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Hannah Hewitt April 11, 2017

D.C. Circuit Court of Appeals and the EPA

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Abstract

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This thesis aims to provide further insight into the conditions under which the D.C. Circuit Court of Appeals rules in favor of the EPA. In an effort to answer this question, I used five independent variables, (1) public mood, (2) president ideology, (3) panel ideology, (4) president and panel ideology alignment, and (5) polarization. I hypothesized that the D.C. Circuit Court of Appeals is more likely to rule in favor of an EPA regulation when (1) the public mood is more liberal than conservative, (2) when the president's ideology is conservative, (3) when the panel ideology is liberal, (4) when the ideology of the panel and the president aligns, and (5) when polarization is low. However, after running an ordered logit for all of these variables, none of them were statistically significant. As a result, I failed to reject the null hypotheses. However, despite these results' departure from some of the literature, they may help highlight the unique relationship that the courts have with bureaucratic agencies, or at least the unique relationship that the D.C. Circuit Court of Appeals has with the Environmental Protection Agency. It also gives credence to the idea that the court is more differential in dealing with the EPA and perhaps with other agencies as well. Finally, the results reveal a potential strength for the executive branch, while highlighting a weakness in the court's policymaking power.

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Introduction

While, the Constitution of the United States specifically gives the power to legislate to Congress, both the judicial branch and the executive branch exercise this power as well. However, as the least developed branch of government in the Constitution, the policymaking power of the judicial branch has received a lot of scrutiny by scholars and the public. Specifically, the Supreme Court is the most heavily studied court in the United States as it is the highest court and presides over the judicial branch of government as established by the Constitution of the United States of America. Despite the idea that judges and justices only apply the law, simply regarding the Court as a legal institution fails to capture its significance to policymaking in the United States (Seamon 2013). Overtime, the Court has grown into a powerful political institution due in part to its power of judicial review, which was established in *Marbury v. Madison* and grants the Court the ability to discern if an action or law is constitutional. This power allows the Court to influence policy by "checking" both other branches of government, as well as, state action as it pertains to federal law or constitutional issues.

While the focus on the Supreme Court provides helpful insight into considerations taken into account by the highest court in the land, the Supreme Court only hears less than one percent of all the cases per year (United States Department of Justice). As a result, the lower courts potentially create more policy than the Supreme Court each year. Thus, in order to more fully understand the power of the judicial branch, it may be most useful to study the lower courts and the factors that influence the judges' decisions. With this in mind, this paper focuses on the relationship between the D.C. Circuit Court of Appeals and the Environmental

Protection Agency (EPA). Specifically, it analyzes the conditions under which the D.C. Circuit Court of Appeals rules in favor of the EPA regulation being challenged. I am choosing to analyze this particular agency and court because the EPA essentially creates all of the United States environmental policies and the D.C. Circuit has exclusive venue over challenges to a wide array of environmental regulations. Further, environmental issues are very important with both experts and military personnel calling global warming the most significant threat to national security. Thus, examining the interaction between the EPA and the D.C. Circuit Court of Appeals will provide valuable insight into how the environmental policies in the United States are shaped.

Literature Review

In an effort to better appreciation the salience of understanding the D.C. Circuit Court of Appeal's interactions with the EPA, a discussion of existing research is warranted. To begin, a brief look into the interactions of the Supreme Court and other political bodies provides a baseline for what one might expect to find or not find when studying the Court of Appeals. Further, the variation in interactions revealed in this literature highlights the importance of examining a specific institution's interactions with the Court in order to more fully understand the decision making process of justices. Due to the Court's considerable influence on policy in the United States, this variation in the Court's use of judicial review based at least in part on the political body involved has drawn scholars to further study these interactions. Further, understanding the variation in interactions adds a layer of knowledge to the Court as a political body as it suggests that policy preferences are not the only political or non-legal consideration taken into account when issuing a ruling.

Though the Supreme Court is a different subsection of the judicial branch than the Court of Appeals, it commands the most robust literature and many of the same factors may still apply to the Court of Appeals. Further, the direct application of the factors and understandings associated with the Supreme Court to the Court of Appeals is valuable as it will provide insight into the similarities and differences between these courts. As a result, a close examination of literature regarding the Supreme Court is an important aspect to my research. In addition, by examining existing research, characteristics that make the bureaucracy unique can be seen more effectively through this comparative lens. Further, through this literature, the importance and power of the judicial branch becomes more apparent.

As gridlock and polarization between Congress and the president has increased, the importance of the Court as a policymaker has also increased (Hasen 2012). With the other two branches of government at odds with each other, the demand and ability for the Court to more actively intervene increases. This is because there is a decreased chance for the other political bodies to overrule their decisions (Hasen 2012). This is significant because the Court as an institution does not have any enforcement power and instead, relies on legitimacy for their decisions to be respected. Thus, the Court can be sensitive to being potentially overruled by Congress, which would damage the legitimacy of the institution (Clayton and Gillman, 1999.) However, with the increase of polarization leading to the decreased chance of being overruled, the Supreme Court is more likely to overturn a congressional statute (Hasen 2012).

However, this strategic behavior does not always hold true as there are also incidents in which the Court signals to Congress how to override a decision and make a law constitutional. This is evident in *Shelby County v. Holder* when they specifically say that sections 4(b) and 5 of

the Voting Rights Act of 1965 are unconstitutional simply due to the law's outdated data (Roberts 2013). Similarly, there is evidence for this sort of signaling to bureaucracies as well. In Emily Meazell's research she highlights an incident in which the Court's decision regarding the Atomic Energy Act (AEA) and Nuclear Regulatory Commission's (NRC) financial qualifications hints at the part of the law that the Court found objectionable and provides a template to fix it (Meazell 2011). The NRC then took these recommendations under advisement and implemented the suggestions (Meazell 2011). Though the Court is still technically being overruled in these cases, the institutions are still complying with the Court's ruling by applying its recommendation. As a result, in these situations, the Court's legitimacy is not really called into question. Further, the adaption of the Court's recommendations lends further credence to its power as a policymaker as their decisions are literally being written into law.

When looking at the research that examines the interactions between the Court and the president, the Supreme Court appears to be more likely to rule in the president's favor than Congress'. For example, Ryan Black and Ryan Owens find that the Solicitor General wins 60-80% of the cases that he or she argues (Black and Owens 2012). This is a far greater percentage than other lawyers who argue before the Court. However, it is unclear if this is because the Court as an institution gives the president the benefit of the doubt or if it is because the Solicitor General argues far more cases in front of the Court and is thus, better prepared and more convincing (Black and Owens 2012). Based on this finding, one may also expect to find that the Court will be more likely to rule in favor of the bureaucracy than Congress since it is an extension of the executive branch and has a close relationship with the presidency. In fact,

presidents often organize bureaucratic agencies in order to best suit their political needs and isolate their policies from future political actors (Lewis 2003).

Matthew Hall is best able to highlight this difference in institutional interactions with the Court in his book, *The Nature of Supreme Court Power*, by exploring the conditions under which the Court's rulings are more likely to garner compliance (Hall 2011). He divides the cases into four categories, popular vertical decisions, unpopular vertical decisions, popular lateral decisions, and unpopular lateral decisions. Popular/unpopular indicate public support for the decision and vertical/lateral indicate the political body. For example, lateral decisions are those in which compliance falls to the other branches of government and vertical decisions are those in which lower courts are responsible for compliance. He finds that popular vertical decisions are most likely to gain compliance, while unpopular lateral decisions are least likely to gain compliance (Hall 2011). Though his research also takes public opinion into account as well, it is clear that the interactions of the Court vary depending on the political body.

While Hall's research is an effective analysis of when the Supreme Court is most likely to receive compliance as a policymaker when dealing with lower courts and other branches of government, it does not address bureaucratic agency compliance. This may be due in part to the fact that the bureaucracy has been found to generally comply with Supreme Court rulings (Spriggs 1997) and is even likely to change their policy with the attitudinal shifts of the Court (Canes-Wrone 2005). As a result, further research on the subject of compliance may have been unproductive. However, his findings remain significant as they lend further credence to the importance of looking at the Court's interaction with different political bodies on an individual

basis in order to more fully understand the Court as a policymaker as there is variation in the interactions.

In particular, there are several other characteristics of bureaucratic agencies that make the interaction between the Supreme Court and the bureaucracy unique from other political bodies. Emily Meazell's research paper, *Presidential Policy Initiatives and Agency Compliance*, highlights the specialization of bureaucratic code when she examines the role of dialogue and deference in bureaucratic code between the courts and agencies. In addition, due to the lack of necessary expertise on the justices' behalf to substantially rule on bureaucratic code, incrementalism is often employed by the Court. Further, administrative law is generally heavily litigated since broad sweeping decisions are not often handed down and many cases are often required to produce change in policy (Meazell, 2011).

Recognizing these unique circumstances when reviewing bureaucratic law, the Court has a precedent of deferring to the bureaucracies. This was established in the 1984 court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*. In this decision, the Court ruled that it would defer to agencies as long as it has a "permissible construction of the statute" (Stevens 1984). However, what is "permissible" is open for interpretation. As a result, the cases in which the Court decides to defer to a bureaucratic agency may vary depending on different political conditions. This variation in when the Court rules in favor of the bureaucracy opens up an area of research that may provide further insight into the decision making process and policymaking of the judicial branch as a whole.

While these factors have been found to influence the Supreme Court and its decision making process, there is little literature that discusses the United States Court of Appeals as a

policymaker. As a result, less is known about the decision making process of the Court of Appeals judges. This is significant as only one percent of cases makes it to the Supreme Court. This means that the majority of policy and precedent is established in the lower courts, specifically the Court of Appeals. Further, the Court of Appeals does not receive as much public scrutiny as the Supreme Court. In addition, the majority of cases are decided by a three judge panel instead of by nine justices like at the Supreme Court. These two factors suggest the the D.C. Circuit may enjoy more freedom to decide cases how they want. However, there is very little research addressing this subject and analyzing the power of the Court of Appeals as a policymaker. As a result, researching the conditions under which the D.C. Circuit Court of Appeals rules in favor of the EPA aims to provide a more complete understanding of the judicial branch as a policymaker.

In addition, though the body of research on the Supreme Court's interactions with other political actors, including the bureaucracy, is not directly related to the Court of Appeals, it does help frame many considerations that must be taken into account. Further, using what is known about the Supreme Court and applying it to the Court of Appeals opens up the potential for an interesting comparison. Specifically, I may find that the factors that drive the Supreme Court do not drive the Court of Appeals. On the other hand, I may find that the same factors that influence the Supreme Court also influence the Court of Appeals, but at different rates.

Theory

Legal Model:

The first main theory in studying judges' opinions is known as the legal model. In this model, the judge is simply applying the law to a specific case with no strategic or political

thought (Seamon). In theory, this is generally how the court system is thought to work. However, due to the constitutionally ambiguous nature of many cases, this model provides little insight into further understanding the interaction between the D.C. Circuit Court and the EPA. This is because when a regulation or constitutional provision is ambiguous, the judges have to interpret the meaning based on their understanding. This interpretation is often clouded by personal preferences and viewpoints, thus making it impossible to simply apply the law. Further, there are also similar variations of this model like textualism or originalism. However, these explanations for a justice's vote are widely regarded as unsatisfactory due to the ambiguity of the text once again, as well as, in the framers' intent. For example, the framers of the Constitution all had varying opinions on what the Constitution should reflect. Some wanted to grant the federal government more power, and others wanted most of the power to rest with the states. As a result, when using "framers' intent" as a justification for a ruling, one is making a judgment on which framer to rely.

Precedent:

However, one particularly important concept that is significant when examining the decisions made by a judge is the idea that they are bound by precedent (Gerhardt 2011). This means that the current and future justices are somewhat restrained by previous decisions. Specifically, with regards to cases involving the EPA, one would expect that the D.C. Circuit will be more likely to rule in favor of the EPA long as the code is "permissible" due to the precedent established in *Chevron.* However, equally important to this expectation is that the language used in *Chevron* is ambiguous. As a result, this ambiguity effectively undercuts much of the restraint that the judges may have been pressured to abide by due to *Chevron*. Now, the

judges are much more free to vote based on their political preferences. However, it is important to note that when issuing a ruling, the decision still must rely on some sort of precedent. Thus precedent is not difficult to find though due to the number of cases and ambiguity present in them. Therefore, instead of precedent guiding the decision, it is more likely that preference guides the precedent used. However, in order to avoid any potential confounding issues presented by the *Chevron* case, I will only look at cases post June 25, 1984, which is when the *Chevron* case was decided. Further, there is another theory that lower courts are concerned with being overruled by the Supreme Court. However, there is evidence that this idea may not always hold true and that lower courts do not take this into consideration (Segal and Spaeth 2002). One explanation for this is that since the Supreme Court hears less than 1% of the cases a year, the lower court judges are not concerned with trying to predict the behavior of the Supreme Court (Segal and Spaeth 2002).

Attitudinal Model:

The theory that judges vote based on political preferences is known as the attitudinal model (Segal and Spaeth 2015). This theory is grounded in the idea that judges are people too and thus, have an ideal policy outcome. As a result, when confronted with ambiguity and the opportunity to realize this policy outcome, the judge will rule based on their preferences. Thus, based on this model, I suspect that the overall composition of the presiding panel, whether conservative or liberal, will influence when the D.C. Circuit rules in favor of the EPA regulation in question (Revesz 1997). Specifically, I suspect that a liberal panel of justices will be in favor of more environmental regulations and a conservative panel of judges will be in favor of less regulation. In addition, I predict that if the president's ideology matches the panel's ideology,

then the panel will be more likely to rule in favor of the EPA. This is because the EPA is essentially an extension of the executive branch and the president himself. Thus, if the president's ideology aligns with the panel's ideology, then there is a good chance that the EPA regulation will also align with the panel.

Further, I expect that the public policy mood, whether conservative or liberal, will have a modest effect on when the judges rule in favor of an EPA regulation. While this may not seem attitudinally based at first, the logic for this expectation reveals that it is. Again, the idea is that the judges are people too and are personally affected by the overall mood of the country as well. The upholding of the internment camps in the case *Korematsu v. United States* has been partially accredited to this idea that the justices were affected by the fear of national security and the attack on Pearl Harbor. Similarly, the cases that upheld the persecution of those associated with communism during the 1950s are attributed to the justices falling victim to the Red Scare like the rest of the public. While these cases are extreme, they do indicate that the overall mood of the country can affect justices' preferences too.

Rational Choice Model:

A fourth important theory in analyzing the justices' opinions is the rational choice model (Epstein and Knight, 1998). This says that the justice will take into account the positions of other actors and potential backlash when making a decision. Potential backlash may be impeachment, less funds, decreased jurisdiction, etc.. This is illustrated by *Ex Parte McCardle* in which the Congress revoked jurisdiction over a case presented to the Supreme Court once it became clear that the Court was most likely going to rule in favor of McCardle and against Congress. Further, the Court of Appeals may also have to consider the potential that they will

be overruled by the Supreme Court (Revesz 1997). Though, as mentioned previously, evidence for this theory is not conclusive (Segal and Spaeth 2002). On the other hand, some positions of other actors can free up the judges' decision making power instead of limiting it. For example, increased political polarization may increase the likelihood of judicial intervention in bureaucratic code since the justices have a decreased chance of being overruled when the branches of government cannot effectively work together due to an inability to find common political ground and pass legislation. Thus, I predict that if polarization in Congress is high, then the D.C. Circuit Court of Appeals will be more likely to rule against the EPA. Further, the independent variable, public policy mood also has roots in this rational choice model, not just in the attitudinal model as stated before. This is because judges do not want to be perceived as anti-democratic and thus, try and avoid appearing like they are legislating from the bench (Gibson 2010). As a result, when the public mood is liberal, I further suspect that the D.C. Circuit Court of Appeals will be more likely to rule in favor of the EPA.

In addition, pressure from the president may also affect the D.C. Circuit's decision on whether to rule in favor of the EPA. Some say that this is what happened in the case, *National Federation of Independent Business v. Sebelius,* when Chief Justice Roberts voted to uphold the individual mandate in Obamacare, effectively holding it together despite his conservative leanings. Further, President Obama's comments may have also had an influence since he would publically say that he has confidence "that the Supreme Court will not take what would be an unprecedented, extra-ordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress" (Blackstone and Goelzhauser 2014). It is important to note though that a big assumption that the rational model makes is that the D.C.

Circuit is concerned about being publicly defeated or embarrassed for fear that it would weaken the institutional legitimacy of the judicial system (Epstein and Knight, 1998). As a result, a judge may decide not to intervene despite policy preferences in order to maintain the integrity of the institution. Despite this, I predict that if the president is conservative, then the D.C. Circuit Court of Appeals will be more likely to rule in the EPA's favor. This stems from the fact that the D.C. Circuit has remained overall conservative since the 1980s.

Thus, as outlined previously in the context of different theories, I hypothesis that the D.C. Circuit Court of Appeals is more likely to rule in favor of an EPA regulation when (1) the public mood is more liberal than conservative, (2) when the ideology of the panel and the president (and by extension the regulation) aligns, (3) when the president's ideology is conservative, (4) when polarization is low, and (5) when the panel ideology is liberal.

Research Design

Though most of the literature and theory regarding the judicial branch as a policymaker is based off of the Supreme Court, I have chosen to study the D.C. Circuit Court of Appeals for several different reasons. First, their docket is not discretionary. This is significant because the cases that are presented to them are more randomized than the ones hand-selected by the Supreme Court. The D.C. Circuit must hear all appeals made to them. As a result, potential biases and confounding variables are eliminated or at least minimized. For example, my results may be skewed if I studied the Supreme Court since it might be the case that the Court is more or less likely to grant a case a writ of certiorari if the lower court decision ruled in favor of the bureaucratic agency. Second, the judges are randomly assigned to a panel of three in the D.C. Circuit Court of Appeals, thus creating a more randomized empirical study than the Supreme

Court would provide. This is especially true with regards to measuring the effects of a panel's ideology on the decision. Finally, I am specifically interested in studying the Environmental Protection Agency's interaction with the D.C. Circuit Court of Appeals since the D.C. Circuit has the exclusive venue over challenges to a wide array of environmental regulations (Revesz 1997). In terms of my decision to study the EPA, it is the most heavily litigated bureaucracy, thus potentially providing the most variation among cases. Further, by deciding to only focus on one bureaucratic agency, I am better able to eliminate confounding variables that may be unique to each bureaucratic agency. Also, this subject is divided upon party lines in Congress today, however that has not always been the case. This should provide variation in measuring and examining the effects of polarization.

Another consideration that I have taken into account is the case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*. As previously mentioned, in this case the Court ruled that it would defer to agencies as long as it has a "permissible construction of the statute" (Stevens 1984). Though there has been little research on the effect that *Chevron* has had on decisions regarding the bureaucracy, I must still take this case into account when selecting cases to review. As a result, in order to account for at least the perceived shift in practice, I have decided to only look at cases post-*Chevron*. This also allows me to control for the ideology of the whole circuit since the D.C. Circuit Court of Appeals has remained conservatively tilted during this time period. This is significant because there has been some evidence to suggest that bureaucratic agencies will shift their policies in order to align with the overall ideology of the composition of the courts (Canes-Wrone 2015). Thus, I am able to more effectively establish causality.

Further, my unit of analysis is the case presented to the D.C. Court of Appeals regarding the EPA and I use a quantitative approach to my research. In order to gather data, I coded a large portion on my own. In an effort to find the cases that the D.C. Circuit Court of Appeals has heard regarding the EPA, I turned to West Law. Here, I set up a query of cases decided only after June 24, 1984, which marks the *Chevron* case and at least the perceived shift in deferring to bureaucracies. Further, due to the limitation in the data that I have for the public mood, I eliminated cases after 2014 since the public mood dataset only includes years through 2014. In addition, I only coded cases that involve a specific EPA regulation. This means that I did not code cases involving petitions for an appeal or cases in which lawyer fees or reparations were the focus. Also, I did not code cases that were dismissed since these cases were dismissed due to lack of standing or jurisdiction. The reasoning behind these restrictions is that my focus is on environmental law and how the D.C. Circuit treats it and the EPA when deciding cases. Further, though cases that are dismissed could be politically significant and effectively serve as a way for the panel to de facto rule for a particular party, it is difficult to determine if the dismissal was indeed politically motivated or if a party really lacked standing (Pierce 1998-1999). Thus, including these cases as well as those that focus on other issues would compromise my results and blur my focus. In terms of the cases heard "en banc," I have also decided to exclude them. Having ten or more judges on the panel deciding the case instead of the usual three randomly assigned panel would present confounding issues. With these restrictions, there are a total of 314 case decisions that I coded.

In terms of coding the dependent variable, which is the decision of the case, I treated it as an ordinal variable with "1" as the D.C. Circuit completely overruling the EPA, "2" as a partial

overrule, and "3" as completely upholding the EPA regulation. This affects the study because by using ordinal measures, I had to run an ordered logit regression instead of a logit regression. However, though this path to operationalize my dependent variable somewhat complicates the study, ignoring cases that fall into the "partially overruled" category would have misrepresented the outcome of the cases and I was not comfortable leaving these cases out or trying to make them fit into one of the two other categories. Further, I briefly considered pulling out the different regulations and coding them separately like independent cases. However, I ultimately decided that this would cloud my dependent variable and overrepresented certain panels of judges and other independent variables, while minimizing others.

In addition, when analyzing the cases, I determined if the Solicitor General submitted an amicus brief for that case. This is an important step to take considering that the the presence of an amicus brief by the Solicitor General could be significant and act as a confounding variable. This is because it has been shown that the side in which the Solicitor General has submitted an amicus brief for has a much higher chance of winning than if the brief was not present (Black and Owens 2012). Further, it was my hope that accounting for an amicus brief by the Solicitor General would serve as the way in which I also capture pressure from the president. As a result, the presence of an amicus brief in a case is worth trying to control for in my research. However, there were no cases in which the Solicitor General submitted an amicus brief on behalf of the Environmental Protection Agency. Thus, it ultimately did not need to be controlled for.

In terms of the independent variable, public policy mood, James Stimson from the University of North Carolina has a dataset available that spans from 1952-2014. James Stimson is the leading scholar in measuring public mood. In order to create this dataset, he conducts a randomized survey of the public on their feelings towards the issues of taxes, the environment, welfare, cities, size of government, education, healthcare, economics and labor. Based on the overall responses to these categories, he assigns each year a numerical value between zero and a hundred. However, I recoded it into either a liberal or conservative year. Since the mean across this time is 60.857, I categorized any number below that as conservative and any number above that as liberal. Further, data regarding the ideological preferences of the judges on the D.C. Circuit Court of Appeals is available through a database from Auburn University. Here, I operationalized the ideological preferences as either liberal (1) or conservative (0), which is how this dataset also operationalized this variable. Further, by identifying the ideology of the individual judges, I was able to make a judgment on the ideology of the panel as well. As a result, I was able to use this dataset in conjunction with the information on the judges presiding over a case provided to me by West Law.

In addition, I coded whether the president is liberal (1) or conservative (0) during the year that the case is brought to court. Using this information combined with the ideology of the panel, I created another independent variable that indicates if the ideology of the panel and president align or differ. If the president's ideology aligns with the panel's ideology, I coded it as a "1". On the other hand, if the president's ideology and the panel's ideology differed, I coded it as a "0." Finally, for polarization in Congress, I used data gathered by Vote View. They measured political polarization by the difference between the Republican and Democratic Party

means in both the House and the Senate. To begin, I decided to separately code the polarization data for the House and the Senate. I left these separate so that I could measure them independently in an effort to understand if polarization in just one chamber of Congress could be significant. However, I also combined the data in order to measure the overall polarization of Congress. To do this, I added the polarization values of the House and the Senate together and then divided by two to average them. Further, I left this variable numerical because the levels only varied from 0.2 to 1.2.

In sum, the unit of analysis is the case presented to the D.C. Court of Appeals. The dependent variable is the decision of the case coded as an ordinal variable where "1" represents overruled, "2" represents partially overruled, and "3" represents upheld. In total, there are four main independent variables coded as categorical variables, (1) president ideology, (2) public mood, (3) panel ideology, and (4) president/panel ideological alignment. Further, there is one numerical independent variable, polarization. Though salience of environmental issues may appear to potentially be an important independent variable, the data available does not have it moving more than 1% from year to year and it never rises above 2%. As a result, I have chosen to exclude it due to its lack of variation and low importance to the public.

Results and Discussion

After combining the data into one spreadsheet, I imported my dataset into the program *R*. Here, I ran an ordered logit regression model. Instead of finding evidence that ideology has an impact over the decision of a case as expected, I found that the ideology of the panel was not statistically significant in determining if the panel was likely rule in favor of the EPA. As one

can see below in Figure 1, the p-value is 0.949, which is well above the p-value cutoff of 0.05 for statistical significance. As a result, I fail to reject the null hypothesis that panel ideology does not impact the ruling issued. However, one confounding variable that may be present in these findings is known as the panel effect. The panel effects states that a member of a panel that has an opposing view from the majority may have a moderating effect on the overall panel (Kastellec 2007). For example, in this study, if two out of the three judges on the panel are conservative, but the other judge is liberal, that liberal judge may have a moderating effect on the overall panel. Thus, one might expect that the panel would issue a slightly more liberal decision than if all three judges on the panel were conservative. In order to account for this, I created an indicator variable for each of the cases. I did this by adding up the values of the judges' ideology on each panel. Panel Effect 1 represents when the panel is comprised of two conservative judges and one liberal judge. Panel 2 Effect indicates when one of the judges is liberal and two are conservative. Finally, Panel Effect 3 indicates a panel with three liberal judges and no conservative judges. I then ran a regression with the results shown in Figure 2. However, as indicated in the table, it was not statistically significant. Thus, the panel effect is not significant in influencing when a panel of the D.C. Circuit Court of Appeals will rule in favor of the EPA.

Panel Ideology

Independent Variable	Value	Std. Error	T-Value	P-Value
Panel Ideology	-0.631	0.433	-1.456	0.949

Fig. 1

Panel Effect

Independent Variable	Value	Std. Error	T-Value	P-Value
Panel Effect 1	0.167	0.318	0.525	0.560
Panel Effect 2	0.087	0.335	0.260	0.795
Panel Effect 3	0.042	0.281	0.709	0.478

Fig. 2

In addition, the public mood is also not a significant indicator of the conditions under which the D.C. Circuit Court of Appeals would be more likely rule in favor of the EPA. This is revealed in Figure 3 where the p-value is 0.427. This is again far above the .05 cutoff for statistical significance and the null hypothesis is not rejected.

Public Opinion

Independent Variable	Value	Std. Error	T-Value	P-Value
Public Opinion	0.171	0.216	0.794	0.427

Fig. 3

Further, the political party of the president is also not statistically significant in determining if the panel will rule in favor of the EPA. Here, the p-value is 0.772. This means that the D.C. Court of Appeals is not statistically significantly more or less likely to rule in favor of the EPA if the president is conservative. This result is surprising because the president presides over the EPA and the regulations largely reflect his political preferences. This point, combined with the fact that the D.C. Circuit Court of Appeals has remained a conservative court since the 1980s further lends credence to the idea that the D.C. Circuit is not voting based off of political preferences with cases regarding the EPA. If it did, one would expect that conservative presidents would enjoy a statistically higher rate of success due to the conservative tilt of the court.

President Ideology

Independent Variable	Value	Std. Error	T-Value	P-Value
President Ideology	-0.061	0.213	-0.290	0.772

Fig. 4

The independent variable, polarization, is also not statistically significant in determining when the D.C. Circuit Court of Appeals will rule in favor of the Environmental Protection Agency. I first measured polarization of the House on its own. It was not statistically significant with a p-value of 0.344. I then ran a separate regression for polarization in the Senate. Again, the p-value was not significant at 0.344. Finally, in order to get a more comprehensive view of polarization, I ran another separate regression for the level of polarization in all of Congress. As shown in Figure 5, Congressional polarization was also not statistically significant in determining when the D.C. Circuit Court of Appeals will rule in favor of the EPA.

Polarization

Independent Variable	Value	Std. Error	T-Value	P-Value
House	-0.590	0.624	-0.946	0.344
Senate	-0.439	0.799	-0.549	0.583
Congress	-0.555	0.709	-0.782	0.434

* Each Independent Variable, House, Senate, and Congress, was ran in a separate regression.

Fig. 5

Finally, the p-value of the independent variable that indicates if the ideology of the president aligns with the ideology of the judge's panel, represented in Figure 5, is also statistically insignificant at 0.61. This result further highlights the trend that ideology plays little to no role in determining if the D.C. Circuit Court of Appeals will rule in favor of the EPA.

President and Panel Ideology Alignment

Independent Variable	Value	Std. Error	T-Value	P-Value
Pres. and Panel Align.	-0.110	0.216	-0.510	0.610

Fig. 6

Finally, I did run an ordered logit for all of the variables together. As seen in Figure 7, this did not make a difference in determining if the variables were significant in determining when then D.C. Circuit Court of Appeals would rule in favor of the EPA. In other words, all of the independent variables came back as statistically insignificant when measured together as well as when they were measured separately. These results are surprising in that they do not align with the current literature that gives major credence to the attitudinal model (Epstein and Knight 1998, Segal and Spaeth 2002, Seamon 2013). Further, these results also seem to reject the rational choice model. Due to none of the independent variables holding any statistical significance, I did not proceed with running the prediction command in *R* to calculate the predicted probability of these variables. This is because, if a variable is not statistically significant, then the predicted future values are also insignificant.

Compiled Independent Variables

Independent Variable	Value	Std. Error	T-Value	P-Value
House Polr.	-2.692	2.080	-1.294	0.196
Senate Polr.	2.468	2.615	.944	0.345
Pres. Ideology	0.175	0.290	0.603	0.547
Panel Ideology	0.397	0.662	0.599	0.549
Pres. and Panel Ideology	-0.073	0.226	-0.324	0.746
Panel Effect 1	0.110	0.322	0.342	0.732
Panel Effect 2	-0.395	0.732	-0.539	0.590
Panel Effect 3	-0.51	0.845	-0.604	0.546
Public Opinion	0.229	0.267	0.857	0.391

Fig. 7

However, despite these results' departure from some of the literature, they may help highlight the unique relationship that the courts have with bureaucratic agencies, or at least the unique relationship that the D.C. Circuit Court of Appeals has with the Environmental Protection Agency. For example, when a crosstab for the panel's ideology and the ruling was

performed, across the board, the panel is more likely to rule in favor of the EPA, regardless of ideology, instead of against it. On the other hand, as one can see in the crosstab, proportionally, a conservative panel ruled in the EPA's favor 47% of the time, while a liberal panel ruled in its favor 45% of the time. Similarly, conservative panel's ruled against the EPA 34% of the time and liberal panels ruled against the EPA 31% of the time. In addition, conservatives are only slightly less likely to partially overrule the EPA at 17.8% of the time in comparison to liberal panels at 18.6% of the time. While this difference has already been shown to be statistically insignificant, laying the information out in this format highlights the inconsequentiality of the panel's ideology and the independence of the EPA from ideological rulings. It also gives credence to the idea that the court is more differential in dealing with the EPA and perhaps with other agencies as well.

Panels and Rulings

	Conservative Panel	Liberal Panel
EPA Overruled	65	41
EPA Partially Overruled	34	24
EPA Upheld	91	59

Fig. 8

These findings also highlight a potential strength for the president. With Congress granting bureaucracies great independence in determining statutes by making them purposefully vague and the D.C. Circuit deferring to the EPA's expertise, the president could perhaps make the most inroads in public policy through bureaucracies if this trend holds true across the board in terms of various bureaucracies and other circuits. This potential strength is especially important if polarization and gridlock continue to increase or even stay at their current levels. Further, this is a potentially important caveat to the widely accepted belief that

as polarization increase, so does the court's power (Hasen 2012). One explanation for this weakness in policymaking when confronted with the EPA is that judges are generalists and bureaucratic law is highly technical (Canes-Wrone 2005). As a result, instead of making broad, far reaching decisions, they have to make incremental decisions or simply defer to the bureaucracy for lack of expert knowledge (Canes-Wrone 2005). As a result, though I had originally thought to further highlight the power of the United States' court system and the judges themselves through my research, I have actually highlighted a weakness in it and a potential strength in bureaucracies and by extension, the president and the executive branch.

Moreover, these results reject both the attitudinal model and the rational choice model. The attitudinal model states that judges will vote their preference when confronted with ambiguity in the law (Segal and Spaeth 2002). Congressional legislature aimed at the EPA is purposefully ambiguous as to allow the agency to interpret the law and make regulations that it deems fit. This is in part due to the highly technical nature of environmental law. However, as discussed before, instead of interpreting congressional legislation to fit his or her preference, the judges on the D.C. Circuit Court of Appeals appears not to vote based on his or her political preference. Further, the public mood, the president's ideology, and the level of polarization also do not significantly impact the decision of the panel. As a result, this further weakens the attitudinal model, while also weakening the idea that the rational choice model is guiding the rulings of the D.C. Circuit Court of Appeals in cases involving the EPA. Thus, the legal model and deference is left as the best explanation for how the D.C. Circuit Court of Appeals rules on cases involving EPA regulations despite ambiguities in the laws. Further, while these results can only

be applied to the D.C. Circuit Court of Appeals and the EPA, it is a basis that may be proven true for other circuits and other bureaucratic agencies.

Limitations and Future Research

While the quantitative approach was useful in garnering a broad overview, a qualitative approach may provide a more nuanced view needed in this situation. For example, while I was able to discern the overall political preferences of the judges on the D.C. Circuit Court of Appeals, perhaps a more focused approach would lead to more insights into how or if ideology plays a part in cases involving the EPA. Since environmental issues do not rank high on most people's list of most important issues, perhaps the judges do not take as hard of a political stance since environmental issues rarely serve as a "litmus" test for a potential Supreme Court nominee. Though this might change in the future. In addition, this concern of a litmus test is particularly relevant to the D.C. Circuit Court of Appeals because more Supreme Court nominees are chosen from it than any other circuit. Some current justices from this bench include Clarence Thomas, Ruth Bader Ginsburg, and John Roberts, in addition to the late justice, Antonin Scalia. Further, perhaps certain panel combinations are more likely to rule a particular way when deciding a case together. This possibility requires a more in depth examination of the judges. In addition, it is possible that overall, a judge is conservative, but breaks into more liberal ground for environmental issues. These are possibilities that I did not address in my quantitative approach that a qualitative approach would allow for.

Further, I did not separate cases involving hot topic environmental issues from the more ordinary ones. As a result, it may be beneficial to separate the hot-button issues and then compare the results to the ordinary case dataset to see if ideology becomes more significant if

the environmental issue is controversial, like with fracking for example. In addition, my research is difficult to generalize to other circuits and other bureaucratic agencies since both the EPA and the D.C. Circuit Court of Appeals have rules that differentiate them from other agencies or circuits. For example, the D.C. Circuit essentially has sole jurisdiction over the EPA. No other circuit can say this about a bureaucratic agency. Further, in terms of quantitative data my sample size was fairly small, though comprehensive. Thus, in order to make this study more generalizable to other circuits and bureaucratic agencies, perhaps a cross circuit study of a different bureaucratic agency would be appropriate. This approach would also provide a larger sample size.

Finally, bureaucratic agencies, including the EPA, are very strategic with regards to the regulations that they put into place. This is because creating regulations take many years and a lot of resources. As a result, the EPA has a vested interest in crafting regulations in such a way as to limit the chances of it ending up before the D.C. Circuit Court of Appeals. Further, as mentioned before, there is evidence that the EPA is strategic about shifting their regulations to match the ideological tilt of the court (Canes-Wrone 2005). This is significant because it presents potential problems and confounding variables in my research's conclusion that the judges do not rule based on political preferences when dealing with cases involving the EPA. In an effort to more effectively establish if the attitudinal model actually does not play a significant role in these cases or if it appears this way because of the EPA's strategic actions, I propose two possible future research projects.

First, one could look at times when there are large numbers of new appointments to the EPA. If there is evidence that these new appointments change regulations that were already

before the D.C. Court, then one may be able to say that bureaucratic agencies are behaving strategically. However, if the new appointments do not alter the regulations already being challenged, then one may be able to say more confidently that the attitudinal model does not apply to cases regarding the EPA and the D.C. Circuit Court of Appeals. Second, one could look at times when there are significant changes in the makeup of the D.C. Circuit Court of Appeals. In this case, if one finds evidence that the EPA moves to change their regulation, then it would imply that the EPA is behaving strategically and the attitudinal model may play a larger role in these types of cases if the EPA did not behave strategically. On the other hand, if one finds that there is no significant change in EPA regulations when the makeup of the D.C. Circuit Court of Appeals shifts, then one could more confidently conclude that political preferences actually do not play a significant role in determining if the D.C. Circuit Court of Appeals will rule in favor of the EPA.

Conclusion

The purpose of this paper is to better understand the policymaking power of the court system in the United States. While a significant amount of research has been done regarding the Supreme Court's policymaking power, the lower courts are not as well researched. While the focus on the Supreme Court provides helpful insight into considerations taken into account by the highest court in the land, the Supreme Court only hears less than one percent of all the cases per year (United States Department of Justice). As a result, the lower courts potentially create more policy than the Supreme Court each year. Thus, in order to more fully understand the power of the judicial branch, research on the lower courts is necessary. Hoping to contribute to this research, I chose to focus on the D.C. Circuit Court of Appeals and the

Environmental Protection Agency. Environmental issues are gaining prominence with some calling them the most significant threat to humans. As a result, further understanding how environmental law in the United States is created and how the D.C. Circuit Court of Appeals rules on cases involving the EPA is particularly interesting.

In this study, I applied independent variables designed to test the attitudinal model and the rational choice model. These variables are (1) president ideology, (2) public mood, (3) panel ideology, (4) polarization, and (5) president/panel ideological alignment. I hypothesized that the D.C. Circuit Court of Appeals is more likely to rule in favor of an EPA regulation when (1) the public mood is more liberal than conservative, (2) when the ideology of the panel and the president (and by extension the regulation) aligns, (3) when the president's ideology is conservative, (4) when polarization is low, and (5) when the panel ideology is liberal.

The unit of analysis are the cases presented to the D.C. Court of Appeals. The dependent variable is the decision of the case coded as an ordinal variable where "1" represents overruled, "2" represents partially overruled, and "3" represents upheld. After running an ordered logit in *R,* none of the independent variables are statistically significant in determining when the D.C. Circuit panel will rule in favor of an EPA regulation. As a result, I was not able to reject the null hypothesis for each independent variable. This even held true when testing for a panel effect with regards to the ideology of the panel. However, not all is lost as this potentially provides insight into the special relationship that bureaucracies have with the United States' Court System as it seems to suggest that instead of being a policymaker or a strategic political actor, the D.C. Circuit Court of Appeals defers to the EPA. This highlights a potential limitation in the court's policymaking power and a potential strength for the

president and the executive branch overall and especially in a time of gridlock and/or polarization in Congress.

In terms of limitations and future research, perhaps a more qualitative approach, in comparison to this quantitative approach, could provide a deeper, more nuanced view of how/if ideological preferences of judges play a part in deciding cases for the EPA. One way to do this would be to separate cases involving hot topic environmental issues from the more ordinary ones. Then, after running a regression on both datasets, compare the results of the hot-topic dataset to the ordinary case dataset to see if ideology becomes more significant if the environmental issue is controversial, like with fracking for example. Further, in ordered to better generalize my research perhaps a cross circuit study of a different bureaucratic agency and different circuits would be appropriate due to the rather unique characteristics of the EPA and the D.C. Circuit Court of Appeals. This would also increase the sample of cases available. Finally, in order to more effectively establish if the attitudinal model does or does not play a significant role in determining if the D.C. Circuit Court of Appeals will rule in favor of the EPA, I propose to potential future research projects. First, one could study times when there have been large numbers of new appointments to the EPA and if these appointments alter regulations already being challenged before the D.C. Circuit. On the other hand, one could look at moments when the makeup of the court shifts and if the EPA changes their regulations in response to the tilt in the ideology of the D.C. Circuit Court of Appeals. By running one of the two aforementioned studies, one could more confidently conclude whether the political preferences of the judges play a significant role in determining if the D.C. Circuit Court of Appeals will rule in favor of the EPA.

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Tables and Figures