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*American Politics Research* published online 16 November 2012

DOI: 10.1177/1532673X12459553

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# Adjudicatory Oversight and Judicial Decision Making in Executive Branch Agencies

American Politics Research

XX(X) 1–30

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DOI: 10.1177/1532673X12459553

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## Abstract

Adjudications are an important, though understudied, means through which administrative agencies create policies that have a lasting impact. We argue that executive branch agency heads utilize their oversight of agency adjudications to advance agency goals. Relying on an original data set of adjudications appealed to the U.S. Department of Agriculture's agency head's adjudication delegee, our empirical results indicate a substantial positive effect on the probability that the agency head will reverse an administrative law judge (ALJ) when he receives the appeal of an antiagency ALJ decision. However, the agency's adjudication oversight is conditional on political constraints, including partisanship differences between an agency and the litigated law and whether the case is being heard during a time of presidential transition. These results have clear implications for the use and effectiveness of agency adjudications as a political tool.

## Keywords

judicial politics, judicial review, administrative agencies

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## Introduction

Adjudications are an important and growing function of federal administrative agencies, providing an agency a path for enforcing regulations while simultaneously sending signals about agency priorities. Over time, deregulation and agency decentralization has caused rulemaking—a.k.a. the promulgation of regulations—to become more difficult for agencies to implement effectively (Whitford, 2002). As a result, adjudication is, at least in certain circumstances, an increasingly attractive tool for agencies to pursue their political priorities (Shapiro, 1965; Spence, 1997; Magill, 2007; West 2005). Because of this shift, along with other factors, the total number of disputes resolved in agency adjudication now dwarfs those in federal Article III courts (Resnik, 2004). In the context of the agency, adjudication “is not simply about deciding individual cases; it is a means to effectuate the statutes enacted by Congress in accordance with the priorities of the executive branch” (Taylor, 2007, pp. 480-481).

Despite its clear importance, judicial decision making within agency adjudications remains understudied by systematic, empirical scholarship, even as work on judicial decision making in other arenas has flourished. A noted exception is the work of Taratoot and Howard (2011), who analyze the decision making of administrative law judges (ALJs) at the National Labor Relations Board from 1991 to 2006. In this research, the authors contend that these initial, trial-level agency judges behave very similarly to federal trial court judges, revealing more generally, how fruitful a careful examination of agency adjudications can be.

What has continued to evade empirical scholarly attention, is what happens next in agency adjudications. Just as federal trial court judges do not have the final word in federal courts, neither do ALJs in agency adjudications. Indeed, adjudication’s potential to be an effective policymaking tool depends largely on the institutionalized oversight role held by agency leaders over the ALJs’ rulings, since the agency head (or his direct delegee), serves as the agency’s final appellate judge.

By definition, the agency head (or his delegee) possesses very few of the independence characteristics commonly held by American judicial branch judges or agency ALJs (cf. Koch, 1994; Marshaw, 1978; Taratoot & Howard, 2011). Rather, the agency head is a political appointee, whose primary function is to further the interests of his agency, in adjudication and otherwise. As such, agency heads will likely behave differently than traditional judges or ALJs, reflecting the priorities ascribed to their institutional position. In other words, we are likely to see different decision making influences on agency

heads than we would for traditional judges. In particular, we anticipate agency heads will use their adjudication oversight role to pursue agency priorities and protect the agency's vested political interests.

Employing an original data set of cases decided by the United States Department of Agriculture's adjudication oversight delegee from 1980 to 2006, we provide one of the first systematic empirical explorations of agency head judicial oversight of the agency's initial and independent adjudicative decision maker, the ALJ. Our results indicate that, like many other appellate judges reviewing lower courts, agency leadership will often affirm the ALJs' initial rulings in cases. However, the likelihood of doing so drops sharply if the agency head receives a high-quality and reliable cue from a trusted actor that propels him into action: the appeal of an anti-agency ALJ decision. The strength of this finding reflects both the agency's commitment to using adjudication to advance its interests and the high quality of the information coming from agency-petitioners (quintessential repeat players). We also identify conditional political constraints on adjudication oversight, including asymmetric partisanship between an agency and the contested law and whether the case is being heard during a time of presidential transition. These results have clear implications for the use and reliance of agencies on adjudications as a political tool.

## **ALJs in the Adjudicatory Hierarchy of Federal Administrative Agencies**

Agency adjudications take a variety of forms, including as benefit determinations, licensing proceedings, and enforcement actions (Magill, 2004), and they vary largely depending upon the statutory guidelines for a particular agency. In most enforcement-type proceedings, agencies are the adjudication initiators and they exercise substantial discretion in deciding when and against whom to bring adjudicative actions, a well documented phenomenon within the Department of Justice (Gordon & Huber, 2009; Shermer & Johnson, 2010; Whitford & Yates, 2003).<sup>1</sup> When an agency has the choice of when and against whom to initiate judicial proceedings, it can be purposeful and strategic in using this process to advance the political interests of the organization and pursue the goals of the current presidential administration.<sup>2</sup>

The features of formal adjudications mirror many of the requirements of traditional trial court litigation, such as the separation of prosecutorial and adjudicatory functions and prohibitions on ex parte contacts between the parties and the decision maker (Magill, 2004). The presiding ALJ also functions much like a trial judge (Mayer, 2006). Through the nature by which ALJs are

hired, evaluated, and protected from undue reprisals, ALJs are afforded a great deal of institutional insulation and independence from agency pressure. The rationale for these safeguards comes from a desire to foster hearings where decisions are based in fairness, impartiality, and independence in the administrative procedural process (Opinion of the Attorney General, 1951; Wolfe, 2002).

How these structural protections translate into ALJ decision making has been a highly debated topic among scholars and policymakers over the last 40 years. Some scholars are suspicious of ALJ independence, arguing that despite the institutional independence protections, she remains a “curious mixture of autonomy and subservience” (Wertkin, 2002, p. 390). Undeniably, the ALJ is “under the administrative direction and control of his employing agency” (Wolfe, 2002, p. 225) and is meant to be impartial but not independent (Moliterno, 2006). On the other hand, some of the most systematic empirical work to date suggests that ALJ independence and autonomy rivals that of a constitutionally protected Article III federal judge (e.g., Guthrie, Rachlinski, & Wistrich, 2009; Koch, 1997; Mashaw, Goodman, Schwartz, & Verkuil, 1978; Taratoot, 2008; Taratoot & Howard, 2011). For these scholars, when ALJs preside, “the outcome of cases depends more on who decides the case than on what the facts are” (Mashaw et al., 1978, p. 99).

## **Adjudication Oversight**

### *Agency Heads, Independence, and Reliable Oversight Information*

Despite any lingering uncertainty regarding the ALJ decision making environment, one thing is indisputable: ALJs do not have the last word in the agency adjudication hierarchy. The actors in executive branch agencies that do—agency heads or their direct delegees<sup>3</sup> (APA § 557(b))—have received surprisingly little attention in this independence debate. This is especially true when it comes to an empirical examination of the possible political consequences of agency head judicial oversight.

For both political and procedural reasons, agency heads should be expected to lack decisional independence and impartiality in their adjudication oversight role. Agency heads are, by definition, political appointees. These officials are selected by the president, and while they must be confirmed by the Senate, the power to remove them rests solely with the president (McCarty, 2004; Whitford & Yates, 2003). For cabinet-level executive branch agencies, like the USDA, an agency head is a short term appointee who serves at the

pleasure of the president and will, at least in theory, use all of the agency tools at his disposal to promote said president's agenda. The necessity for this is simple: "the modern president is also the chief administrator of national agencies; his powers include appointments, budget review, and agency reorganization" (Whitford & Yates, 2003, p. 997). As such, there is little doubt that the cabinet appointee's primary task is to advance the interests of the president through the agency as effectively as possible, using regulations, policy statements and adjudication, among other things.

Empirical research on agency behavior suggests that agency heads view themselves as political actors and use their leadership position to shape agency policy. In his assessment of EPA enforcement activities, Wood (1988) finds that agency heads use their position to control the level of enforcement activities, which is driven by their own preferences and changes in the larger political environment. This finding is further substantiated by Wood and Waterman (1991), who show that leadership regimes exert an appreciable effect on levels of bureaucratic oversight and enforcement. In other words, change in agency leadership is the strongest predictor of regulatory zeal.

In addition, unlike ALJs, agency heads serving in an adjudication oversight role are not subject to statutory procedural requirements which mandate a separation of investigation, prosecutorial, and adjudication functions (Bush & Knutson, 2004). This means that legislators anticipate that agency heads will review statutorily impartial ALJ decisions and will approach their adjudication oversight power with political partiality toward the agency's interests—the very same bias that led the agency to investigate and prosecute the action to begin with. In justifying this departure from the carefully crafted independence checks on ALJs, Pierce (2010, p. 889) notes as follows:

Congress' decision to allow an agency head to control all three functions represents a tradeoff between the goal of minimizing the risk of potential conflicts of interest attributable to an agency head's multiple roles and the goal of creating an efficient decisionmaking structure. The Supreme Court has consistently acquiesced in the balance Congress struck in the APA.

However, agency heads serving in an adjudication oversight role are burdened by limited time, resources, and information. These factors combine to make it impractical, if not impossible, to single-mindedly focus on achieving their agency-political goals via adjudication. Lacking docket control to filter out frivolous or routine cases,<sup>4</sup> agency appellate caseloads are often quite large. This is particularly true given that there is a single agency official

hearing the appeals, an actor who is also tasked with agency responsibilities beyond adjudication oversight. This is likely compounded further by the undoubtedly high level of pressure on agency heads to quickly process appeals in a way that does not exist for ALJs or Article III judges. In addition to any due process considerations, agency officials viewing adjudication will likely have self-interested reasons for reaching expedient final resolutions, even at the expense of polished and well-researched opinions.<sup>5</sup>

In practice, much of agency heads' appellate review process is cursory in nature (Bernstein, 1954; Magill, 2004). In similar appellate court institutional hierarchies, high numbers of affirmances of lower court decisions result, many of which are summary affirmances. In the federal courts of appeals, for example, the overall reversal rate sits below 20% (Davis & Songer, 1989). The explanation for this is easy: affirming lower court decisions is simply easier than investing the time, energy and resources necessary to reverse a lower court's decision. For agency oversight officials, defaulting to affirmance is the pragmatic solution. And, as a result, reversals should be rare and purposefully sought.

However, given that adjudication is a viable means to pursue and advance political goals of an agency, the agency head still needs a way to reconcile his limited time and resources with his broader agenda. To do this, we expect the agency head to rely on high value information from a trusted and skilled source that holds similar goals (Bailey, Kamoie, & Maltzman, 2005; Gailmard & Patty, 2011; McCubbins & Schwartz, 1984; McGuire, 1998). In the case of agency heads, this is likely to come in two complementary forms: an ALJ decision that rules against the agency and the decision of the agency-employed counsel to appeal that decision to the agency head. Agency head adjudication oversight exists to "maintain control over policy development and application," not necessarily to review or 'correct' every possible ALJ mistake (Gifford, 1991, p. 980). Therefore, both of these events are easy to identify and, when present, provide exceedingly valuable guidance for an agency head looking to exercise the time-consuming task of reversing ALJ decisions in a limited but strategic fashion.

In most agency adjudications, the agency is a party in the case and is represented by agency-employed attorneys. If those actors lose in their ALJ hearing and choose to appeal, they will then be appealing directly to their agency leadership, asking to have the decision below reversed. These agency attorneys are quintessential repeat players in the agency litigation game (Bailey et al., 2005; Galanter, 1974; McGuire, 1998). Like other repeat players, agency attorneys have regular, frequent interactions with agency judges (including the agency head) and have a vested interest in developing good

long-term reputations. For these attorneys, this means not only presenting well-researched and credible arguments in their briefs and oral arguments, but also carefully filtering their cases when determining if and when to seek further review at all (e.g., Galanter, 1974; Johnston & Waldfogel, 2002; McGuire, 1998; Songer & Sheehan, 1992). In other words, these agency insiders will not bother to file a petition they do not think the agency head would plausibly or even likely reverse, and they are good at making this determination. This type of calculated and intelligent decision making is not likely to be present for typical one-shot litigants that participate in agency adjudications.

Agency attorneys' appeals decisions are also likely to be viewed as reliably pro-agency. This is an advantage that many repeat players do not hold. When it is missing, it can influence a repeat player's effectiveness. In the context of their study of Supreme Court justices' agreement with the Solicitor General's *amicus* position, Bailey et al. (2005, p. 83) argue that "All justices may be receptive to cues sent from the solicitor general, but justices are especially receptive to such cues . . . when they are ideologically close to the president and S.G." Unlike most other repeat players in litigation, agency attorneys are likely to be viewed as *consistently* and *reliably* holding policy goals that align with the appellate body that they are petitioning—that is, the attorneys' employer, the agency.<sup>6</sup> Because of this structure and where the agency attorneys' incentives rest, therefore, the agency head should believe that the information coming from them via their decision to appeal an anti-agency ALJ decision is dependable for gauging when taking action—that is, reversing the ALJ—is in the agency's interest.

As previous quantitative research has indicated in other contexts, where courts and judges do not frequently reverse original decisions on appeal, the receipt of a repeat player's input can lead to a dramatic shift in behavior away from judicial oversight inactivity. In Table 1, we further explore this effect from previous studies at both the U.S. courts of appeals and the Supreme Court. In the courts of appeals, the intermediate appellate courts in the federal system, judges lack docket control and are greatly predisposed to affirm the lower court decisions appealed to them. According to Songer and Sheehan (1992), the presence of a strong cue—e.g., an appeal initiated by a federal government repeat player—makes the likelihood of reversal jump to 0.87. In the U.S. Supreme Court's discretionary agenda setting process, justices (and their clerks) review petitions for certiorari. While the modern Supreme Court grants review to only approximately 1% of petitions, as Caldeira and Wright (1988) confirm, the presence of key cues can greatly improve a petition's likelihood of moving to the merits stage at the Court.

**Table 1.** Repeat Players' Effect on Other Courts

Institution (study)	Probability of:	Baseline probability	Cue	Probability given cue
U.S. Courts of Appeals (Songer & Sheehan, 1992)	Reversing lower court	0.34	U.S. government appeals	0.87
U.S. Supreme Court (Caldeira & Wright, 1988)	Granting certiorari	0.01	SG supports cert	0.37
		0.01	SG & two or three amicus briefs supporting cert	0.96

Note: The table displays the probabilities of appellate courts moving from inactive to active review stances in their oversight roles based on the results of two key studies. The table includes Songer and Sheehan's (1992) Table 9 estimated probabilities for published decisions, where the baseline case is one appealed by a regular (non-underdog) individual. The table also provides estimated probabilities from Caldeira and Wright's (1988) Table 2, where the baseline petition has no conflict, no Solicitor General participation, and 0 or 1 amicus briefs supporting certiorari.

In the case of administrative agency oversight, we have every reason to expect a similar story and comparable magnitude of effects. In his capacity as a petitioner, an agency attorney's appeal will likely to be viewed as high-quality and credible information about an ALJ decision that merits close review and poses a threat to the agency's long-term policy interests. This combination—an anti-agency ALJ decision and a filtered appeal brought by a credible agency petitioner—should serve as the impetus for moving an agency head into action to protect his agency's interests through adjudication oversight, thus moving him from being firmly “affirm-minded” and greatly increasing his likelihood of ALJ decision reversal. We formalize this expectation in Hypothesis 1:

*Hypothesis 1:* The agency head's likelihood of reversing an ALJ's decision will increase when the ALJ issues an anti-agency decision and the agency petitions for review.

### *Conditional Political Constraints on Agency Head Oversight*

Beyond the repeat player information that comes from an agency-employed petitioner, an agency's political environment, combined with timing and the

specifics of the case in front of them, may operate directly to increase an agency head's motivation to reverse an ALJ's decision. We therefore consider the role that three conditional political factors—distance between a litigated law and the agency, the transition to a new presidential administration, and divided government—have on agency head adjudicatory oversight.

When serving in their adjudication role, savvy agency heads will likely take the dynamic nature of politics and legislation into account (Ferejohn & Shipan, 1990; McCubbins, Noll, & Weingast, 1987; Shepsle & Weingast, 1987; Shipan, 2004). In particular, when considering the efficacy of reversing an ALJ's decision, the agency head may consider the agency-related legislation under which the adjudication is being litigated. If that act was passed by a Congress with preferences that are consistent with the current agency, then carefully examining the ALJ's decision for reversal becomes less attractive. If the act was passed by a Congress that was ideologically dissimilar from the current agency, the agency head may take a much closer look at an appeal, to assess the possibility that by reversing the decision, the current president's political agenda might be advanced.<sup>7</sup> In other words, when the contested legislation was passed by an ideologically dissimilar Congress, the chances of reversal will increase.

As we note above, cabinet-level executive branch agency heads are selected by the president and serve at his pleasure. While this political design is central to the agency head's motivation to further the agency's interests in his decision making, it is not likely to be a constant pressure across time. Rather, the strength and clarity of a president's message regarding his agenda for agencies is probably conditional on his tenure in office. In particular, during the early stages of a new president's administration, he is still formulating his policies, clarifying priorities and appointing the members of his cabinet, and communicating his goals to these newly installed agency officials.

During this period, executive branch agencies will also be in transition and many key appointed agency positions will be vacant (O'Connell, 2009). As such, agency policymaking in all areas is likely to slow down and be less directed toward driving a political agenda. For adjudication appeals, there will tend to be more affirmances during this time, since the signs of when to reverse (and the political gains from doing so) will be much less clear. After this period of transition ends, though, the president's policy goals and direction for the agency will be more established and, as such, the likelihood of agency heads reversing ALJ decisions should also be higher.

While the president and Congress have a variety of ways to control and influence agency actions, the effectiveness of these actors is complicated by the uncertainties inherent in delegation, responsiveness, and agency

activism present during times of divided government (e.g., Epstein & O'Halloran, 1996; Shipan, 2004). Agencies desiring to be faithful servants may have difficulties determining how to comply when faced with multiple principals with "uncoordinated and often conflicting demands, requirements, and incentives" (Moe, 1984, p. 768). Whitford (2005) describes the situation as a tug-of-war between multiple political actors, all of whom seek control.

The "possibility that principals will not agree on goals" (Lindquist & Haire, 2006, p. 237) means that great uncertainty remains, something we should expect to be most common during times of divided government (e.g., Shotts and Wiseman 2010), to be most common during times of divided government. Conversely, we should expect that during times of unified government, Congress and the president may exert more control over agencies with relative ease, since their goals and corresponding signals to the agencies should generally be consistent across institutions. Specifically for agency adjudication appeals, we expect that the uncertainties related to divided government should make the agency head less likely to exert the additional work necessary to pursue reversals, while during periods of unified government, the consistency of the political signals that he is receiving should make reversals of ALJ decisions more likely.

Our three conditional political hypotheses follow:

*Hypothesis 2:* As the ideological or partisanship distance between an agency and the litigated law increases, so too will the likelihood that the agency head will reverse the ALJ's decision.

*Hypothesis 3:* The agency head will be more likely to reverse an ALJ's decision after the initial transition period into a new presidential administration.

*Hypothesis 4:* The agency head will be more likely to overturn an ALJ decision during times of unified government than during times of divided government.

## **Data and Variables**

### *USDA Application*

To empirically examine the use of adjudications to promote executive branch administrative agency goals, we focus on the outcome of intra-agency appeals within the U.S. Department of Agriculture (USDA), one of 15 major agencies housed within the president's cabinet and directly under his control. The USDA is designated with the broad mandate to

[A]cquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition in the most general and comprehensive sense of those terms and to procure, propagate, and distribute among the people new and valuable seeds and plants. (7 U.S.C.S. § 2201, 2008)

With its structure, actors, and motivations typifying executive branch adjudications, the USDA provides an excellent application for this study.

Within the USDA, ALJs conduct hearings around the country on issues administered by the agency, with 40 of the USDA's statutes providing for APA hearings. These statutes include, for example, the Packers and Stockyards Act (7 U.S.C. § 181), the Perishable Agricultural Commodities Act (7 U.S.C. § 499a), and the Horse Protection Act (15 U.S.C. § 1821). Each permits the USDA to initiate disciplinary hearings against alleged violators of their provisions, with findings of liability (from the ALJ or agency head) resulting in the assessment of civil penalties and/or the revocation of operating licenses. As with other executive branch agencies, USDA rules permit that any party that disagrees with all or part of an ALJ's decision may, within 20 days, appeal that decision to the agency head. This results in a lack of docket control in the USDA's adjudication oversight, such that the appellate caseload will inevitably consist of a mix of frivolous and meritorious claims and tend toward a high affirmance rate.

The USDA's Secretary is selected by the current president (with the consent of the Senate) and, as a purely executive branch official, can be removed by the president alone (*Myers v. United States*, 272 U.S. 52 (1926)). For purposes of the USDA's adjudication oversight role, the Secretary directly delegates all of his statutory oversight authority to a single delegee, the Judicial Officer. As a result, the Judicial Officer's decisions not only serve as the agency's final adjudicatory outcome but are also designed to represent the views of the Secretary for the agency and the current president of the United States. While the statutory guidance on the Judicial Officer position is limited to discussion of the (limited) delegation of the position by the Secretary and the adjudicative areas where the Judicial Officer has authority, previous Judicial Officers have been agency insiders with prior experience implementing agency regulations and serving as USDA litigators.

### *Data and Dependent Variable*

Our data consist of Judicial Officer opinions from USDA disciplinary cases (all of which were initiated by the USDA based on alleged violations of one

of its 40 agency statutes) on appeal from ALJ decisions. We drew a 30% simple random sample of Judicial Officer opinions published in *Agricultural Decisions*, the USDA's official quarterly review publication, from 1980 to 2006.<sup>8</sup> This resulted in a sample of 191 USDA appellate decisions.<sup>9</sup>

As described above, our dependent variable is the Judicial Officer's decision to reverse the initial decision of the ALJ. The coding scheme for this variable is dichotomous, with all reversals receiving a 1 and all affirmances of the original decisions coded as 0. Decisions were coded as reversals if there was any record of disagreement by the Judicial Officer with the ultimate outcome of the ALJ, meaning that vacations and reversals in part were also coded as reversals. Approximately 30% of the cases in our data were overturned by the Judicial Officer.

### *Anti-agency ALJ Decision Variable*

Our key independent variable for testing our first hypothesis is *Anti-Agency ALJ Decision Appealed*, which is measured as 1 when an ALJ's decision finds against the USDA in all or in part. Like most agency adjudications, those adjudications resolved within the USDA include the agency as a party, and it is represented by USDA-employed counsel. We observe 55 instances (29%) of ALJ decisions that are appealed after being anti-agency in nature.

### *Political Variables*

In terms of political environment, our modeling for Hypotheses 2 to 4 calls for variables relating to the legislation under review, the presidential administration, and the overall political divisiveness of Congress and the White House. We measure *Ideological Distance between Current Agency & Litigated Law* as the absolute difference between the ideological position of the agency and the ideological position of the law when it was originally passed by Congress. Both ideological measures are derived from the DW-NOMINATE scores of the underlying actors (Carroll, Lewis, Lo, Poole, & Rosenthal, 2009), with -1 being the most liberal and 1 being the most conservative. For the agency, since we are focusing on a cabinet-level agency, we rely on the score for the president at the time of the decision. Within our data, this ranges from -0.539 at its most liberal to 0.723 at its most conservative. For the law, of which there are 15 in our data, we take the average of the House and Senate median DW-NOMINATE scores for the year that it was enacted. The scores for this range from -0.194 to 0.36125. The resulting

absolute differences, which compose *Ideological Distance between Current Agency & Litigated Law*, run from 0.21875 to 0.917.

Ideal point estimates of actors' ideology such as those employed for the measurement of *Ideological Distance between Current Agency & Litigated Law*, are not without criticism, especially when used to compare ideology across legislative chambers, branches of government or over long periods of time (e.g., Ansolabehere, Snyder, & Stewart, 2001; Bailey, 2007). At the heart of the problem are the statistical assumptions necessary to identify ideal point models, which require that either some members' ideology is held constant over time or that the underlying ideological scale does not substantively change over time. Given that our data include cases from a nearly 30-year period with statutes that were enacted in the early 20th century, those assumptions are questionable at best.

To account for this possibility, we devised an alternative measure to gauge divergent preferences between the current agency and the preferences of the Congressional coalition responsible for statute enactment. Specifically, we include *Different Party: Current Agency & Litigated Law*, which we coded based on comparing the party of the current president (at the time of the decision) to the party controlling Congress at the time the bill was enacted. Divided Congresses always resulted in a coding of difference, such that this variable takes the value of 1. Nearly 60% of our observations are coded as having been enacted under a different party than that which controlled the USDA at the time of the Judicial Officer's decision.

The variable *After First Year of New President's Administration* is a dichotomous measure with values of 0 for the first year of a presidential administration and 1 for each year thereafter. Our data contain the emergence of four new presidents (Reagan, 1981, G. H. Bush, 1989, Clinton, 1993, and G. W. Bush, 2001), and approximately 15% of the appellate decisions in our data are decided during this first year of a presidency. *Unified Government* is coded as 1 if both chambers of Congress and the presidency share the same controlling political party. Nearly 24% of our agency appeals were decided during periods of unified government.

### **Control Variables**

Turning now to the control variables, our modeling accounts for the judicial and litigant characteristics that, while not central to the agency head story of focus here, are likely to have an effect on the likelihood that an ALJ's decision will be overturned by the USDA. The first of these has to do with the presence of representation for the non-agency party in a case. If this party is

not represented by an attorney (i.e., *pro se*), we anticipate that his underlying case is weaker, both in practice and in perception (Haire, Lindquist, & Hartley, 1999; Smith, 1999). In these cases, we expect the USDA's Judicial Officer to further limit the time allotted to these (often frivolous) cases, thereby increasing the likelihood of affirmance. 29% of the cases in our data fall into this category.

As we note above, unlike with agency heads and their adjudication oversight delegees (like the Judicial Officer), there are a variety of institutionalized protections in place to keep ALJs isolated from agency pressure in their decision making. Despite an institutionalized independence, the final selection of ALJs is made by the agency, something that may lead to ALJs feeling politically indebted to the administration at the time of their selection, as with many Article III judges (Segal, Epstein, Cameron, & Spaeth, 1995; Segal & Spaeth, 2002). Therefore, to control for this possibility, we include a dichotomous variable, *ALJ Opposite Party*, that measures when the ALJ's selecting president is of a different political party than the president in office at the time of the decision in our data set. If this operates (or is perceived to operate by the Judicial Officer), we would expect a greater chance of reversal of the ALJ's decision when there is a difference in these parties.

By controlling for the length of time served by the ALJ, *Years of ALJ Service*, we explicitly account for any "freshman" effects we might observe, wherein new judges may be more frequently overruled since they are still learning their jobs and gauging the strength of cases and precedent in their area (Hagle, 1993). This may be particularly true with agency adjudications, where the subject matter being litigated is very specialized. Within our data, this variable peaks at 35 years, with a median service time of 10 years. To control for possible tenure-based influences of the Judicial Officer and/or his delegator the USDA agency head (with increased tenure leading to a higher propensity to reverse [for Judicial Officers] or encourage reversal [for agency heads]), we include controls for the *Years of Judicial Officer Service* and the *Years of USDA Secretary Service*. The median term of service for Judicial Officers in our data is 15 years, with a median tenure of 1 year for agency heads.

Finally, we control for *Litigated Law Age*, which measures the number of years (from the current case) since the underlying litigated law was passed. As that number increases, we expect fewer reversals. While longer standing acts have historical and institutional importance to the agency, their interpretation and enforcement through adjudication is more likely to be uniform and routine as time passes. This may result in fewer instances where the Judicial Officer needs to reverse the ALJ. Table 2 provides a descriptive summary of all our explanatory and control variables.

**Table 2.** Summary Statistics for Key Explanatory Variables

Variable	Mean	SD	Min.	Max.
Anti-agency ALJ decision	0.29	0.45	0	1
Ideological distance: Current agency & litigated law	0.60	0.21	0.22	0.92
Different party: Current agency & litigated law	0.58	0.50	0	1
After first year of president's administration	0.85	0.36	0	1
Unified government	0.24	0.43	0	1
Pro se litigant	0.29	0.46	0	1
ALJ opposite party	0.37	0.48	0	1
Years of ALJ service	10.78	8.31	0	35
Years of judicial officer service	14.12	7.50	0	25
Years of USDA secretary service	1.33	1.30	0	5
Litigated law age (Years)	52.03	22.26	4	89

## Results

To test our hypotheses, we estimate a logistic regression of whether the USDA Judicial Officer reverses the ALJ's decision in a case. To account for the two measurements used to test Hypothesis 2, we estimate this model twice. Model 1 includes *Ideological Distance: Current Agency & Litigated Law*, while Model 2 employs the alternative measure, *Different Party: Current Agency & Litigated Law*. The results from these estimations are reported in Table 3. The constants' negative signs and significance indicates that, as expected, when all of the independent variables are held at 0, the likelihood of an ALJ's decision being reversed is very low. More generally, with high percent reductions in error, the overall models perform well in predicting this dependent variable.

Our key hypothesis, Hypothesis 1, turns on the agency head or his delegee being propelled into action by the presence of high quality information from a reliable repeat player: an agency attorney choosing to appeal an ALJ decision that stands in opposition to the interests of the agency. Adjudication or not, the agency head's function is to advance the political agenda of the president and corresponding agency. Therefore, we expected that when the ALJ decides in opposition to this, that is, issues a decision in favor of the non-agency party and against the USDA, the likelihood of the ALJ's decision being overturned in favor of a proagency outcome should be substantial.<sup>10</sup>

**Table 3.** Logistic Regressions of Whether the USDA's Judicial Officer Reverses an ALJ's Decision During Agency Adjudication Appeals

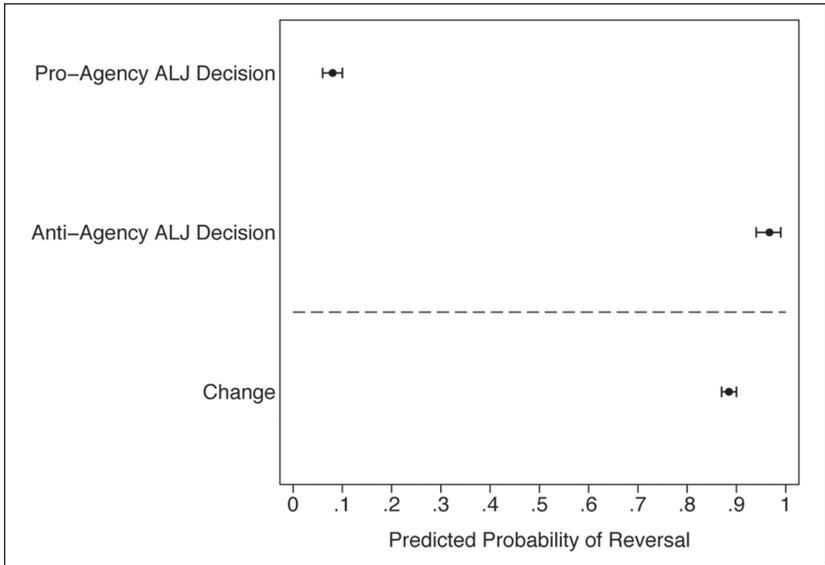
	Model 1		Model 2	
	Estimate	RSE	Estimate	RSE
Anti-agency ALJ decision	5.804**	(0.07)	5.685**	(0.22)
Ideological distance: Current agency & litigated law	2.434	(1.91)	n/a	
Different party: Current agency & litigated law	n/a		0.811**	(0.06)
After first year of new president's administration	1.905**	(0.67)	1.981**	(0.57)
Unified Government	0.511	(0.90)	0.777	(0.67)
Pro se litigant	-2.500**	(0.15)	-2.541**	(0.06)
ALJ opposite party	-0.745	(1.18)	-0.869	(0.80)
Years of ALJ service	0.007	(0.03)	0.007	(0.02)
Years of judicial officer service	-0.033**	(0.02)	-0.037**	(0.02)
Years of USDA secretary service	0.023	(0.26)	0.045	(0.30)
Litigated law age	0.014	(0.03)	0.012	(0.03)
Constant	-6.299**	(1.36)	-5.169**	(0.19)
Log Likelihood	-43.275		-43.609	
Observations	191		191	
Percent reduction in error	67.3%		69.23%	

Note: Standard errors are robust (RSE) and are clustered on the Judicial Officer deciding the appeal. Data are from USDA agency adjudications from 1980 to 2006, as collected by the authors from the volumes of *Agricultural Decisions*.

\*denotes statistical significance at the .10 level and \*\*at the .05 level.

Table 3 indicates a positive and significant effect for *Anti-Agency ALJ Decision Appealed*, as predicted. To further examine the size of this effect, we plot the predicted probabilities related to this variable (based on Model 1's estimation) in Figure 1.

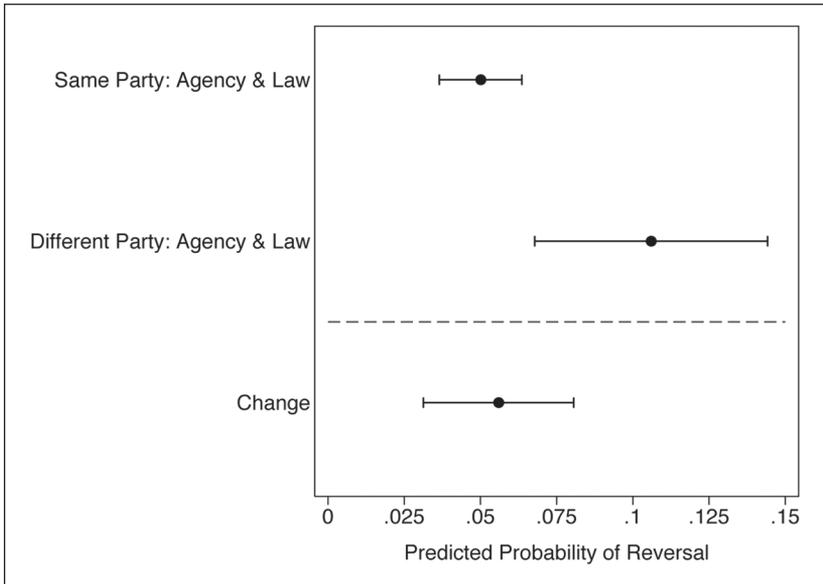
This further graphical examination is quite revealing into how powerful this effect really is. As we can see, when the ALJ rules in favor of the agency in his initial decision and the losing non-agency party appeals, the USDA Judicial Officer is very unlikely to overrule that decision—doing so only about 8% of the time. However, once the ALJ rules against the agency and the agency attorneys decide to appeal the adverse ruling, the agency head will be far more likely than not to reverse it on appeal. The likelihood of reversing in this latter situation jumps to nearly 97%. The change between these two



**Figure 1.** Predicted probability that a USDA Judicial Officer will reverse the decision of an ALJ based on whether the ALJ made an anti-agency decision or not. Probabilities computed from Model 1. Other variables are held at their modal (for dichotomous variables) and median (for continuous variables) values. The bottom panel depicts the change in the predicted probability (and 95% confidence interval around that change) between the top two values.

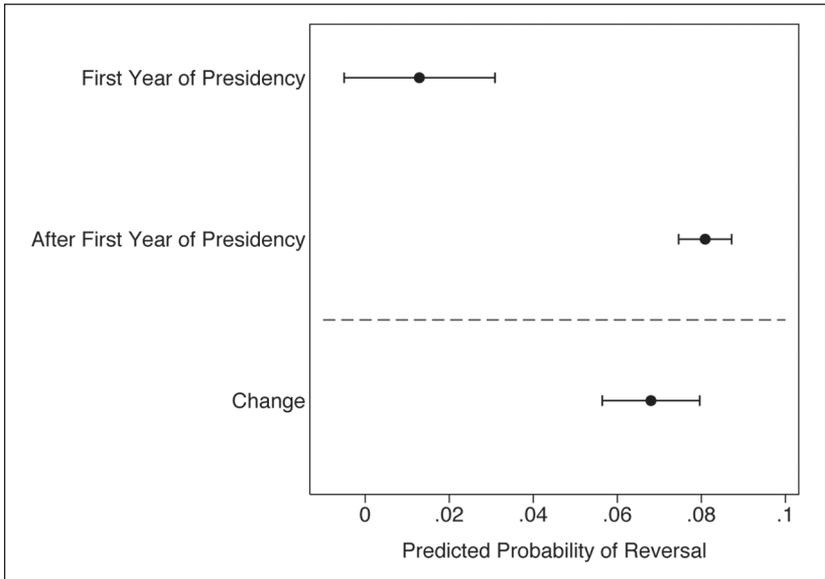
scenarios, as plotted in the bottom portion of the Figure 1, is just over 0.88. In other words, then, we find overwhelming empirical support that the USDA’s agency head adjudication delegatee uses this oversight power to promote and protect his agency’s interests.

The magnitude of this effect is unquestionably huge, but is by no means unprecedented. Recall that the numbers in Table 1, above, reveal similar patterns for other hierarchical appellate review scenarios. In each of these appellate courts, whether it is the USDA in an adjudication oversight role, the U.S. courts of appeals reviewing the federal district courts, or the Supreme Court shaping its docket, the presence of a strong and trusted repeat player serving as the petitioner moves the court from inactivity to impressive activity. And, in the case of the USDA, this scenario should be even more effective and lead to more petitioner success, since the appealing counsel is employed by the agency head—that is, the very actor that he is petitioning to for review.<sup>11</sup>



**Figure 2.** Predicted probability that a USDA Judicial Officer will reverse the decision of an ALJ based on whether the agency is controlled by the same political party as the one that controlled Congress when the law being litigated was passed. Probabilities computed from Model 2. Other variables are held at their modal (for dichotomous variables) and median (for continuous variables) values.

Turning now to our political variables and their corresponding hypotheses, our expectation in Hypothesis 2 that difference between the agency and the adjudicated law should lead to increased agency head supervision and resulting reversals receives mixed support in our models. As we note above, we measure the presence of political divergence between the agency and the law in two ways and model their effect on the dependent variable separately. *Ideological Distance: Current Agency & Litigated Law*, which is included in Model 1, provides a continuous measure of difference. As we can see from Model 1, this measure behaves in the expected positive direction, but the effect falls short of reaching statistically significant levels. In Model 2, we focus instead on the dichotomous *Different Party: Current Agency & Litigated Law*. Here, the resulting effect is positive and statistically significant on the likelihood of reversal. To provide further insight into this effect, we plot the predicted probability of reversal based on this difference. As we can see in Figure 2, the predicted probability of an average case being



**Figure 3.** Predicted probability that a USDA Judicial Officer will reverse the decision of an ALJ based on whether a case is decided during the first year of a presidential administration or after. Probabilities computed from Model 1. Other variables are held at their modal (for dichotomous variables) and median (for continuous variables) values. The bottom panel depicts the change in the predicted probability (and 95% confidence interval around that change) between the two top values.

reversed on appeal to the Judicial Officer is 0.05 when the current agency and the adjudicated law have the same political party and is nearly 0.11 when the controlling parties are different.<sup>12</sup> This result for Hypothesis 2, while dependent on measurement, does provide some evidence of agency officials that are cognizant of the dynamics of politics and what they mean for agency effectiveness.

Additionally, Hypothesis 3's variable, *After First Year of New President's Administration*, is statistically significant at the 0.05 level and is signed in the positive direction.<sup>13</sup> We plot the predicted probability of this effect in Figure 3. For the first year of a president's administration, the probability of a reversal of an ALJ is nearly nonexistent at 0.013. After that first year, however, this number increases to 0.08. This 7% difference indicates a substantive effect for how the USDA's Judicial Officer accounts for the political environment

around him—here, a transition in presidential administration—while making decisions to advance the agenda of the president.

Of our four hypotheses, only Hypothesis 4 receives no support in our statistical modeling. As we can see in Table 3, *Unified Government* is signed positively, which is the expected direction. However, this effect is not statistically significant and, thus, cannot be distinguished from 0. In other words, then, we see no difference in the likelihood of an agency head overturning an ALJ during times of unified government and divided government.

Finally, we return briefly to our party and case control variables. Of these, only the coefficient for *Pro Se Litigant* reaches statistical significance in the expected direction. As expected, the presence of pro se litigants decreases the likelihood of ALJ decision reversal. Further estimation reveals that the change in predicted probability of reversal from the presence of a non-pro se litigant to a pro se litigant is approximately 0.07. *Years of Judicial Officer Service* is also statistically significant, but, surprisingly, has a negative effect.

## Discussion

Along with rulemaking and enforcement, monitored adjudication outcomes empower an executive agency to create policies that have an enduring and profound impact. We argue that, despite being constrained by limited time and resources, executive branch agency leaders use adjudication oversight to effectively forward the agency's goals while simultaneously remaining responsive to the political environment around them. In our empirical analysis of USDA adjudications, a cabinet-level executive branch agency, we find strong support for the success of this interagency hierarchical control. We find an increase of 0.88 in the predicted probability that the agency head will reverse an ALJ when that lower court judge made an anti-agency decision and the agency's attorneys initiated an intra-agency appeal. The direction and magnitude of this result confirms that agency adjudication oversight is not only motivated by agency self-interest, but is effective in that pursuit. Also, we also find evidence of conditional political constraints in agency adjudication oversight. Specifically, agency heads take advantage of the adjudication oversight power to correct ALJ decisions when the litigated law was passed by a politically dissimilar Congress and are more likely to exert this power after the first year of a presidential administration.

Viewing this project in a broader perspective, our results may give pause to a number of administrative agency observers. This includes those that are unhappy with the growth of the bureaucracy as the federal government's "fourth branch" and the increase in the size and power of the executive

branch. Our findings indicate that adjudication oversight is a powerful means by which agencies further their goals. Furthermore, unlike rule promulgation, adjudication permits agency activism without formally involving the public via notice-and-comment periods. Though litigants are guaranteed review of executive action by an impartial and structurally independent ALJ, we suggest that these procedural guarantees may ultimately be of little help when subject to hierarchical oversight by the agency's political leader, an actor that is motivated to protect and promote his agency's political agenda. Interestingly, this echoes recent concerns from House Ways and Means committee chairman, Sam Johnson (R-Texas), who questioned the "fundamental fairness" of the federal agency adjudication system, including "whether it operates as the public has a right to expect" (Johnson, 2011).

As much as this research has unveiled a new empirical understanding of administrative agency adjudications and agency head oversight of judicial processes, we believe that it also opens the door for future systematic inquiries into other areas related to agency adjudications. As a preliminary step, this includes extending analyses to federal agencies beyond the USDA. While we have reason to believe that this agency typifies many federal executive branch agencies that utilize adjudications, only future quantitative work, including on those agencies that are not housed in the executive branch cabinet and those with very different arenas of policymaking, can confirm how representative the results that we find here are—both in direction and in magnitude.

Our research also hints at the possibility of agencies (and Congress via agency statutes) being equipped to strategically manipulate adjudication outcomes in more indirect ways than through agency head adjudication oversight. For one, the APA and agency statutes generally give agencies vast discretion in the choice of formal and informal adjudications. The choice of the latter positions an agency to avoid many of the few remaining procedural protections left in agency adjudications while likely simultaneously giving the agency more control over outcomes earlier in the process. On a grander scale, a similar choice exists for many (but not all) agencies in whether to focus their policymaking efforts in rulemaking, enforcement, adjudication, or elsewhere. This choice too has very important political and legal implications for agencies and could be subject to longitudinal empirical inquiry, both within and across agencies, but as of yet has received only sparse scholarly attention.

While the agency, the president, and Congress have received the bulk of our attention here, we would be remiss to not discuss, at least briefly, how the prospect of Article III judicial review after an agency head's decision may

affect agency adjudications. While scholars have certainly examined the resolution of administrative law cases in federal courts (e.g., Smith & Tiller, 2002; Spriggs, 1996), little work has explored how this potential judicial review might operate as a constraining effect within agency adjudications.<sup>14</sup> In practice, after an agency's adjudication process concludes, a losing litigant may appeal into the federal courts (either U.S. courts of appeals or U.S. district court, depending on the agency and statute involved). Some agencies, like the USDA, prohibit the agency from seeking judicial review of a unfavorable adjudicative decision coming from the agency head. From a legal perspective, federal courts will give a relatively high level of deference to agency adjudication decisions, overturning them only in the face of either substantial evidence or an arbitrary and capricious outcome below (Magill, 2004; Spriggs, 1996). Because our model indicates that agency heads usually only turn to reversals of ALJ decisions when it is politically appropriate to do so, we expect that federal judges (who are also generally responsive to the political environment around them) will often approve (Dahl, 1957; Epstein & Knight, 1998; Smith & Tiller, 2002). And when the federal judges do not approve, their actions may ultimately benefit the agency anyway (Fox & Stephenson, 2011). Thus, while the introduction of the federal court system is certainly something to think more about in future work, we anticipate that our expectations and findings will generally hold even in the face of this more complex environment.

Finally, due to selection concerns with empirically studying appeals (Eisenberg & Heise, 2009), our findings may hide a constraining effect that agency head preferences have on *initial* ALJ decision making. In other words, like judges serving in other judicial hierarchies, ALJs may recognize that they are subject to review by the agency head and strategically conform their outcomes in anticipation of that (Guthrie et al., 2009; Randazzo, 2008; Smith & Tiller, 2002). If ultimately confirmed, this would certainly provide support to those that argue that ALJs are a "curious mixture of autonomy and subservience" (Wertkin, 2002, p. 390) while simultaneously making our results in this current project all the more impressive. Each of these can and should be the subject of further quantitative evaluation, the results of which are likely to provide insight to administrative law, bureaucracy, and judicial politics scholars, as well as to politicians, bureaucrats, civil servants, interest groups, and the hundreds of thousands of administrative agency litigants per year.

### **Acknowledgments**

We appreciate the support of the Baldy Center for Law and Social Policy at the University at Buffalo and the Center for Empirical Research in the Law (CERL) at

Washington University, the feedback from James Battista, Gary Miller, Margaret Taylor, and Richard Waterman, and the helpful research assistance of Benjamin Guthorn, Laura Johnson, and Keith Blackley.

### **Declaration of Conflicting Interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### **Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.

### **Notes**

1. For an example outside of the DOJ, an agency official for the U.S. Department of Agriculture wrote in an opinion that “[a]gency officials have broad discretion in deciding against whom to institute disciplinary proceedings. Even if Respondent could show that he was singled out for a disciplinary action, such selection would be lawful so long as the administrative determination to selectively enforce the Plant Quarantine Acts was not arbitrary (*In re: Robert Houriet, d/b/a Hardwick Organic Produce, P.Q. Docket No. 98-0016, 1999*)”.
2. When nonagency parties can request adjudicative agency hearings, like in the U.S. Department of Health and Human Services’ Medicare benefits determinations, the necessity of the process to handle case-by-case determinations and disputes is apparent, but the policymaking and agenda setting advantages of adjudication are less clear.
3. Agency enacting statutes permit the agency head to delegate his role as final agency decision maker for purposes of adjudications to another official. This delegation is direct and can be revoked at any time by the Secretary (e.g., 7 U.S.C.S. § 450(d); Shotts & Wiseman, 2010). As such, its design, at least in theory, allows the Secretary to maintain close control over the outputs of his delegee while accounting for the Secretary’s inability to directly serve in the role himself due to time constraints and competing agency obligations. We recognize, however, that delegation like this can sometimes lead to a loss of control over outputs, something that Spence (1997) argues can occur for presidents over agencies even when they carefully and ideologically select agency heads. For some independent agencies (i.e., not in the executive branch), like at the National Labor Relations Board or the Federal Trade Commission, the agency head position is embodied by a board of appointed officials. While much of this article’s theory and findings still apply to these independent agencies, there are some distinct differences between them and executive branch agencies, including

their distinctly bipartisan board memberships and missions (Bernstein, 1954). As such, we leave it to future work to evaluate how politics and agency agendas affect their adjudications.

4. Like in state and federal courts, parties unhappy with the outcome of their ALJ hearing may appeal, something that generally exists as “of right” so long as procedural filing requirements are satisfied.
5. The agency head adjudication delegatee’s decision in *In re: Eddie C. Tuck, Edmund B. Flynt, Jr., and Donald B. Longest* provides an excellent example of what gets sacrificed in agency appellate opinions to save time:

“Based upon a careful consideration of the record in this case, the Initial Decision and Order is reversed. I disagree completely with the ALJ’s analysis of the evidence. However, for convenience, I am using portions of his Initial Decision as a draft, with additions shown by brackets, deletions shown by dots, and with trivial editorial changes not specified. It should be noted that my omissions or additions, at times, make the statement diametrically opposite to the ALJ’s views. (HPA Docket No. 91-115, 1994)”

6. In some agencies, particularly in those that are small and/or that have a relatively small number of adjudications, it is possible that there is direct communication between an agency’s attorneys and the agency head (or her adjudication delegatee) about which anti-agency ALJ decisions should be appealed. While we have no evidence of this happening, we also do not know of an explicit prohibition of it in the APA. If and when this happens, this would be an advantage that extends far beyond being *just* a repeat player and also amounts to a direct informational exchange that would not otherwise happen. While we do not focus on this as a primary explanation for adjudication oversight outcomes, it is important to note that it amounts to an observationally equivalent explanation for our repeat player-based *Anti-Agency ALJ Decision* variable included in our modeling below.
7. This conjecture requires that the actors in our model have excellent information about the ideological orientation of enacting coalitions of each of the statutes in question. This assumption may be defensible in light of the literature on bureaucratic expertise, but seems reasonable in a less stringent sense as well. Even if the agency head (or delegatee) lacks the ability to generate good estimates of statute ideology, she should still be well informed with respect to statutory content relative to the preferences and priorities of the administration in which she serves. To account for this, we measure ideological distance between the statute and the agency in two different ways in our empirical analysis.

8. Like empirical research on many appellate judicial bodies, this study relies on published opinions as its data source. In the current study, this means that neither settled disputes nor unreported decisions are included in the sample. However, the Judicial Officer is required to submit his final decisions to the *Agriculture Decisions*, meaning that the concern over unreported decisions is much smaller than it would be if we focused primarily on ALJ decisions (Jenson, 2009). Because of the preliminary stage of empirical research on administrative agency adjudications, the effects of any data selection that exists in this study, while unavoidable from a research design standpoint, are not yet entirely clear. Within federal courts, similar opinion selection results in a data set over represented with important and nonroutine disputes (e.g., Siegelman & Donohue, 1990).
9. Cases which were not heard on the merits on appeal were also excluded from the analysis. In our final model, this reduced our sample by eight observations, which is less than 5% of the sampled data.
10. While our model permits us to easily assess whether an ALJ decision was anti-agency in nature, we recognize that the assessment of “the interests of the agency” is not always straightforward. As simplification erodes, we would expect that career agency employees, like attorneys, will sometimes struggle in making this determination.
11. To ensure that our other independent variables have a similar effect on agency-initiated appeals as they do in the full model, we separately estimated Model 1 for only agency-initiated appeals. The results of this supplemental modeling, which are available upon request, are very similar to those reported above with the notable exception that *Unified Government* gains statistical significance (albeit substantively small) when isolated to just agency-initiated appeals.
12. While the 95% confidence intervals on these probabilities overlap, the key to statistical significance here is the overall change in this probability, 0.06 (that is plotted in the bottom panel of Figure 2), and the fact that the interval around this change does not include 0 (Austin & Hux, 2002; Epstein, Lindstädt, Segal, & Westerland, 2006).
13. It is worth noting that *After First Year of New President's Administration* is highly negatively correlated with whether the USDA's Judicial Officer was reviewing an ALJ decision that was made during a previous presidential administration. In other words, both this latter event and being in the first year of a new presidential administration have a negative effect on whether an ALJ's decision will be reversed. While we believe that the transitional period of a new presidential administration, and the uncertainty that comes with it on agency policy, is the driving force on this dampening effect on reversals, we suspect that a larger data set would enable us to untangle this relationship more definitively.

14. As an empirical matter, it is very difficult to systematically track agency adjudications through the federal court system. Federal courts tend to refer to prior agency opinions in different ways and without a common citation practice. Research that has successfully overcome this, like Spriggs (1996), has started at U.S. Supreme Court and worked its way back to the agency. However, from the USDA Judicial Officer's Annual Reports for 2008 through 2011, we can gain a general sense about the results of USDA-specific judicial review. During this 4-year period, federal district and circuit courts affirmed 23 Judicial Officer decisions and reversed just 4, a 15% reversal rate (e.g., Jenson, 2009).

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