hettinger, and Todd Peppers. 2002. "Measuring the Preferences of Federal Judges: Alternatives to Party of the Appointing President." *Unpublished manuscript.*

Giles, Micheal W., Virginia Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54 (September):623-641.

Goodsell, Charles T. 2003. *The Case for Bureaucracy: A Public Administration Polemic*. 4th ed. Washington, DC: CQ Press.

226

Gordon, Scott. 1991. *The History and Philosophy of Social Science*. London: Routledge.

Gossett, David M. 1997. "Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes." *University of Chicago Law Review* 64 (2):681-708.

Hagle, Timothy M. 1993. "A Reply to Professor Canon's Review of The Supreme Court and the Attitudinal Model." *Law and Politics Book Review* 3 (9):98-100.

Haire, Susan, and Stefanie Lindquist. 1997. "An Agency and 12 Courts: Social Security Disability Cases in the U.S. Courts of Appeals." *Judicature* 80 (8):230-236.

Hall, Daniel E. 2002. *Administrative Law: Bureaucracy in a Democracy*. Second ed. Upper Saddle River, NJ: Prentice Hall.

Hall, Mark A., and Ronald F. Wright. 2008. "Systematic Content Analysis of Judicial Opinions." *California Law Review* 96 (63).

Hansen, Wendy L., Renee J. Johnson, and Isaac Unah. 1995. "Specialized Courts, Bureaucratic Agencies, and the Politics of U.S. Trade Policy." *American Journal of Political Science* 39 (3):529-557.

Harriman, Linda, and Jeffrey D. Straussman. 1983. "Do Judges Determine Budget Decisions? Federal Court Decisions in Prison Reform and State Spending for Corrections." *Public Administration Review* 43 (4):343-351.

Horowitz, Robert B. 1994. "Judicial Review of Regulatory Decisions: The Changing Criteria." *Political Science Quarterly* 109 (1):133-169.

Howard Jr., J. Woodford. 1973. "Litigation Flow in Three United States Courts of Appeals." *Law & Society Review* 8 (1):33-53.

———. 1977. "Role Perceptions and Behavior in Three U.S. Courts of Appeals." *The Journal of Politics* 39 (4):916-938.

Howard, Jr., J. Woodford. 1977. "Role Perceptions and Behavior in Three U.S. Courts of Appeals." *Journal of Politics* 39 (4):916-938.

Howard Jr., J. Woodford. 1981. *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits*. Princeton: Princeton University Press.

Howard, Robert M., and Jeffrey A. Segal. 2004. "A Preference for Deference? The Supreme Court and Judicial Review." *Political Research Quarterly* 57 (1):131-143.

Humphries, Martha Anne, and Donald R. Songer. 1999. "Law and Politics in Judicial Oversight of Federal Administrative Agencies." *Journal of Politics* 61 (1):207-220.

Jaffe, Louis L. 1965. *Judicial Control of Administrative Action*. Boston: Little, Brown and Company.

Kaheny, Erin B., Susan Brodie Haire, and Sara C. Benesh. 2008. "Change over Tenure: Voting, Variance, and Decision Making on the U.S. Courts of Appeals." *American Journal of Political Science* 52 (3).

King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton: Princeton University Press.

Kirby, John B. 1970. "Early American Politics--The Search for Ideology: An Historiographical Analysis and Critique of the Concept of "Deference"." *The Journal of Politics* 32 (4):808-838.

Leahy, Richard E. 1989. "Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines." *California Law Review* 77 (6):1483-1528.

Leiter, Brian. 1997. "Rethinking Legal Realism: Toward a Naturalized Jurisprudence." *Texas Law Review* 76:268-315.

Long, J. Scott. 1997. *Regression Models for Categorical and Limited Dependent Variables*. Edited by R. Berk. 10 vols. Vol. 7. Thousand Oaks, CA: Sage Publications.

Long, J. Scott, and Jeremy Freese. 2006. *Regression Models for Categorical Dependent Variables Using Stata, Second Edition*. College Station, TX: Stata Press.

Lovejoy, Daniel. 2002. "The Ambiguous Basis for Chevron Deference: Multiple-Agency Statutes." *Virginia Law Review* 88 (4):879-917.

Manning, John F. 1996. "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules." *Columbia Law Review* 96 (3):612-696.

Matsubara, Kerne H. O. 1994. "Domicile under Immigration and Nationality Act Section 212(c): Escaping the Chevron "Trap" of Agency Deference." *California Law Review* 82 (6):1595-1642.

Maveety, Nancy. 2003. *The Pioneers of Judicial Behavior*. Ann Arbor, MI: University of Michigan Press.

Melnick, R. Shep. 1985. "The Politics of Partnership." *Public Administration Review* 45:653-660.

Merrill, Thomas W. 1992. "Judicial Deference to Executive Precedent." *Yale Law Journal* 101 (5):969-1041.

Molot, Jonathan T. 2000. "The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role." *Stanford Law Review* 53 (1):1-110.

Monroe, Kristen Renwick (ed.). 2005. *Perestroika! The Raucous Rebellion in Political Science*. New Haven: Yale University Press.

Morton, Rebecca B. 1999. *Methods and Models: A Guide to the Empirical Analysis of Formal Models in Political Science*. Cambridge: Cambridge University Press.

Nichols, Lindsay J. 2003. "The NMFS's National Standard Guidelines: Why Judicial Deference May Be Inevitable." *California Law Review* 91 (5):1375-1416.

O'Leary, Rosemary, and Charles R. Wise. 1991. "Public Managers, Judges, and Legislators: Redefining the "New Partnership"." *Public Administration Review* 51 (4):316-327.

Oldham, Phillip G. 1995. "Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations." *University of Chicago Law Review* 62 (1):393-422.

Pierce, Richard J., Jr. 1988. "Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking." *Duke Law Journal* 1988 (2/3):300-328.

Poole, Keith T. 1998. "Recovering a Basic Space from a Set of Issue Scales." *American Journal of Political Science* 42:954-953.

Poole, Keith T., and Howard Rosenthal. 1997. *Congress: A Political-Economic History of Roll Call Voting*. New York: Oxford University Press.

Pritchett, C. Herman. 1948. *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*. New York: Macmillan.

Revesz, Richard L. 1997. "Environmental Regulation, Ideology, and the D. C. Circuit." *Virginia Law Review* 83 (8):1717-1772.

———. 1999. "Ideology, Collegiality, and the D. C. Circuit: A Reply to Chief Judge Harry T. Edwards." *Virginia Law Review* 85 (5):805-851.

Scalia, Antonin. 1978. "Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court." *Supreme Court Review* 1978:345-409.

———. 1989. "Judicial Deference to Administrative Interpretations of Law." *Duke Law Journal* 1989 (3):511-521.

Segal, Jeffrey A. 1986. "Supreme Court Justices as Human Decision Makers: An Individual-Level Analysis of the Search and Seizure Cases." *Journal of Politics* 48 (4):938-955.

Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83 (2):557-565.

Segal, Jeffrey A., Lee Epstein, Charles M. Cameron, and Harold J. Spaeth. 1995a. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *The Journal of Politics* 57 (3):812-823.

———. 1995b. "Ideological Values and the Votes of U.S. Supreme Court Justices Revisited." *Journal of Politics* 57 (3):812-823.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.

Shapiro, Carolyn. 2009. "Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court." *Hastings Law Journal* 60 (3).

———. 2010 (forthcoming). "The Context of Ideology: Law, Politics and Empirical Legal Scholarship." *Missouri Law Review* 75.

Shapiro, Martin. 1964. *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence*. New York: Macmillan Company.

———. 1968. *The Supreme Court and Administrative Agencies*. New York: Free Press.

———. 1988. *Who Guards the Guardians? Judicial Control of Administration*. Athens, GA: University of Georgia Press.

Sheehan, Reginald S. 1990. "Administrative Agencies and the Court: A Reexamination of the Impact of Agency Type on Decisional Outcomes." *Western Political Quarterly* 43 (4):875-885.

———. 1992. "Federal Agencies and the Supreme Court: An Analysis of Litigation Outcomes." *American Politics Quarterly* 20 (October):478-500.

Sheehan, Reginald S., William Mishler, and Donald R. Songer. 1992a. "Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court." *The American Political Science Review* 86 (2):464-471.

———. 1992b. "Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court." *American Political Science Review* 86 (2):464-471.

Songer, Donald R. 1982. "Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Courts of Appeals." *American Journal of Political Science* 26 (2):225-239.

———. 1988. "Nonpublication in the United States District Courts: Official Criteria Versus Inferences from Appellate Review." *Journal of Politics* 50 (1):206-215.

Songer, Donald R., and Reginald S. Sheehan. 1992. "Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals." *American Journal of Political Science* 36 (1):235-258.

Songer, Donald R., Reginald S. Sheehan, and Susan B. Haire. 2000. *Continuity and Change on the United States Courts of Appeals*. Ann Arbor: University of Michigan Press.

Spaeth, Harold J. 1989. "Consensus in the Unanimous Decisions of the U.S. Supreme Court." *Judicature* 72:274-81.

Stefan, Susan. 1992. "Leaving Civil Rights to the 'Experts': From Deference to Abdication under the Professional Judgment Standard." *Yale Law Journal* 102 (3):639-717.

Stephenson, Matthew C. 2006. "The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations." *Harvard Law Review* 120:528.

Sunstein, Cass R. 1990. "Political Economy, Administrative Law: A Comment." *Journal of Law, Economics, & Organization* 6:299-306.

Sunstein, Cass R., David Schkade, Lisa M. Ellman, and Andres Sawicki. 2006. *Are Judges Political? An Empirical Analysis of the Federal Judiciary*. Washington, DC: Brookings Institution Press.

Sunstein, Cass R., David Schkade, and Lisa Michelle Ellman. 2004. "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation." *Virginia Law Review* 90 (1):301-354.

Tanenhaus, Joseph. 1960. "Supreme Court Attitudes Toward Federal Administrative Agencies." *Journal of Politics* 22 (3):502-524.

Tiller, Emerson H., and Frank B. Cross. 1999. "A Modest Proposal for Improving American Justice." *Columbia Law Review* 99 (1):215-234.

———. 2007. "Modeling Agency/Court Interaction." *Harvard Law Review* 121:13-20.

Wald, Patricia M. 1996. "Judicial Review in Midpassage: The Uneasy Partnership between Courts and Agencies Plays On." *Tulsa Law Journal* 32 (Winter).

———. 1999. "A Response to Tiller and Cross." *Columbia Law Review* 99 (1):235-261.

Walker, Melanie E. 1999. "Congressional Intent and Deference to Agency Interpretations of Regulations." *University of Chicago Law Review* 66 (4):1341-1371.

Warner, Richard. 1989. "Three Theories of Legal Reasoning." *University of Southern California Law Review* 62:1523-71.

White, Rebecca Hanner. 2000. "Deference and Disability Discrimination." *Michigan Law Review* 99 (3):532-587.

Willison, David H. 1986. "Judicial Review of Administrative Decisions: Agency Cases before the Courts of Appeals for the District of Columbia, 1981-1984." *American Politics Quarterly* 14 (October):317-27.

Wilson, Sean. 2006. *The Attitudinal Model, Political Science, Ecological Fallacy and Exaggeration*: SSRN.

Yarbrough, Tinsley E. 1985. "The Political World of Federal Judges as Managers." *Public Administration Review* 45:660-666.

Yavelberg, Jamie A. 1992. "The Revival of Skidmore v. Swift: Judicial Deference to Agency Interpretations after EEOC v. Aramco." *Duke Law Journal* 42 (1):166-202.

CASES CITED

Alvarez-Flores v. Immigration and Naturalization Service, 909 F.2d 1 (1st Cir. 1990)

Association of Data Processing Service Organizations, Inc. v. Federal Reserve Board, 745 F.2d 677 (D.C. Cir. 1984)

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

Exportal Ltda. v. U.S. and Clayton Yeutter, Secretary of Agriculture, 902 F.2d 45 (D.C. Cir. 1990)

Freeman United Coal Mining Co. v. Benefits Review Board, U.S. Dept. of Labor, 919 F.2d 451 (7th Cir. 1990)

Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000)

Heckler v. Chaney, 470 U.S. 837 (1985)

Illinois Central Gulf Railroad Co. v. Interstate Commerce Commission, 717 F.2d 408 (7th Cir. 1983)

International Brotherhood of Teamsters, etc. v. U.S., 735 F.2d 1525 (D.C. Cir. 1990)

Kentucky Utilities Co. v. Federal Energy Regulatory Commission, 760 F.3d 1321 (D.C. Cir. 1985)

L.R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664 (D.C. Cir. 1982)

Liberty Mutual Insurance Co. v. Commercial Union Insurance Co. et al., 978 F.2d 750 (1st Cir. 1992)

Molina v. Immigration and Naturalization Service, 981 F.2d 14 (1st Cir. 1992)

Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co., 463 U.S. 29 (1983)

National Labor Relations Board v. Instrument Corp. of America, 714 F.2d. 324 (4th Cir. 1983)

Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 907 F.2d 1146 (D.C. Cir. 1990)

Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 966 F.2d 1292 (9th Cir. 1992)

Scripps-Howard Radio v. Federal Communications Commission, 316 U.S. 4 (1942)

Skidmore v. Swift & Co., 323 U.S. 134 (1944)

U.S. v. Mead Corp., 533 U.S. 218 (2001)

Wilson & Sons Heating and Plumbing, Inc. v. National Labor Relations Board, 971 F.2d 758 (D.C. Cir. 1992)

PUBLIC LAWS CITED

Administrative Procedure Act. 5 U.S.C. § 551 et seq. (1946)
Federal Courts Improvement Act. 28 U.S.C. § 1295 (1982)
Fifth Circuit Court of Appeals Reorganization Act. 94 Stat. (1980)
Freedom of Information Act. 5 U.S.C. § 552 (1966)
Government in the Sunshine Act. 5 U.S.C. § 552b (1976)
Occupational Safety & Health Act. 29 U.S.C. §§ 651-657 (1976)

VITA

Jerry D. Thomas
Born August 5, 1969 in Lincolnton, North Carolina, USA.

Educational Institutions Attended and Degrees Awarded
Coker College, Hartsville, SC — B.A. in History (1991)
University of South Carolina, Columbia, SC — M.P.A. (Public Administration) (1994)
University of Kentucky, Lexington, KY — M.A. in Political Science (2007)
University of Kentucky, Lexington, KY — Ph.D. in Political Science (2010)

Professional Positions Held
Visiting Assistant Professor of Government (2004–2008)
Eastern Kentucky University, Richmond, KY

Training Manager (1999–2003)
Palmetto GBA, Columbia, SC

Director, EXCEL Leadership Institute, and
Director, Staff Development & Training (1996–1998)
Office of the Governor, State of South Carolina, Columbia, SC

Assistant Director, South Carolina Executive Institute (1993–1996)
Budget and Control Board, State of South Carolina, Columbia, SC

Research Assistant, Center for Health Promotion (1992–1993)
Department of Health & Environmental Control, State of South Carolina, Columbia, SC

Scholastic and Professional Honors
William Chambers Coker Academic Scholarship, Coker College (1987–1988)
Susanne G. Linville Academic Scholarship, Coker College (1988–1991)
Chicago-Kent Academic Scholarship (2008–2010)

Professional Publications
 "The Marriage Debate and Minority Stress," with Ellen D. B. Riggle and Sharon Rostosky. 2005. *PS: Political Science and Politics*, 35(2): 221-224.

Review: David W. Patton, Stephanie L. Witt, Nicholas P. Lovrich, and Patricia J. Frederickson, *Human Resource Management: The Public Service Perspective* (Boston: Houghton Mifflin, 2002) in *Review of Public Personnel Administration* 25(2): 196-198. (June 2005).