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Appeals Court Reactions to the Political Control of Bureaucracies: Who Sues the EPA and Who Wins?

Scott Ainsworth

Department of Political Science
School of Public and International Affairs
University of Georgia
Athens, GA 30602-1615
sainswor@uga.edu

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Abstract
In this paper, I focus on the behaviors of stakeholders who have claims related to decisions from the Environmental Protection Agency. To wit: I have gathered data related to every instance the EPA was sued in the federal Courts of Appeals. Using a common agency framework, I develop straightforward hypotheses. First, depending on the partisan control of the White House and Congress, some stakeholders are more apt to work through the internal EPA channels while other stakeholders are more apt to move to the courts. If deck stacking has long term implications, then there should be little variation in the types of stakeholders that use the federal courts for relief from EPA decisions. If continuous political control is important, then one might imagine that the decisions of agencies are affected by the partisanship of their immediate principals. Preliminary results are straightforward and quite clear. Business interests are more apt to sue the EPA during Democratic administrations. Citizens groups are more apt to sue the EPA during Republican administrations. These results are reminiscent of Moe s work on the NLRB (1985). Political control is meaningful, especially when one considers actions taken by business interests and citizens groups as opposed to the regulatory actions taken by the EPA itself. The strength of those preliminary results leads to a more striking finding. The courts themselves act as if they use deviations from these litigation patterns as signals. To wit: the courts resolve cases involving the EPA differently depending on the partisan environment in the White House and the Congress. The implications of political control are seen one step removed from the EPA in the pattern of cases reviewed by the Appeals Courts and in the manner in which those cases are decided.

Introduction[1]

In June of 2007, the Environmental Protection Agency (EPA) was set to announce new standards for ozone pollution. Although the Clean Air Act mandates that the agency reevaluate ozone standards every five years, the EPA was still operating under its 1997 guidelines. To spur agency action, the American Lung Association sued the EPA in 2003. By 2007, the EPA s own Clean Air Scientific Advisory Committee concluded unanimously that the 84 parts per billion standard should be reduced to a figure as low as 70 parts per billion. However, as it turns out, an acceptance of the Advisory panel s report would not automatically lead to the creation of an

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established rule because the EPA chose to allow a 90 day comment period. Given the representative nature of the Clean Air advisory panel (see e.g., Balla and Wright 2001), one might think the comment period would be unnecessary, but business groups lobbied hard for the comment period and used that time for additional lobbying and a possible end-run around the advisory panel. Where did the lobbying occur? Evidence suggests that as the EPA s Clean Air Scientific Advisory Committee worked on new ozone standards, the National Association of Manufacturers and other business groups lobbied key officials at the EPA as well as officials at the White House. The White House insured the success of the end-run.

Frank O Donnell, president of the non-profit Clean Air Watch, stated that the EPA s smog proposal sends a mixed message.... The good news is that EPA agrees that current smog standards are too weak to protect people s health. Its proposal would be a step in the right direction, *though weaker than the standards recommended by EPA s science advisers* (emphasis added). O Donnell was clearly disappointed by the comment period. Establishing a comment period after the EPA s advisory panel concluded its work seemed unnecessary at best and even outrageous by some environmental advocates. The advisory panel was designed to reflect the interests of key stakeholders, so a comment period could only be used to provide an end-run to undermine that same panel. One advocate asked Why is EPA dithering? Evidence points to the secret hand of the White House (Washington Post). Clean Air Watch was not alone in seeing a mixture of science and partisan politics. Recently, the EPA chose to implement a 75 parts per billion standard.

The EPA and numerous stakeholders have struggled for many years to clean up the Chesapeake Bay and protect it from both point and non-point pollution. In 2006, the EPA demanded that the Blue Plains sewage plant reduce its nitrogen-rich releases into the Bay, but no timetable was established. The Chesapeake Bay Foundation cried foul. Without a timetable, Blue Plains had no incentives to move expeditiously. An internal review by the EPA s Environmental Appeals Board supported the Bay Foundation s legal challenge. Yes, a timetable had to be established. What remains unclear? No actual deadlines, target dates, or timetables were ever established. The Chesapeake Bay Foundation secured a win of sorts; but once established, the timetable may or may not please the Foundation.

It was just seven months into their first term when Vice President Cheney contacted Christine Todd Whitman, the first Bush-Cheney EPA secretary. Cheney was concerned about a rule implemented during the previous administration that required coal fired power plants to install scrubbers whenever those plants underwent refurbishment. What, however, constituted refurbishment? Cheney wanted to allow the plants to undergo more thorough refurbishment before the rule requiring scrubbers would be triggered. Whitman thought the rule needed to be reevaluated, but she did not see eye to eye with Cheney. Whitman urged careful deliberation so we don t look like we are ramrodding something through. Because it s going to court (Becker Gellman, 2007). As it happens, Whitman left the EPA when she decided that she could not sign the revised rule that the White House wanted. As it happens, the revised rule was overturned by an Appeals Court. Pressure was not necessarily reserved for the highest ranks. Becker and Gellman (2007) also noted one instance in the Department of Interior when Cheney contacted the 19th ranking department official.

What emerges from these stories that can inform our debates about bureaucratic policymaking and stakeholders pursuit of legal remedies against the EPA? In the first instance, deck stacking and hardwiring the agency rules appeared to have little impact on EPA behavior. Though mandated to conduct reviews every five years, the EPA chose to do nothing until it was sued by the American Lung Association. The hardwiring that mandated something as simple as a five year review was readily circumvented. Was the EPA s departure from procedures, established by the Clean Air Act and agreed upon by the executive and legislature at the time, an instance of agency discretion or was the EPA responding to a new set of political agents? At a basic level, representation on an agency s advisory committees may represent successful hardwiring or deck stacking if stakeholders are still represented in proportion to their political clout at the time of the agency s creation. But the *representation* exhibited on the advisory panel need not be reflected in an agency s *implementation* if some of the stakeholders can use end-runs around advisory committee recommendations.[2] Today s political agents may not have had any

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[2] Balla and Wright (2001) found that the National Drinking Water Advisory Council within the EPA reflected the same interests represented before Congress in congressional hearings. An end-run in that situation would require either engaging the White House or the

role in the establishment or authority of advisory panels.

The push and pull of diverse political forces provides a compelling metaphor, but no one has established the boundaries of political competition within which the push and pull actually occurs. Pluralism at one stage of the information gathering process does not insure a pluralist outcome during final implementation. Clever strategists avoid head-on confrontations. Within the advisory committee there may have been a balancing of forces, but that equilibrium can be undone by an ex post political decision. In the current example, executive branch lobbying provided an end-run, but agency decisions may also face congressional review or legal challenge. As Moe noted in his study of the NLRB (1985), political agents affect bureaucratic actions. A question I pursue in this paper is: How do judges react to the fact that political actors may have influenced agency actions that are now involved in legal claims?

In the second story, the Chesapeake Bay Foundation pursued remedy within the EPA procedures. The Foundation secured a partial win, which does not preclude future legal action. How will the Foundation react if a lax timetable is established? How will the Foundation react if the current administration fails to establish a timetable before the 2008 elections or 2009 inauguration? The Chesapeake Bay Foundation may yet pursue legal remedy through the federal court system or may secure a preferred timetable from a Democratic administration.

In the third story, Whitman reminded the Vice President that agency decisions are often vulnerable to court review. Pushing too hard on a rule may simply lead to litigation and a court review. With the scrubber rule, Whitman was indeed prescient, but are such stories of political influence typical? Work by Croley (2003) and O Brien (1993) suggest that the Bush-Cheney efforts to influence the EPA were hardly unique.

In this paper, I evaluate stakeholders pursuit of claims through the federal Courts of Appeals and judges reactions to those claims. Indeed, I review all of the legal challenges to the EPA that entered the federal Appeals Court system. Scholars from across the social sciences have evaluated judicial review and its implications for inter-branch relations, typically highlighting opportunities for judicial corrections or undue activism. Sunstein (1989, 522, 537)

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courts.

argues that judicial review often increases the incidence of legality. Building on the work of Marks (1989), Eskridge (1991) consider the opportunities for a court to promulgate legal interpretations that are invulnerable to subsequent congressional actions or statutes.[3] Typically, these works revolve around a spatial model and a court s review of a single case. Herein, I control for the basic political environment surrounding the cases and empirically address two questions. First, are some environments more conducive to certain types of cases being pursued? Second, if distinct patterns emerge in the array of cases that courts face during periods with different political environments, then we can consider how judges react to deviations from those patterns. In this paper, I argue that there is information in patterns and in deviations from those patterns. It is worth noting that the entire belief refinement literature in game theory revolves around deviations from the expected. So, if there is political control of a bureaucracy that establishes a distinct pattern in the sorts of legal remedies pursued, then judges can glean information from cases that deviate from the norm.

How do political actors affect agency decisions? I contend that an agency s behavior is affected by its initial deck stacking and hardwiring, its current political environment, as well as the opportunities for ex post corrections of rules. Hardwiring or deck stacking provides a baseline for the EPA or any other agency. I view hardwiring rather broadly, affected by agency design as well as subsequent statutory decisions. Debates in the 1980s about congressional dominance and presidential control still loom large in some circles of bureaucracy scholars.[4] I envision the EPA having multiple principals (see e.g., Bertelli and Lynn 2004; Whitford 2005). The White House remains a prominent player in the agency s environment because of the EPA s initial design. Unlike most other regulatory agencies, the head of the EPA is under rather close presidential supervision. For instance, the head of the EPA, like a cabinet official, is nominated by the president and confirmed by the Senate. Furthermore, the president may replace an EPA head. Of course, Congress maintains an oversight role and can revisit its earlier decisions

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[3] Also see Melnick (1983). Shipan (2000a; 2000b) notes that the design of judicial review is itself a political decision.

[4] For early overviews on the debate, see sections from Moe (1985) and Calvert, McCubbins, and Weingast (1989). Earlier papers by these scholars initiated the debate.

regarding the initial hardwiring of the agency. Important environmental legislation affected the agency hardwiring by defining goals and procedures for the agency and by encouraging stakeholders to pursue their own claims. For instance, Clean Air and Clean Water legislation provided direction to the agency, but it also established clear roles for stakeholders. Given the opportunities for citizen suits in many of the landmark pieces of environmental legislation, the U.S. Congress enhanced the roles of stakeholders and the federal court system.

Presidential control of the EPA may be particularly strong since former President Reagan s institution in 1981 of regulatory clearance as established through the Office of Information and Regulatory Affairs (OIRA) within the OMB. Wiseman (2007) explores one instance reported by Heizerling (2006) where OIRA review appeared to alter regulatory decisions. The issues at hand dealt with water intake procedures for cooling power plants. Massive draws of water often deleteriously affect marine life. In 2001, the EPA ruled that the largest power plants must use closed cycle water cooling procedures. Of course, closed cycles substantially reduce or eliminate continued draws of water, so fewer fish are killed. After the OIRA review, concerns about cost effectiveness were added, allowing plants to postpone or by-pass expensive, fish-friendly closed cycle systems. Whether OIRA review systematically strengthens the president s hand remains in some contention (see e.g., Wiseman 2007).[5]

In the next section, I review some of the literature related to bureaucratic agency access and bureaucratic agency control and outline my model of multiple principals, or common agency. Three hypotheses derived from the common agency perspective are tested in the third section. H1: The ratio of environmental groups and business groups suing the EPA will vary depending on the political control of the EPA and the political environment in Washington. The reasoning behind H1 is straightforward. The courts provide one route for affecting the EPA, but the courts are not the only route or necessarily the easiest route. For instance, during a period of unified Republican control in Washington, environmental groups may find the courts a viable route for EPA influence, but businesses and business groups are more apt to approach the EPA, the White House, or the Congress directly. H2 and H3: The courts will treat lawsuits differently depending

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[5] There is a rapidly growing literature on OIRA and issues related to OIRA, including Balla, Deets, and Maltzman (2005), Croley (2003), Heinzerling (2006), and numerous others.

on the political environment. For instance, H2: a business suing the EPA during the Bush administration is treated differently in the federal courts than a business suing the EPA during a Democratic administration. By the same token, H3: environmental groups are treated differently by the courts during periods of Democratic control as opposed to Republican control. The failure to reject these hypotheses allows us to qualify our understanding of key debates in the bureaucracy literature as well as debates in the courts and interest groups literature. Our understanding of deck stacking and political control is affected, and our understanding of representative bureaucracies and interest group pluralism is affected. Finally, these results indicate that for a particular set of cases, the federal courts at the Appeals Courts level are affected by signals emanating from a partisan environment.

Access and Influence in Bureaucracies: A Common Agency Framework

There is a long list of authors who explore one aspect or another of principals attempts to control bureaucracies. There are scholars who have highlighted the role of the enacting coalition and the possibility of deck stacking (e.g., McCubbins, Noll and Weingast, 1987 and 1989). There is some evidence that deck stacking and hardwiring does affect subsequent stakeholder access to agencies (e.g., Balla and Wright 2001; Reenock and Gerber 2007). To be certain, enacting coalitions have the incentives to hardwire agencies behavior, but hardwiring is seldom absolute given that coalitions in the House and Senate must come to a mutual agreement that the White House in turn is willing to accept.[6] In the end, not all administrative procedures create opportunities for political control (e.g., Balla 1998) and opportunities for legislative control are affected by both preferences and capabilities (see e.g., Huber, Shipan, and Pfahler 2001; Reenock and Poggione 2004). After an agency s creation, control through statutory means requires cooperation between the White House and coalitions in the House and Senate. When considering initial hardwiring and subsequent statutory control, it is worth noting that elected officials come and go. Simply put, coalitional drift undermines established controls (Horn and

[6] In the case of the creation of the EPA, the House and Senate played virtually no role because President Nixon used executive orders to reorganize existing agencies and programs to form the EPA.

Shepsle 1989). Hardwiring also comes at a cost for the legislators themselves. Bawn (1997) notes the trade-off between statutory control and oversight control. That is, legislators have a harder time fine tuning bureaucratic decisions if their earlier hardwiring remains too well established. Legislators may want to preserve ex post means of influence and control to address unforeseen issues.

Terry Moe writes that the bureaucracy arises out of politics (1989, 267) to emphasize that many aspects of bureaucratic agencies reflect partisan and political concerns. I adopt a view of agency control that comes closest to common agency (see e.g., Bertelli and Lynn, 2004). In a common agency setting, many principals seek to influence or control one agent. In the basic common agency model, there is only a single venue for influence within the agency itself and no clear opportunities for end-runs. Imagine numerous stakeholders competing for agency influence during a quasi-legislative session, on an advisory panel, or during the notice-and-comment period. That standard view of common agency within a single venue needs modification when applied to bureaucratic politics because stakeholders have both direct and indirect means to influence an agency. Stakeholders may approach the White House or the Congress to influence the EPA indirectly. Even if the routes of access to the EPA are hardwired with established costs for stakeholders, the costs of approaching the White House or the Congress vary considerably as partisan control shifts, which insures that the *relative* costs of directly influencing the agency also must vary.[7] In addition, writing about the EPA, Moe notes that virtually every decision of the agency has been subject by legislative design to judicial review (Moe 1989, 318). If one accepts that there are multiple venues for influencing the EPA, then the *relative* value of pursuing legal remedies is affected by the ease of access and influence in the other venues. Consider the subgames in Figure 1 starting at the nodes for the Executive and Congress.

[Figure 1 about here]

[7] Macey (1992) argues that stakeholder access to the agency is hardwired from the start, suggesting that only one set of stakeholders will ever have guaranteed access. Given such a hardwire guarantee, end-runs in other venues serve little purpose.

The expected values for those subgames affect the relative value of pursuing a legal remedy. In short, the value of pursuing a legal remedy is affected by the political environment in the White House and Congress.[8]

Before moving to the empirical section of the paper, I offer some questions to guide our thinking. Which stakeholders have access to EPA decision making? Which stakeholders have easy indirect access to influencing the agency through political channels? What are the routes of indirect access? Stakeholders look at the overall political environment and choose different routes for influence. Events that give *all* groups more influence [or access] have little impact on policy (Bertelli and Lynn 2004, 175). Only differential access has the potential to affect policy. Formal models of agency often refer to stakeholders influence technologies. If there are multiple venues, the effectiveness of those technologies is affected by the political environment. Indirect lobbying in the White House or the U.S. Congress has varying effectiveness as the key political actors in the White House and Congress change. This suggests that the impact of coalitional drift has two components. First, in the presence of coalitional drift, the Congress and the White House may attempt bureaucratic reforms. Second, coalitional drift in the Congress and White House will affect which stakeholders choose to lobby the White House, which choose to lobby the Congress, which choose to lobby the agency directly, and which choose to seek a legal remedy. Simply put, opportunity structures for stakeholders change as controlling coalitions drift.

No one can deny that political coalitions change, but what is the evidence of the *impact* of coalitional drift? If the set of actors suing the EPA varies in relation to the political environment in the White House and the Congress, then we have new evidence of the impact of coalitional drift. If EPA deck stacking was invulnerable to subsequent reforms, then the set of actors pursuing relief through the federal courts would show little variation over time. If there is continual political control of the agency, then we would imagine different sets of actors working through the courts at different times. Further, if the political environment were unfavorable for

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[8] Some of the most important work on judicial review of agencies is by Shipan (2000a; 2000b). Boehmke, Gailmard, and Patty (2005) develop and test a model of venue shopping in which a lobbyist chooses to approach either the Congress or an agency.

indirect agency influence through the White House or the Congress, then legal cases might be pursued. I envision indirect political influence and legal efforts as crude substitutes. As political influence becomes more costly for an actor, that actor is more likely to pursue a legal remedy.

If the set of individuals who sue the EPA is a function of the political environment, then courts themselves may recognize patterns in the cases before them. That is, the courts may recognize that a request for review emerged from a particular political environment and that political environment provides cues about the case. Deviations from these established patterns of behavior provide signals or cues to the courts. Only those stakeholders who might benefit from a deviation should be expected to take such an unexpected course.[9] Of course, those cues are most meaningful when the structure and operation of the agency are affected by the political environment. There are important methodological implications of this work. Contrasting theories of bureaucratic agency control by focusing exclusively on an agency s behaviors ignores the possibility of selection bias that may occur when some interests simply give up on an agency during a particular administration and pursue indirect influence. Though I do not dismiss the importance of agency behaviors, I focus on the behaviors of stakeholders who have pursued legal claims related to EPA decisions.

Data and Hypotheses

I collected data related to every case within the federal Courts of Appeals in which the EPA was sued. Stakeholders suing the EPA were readily placed into one of four categories. Litigants were either businesses or business trade associations, environmental or citizen-based groups, state or local governments, or individuals. The preponderance of cases involving individuals were related to equal employment, discrimination, or harassment issues. Citizen suits that are ultimately funded by a business or environmental group are not included in the individuals category. Most citizen suits are ultimately funded by environmental groups and are categorized with them. State and local governments were prominent proponents of the creation of the EPA,

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[9] Banks and Sobel (1987) and Cho and Kreps (1987) remain the most eloquent formal portrayals of this notion. Calvert (1985) shows the value of information from a biased source rests on the unexpected signal.

and they remain attuned to its affairs and decisions. The resolution of each case is also coded. The court s actions were coded as favoring the EPA or the litigant. In a small handful of cases, neither party appeared to be clearly favored. For the empirical analyses in this paper, I use only those cases emanating directly from the EPA involving business or environmental stakeholders.[10]

My first hypothesis is that the ratio of environmental groups and business groups suing the EPA will vary depending on the political control of the EPA and the political environment in Washington. I use *Party of the President* and *House Median NOMINATE* to reflect the political environment. I predict that Democratic control will encourage business suits, and Republican control will encourage suits from environmental groups. The observations are clustered by president to account for the possibility that suits during a particular president s administration may not be entirely independent from one another.

There are alternative hypotheses related to deck stacking, coalitional drift, and judicial review in both the academic and popular presses. If deck stacking were invulnerable to subsequent reforms, then the set of actors pursuing relief through the federal courts would show little variation over time regardless of changes in political control. Initial agency insulation from undue stakeholder pressure might survive political upheaval in Congress and the White House (see e.g., Reenock and Gerber 2007). If coalitional drift coupled with continual political control have an impact on agency behavior, then we might also see a variation in the set of stakeholders pursuing legal remedy as political control varies. My view of the role for the courts is somewhat different than the traditional, canonical view. A canonical view of the courts suggests that they reassert control from over-zealous agencies. Under some situations, judicial review yields a court the ability to act as a veto player or as a selector of policy (see e.g., Shipan 2000). Given a certain array of institutional preferences, judicial review may actually pull agency policy back into line with the preferences of Congress or the White House (see e.g., Eskridge and Ferejohn 1992). Courts may simply help to constrain out-of-control agencies. Some claim that the fissure between the agency s political leadership and enforcement division has its roots in a 1994 reorganization of the E.P.A. that spun out an enforcement division separate from the water, air

[10] Some cases involving the EPA come for lower level District Courts or from special commissions or boards such as the Merit Systems Protection Board.

and other programs (Lee, 2003). A writer for the *New York Times* suggested that the agency s friend today, foe tomorrow relationship ... stems from a personality split within the agency itself (Lee, 2003). That is, the structure itself could affect the type and number of lawsuits (Oppel 2003).

What does the array of lawsuits against the EPA look like over the last thirty four years? The results for HYP 1 are displayed in Table 1. The independent variable and model statistics are very strong, suggesting that stakeholders disputes with the EPA vary considerably as the political control of the EPA varies. The *House Median Nominate* and *Party of the President* variables are significant at the .02 and .001 levels. Overall, there is no evidence in these results that deck stacking ossified the set of stakeholders pursuing legal remedies against the EPA. Prima facie, stakeholders pursuit of legal remedy is indeed affected by the political environment in the Congress and White House.

There are some statistical results that deserve additional scrutiny either because of their substantive implications or because of their own empirical foundations. Here, the substantive implications are simple: environmental groups are more likely to sue the EPA during conservative periods and businesses are more likely to sue the EPA during liberal periods. Political control of the agency seems to work. However, the common agency framework with multiple venues suggests that the willingness to pursue a legal remedy is affected by the EPA and also the political and partisan environment surrounding the EPA. That is, the variation in legal cases occurs simply because the costs of lobbying the Congress, the White House, and the EPA itself all vary.

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Table 1: OLS Regression Results for Business/Group Ratio of EPA Related Lawsuits

DepVar = Number of Business Suits / Number of Group Suits by Year

	Coef.	Robust Std. Err.	t	P>|t|	95% Conf.	Interval
House Median Nominate	-3.138	1.001	-3.10	0.021	-5.613	-.664
Party of the President	-1.307	.193	-6.76	0.001	-1.779	-.834
Constant	2.793	.096	29.24	0.000	2.560	3.027

N= 34

F(2,6) = 26.65

Prob > F = 0.001

R-squared = 0.41

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The statistical results at the individual variable level and at the model level are quite strong. However, the empirical foundation for the result is based on a small number of observations. Because of the small sample size, I evaluated other dependent variables, additional controls, as well as other statistical techniques. Gross economic evaluations (e.g., GDP) had no effect on case incidence or the ratio of cases by groups and businesses. I found absolutely no evidence that we need to control for economic conditions. Using simple counts for lawsuits tied to business interests or environmental groups in negative binomial regressions works reasonably well, although in some permutations the independent variables fail to maintain traditional levels of statistical significance. The count models generally worked better for environmental suits than business suits. If we change the dependent variable to environmental or business suits as a percent of the total number of EPA suits, very strong results again emerge similar to those in Table 1. The main result emerging from all of the statistical analyses is that when we analyze the business cases and environmental cases separately the substantively important coefficients are signed in opposite directions, so we can use the ratio of business to group cases and employ a simple ols regression. The main point to keep in mind is that these patterns are very stark and have a strong statistical foundation. Given such a stark pattern, individual deviations from the pattern provide signals to others.

The results in Table 1 are at the aggregate level. If the actors in the various branches of government are aware of the lobbying and legal end-runs that stakeholders pursue under some circumstances and avoid under others, then there is meaningful information in the mere presence of a lawsuit during a particular time period. That is, the lawsuit emerges because other avenues are more costly. So we see more business suits during a Democratic era and more group suits during a Republican era because the costs of access to other venues are prohibitive. Court action is costly, but it still affords the best alternative available for groups during a Republican era and business interests during a Democratic era. As noted in the discussion of Table 1, this pattern is very strong, *but* not all cases maintain the pattern. What does a business suit during a Republican era signal to the court? Ceteris paribus, the case was too weak to pursue through the other, generally favorable venues. What does an environmental group suit pursued during a

Democratic era signal to the court? Ceteris paribus, the case was too weak to pursue through other, generally favorable channels. If the court is attuned (subconsciously perhaps) to the dominant patterns in lawsuits involving the EPA, then deviations in those patterns provides valuable information. Deviations from established patterns are signals. If courts use deviations in dominant patterns as signals, then the disposition of business suits against the EPA should be different during Democratic and Republican eras. By the same reasoning, the disposition of group suits by the courts should be different during Democratic and Republican eras.

Are judges responding to political pressures directly, or even indirectly? Are they making ideological votes? I would argue that the judges are simply aware of the political environment within which the stakeholders are operating.[11] Common agency with multiple venues indicates that stakeholders are more likely to sue when the costs of other means of influence are too high. A thought experiment might help. An environmental group sues a Republican controlled EPA. The court imagines that the Republican controlled EPA might not be treating the groups as favorably as it had earlier. The complaint has prima facie legitimacy and likely deserves additional scrutiny. The court in this setting may reassert control over the zealous, out-of-control agency (see e.g., Sunstein 1989). If an environmental group sues the EPA during Democratic control, the prima facie legitimacy is completely removed and in a sense completely reversed. Environmental groups that sue a Democratic controlled EPA have either been locked out of other channels of influence or they themselves have shunned the other channels. In either event, the signal is not favorable. It is one thing to argue that an environmental group cannot get a fair shake during a Republican era, but it is something entirely different to argue the same during a Democratic era.

The courts will treat lawsuits differently depending on the political environment because the lawsuit s political context provides a meaningful signal to the court. To explore this claim I separate the business and group claims. I hypothesize that Republican control of the EPA makes the courts more likely to rule against business interests. In a similar fashion, Democratic control of the EPA makes the courts more likely to rule against groups. The dependent variables are

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[11] See Sunstein et al., (2004) for a more direct look at votes of individual judges and panels.

simply wins or losses at the case level. The independent variables include the *Party of the President*, the *House Median Nominate*, *OIRA*, and the *Panel Median*. *OIRA* is a dummy variable used to differentiate the periods before and after the practice of pre-clearance that was first established during the Reagan administration. Several panel issues require attention. Most Appeals Courts cases are heard by three judge panels. A much smaller number are heard en banc, with all judges sitting. Traditionally, each circuit has maintained slightly different procedures for placing judges onto panels. Randomization of the process was deemed increasingly important in the fifth circuit in the 1960s as that court addressed more and more civil rights cases. Though straightforward in concept, randomization was also affected by seniority, workload, case weight, and geographic concerns (Howard, 1981, ch. 8). Today, circuits use a double randomization process: judges to panels and cases to panels (Cohen 2002). As it happens, formal work by Lax (2007) suggests that panel make-up might be of little or no consequence in these sorts of situations. For the empirical work here, I would not anticipate omitted variable bias if panel information were left out because judge and panel ideology are unlikely to interact with the variables already used for the president and the House. As it happens, these issues are moot because widely accepted ideological scores for judges at the Appeals Court level are now readily available (Giles, Hettinger, Peppers 2002). The *Panel Median* variable is based on the Giles, Hettinger, and Peppers ideological scores for judges.[12] Observations are once again clustered by president. Table 2 presents the results for environmental cases, and Table 3 presents the results for business cases.

[12] The GHP scores are derived from common space NOMINATE scores. They have most recently been used in published work by Kaheny, Haire, and Benesh (2008).

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Table 2: Probit Regression with Interest Group Wins (1) and Losses (0) at the Appeals Court Level, Clustered by President

	Coef.	Robust Std. Err	z	P>|z|	95% Conf.	Interval
Party of the President	.436	.157	2.78	0.005	.129	.744
House Median Nominate	.923	.382	2.42	0.016	.174	1.672
Panel Median	-.217	.301	-.72	0.470	-.807	.372
OIRA	-.293	.231	-1.27	0.205	-.746	.160
Constant	-.660	.217	-3.04	0.002	-1.086	-.234

N=137

Wald chi2(4)=20.24

Prob > chi2=0.000

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Table 3: Probit Regression with Business Wins (1) and Losses (0) at the Appeals Court Level, Clustered by President

	Coef.	Robust Std. Err	z	P>|z|	95% Conf.	Interval
Party of the President	-.431	.074	-5.82	0.000	-.576	-.286
House Median Nominate	-.020	.273	-.07	0.942	-.555	.515
Panel Median	.400	.122	3.28	0.001	.161	.640
OIRA	.049	.128	.38	0.701	-.201	.300
Constant	-.425	.064	-6.68	0.000	-.550	-.301

N=300

Wald chi2(4)=69.71

Prob > chi2=0.000

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Both models work quite well. The *Party of the President* is significant in each model, which is consistent with the executive branch s established influence in the EPA. Croley (2003) notes that the EPA s rules are more likely than any other agency s rules to spur an OIRA meeting. Indeed, during the Clinton era over half of all OIRA meetings were focused on EPA rules. EPA rules are also more likely than rules from other agencies to be altered by OIRA review. However, the *OIRA* variable does not appear to add additional administrative control. For each model, *OIRA* fails to achieve statistical significance, but the president maintains a clear role to play in the management of the EPA. The clear significance of the *Party of the President* variable also corroborates some of the arguments made by Moe and Howell (1999) about unilateral executive actions. The *House Median* variable achieves significance in the group model, but not the business model. *Panel Median* is significant for the business model, but not the group model.

The impact of an independent variable in MLE models may vary considerably as the levels of the other variables change. To isolate the impact of the *Party of the President* in these models, I set all other variables at their means, and then assessed the change in the predicted probability of a case being won or lost. Since *OIRA* is a dummy variable, I assessed these changes in probabilities during the absence as well as the presence of OIRA. For the business model, the value of *OIRA* has no substantive impact on predicted probabilities. For the group model, the presence of OIRA reduces the change by about .2. Although *OIRA* was never statistically significant, its substantive impact still needed to be evaluated before it could be entirely discounted. *Party of the President* was strongly significant and, as Table 4 shows, also substantively important. Table 4 illustrates that groups are more likely to win as control of the White House shifts from Democrats to Republicans. Businesses are less likely to win under those same shifts. The 95% confidence intervals for predicted baseline probabilities of winning are .25 to .33 for groups and .29 to .40 for businesses, so shifts of the magnitudes in Table 4 are substantively important. Groups increase their predicted probability of winning by .15, and businesses decrease their s by .14.

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Table 4: Changes in Predicted Probabilities of Winning a Case as White House Control Shifts from Democratic to Republican

Party of the President	Group Model	Business Model
Shift from D to R	.15 (se .057) (95% CI:.04 to .27)	-.14 (se .025) (95% CI: -.19 to -.10)

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The impact of the *House Median* on group wins and losses varies only slightly by party control of the White House. As the *House Median* moves from the 35th percentile to the 65th, the predicted probability of groups winning their case improves by about .10 during a Republican administration and .075 during a Democratic administration. Two points deserve attention. First, as the House becomes more conservative, groups have greater predicted probabilities of success in the courts. Second, shifts in the White House partisanship have greater impact (as seen in Table 4) than shifts in the House partisanship. In sum, conservative political environments, as measured by *Party of the President* and *House Median*, hurt the prospects of legal cases brought by businesses and help those brought by groups; and liberal political environments hurt the prospects of cases brought by groups and help those brought by businesses.

The effects of judge s ideologies are sensitive to the political environment in the White House. Table 5 displays an array of changes in predicted probabilities as the *Panel Median* shifts from one side of its mean to the other. For instance, as *Panel Median* shifts from its twentieth percentile to its eightieth, the predicted probability increases by .13 during a Democratic presidency. Business interests are favored by more conservative panels; and, as seen when contrasting the columns in Table 5, this result is stronger during a Democratic administration. Conservative judges are more willing to accept an anti-business ruling from a Republican

controlled EPA than from a Democratic controlled EPA. Business claims during a Democratic administration have greater prima facie validity than those business claims pursued during a Republican administration.

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Table 5: Changes in Predicted Probabilities of Business Interests Winning a Case as the Appeals Courts Panels Become More Conservative

Panel Median Shift (in Percentiles)	Democratic Presidency	Republican Presidency
35th to 65th percentiles	.07 (se:.02) (95% CI:.03-.11)	.05 (se:.02) (95% CI:.02-.08)
20th to 80th	.13 (se:.04) (95% CI: .06-.20)	.10 (se:.03) (95% CI:.05-.16)
1st to 99th	.17 (se:.05) (95% CI: .07-.25)	.13 (se:.04) (95% CI:.06-.20)

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The panel median is only a concern for business cases. For cases brought by citizens groups, there were no panel effects as measured by the GHP scores. Prior to the development of the GHP scores, scholars frequently attached the nominating president s partisanship to the judge. Using judge and panel partisanship, Sunstein, Schkade, and Ellman (2004) argue that there are regular panel effects. Sunstein et al. suggest that panel effects may create either dampening or amplification of judges ideologies. Dampening occurs when a lone Democratic (R) judge mimics the ideologies of the other two Republican (D) judges. Amplification occurs when three Democrats (Republicans) become more ideologically extreme in the absence of a

minority party voice. In the cases studied here, there is no evidence of dampening or amplification. Sunstein, Schkade, and Ellman (2004) argue that they have found dampening and amplification panel effects in their work, but they fail to control for the political environment from which the cases they analyze emerge. The presence of stakeholders before the court and judges reactions to those stakeholders must be conditioned on the political environment that spurred the legal case. Lawsuits related to federal agencies signal important case-specific information *because* of the political environment from which they emerged. Screening of cases already occurred in the agency itself and through OIRA at OMB. Opportunities for lobbying agency principals has already been by-passed or lost. There is a very strong selection effect at play that produces a strong signal to the court. Again, it is the presence of the unexpected deviation that provides information (see e.g., Calvert 1985).

My interpretation of judicial review in these cases is slightly different than the canonical view. In the canonical view of judicial review, courts correct an over-reaching agency. Of course, the placement of the court in relation to the agency and other political actors is crucial to the court s willingness and ability to correct an over-zealous agency. However, the over-zealous agency storyline is easier to accept when businesses win under Democratic presidencies and harder to accept when businesses lose under Republican presidencies. If litigation brought by a business under a Republican administration is off the equilibrium path, then we must consider the most likely circumstances that would lead to such a situation. To wit: business cases under a Republican administration are prima facie weaker, so they inevitably lose more in the Appeals Courts. For the interest group cases, *Panel Median* is neither statistically nor substantively important. Regardless of their own ideologies, judges treat similar group cases differently under different political environments. The more liberal the surrounding political environment, the more likely groups are to lose their Appeals Court cases. I do not mean to suggest that this work supplants the canonical view of judicial review, but it is important to recognize that the results in the traditional literature rely crucially on the ideology of the courts. The results in the present work hold regardless of the partisanship or ideology of the judges and panels. Whether a judge is a Democrat or a Republican, a conservative or a liberal, she recognizes that for some types of claims the political environment surrounding a case yields important information. A business

complaining about a Republican controlled EPA is treated differently than a business complaining about a Democratically controlled EPA, and a group complaining about a Democratically controlled EPA is treated differently than a group complaining about a Republican controlled EPA.

Discussion and Conclusion

The public generally has tolerance for political influence at the front end of lawmaking lobbying on legislation and regulations. But at the back end, once those laws and regulations are in place, the public wants the political influence to stop (Lee 2003). The common agency framework with multiple venues that I used in this paper highlights the end-runs the public purportedly disdains. End-runs conceivably undermine all of the efforts to insure representative bureaucracies. Concerns about representative bureaucracy are generally handled by exploring direct access to an agency. Such direct access may have little impact in the presence of multiple venues for end-runs.

Balla and Wright (2001) are rather sanguine about the composition of advisory panels. Congress appears able to control information flows in the bureaucracy. Smith (2006a; 2006b) notes that Congress has used citizen suits to affect policy, but the actual filings are affected by who is in control in the White House and the ideological nature of Congress. Smith notes that Democratic congresses are more apt to amend the Clean Air Act to facilitate citizen suits to maintain an activist EPA. But under a Democratic regime, if the EPA is activist, then there is little need for citizen suits. Recent work by Yackee and Yackee (2006) explores who participates before agencies to determine whether there is a bias towards business. Here, I assess bias by determining whether the parties seeking legal redress are the same over time or whether they vary over time in some sort of regular pattern. If there is no bias in the agency, then there should be little variation in cases brought to the Appeals Courts. For the EPA, there is considerable variation in the types of stakeholders pursuing legal remedies. In seven of the thirty five years, environmental groups had as many or more cases than business groups. For the other twenty eight years, businesses cases dominated. One might argue based on these figures that there is successful deck stacking, but such a conclusion would be premature given the incredible

variation that occurs over time as political contexts change. Yes, there is pluralism at some stages of policymaking, but where does the ultimate balancing of competing influence occur? Different actors pursue policy goals in very different venues, and ready access of all to one venue does not insure access to the most important venues. The importance of a particular venue for an actor varies considerably, depending on the costs of indirect influence in the political environment.

Courts and agencies affect one another in intricate ways. Canes-Wrone (2003) finds that court composition can affect agency rulings. Here, I find that the political environment of the agency affects the court s treatment of particular cases. The results presented here also affect how one might interpret established results in the judicial subfield. The disadvantage theory of group litigation used to presume that groups were more favorably treated by the federal courts than other types of litigants. The empirical evidence for the disadvantage theory has indeed been mixed (e.g., Epstein and Rowland 1991), but no one evaluating the disadvantage theory has assessed the political environment from which group cases emerged. When groups go to the courts is a crucial element of that debate. Perhaps civil rights or voting rights cases fare better in the courts when Republicans (Democrats) control key agencies and commissions.[13] Judicial scholars also look to resources of an organization when assessing their success rates in the courts. However, even the presence or absence of resources may be interpreted differently depending on the political environment surrounding the cases. We know that businesses who are repeat players are more apt to receive favorable rulings. Are repeat filings during a Republican era treated the same as those in a Democratic era? We also know that the state (in this case the EPA) generally wins. What has not been recognized is that business or group interests are more apt win or lose under particular political contexts. Given that the state is the other named litigant, we can also refine our understanding of when the state wins and loses. There is some talk that Chief Justice Roberts is keen to alter the rules regarding standing. Changes in standing requirements would

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[13] Since the 1965 Voting Rights Act, the courts, the White House, Congress, and the Department of Justice have interpreted and treated voting rights issues in manifold ways (Ball 1986), but no one to my knowledge has explored whether courts treat such cases differently depending on the partisan control of Department of Justice.

alter the common agency model by altering the costs of pursuing claims within the different available venues.

Are judges swayed by politics? Judges are of the same polity as the rest of us, and they are likely to be more attuned to the affairs of the polity than the typical citizen. They are well-positioned to view signals inherent in some cases. Does the work here suggest that judges do not follow their own attitudes? No, but attitudes are somewhat constrained by pesky little items like case facts. Attitudes can seldom reign supreme. Indeed, if attitudes reigned supreme, there would be no role for signals and there would be no variation in the disposition of cases based on the political environment. Judicial review exists within a sequential game format, and judges act toward the end of the game and update their beliefs about the prima facie value of the cases before them.

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Figure 1: The Stakeholder s Game