

William S. Jordan, III

*Judges, Ideology, and Policy in the Administrative State:
Lessons from a Decade of Hard Look Remands of EPA Rules*

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Abstract by Lisa Hodes

This article begins by identifying the scope of discretion given to judges in administrative law. The ultimate question becomes whether political ideologies or legal principles drive judges when they review agency decisions. The author contends that if the answer is the former, then the judicial system is failing. Prior studies of the D.C. Circuit have, in fact, concluded that ideology is a significant factor influencing judges. To test this claim, the author applies a methodology to decisions where the D.C. Circuit remanded an EPA rule under the “hard look doctrine” between the years 1985-1995.

The methodology begins with two types of hypotheses: substantive hypotheses and agency-related hypotheses. First, the substantive hypotheses involve the relationship between ideology and substantive outcomes. For example, democratic judges are more likely than Republicans to vote for the outcome preferred by an environmental organization or opposed by industry. Second, agency-related hypotheses concern the relationship between ideology and the functioning of federal agencies. For example, Republican judges will tend to vote against agency action more than Democratic judges. The author applies these hypotheses to three categories of substantive issues that correspond to the standard of review the court used: Chevron I, Chevron II, and Hard Look. The author also distinguishes between “All Policy Opportunities” and “Significant Policy Opportunities” in order to determine how much discretion the judge could reasonably apply to an issue.

The results of the author’s study contradict earlier studies pinpointing political ideology as a motivating factor when a judge reviews an agency decision. Overall, Republicans were found to favor the environmentalist position more than Democrats - a position contrary to the Republican platform. Similarly, the Democrats favored industry more frequently than Republicans - a position with deeper roots in the Republican camp. Although the author admits the numbers may be too small to be decisive, the author posits that, for judicial panels of three, ideology is not the dominant force. With the exception of two judges (one of whom is a pro-environment Republican), the database reveals similar results for individual performance. Therefore, political principles seem to trump political ideology in the D.C. Circuit with regard to EPA decisions.