TO PROSECUTE OR NOT TO PROSECUTE, THAT IS THE QUESTION: THE FEDERAL TRADE COMMISSION AND ANTITRUST DIVISION'S ANTITRUST ENFORCEMENT DILEMMA UNDER JUDICIAL UNCERTAINTY

A Dissertation

by

QUAN LI

Submitted to the Office of Graduate Studies of
Texas A&M University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

August 2006

Major Subject: Political Science

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Approved by:

Chair of Committee,	Roy B. Flemming
Committee Members,	James Rogers
	Kenneth J. Meier
	William West
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ABSTRACT

To Prosecute or Not to Prosecute, That Is the Question: The Federal Trade Commission and Antitrust Division's Antitrust Enforcement Dilemma under Judicial Uncertainty. (August 2006)

Quan Li, B.A., Shanghai International Studies University;
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This dissertation develops and empirically tests a theory of interaction between the federal appellate courts and the bureaucracy with regard to bureaucratic prosecution. Modeling the bureaucracy as a forward-looking and risk-averse institution and assuming that there is no uncertainty at the district court level, I posit that institutional uncertainty created by appellate courts' random assignment of judges and cases affects the likelihood of bureaucratic prosecution. Given that the decision from a specific panel of a circuit court can be estimated by its median judge's policy position and that the bureaucracy does not know which panel will hear the case, there exists institutional uncertainty at the appellate court level in terms of ideological differences among panels represented by their median judges. I contend that increasing ideological heterogeneity within an appellate court measured by its *ideological variance* among judges increases institutional uncertainty with respect to the bureaucracy's policy position, which in turn discourages bureaucratic prosecution. My examination of the Antitrust Division's prosecution record from 1950 to 1994 demonstrates that ideological variance within the

federal circuit courts has a significant impact on the likelihood of prosecution by the agency. The Antitrust Division is less likely to prosecute when facing a circuit court with large ideological variance among judges. Studies of judicial decision-making and judicial control of the bureaucracy have not fully examined the implication of appellate courts' institutional practice of randomly assigning judges and cases. The development of ideological variance among circuit judges, in this project, as a measure of the institutional uncertainty created by the random assignment process suggests that the courts' unique institutional practice can now be fully incorporated into future studies of the interaction between the judiciary and the bureaucracy.

DEDICATION

For my parents, Hancheng and Guoqiang, my wife, Jin, and my daughter, Xinwu (Audrey), who have made this project possible with their enduring love and patience.

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CHAPTER I

INTRODUCTION

The development of an administrative state in the U.S. since the New Deal has given rise to a debate regarding the balance between controlling the bureaucracy and maintaining bureaucratic efficiency and efficacy. Specifically, the question is about how to effectively control the bureaucracy so that it does not abuse its power and create injustice for citizens while stifling the bureaucracy's ability to serve the citizenry. Underlying the debate is the tension between citizens' ever-rising expectations of the government and their distrust of the government. High expectations of the government demand the bureaucracy to provide more social services, which requires more power for the bureaucracy. The traditional distrust of the bureaucracy, on the contrary, demands that it should be placed under constant oversight so that individuals' fundamental liberties are protected against bureaucratic intrusion.

Given that numerous studies have examined the mechanisms through which the bureaucracy can be controlled (Meier 1993), I chose to study judicial influence on the bureaucracy because it is a relatively less developed area compared to other control mechanisms such as presidential and congressional oversight. Despite discussions in the administrative law literature about the purpose and nature of judicial review of the bureaucracy, it is not clear how the judiciary's institutional characters affect its interaction with the bureaucracy. While judges serve on the appellate courts and the Supreme Court act as a group, we do not know how the reviewing courts' collective

This dissertation follows the style of *American Political Science Review*.

nature influences bureaucratic behavior. More importantly, when it comes to the relationship between federal appellate courts and the bureaucracy, we don't know how the courts' institutional decision-making process in terms of randomly assigning judges to panels affects bureaucratic decision-making, especially prosecutorial decision-making. In this project, I develop a theory of judicial influence on bureaucratic prosecution that hinges on uncertainty created by the appellate courts' institutional decision-making process. The dependent variable, therefore, is the bureaucratic decision whether or not to prosecute a case when facing uncertainty at the appellate court level. The empirical test of the theory is based on the data collected from the antitrust agencies' prosecution record. I focus on antitrust prosecution because it allows me to test the applicability of my theory to both departmental agencies and independent commissions while controlling for policy factors. In the context of antitrust, the Antitrust Division of the Department of Justice is a departmental agency headed by an Assistant Attorney General. The Federal Trade Commission, on the other hand, is an independent commission run by five commissioners. Not only does this project have a normative implication for controlling the discretionary power of the bureaucracy, it also contributes to the existing literature with theoretical and empirical improvement.

Discretionary Justice and Prosecution

From a normative standpoint, it is important to study the choice between prosecution and non-prosecution because this aspect of bureaucratic discretion is generally ignored by scholars. The focus of the bureaucratic control literature has been on how to rein in the bureaucracy so that it does not depart from positions agreed upon

by the executive and legislature at the time of legislation (e.g., Calver, McCubbins, and Weingast 1989, Gely and Spiller 1990, Spiller 1992a, Spiller and Tiller 1997, Tiller 1998).

But as Davis (1969) suggests, the most important aspect of bureaucratic discretion is *inaction*; the discretion not to initiate, not to investigate, not to deal, or not to prosecute. According to Davis, the bureaucracy is more likely to produce injustice when it chooses not to act because inaction is least supervised by external forces such as the judiciary. Based on Davis's insight on bureaucratic inaction and its empirical implication for judicial review, this project suggests that there can be an institutional solution to stimulate bureaucratic prosecution, which will enable the judiciary to play a stronger role in overseeing the bureaucracy. Given such an ultimate objective, the institutional solution, at minimum, should not deter bureaucratic prosecution. If the bureaucracy functions in an environment that forces it not to prosecute, the potential for judicial review will be greatly reduced. Instead, the courts will rely heavily on private party litigation against the bureaucracy, which is always a formidable undertaking from an individual's perspective. As a result, judicial review of bureaucratic prosecution will be rare and unsystematic. As I argue in this dissertation, the institutional decision-making process of the appellate courts plays a fundamental role in finding an institutional solution to improve judicial review and strike a balance between prosecution and non-prosecution.

A Theoretical Gap

In addition to the normative concern regarding improving judicial review of the discretionary power of the bureaucracy, this project makes a theoretical contribution by bridging the gap between the judicial politics literature and the bureaucratic control literature. Davis's solution to reducing the discretionary power of the bureaucracy dismisses the judiciary as an effective check on bureaucratic inaction and argues for imposing more administrative rules. One reason that Davis has not been challenged on this question is due to the research tradition in judicial behavior.

The behavioral tradition in judicial politics has been concerned primarily with judicial ideology at the individual level, which reflects the pioneer works of Pritchett (1948), Schubert (1965), and Rohde and Spaeth (1976). Nevertheless, as Schubert (1974) pointed out, judicial ideology at the individual level serves only as a stepping stone for examining the full complexity of judicial decision-making. Institutional variables, cultural variables, biological variables, and social variables can all contribute to our understanding of judicial politics. Therefore, drawing on the extensive research on the effects of collective decision-making on judicial behavior (Howard 1968, Malzman, Spriggs, and Wahlbeck 2000, Murphy 1966, Ulmer 1971), I choose to focus on the appellate courts' *collective* decision-making process in this project; an institutional factor that not only affects judicial decision-making but also influences the bureaucracy.

As suggested by small group theory (e.g., Howard 1968, Murphy 1966), judges behave differently in a collective setting than they do when acting alone. Yet an examination of the literature demonstrates that no one has linked the study of group

context within the courts to its effects on bureaucratic decision making. Instead, the major focus of small group theory in judicial politics has been on the fluidity of judges' voting patterns (Howard 1968 versus Brenner 1980, 1982), minimum winning coalition formation (Rohde 1972), and the opinion writing dynamics (Maltzman, Spriggs, and Wahlbeck 2000). We have yet to see studies that examine how the courts' collective decision-making process affects its interaction with the bureaucracy. Moreover, because small group studies have focused primarily on the Supreme Court, scholars to a large extent have ignored the effect of appellate courts' institutional decision-making process on their group decision-making dynamics and their implication for bureaucratic decision-making. A major difference of decision-making process between the Supreme Court and appellate courts is that the appellate courts randomly assign their judges to panels of three to review appeals. While small group studies based on the Supreme Court can provide us with insights on the group decision-making dynamics of appellate court panel, we do not know how the random assignment process of selecting these panels influence the bureaucracy.

Moreover, scholars who study the courts' function in controlling the bureaucracy tend to treat the judiciary as a unitary institution whose preferences can be represented by its median member (e.g., Tiller and Spiller 1999, Spiller and Tiller 1997). Such a practice is also common in the study of the relationship between the judiciary and Congress and the president (e.g., Epstein and Knight 1998).

But as Rogers (2001) points out, focusing on the median judge's ideology relies on a common set of assumptions. The median judge's choice becomes the court's choice

when judges' preferences are single peaked and the policy domain is unidimensional. For the Supreme Court, the median voter theorem works well due to the relative ease of locating the median justice as a result of its stable membership. When it comes to the appellate courts, however, the median voter theorem provides bureaucracies with limited help in predicting a panel's possible decision because they cannot anticipate the composition of the panel and thus its ideological alignment since appellate courts randomly assign judges to panels. In other words, litigants when filing an appeal do not know which panel they will face and therefore the median voter theorem has very little utility for them. Consequently, if we focus exclusively on a panel's median judge's policy preferences in our study of the interaction between the appellate courts and the bureaucracy, we essentially ignore the uncertainty surrounding the possible range of median judges in panels due to the courts' random assignment process. Median judges' policy preferences may provide us point estimates of panels, but it is the *range* of possible point estimates that create problems for litigants and bureaucracies.

Therefore, we see that the small group study in judicial politics has a very narrow focus and does not take into consideration the appellate courts' institutional practice of random assignment of judges and cases and their implications for bureaucratic decision-making. In addition, scholars who study the interaction between the appellate courts and the bureaucracy ignore also the courts' random assignment process and rely heavily on the median voter theorem. By studying the effect of random assignment of judges on bureaucratic prosecution, this project contributes to both the bureaucratic control literature and the judicial politics literature while addressing and incorporating a

common feature of decision theory: uncertainty. In this dissertation, I try to incorporate the group context into the study of the interaction between the judiciary and antitrust agencies and examine the effect of judicial ideological variance on antitrust prosecution. As I will demonstrate in the following chapters, group context within the federal appellate courts manifested through ideological variance among judges significantly affects the likelihood that the antitrust agencies will prosecute their investigations. The larger the variances among judges, the less likely that agencies prosecute.

Prosecution as a Last Resort

Besides the normative and theoretical implications, the empirical implication of this project centers on understanding why the bureaucratic agencies with prosecutorial powers treats prosecution as a last resort. As I pointed out earlier, Davis's discussion of bureaucratic inaction, the bureaucracy's choice of prosecution versus non-prosecution, has a profound implication for judicial review because the bureaucracy can significantly reduce the scope of judicial review by not prosecuting cases. While current studies of bureaucratic prosecution focus on its cost, this project proposes that the legal and institutional uncertainties generated by the appellate courts' collective decision-making process play an important role in determining the likelihood of bureaucratic prosecution and explain why the bureaucracy treats prosecution as a last resort.

According to Hawkins (2002), prosecution, compared to other informal enforcement procedures such as settlements, functions as the foremost enforcement tool:

> [I]t is the ultimate formal expression of the law … that makes all other law enforcement possible by granting credibility to more private and informal practices and thereby, in the great majority of cases, foreclosing the possibility of costly prosecution and trial (Hawkins 2002, 13).

In other words, prosecution serves several purposes simultaneously. It indicates bureaucratic activity in pursuit of legislative mandate. It serves an expressive objective by revealing affirmatively the social and political values embedded in agencies' enabling legislation. Finally, it functions as a back-up mechanism that gives credibility to informal enforcement tools.

Despite these benefits, Hawkins's study suggests that prosecution is always considered as a last resort. It is usually undertaken under one of two circumstances. Either agencies decide to prosecute because no alternative enforcement mechanism is available or they have exhausted all other enforcement tools. For Hawkins, multiple reasons contribute to such a choice.

First of all, prosecution is in and of itself more expensive than informal enforcement tools in terms of time, money, and human resources. Second, it draws the attention of a larger audience to bureaucratic actions, which, as Baumgartner and Jones (1993) argue, may destabilize an agency's political environment. A larger public audience not only brings more attention to agency behavior but also puts more pressure on agencies to succeed. Third, a "good case" in the public policy sense is not necessarily congruent with a "good case" in the legal sense. In transforming a case into a legal matter, agencies usually face questions such as what rules need to be chosen, the sufficiency and reliability of evidence, the persuasiveness of witnesses, and the legal strength of the defense. Substantive policy concerns may be lost during such transformation because

> …the goal of adversarial legal action is to win the case at hand. Inspectors are encouraged to gather evidence for legal purposes, rather than to find facts for regulatory purposes, leading to a systematic tendency for certain events or acts to be repeatedly subject to enforcement, to the neglect of others. If a case seems to be one worth prosecuting, the inspector's decision-making is shaped by an assessment of the prospects of conviction rather than by some broader strategic policy interests to be advanced, preserved, or protected. Winning the present case takes priority (Hawkins 2002, 409).

Finally, in prosecution the bureaucracy loses control of the outcome to the courts. This adds more uncertainty to agencies' output compared to the use of other informal enforcement tools.

Therefore, Hawkins contends that, despite the considerable payoffs from successful prosecution, in general the bureaucracy avoids prosecution because of the difficulties involved. Nevertheless, avoiding prosecution does not mean abandoning prosecution entirely. Given that the bureaucracy does prosecute, the empirical question then becomes under what conditions will it do so. As I argue in this dissertation, uncertainty imposed by the appellate courts plays a critical role in the bureaucracy's decision to prosecute. Such uncertainty, I further argue, originates in the courts' institutional decision-making process.

Antitrust Prosecution

When it comes to antitrust prosecution specifically, Hawkins's general conclusion about prosecution being a last resort fits the practices of antitrust agencies. According to Calkins (1998), the antitrust agencies achieve three purposes through prosecution: to correct wrongly decided judicial decisions; to influence the development of the antitrust law; and to increase certainty and predictability (5). Nevertheless, Weaver's (1977) study of the Antitrust Division shows that "of the cases investigated

'seriously,' prosecution is recommended in fewer than half; most of the rejections occur because the case cannot possibly be won" (Weaver 1977, 81).

Given Hawkins's general conclusion about bureaucratic agencies' tendency to avoid prosecution in spite of its benefits and Weaver's finding that the Antitrust Division prosecutes less than half of its investigation, the question becomes what makes antitrust agencies prosecute. As I argue in this dissertation, uncertainty imposed by the federal appellate courts as a result of the courts' collective decision-making process plays a crucial role in antitrust agencies' selection of "winnable" cases to prosecute.

By empirically testing the theory developed in this dissertation in the policy domain of antitrust, I also contribute to the existing study of antitrust agencies with a different perspective. While the focus of this project is on the choice of prosecution versus non-prosecution, the existing literature has focused on policy changes in the antitrust agencies. For example, both Eisner and Meier (1990) and Wood and Anderson (1993) studied the Antitrust Division and focused on the agency's choice of different types of antitrust cases. To measure policy change in terms of priorities of cases, Eisner and Meier examined the percentage of cases prosecuted each year in price-fixing, monopolization, and merger. They did not study, however, cases that were not prosecuted by the Division. Similarly, Wood and Anderson compared the percentages of criminal and civil prosecution but did not examine non-prosecuted cases.[1]

By focusing on the choice between prosecution and non-prosecution, this project offers a broader picture of the antitrust agencies' decision making process. Although

[1] They do have a model for examining the effect of political principals on the total number of prosecution, but the empirical evidence does not provide strong support to their theoretical argument.

examining prosecuted cases and comparing them across can help reveal the agencies' policy priorities, ignoring the decision not to prosecute prevents us from understanding the question of which cases to prosecute. Regardless of a case's legal nature, be it a merger case or a price-fixing case, the primary question faced by the agencies is always whether the case is good for prosecution. As I argue in this project, the group dynamics within the appellate courts play a significant role in affecting prosecution versus non-prosecution.

Organization of Dissertation

In addition to this chapter, there are five other chapters in this project. Chapter II reviews the antitrust agencies' organizational structure and enforcement procedure. Chapter III presents the legal framework within which the antitrust agencies carry out enforcement against antitrust violations and include a general discussion of legal uncertainty. I specifically focus on two legal standards: the rule of reason and per se illegality. I demonstrate in this chapter that the Supreme Court, over the history of antitrust law development, vacillates between the two legal standards.

Chapter IV is the theory chapter, in which I review the sources of institutional uncertainty faced by the bureaucracy in prosecution and argue that variance in judicial choices with respect to the bureaucracy's position is a result of the courts' group decision-making context. I propose in this chapter that ideological variance within an appellate court can function as a good indicator of the court's internal group decision-making dynamics, which in turn affect the likelihood that antitrust agencies would prosecute. Chapter V is the empirical chapter that presents support to my theory based

on the Antitrust Division prosecution data from 1950 to 1994. The test of the Federal Trade Commission is inconclusive. I propose that structural differences between the two agencies may contribute to the different results. Chapter VI is the concluding chapter in which I summarize the entire project and its contribution to the existing literature. Future research agenda developed from this project are discussed in this chapter as well.

CHAPTER II

THE ENFORCEMENT PROCEDURE OF THE ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION

In this chapter, I give an overview of the enforcement procedure followed by the Antitrust Division and the Federal Trade Commission (FTC), respectively. The purpose of this chapter is to provide a basic understanding of the agencies with respect to their prosecution decisions.

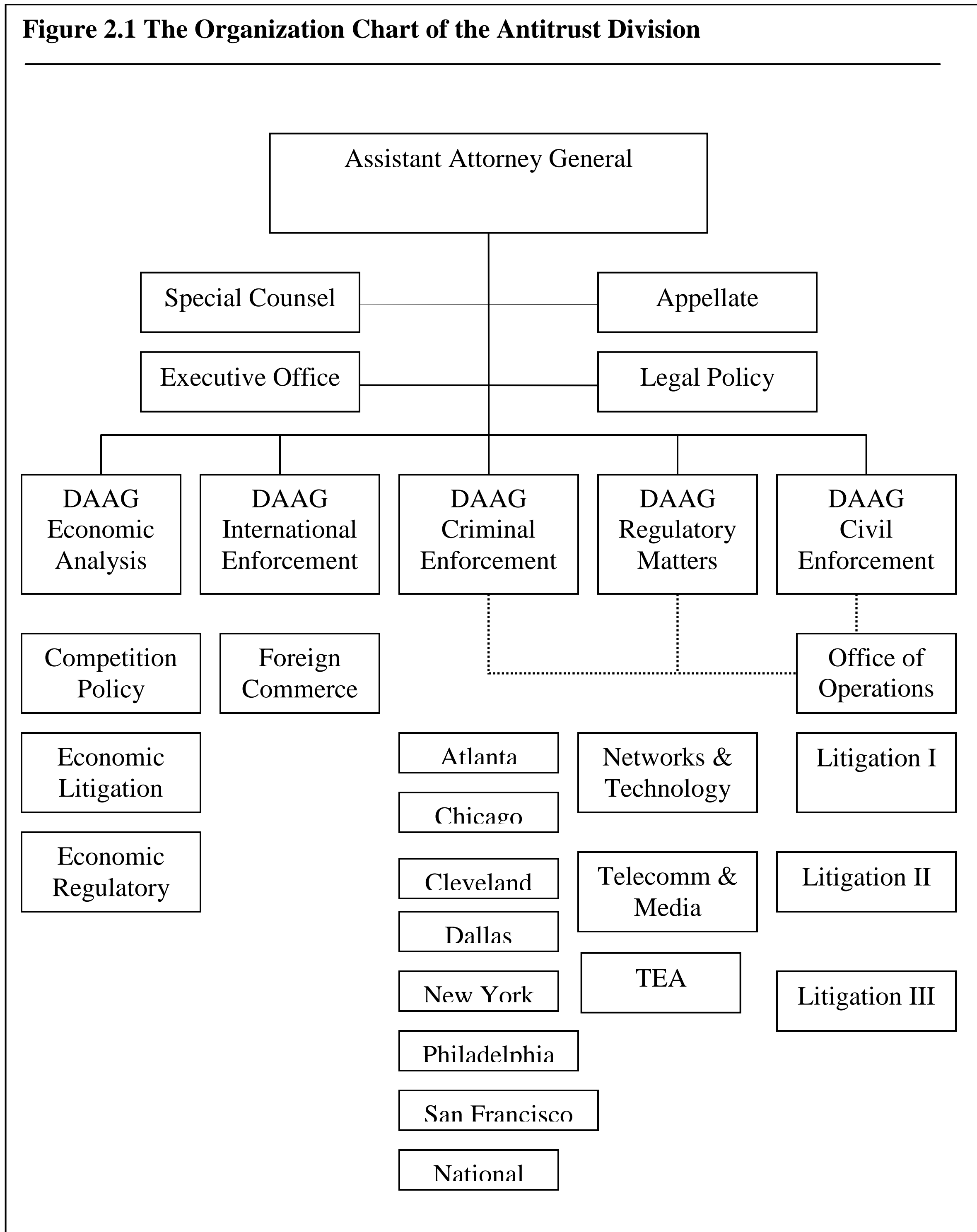
Antitrust Division and Its Enforcement Procedure[2]

The Antitrust Division is an executive agency located within the Department of Justice and is headed by an Assistant Attorney General (AAG), who is nominated by the President and confirmed by the Senate. Under the Assistant Attorney General, as shown in Figure 2.1,[3] five Deputy Assistant Attorneys General (DAAG) supervise 11 of the 13 sections of the agency.[4] In addition to these 11 sections, the appellate section handles the Division's appeals, both civil and criminal, and reports directly to the AAG. The legal policy section is responsible for policy analysis and long-term planning.

The sections that are particularly relevant to this project are the ones that handle prosecution. The criminal enforcement branch of the Division, supervised by a DAAG, has seven field offices and one national office. The civil enforcement branch of the Division has three sections: Litigation I, II, and III sections. Between the DAAGs and

[2] I rely on the two agencies' manuals of enforcement for the discussion of their enforcement procedure in this chapter.
[3] This is adapted from the Antitrust Division's website: http://www.usdoj.gov/atr/org.htm.
[4] These sections are competition policy section, economic litigation section, economic regulatory section, foreign commerce section, legal policy section, litigation I, II, and III sections, national criminal enforcement section, networks and technology enforcement section, telecommunications and media enforcement section, and transportation, energy, and agriculture section.

Figure 2.1 The Organization Chart of the Antitrust Division



the enforcement sections, the Office of Operations coordinates the Division's investigations and prosecution, both civil and criminal.

As shown in Figure 2.2, the Antitrust Division's enforcement process starts with preliminary investigations after the Division becomes aware of possible violations.[5] The Division will authorize a preliminary inquiry if all of the following four conditions are met:

a. there are sufficient indications of evidence of an antitrust violation;
b. the amount of commerce affected is substantial;
c. the investigation will not needless duplicate or interfere with other efforts of the Division, the Federal Trade Commission, a United States Attorney, or a state Attorney General;
d. and resources are available to devote to the investigation.

A preliminary inquiry request only needs approval from appropriate directors of field offices and litigation sections. Investigation ensues once it gets clearance from the FTC so that action by the Division does not duplicate or intrude the FTC. At this point a preliminary inquiry is not formally "civil" or "criminal," although a preliminary judgment has been made that the inquiry will be conducted as a civil or criminal matter when the request for preliminary inquiry is submitted. Mergers, cases of collusion, and monopolization are usually pursued with civil investigation. Per se violations such as price fixing and bid rigging are pursued with criminal investigation.

[5] There are, in general, eight different ways the Division becomes aware of possible violations. Citizens and businesses can file complaints to report unlawful conduct; the Division's review of premerger filing can detect violations; the media's reports of business practices can reveal violations; informants or insiders can provide information about violations; other government departments or agencies can notify the Division about possible violations; US attorneys and state attorneys general may also inform the Division; systematic industry-wide analysis conducted by the Division itself may reveal unlawful conduct; finally, violations may come to the Division's attention through monitoring private antitrust prosecution.

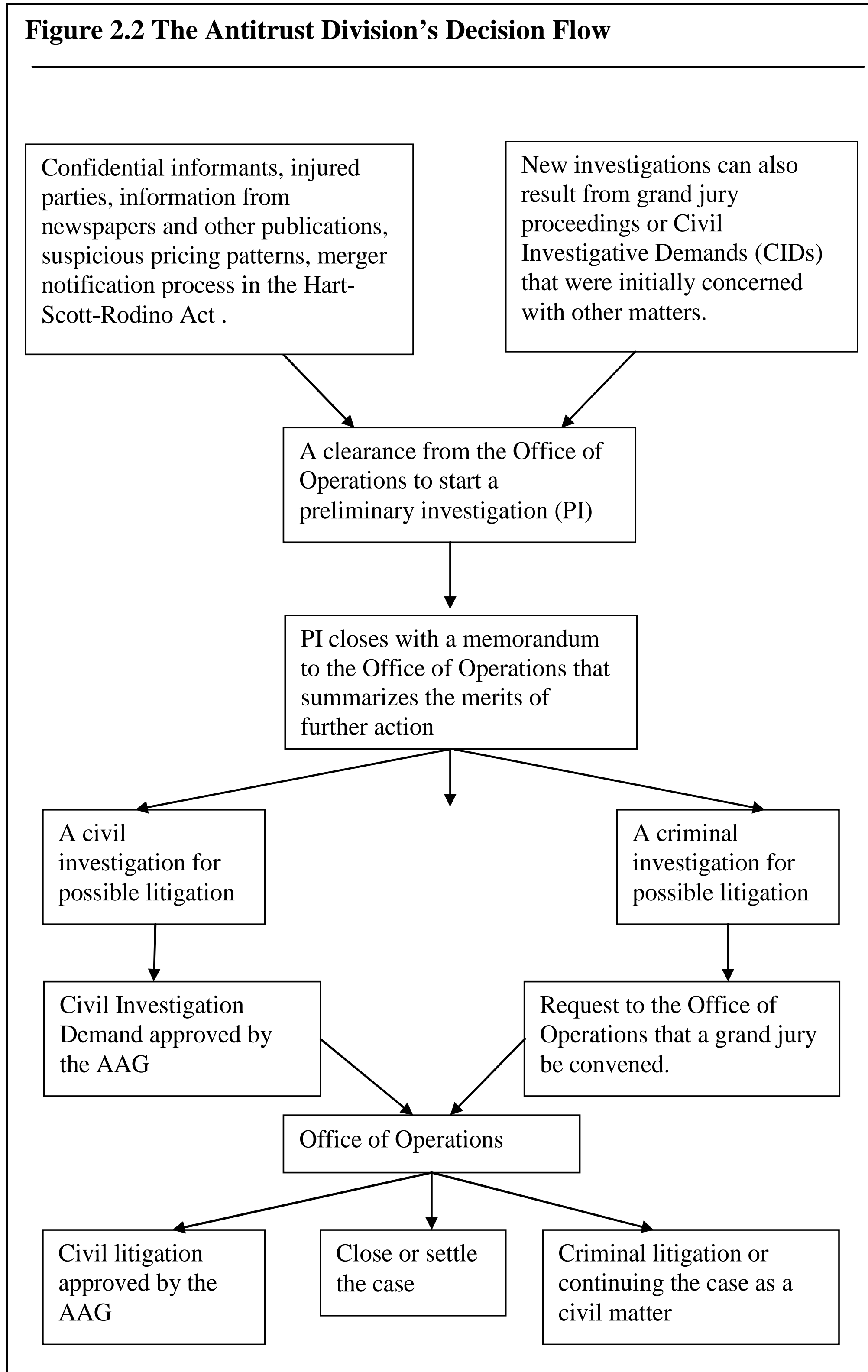


Figure 2.2 The Antitrust Division's Decision Flow
Confidential informants, injured parties, information from newspapers and other publications, suspicious pricing patterns, merger notification process in the Hart-Scott-Rodino Act .
New investigations can also result from grand jury proceedings or Civil Investigative Demands (CIDs) that were initially concerned with other matters.
A clearance from the Office of Operations to start a preliminary investigation (PI)
PI closes with a memorandum to the Office of Operations that summarizes the merits of further action
A civil investigation for possible litigation
A criminal investigation for possible litigation
Civil Investigation Demand approved by the AAG
Request to the Office of Operations that a grand jury be convened.
Office of Operations
Civil litigation approved by the AAG
Close or settle the case
Criminal litigation or continuing the case as a civil matter

For a civil matter, the most important factor affecting the approval of a request for preliminary inquiry is the matter's doctrinal significance. The Director of Enforcement is more likely to approve a request if the potential significance of the matter is great. Other factors that influence the Director's decision include legal theory, relevant economic learning, the strength of likely defenses, and policy implications.

For a violation that appears more suitable for a criminal proceeding, approval depends on three questions. The Division needs to decide whether there is probable cause for a criminal investigation. The matter also needs to be significant. Factors that determine a case's "significance" include: "volume of commerce affected; geographic area impacted; the potential for expansion of the investigation or prosecution from a particular geographic area and industry to an investigation or prosecution in other areas or industries; the deterrent impact and visibility of the investigation and/or prosecution; the degree of culpability of conspirators; and whether the scheme involved a fraud on the federal government." Among all of the factors, whether the scheme inflicts any damages on the federal government can potentially prevail over other factors and be the determining factor. For less significant cases, the Division also makes an assessment about the resources needed for investigation and prosecution. The resource question is only relevant when insignificant cases are involved. The Division is committed to prosecuting all significant cases.

After reviewing the results of a preliminary inquiry, the Division will make a formal decision whether to carry out a formal civil or criminal investigation. The Division carries out a formal civil investigation after the Assistant Attorney General

(AAG) for the Antitrust approves the issuance of a Civil Investigative Demand (CID). The function of CIDs is to compel production of information and documents relevant to the civil investigation. After concluding the investigation, the Office of Operations is responsible for recommending to the AAG to either close the civil investigation, settle the investigation with a consent decree, or prosecute it as a civil case in a federal district court.

In order to enter a civil consent judgment, the Division needs to comply with the Antitrust Procedures and Penalties Act of 1974 (APPA), which requires public scrutiny and comment of the consent judgment. The proposed settlement must be published in the Federal Register at least 60 days prior to its effective date, and the final version of the consent decree needs to be filed with a district court. The court will only sign and enter the settlement after all the requirements of the APPA have been met. As a general rule, however, the Division does not initiate settlement discussions. When defense counsel makes an attempt to negotiate a settlement, trial staff in the Division then prepare a draft of a settlement under the condition that it is in the government's interest to settle.

If the AAG decides to prosecute the case, it fills a complaint. After the complaint is filed with the Clerk of the Court, if needed, the Division can seek for preliminary relief in the forms of either a temporary restraining order (TRO) or a preliminary injunction (PI). In many instances, either the Division or defendants may move for summary judgment to expedite the trial procedure.

Criminal prosecutions start with a request to the Office of Operations that a grand jury be convened. When preparing this request, staff attorneys take into serious

consideration the likelihood that the Division will proceed with a criminal prosecution given that a grand jury investigation develops sufficient evidence. Information for the grand jury request comes from a preliminary inquiry or a CID investigation. In general, however, information contained in a complaint filed by a private party is sufficient to request a grand jury investigation without even a preliminary inquiry. After a grand jury investigation, the Division attorneys usually will inform potential defendants that they are a target of that investigation while waiting for the final decision by the AAG whether or not the defendants will be prosecuted. Since no action can be taken during the period of grand jury deliberation, the Division, in general, does not inform defendants of its decision to prosecute.

Criminal prosecution starts when the AAG approves the recommendation of pursuing a grand jury indictment. The staff will summarize the evidence in an indictment and presents it to a grand jury. After the grand jury returns an indictment, a summons will be issued to defendants who will then appear for arraignment. Once a defendant is convicted at trial, the Division will then make sentencing recommendations to the district court complying with the United States Sentencing Guidelines.

Defendants can enter a plea of guilty or nolo contendere either before or after a grand jury indictment. As a general rule, defendants bear the responsibility for initiating negotiations over the plea. They can do so immediately after being informed by the Division as a target of criminal investigation or after being indicted by a grand jury. If defendants in pre-indictment plea bargaining do not negotiate in good faith and employ tactics to delay prosecution, the Division would proceed with an indictment. It should be

noted that the Division, as a general rule, will oppose pleas of nolo contendere at the arraignment except for some extraordinary circumstances.[6] Once the AAG approves a plea agreement, it is submitted along with the Division's sentencing recommendations to a district court that decides whether or not to accept it.

In both civil and criminal prosecution, the Division's Appellate Section is informed of prosecution after a final judgment has been returned in the district court. In practice, the trial staff contacts the Appellate Section before any final judgment if an appeal is highly likely. If the Division decides to appeal, the Appellate Section prepares a final version of a memorandum and transmits it to the Solicitor General's Office. In general, an Assistant to the Solicitor General and a Deputy Solicitor General review the memorandum and make a recommendation to the Solicitor General, who makes a final decision as to whether or not the case will be appealed to a circuit court.

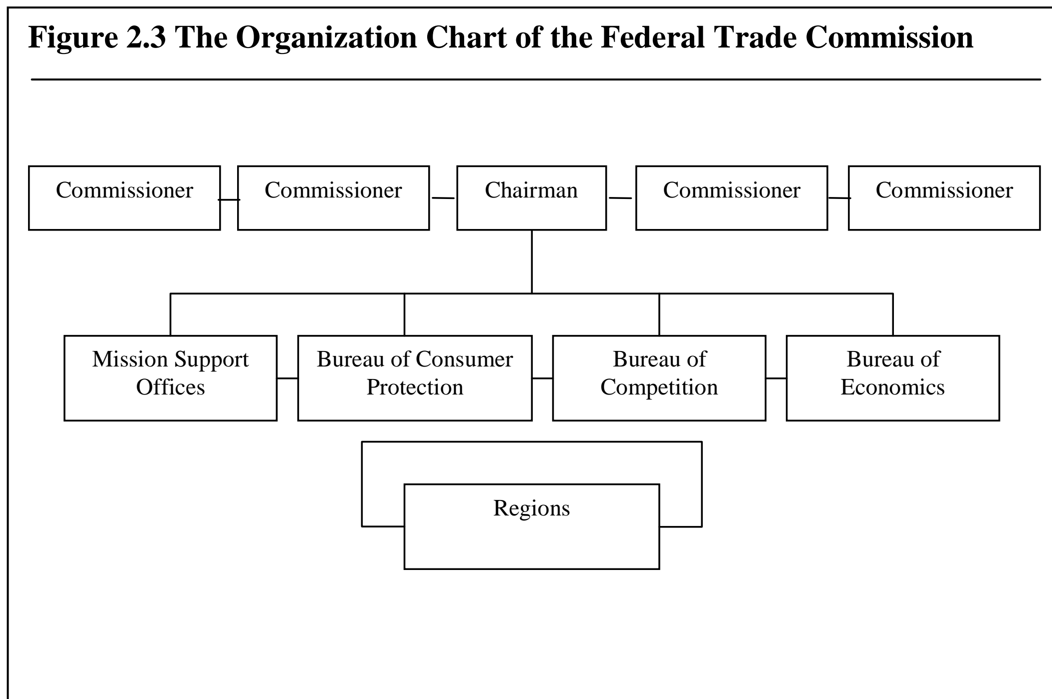
Federal Trade Commission and Its Enforcement Procedure

The Federal Trade Commission (FTC) is an independent regulatory agency that reports directly to Congress. It is headed by a five-member Commission with staggered 7-year tenures. No more then three commissioners can come from the same party. The president chooses a member to act as Chairman. The organization of the Commission, as shown below in Figure 2.3,[7] is composed mostly by three bureaus: the Bureau of Consumer protection, which protects consumers against unfair, deceptive, or fraudulent practices by enforcing consumer protection laws; the Bureau of Competition, which

[6] Most defendants prefer to enter a plea agreement in pre-indictment period because they only need to plead guilty to an information rather than to an indictment. Even though there is no legal difference between an indictment and an information, for most defendants, an indictment sounds more serious than an information.
[7] This is adapted from the annual report of the Federal Trade Commission.

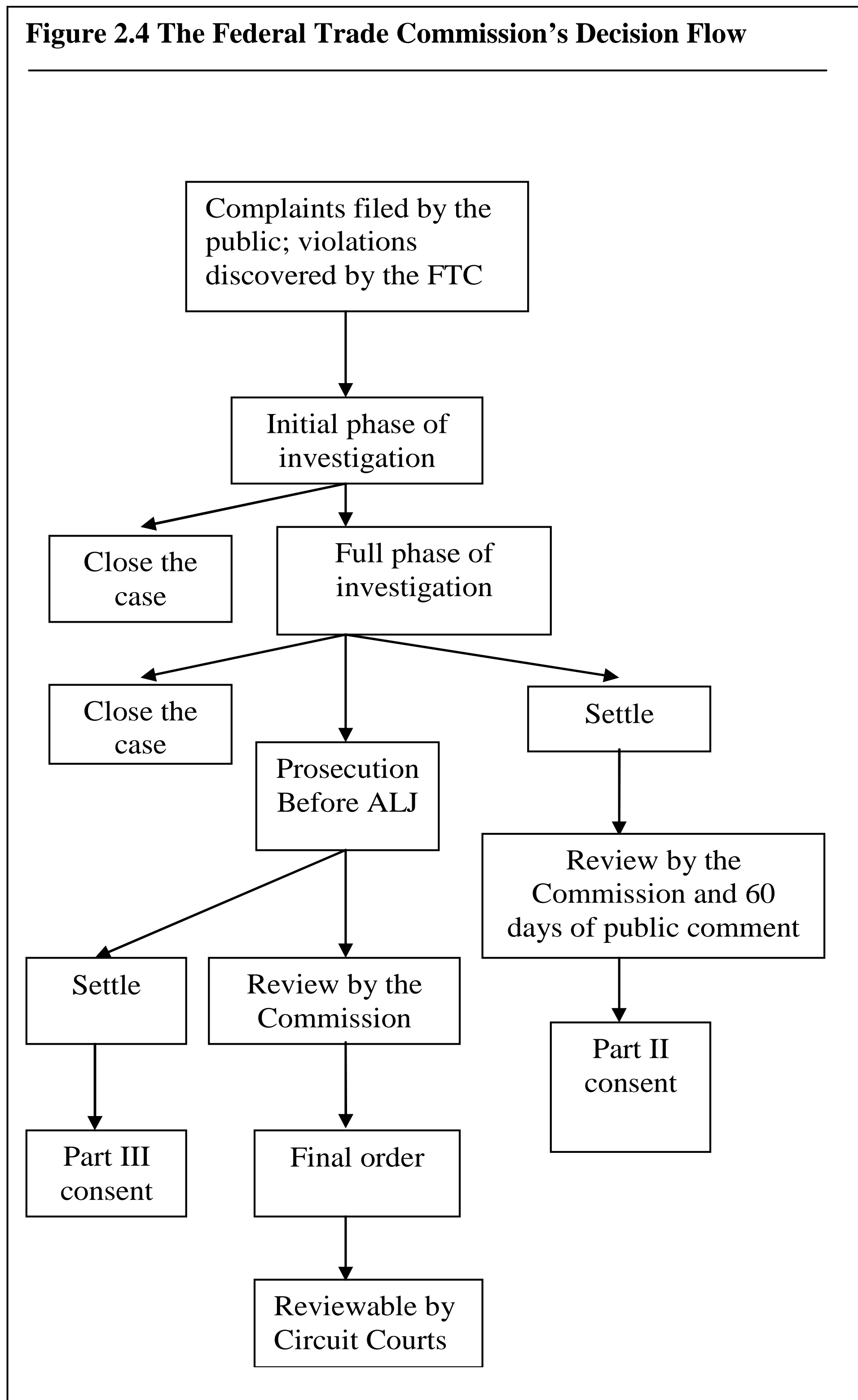
handles antitrust issues; and the Bureau of Economics, which conducts policy analysis and evaluates the Commission's economic impact.

Figure 2.3 The Organization Chart of the Federal Trade Commission



The mission support offices include the office of Congressional Relations, the office of the Executive Direction, the Office of the General Counsel, the office of Public Affairs, the office of Administrative Law Judges, and the office of the Secretary. The Commission also has seven regional offices; the Northeast, Southeast, East-central, Midwest, North-West, Southwest, and West. These regional offices have the authority to conduct investigations and litigation. What is particular relevant to this project is the Bureau of Competition, which is the Commission's antitrust branch.

Figure 2.4 The Federal Trade Commission's Decision Flow



As a general matter, the FTC's antitrust enforcement procedure is different from the Antitrust Division's because it only carries out civil actions and it has its own administrative adjudication procedure, although decisions made by the Commission are still subject to judicial review. Its investigation stage, as shown in Figure 2.4, however, is very similar to that of the Antitrust Division. The Commission initiates an investigation on the basis of complaints filed by the public or studies done by its staff.[8] In general, the Commission divides an investigation into an initial phase and a full phase.

The purpose of the initial phase is to gather sufficient evidence to determine whether there are grounds for a full investigation. If the initial investigation reveals no violations, the Commission closes the investigation. If, however, the initial investigation indicates possible violations, the Commission, after careful review, decides whether or not to authorize a full investigation.[9] Like the Antitrust Division, the Commission can employ compulsory processes such as investigational subpoenas and CIDs to compel production of information from defendants. At the end of a full investigation, the Commission decides either to close the investigation or pursue appropriate corrective actions.

The two major corrective actions include either accepting a consent agreement or issuing an administrative complaint and prosecuting the case within the Commission's adjudication system.[10] As a general matter, the Commission seeks settlement when

[8] The Commission may also carry out investigations due to congressional mandate or referral by another government agency such as the Antitrust Division.
[9] Since full investigation requires serious commitment of resources, the Commission may not authorize one even if initial investigation indicates that violations of law may have occurred.
[10] Other forms of corrective actions include issuing an injunction, proposing a trade regulation rule or guide, enforcing a Trade Regulation Rule, or pursuing a civil penalty action.

feasible and prosecutes only if necessary. As a result, during both phases of an investigation, the respondent under investigation is afforded an opportunity or invited to submit a proposal for settling the matter in the form of a consent order. The Commission may accept or refuse the proposed consent agreement. If the Commission decides to accept the agreement, the proposed consent becomes a Part II Consent and is placed on the record for 60 days of public comment before the FTC decides that the settlement is final.

If the Commission decides not to accept a consent agreement, it votes whether or not to issue a Part III complaint, which commences an adjudicative/prosecution proceeding.[11] This is a trial-like proceeding before an Administrative Law Judge (ALJ). Formal hearing dates are set and testimony and evidence are presented during the hearing. An initial decision made by an ALJ includes findings of fact, conclusions of law, and a recommended order. If neither side appeals, the decision becomes the FTC's final order. If an appeal is filed by defendants or the Commission decides to review the ALJ's decision, briefs from the FTC attorney and the respondent are presented to the Commission during an oral argument. The Commission's actions are similar to the ALJ's as if it is making an initial decision. It may also request additional information during the process. The Commission can either alter or reverse the ALJ's initial decision. The final decision reached by the Commission can be appealed to a federal appellate court by the respondent.[12]

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[11] A Part II complaint is issued when the Commission decides to accept a consent agreement.
[12] It should be noted that a Part III consent agreement could be reached after the commencement of adjudication. The FTC, however, needs to submit a motion to ALJ to withdraw the matter from adjudication before it reaches a consent agreement with the respondent.

CHAPTER III

ANTITRUST LAWS AND LEGAL UNCERTAINTY

In this chapter, I describe legal uncertainty faced by the antitrust agencies in their prosecutorial decision-making. The focus of the discussion is on the legal framework within which the Antitrust Division and the FTC prosecute antitrust violations. I also review the contradicting rulings made by the Supreme Court in the development of antitrust doctrines in horizontal merger cases as an example to illustrate the uncertain legal environment faced by the two agencies. In addition to the discussion of legal uncertainty specifically in the policy domain of antitrust, the final section of this chapter examines also legal uncertainty in general regarding forms of judicial review and doctrinal indeterminacy.

The Antitrust Legal Framework

There are three major antitrust laws: the Sherman Act of 1890, the Federal Trade Commission Act of 1914, and the Clayton Act of 1914. While both the Antitrust Division and FTC share jurisdiction under the Clayton Act, the Antitrust Division is mostly responsible for enforcing the Sherman Act and the FTC is charged with enforcing the FTC Act, respectively (Handler, Pitofsky, Goldschmid, and Wood 1990).

Section 1 and 2 of the Sherman Act are its most critical parts, which can be enforced by the Antitrust Division in both civil and criminal proceedings. Section 1 deals with conspiracy that restrains trade and Section 2 targets monopolistic behavior. Unlike the Sherman Act which is very broad and vague about specific anticompetitive behavior, the Clayton Act has several sections that make specific business practices

illegal. Section 2 of the Clayton Act prohibits price discrimination;[13] Section 3 deals with tying and exclusive dealing contracts; Section 7 governs mergers that may result in monopoly; and finally, Section 8 prohibits interlocking directorates. All of the above practices become illegal when they have the effect of substantially curtailing competition or creating a monopoly (Hylton 2003).

While Congress's efforts in enacting the Clayton Act may be taken as a move to clarify legal standards in the antitrust domain and restrict the delegation of congressional power, the FTC Act enacted the same year sends an opposite signal. It not only established the Federal Trade Commission as an independent agency but empowered the Commission with broad jurisdiction. Section 5 of the FTC Act allows the Commission to declare any "unfair methods of competition" unlawful. Since its enactment, a broad interpretation of Section 5 by the courts has allowed the FTC to move against competition violations that contradict the principles in the Sherman Act.[14] As a result, substantial overlap exists between the two agencies' respective jurisdiction. (Handler, Pitofsky, Goldschmid, and Wood 1990).[15]

Two related reasons contributed to Congress's seemingly contradictory choice of two laws with different delegation of congressional power. The first reason is legal.

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[13] This Section was later amended by the Robinson-Patman Act of 1936.
[14] *FTC* v. *Brown Shoe Co*., 384 U.S. 316 (1966)
[15] Because of the jurisdictional overlap, the two agencies now coordinate their enforcement through a liaison system in order to improve the overall efficiency of the two. Other than price discrimination cases which are completely left to the FTC to handle, other antitrust cases can only be investigated after being cleared between the two agencies. Over time, however, the two agencies have developed their respective expertise areas. For example, the Antitrust Division usually investigates "hard-core" price fixing cases, and it usually handles cases originated in the data processing industry and basic metals industry. The FTC, on the other hand, deals with pharmaceutical and food distribution industries (Handler, Pitofsky, Goldschmid, and Wood 1990).

When the Sherman Act was enacted, there had not been a strong common law tradition for the antitrust law.

> There was a doctrine governing trade restraints, but it began as and remains part of contract law. There was a criminal conspiracy doctrine, but it had not been applied to mere business agreements that did not either aim to violate a criminal law or did not require such a violation for execution. It is hard to escape the conclusion that the Sherman Act attempted to take an area of private law, and to expand public enforcement into that realm. To do so required a new form of conspiracy (Hylton 2003, 37).

Without a strong common law tradition, the courts essentially were forced to develop legal doctrines for antitrust violations through trial and error, triggering political pressure for Congress to modify both the antitrust law and the enforcement agency, which is the second reason why the FTC Act was passed the same year as the Clayton Act.

Political pressure peaked when the Supreme Court announced a "rule of reason" approach to antitrust violations in *Standard Oil Co. v. United States* in 1911 that sanctioned only unreasonable restraints of trade. The reaction from all sides was negative. Pro-regulation interest groups felt that the decision not only gave the judiciary undue power over the nation's economic development but also reduced the effectiveness of the Sherman Act. Pro-business interest groups, on the other hand, worried that a "rule of reason" doctrine neither provided clear guidance as to the boundaries of the antitrust law nor placed a proper constraint on the government's power to investigate and prosecute business practices (Hylton 2003; Handler, Pitofsky, Goldschmid, and Wood 1990).

In responding to political pressure, Congress passed the Clayton Act by specifically identifying what business practices were unlawful. Nevertheless, facing the

danger that the Clayton Act's identification of limited number of unlawful practices may become overly restrictive and prevent inclusion of emergent unlawful acts, Congress passed the FTC Act and included very broad and vague delegation of power in order for the FTC to effectively monitor the running of the economy (Handler, Pitofsky, Goldschmid, and Wood 1990).

The business interests behind the passage of these two laws failed to achieve their original purpose of establishing definitive standards for competition (Henderson 1924). Because of the very vague and broad wording of the Section 5 of the FTC Act, the business interests' hope that the FTC would be empowered to clarify the rather vague Sherman Act standards as developed by the courts essentially failed.[16] Furthermore, in mandating that the business practices enumerated in the Clayton Act will only be declared unlawful if the effect of which is to "substantially lessen competition or tend to create a monopoly in any line of commerce," Congress did not provide definitive answers to the standards for what constitutes reduction of market competition. For Henderson, therefore, the Clayton Act was as vague as the Sherman Act and the rule of reason adopted by the Supreme Court in *Standard Oil*. He concluded that

> Both statutes [The Clayton Act and the FTC Act] were rather a victory for those who doubted the efficacy of legislative codification, and placed their reliance

[16]Two very different expectations of the FTC were present at the time of its establishment. The business interests wanted an agency that was not only tolerant of big capital but also capable of giving meaningful advisory opinions to businesses as to the legality of its contemplated practices. Such an expectation was essentially congruent with President Theodore Roosevelt's view of big business, who was opposed to indiscriminately sanctions against big business and favored a regulation on the basis of public interest. An opposing view shared by Senators such as Newlands and Cummins and President Wilson suggested that the purpose of establishing the FTC was to have a more efficient antitrust agency. "The only object was to eliminate the delays and uncertainties incident to judicial enforcement" (Henderson 1924, 22).

> instead upon the development of rules and precedents by the gradual process of interpretation and decision of controversies by administrative and judicial tribunals (Henderson 1924, 48).

Due to the vague wording of the Clayton Act and FTC Act, the creator of the FTC did not take away judicial influence on the development of antitrust doctrines. Although the FTC has the power of administrative rule making to independently develop antitrust rules and precedents, the requirement that its decisions be reviewed by the courts made the interaction between the courts and antitrust agencies even more complicated. The focus of the contention between the courts and the antitrust agencies, as pointed out by Hylton (2003), lies with the application of the rule of reason and per se rule to different antitrust cases. The competing institutional interests of the agencies and the judiciary determine that the contention over the application of legal standards will continue into the future.

Rule of Reason or Per Se Illegality?

Although the rule of reason and per se illegality are two different legal standards, the line that separates the two has not always been clear. While antitrust agencies prefer per se illegality to reduce uncertainty, the judiciary struggles to justify its decisions as economically reasonable, which makes the courts in favor of the rule of reason. This structural conflict of interest, according to Hylton (2003), leads to even more uncertainty in the long run because the courts are forced to vacillate between the rule of reason and per se illegality.

As a general matter, the key difference between the rule of reason and per se illegality as legal standards hinges on the burden of proof required for the plaintiff and

whether the defendant is allowed to give a defense in terms of the legitimacy of certain practices. Specifically, when the rule of reason is applied, a business practice is unlawful only when it unreasonably hinders competition. The plaintiff has the burden of proof to demonstrate to the court that first, the defendant or defendants have market power; and second, defendants intend to incur anticompetitive effects in the market. Finally, the plaintiff needs to demonstrate that the effect of the challenged practices is indeed anticompetitive. Only after the plaintiff has met the burden of proof is it then necessary for the defendant to demonstrate that the challenged practice serves some legitimate objective. If the court accepts the defendant's claim about the legitimacy of its behavior, it then decides whether the restraint is "reasonably necessary" to serve the legitimate purpose. The plaintiff again bears the burden of persuading the court that the defendant's behavior is "unreasonable on balance." The courts' decision as to when and how the burden of proof shifts from the plaintiff to the defendants "depends on our general knowledge about the class of restraint being challenged, its size and significance in relation to the market in which competition is allegedly threatened, and the relative difficulty each party would have in carrying its burden" (Areeda and Hovenkamp 2003, 583-722).

Many plaintiffs that proceed under the rule of reason fail to prevail in court because they cannot demonstrate the defendant's market power, which in general is inferred from the defendant's share of a relevant market. Often times, the plaintiff either fails to define a relevant market or does not show that the defendant possesses a substantial share of the defined market. (Areeda and Hovenkamp 2003, 722).

Compared to the rule of reason, the per se illegality rule presents a much lower hurdle for the plaintiff to cross because, when it is applied, the challenged business practice is automatically illegal whenever it is shown to have occurred. The rationale behind declaring a practice illegal per se is that the practice itself is deemed as having no redeeming virtue whatsoever other than reducing competition (Areeda and Hovenkamp 2003, 612).

From the antitrust agencies' point of view, per se illegality is preferred to the rule of reason not only because of the low cost of applying the per se rule to antitrust violations but also because of the per se rule's effect of leveling the battle field between the antitrust agencies and private defendant. According to Hylton (2003), antitrust agencies in prosecuting violations often lack full or complete information about the challenged agreement or unilateral behavior. "Replacing the rule of reason with a rule declaring all or certain trade restraints unlawful irrespective of reasonableness (per se illegality) reverses the effects of the informational imbalance, and in this sense equalizes the position of the parties" (Hylton 2003, 103).

From the courts' point of view, one of the differences between the rule of reason and the per se illegality is the difference in the cost of false acquittal and false conviction.

> Choosing between per-se and rule of reason analyses is in part of choice between a greater risk of false acquittals and a greater risk of false convictions. It should be clear that potential false acquittal costs are grater under the rule of reason, and potential false conviction costs are greater under the per-se rule (Hylton 2003, 130).

In addition, it is much more costly for the courts to apply the rule of reason in administering an antitrust case. Nevertheless, this does not mean that the courts, like the antitrust agencies, also prefer per se illegality to the rule of reason.

Table 3.1 Legal Standards for Antitrust Violations

Restraints \ Legal Standards	**Rule of Reason**	**Per Se Illegality**
	Merger	
	Monopolization	
Vertical restraints	Exclusive Dealing	Tying
	Non-Price restraints	Dealer Cartels
	Maximum Resale Price Restraints	Minimum Resale Price Maintenance
Horizontal Restraints	Restraints Facilitating Development, Production, or Distribution	Price Fixing
	Restraining Advertising	Maximal Price Fixing
	Excluding Rivals*	Excluding Rivals*
	Naked Buyers Cartels*	Naked Buyers Cartels*
	Market Division*	Market Division*

*These practices are subjected both the rule of reason and per se illegality.
Source: Areeda, Phillip E., and Herbert Hovenkamp. 2003. *Fundamentals of Antitrust Law.* New York: Aspen Law & Business.

According the Areeda and Hovencamp (2003), the per se rule was a creation of the federal judiciary and the choice of the rule is driven by factors such as judicial experience, the cost of prosecution and the scope of knowledge about a particular business practice. As a general matter, the courts will never apply the per se rule when a case is brought to the courts for the first time. Only after considerable judicial experience through litigation and when it is clear that a restraint's anticompetitive effects outweigh

any possible justifications will the court choose per se illegality (Areeda and Hovencamp 2003, 625).[17]

Given that the agencies have an incentive to persuade the courts to adopt more per se illegality rules and that the courts in general do not easily make the transition from the rule of reason to per se illegality, the crucial question then becomes which side actually prevails. A survey of major antitrust legal areas, as shown in Table 3.1, indicates that the rule of reason is the dominant legal standard for most of the antitrust violations (Areeda and Hovenkamp 2003).

According to Hylton (2003), the differences in the legal characteristics of the two rules plays a fundamental role in explaining the conflict of interests between the agencies and the courts.

> Public enforcement agencies and federal statutes put pressure on courts to adopt per-se standards. This pressure pushes the law in the direction of per-se rules until, in some cases, a "validity crisis" is reached—a point at which the court can no longer defend its decisions by appealing to economic reasonableness arguments. At that point, the court either retreats from the per-se standard or reinterprets the reasonableness arguments (Hylton 2003, xiv-xv).

Hylton in this model clearly recognizes the incentive of the antitrust agencies in terms of using prosecution to persuade courts to adopt per se illegality rules. Nevertheless, government prosecution is not the major force in this explanation that determines the choice of antitrust doctrines. For Hylton, the courts' concern about justifying their decisions as being reasonable is the driving force behind the shifts between the rule of reason and the per se illegality. The common law tradition of

[17] Stare decisis does not play an important role in such a shift from the rule of reason to the per se illegality. If the courts decide to move back to the rule of reason from the per se illegality, however, stare decisis then becomes a major consideration in the transition.

adjudication dictates that the legal validity of judicial rules is associated with the rules' reasonableness. Hence in antitrust cases proceed under the rule of reason requires the plaintiff shoulder the burden of proof to demonstrate that the defendant's behavior unreasonably hinders competition despite that it serves some legitimate objectives.

Although Hylton does not suggest that the per se rule is a direct departure from the reasonableness test considering the fact that the courts have been very cautious in terms of adopting a per se illegality rule, he argues that the rule is rigid enough for not accommodating emergent economic justifications that may legitimize an illegal restraint under the rule. In other words, the emergence of new economic situations may render a per se illegality rule unreasonable and force the courts to retreat to the rule of reason. Hylton's (2003) evaluation of merger cases clearly demonstrates the conflict between the courts and antitrust agencies.

Horizontal Merger and Ruling Inconsistency

One of the earliest and historically important merger cases decided by the Supreme Court was *Northern Securities Company v. United States*.[18] The Supreme Court made a per se illegality rule in its decision and prohibited all mergers between directly competing companies.

> The [Sherman] act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy or monopoly upon such trade or commerce (193 U.S. 197, 1904).

[18] To prevent E.H. Harriman from gaining access to a railway line that connected Chicago and St. Paul with Billings, Montana through purchasing of stocks, J.P. Morgan and James J. Hill established Northern Securities Company to hold stocks of two railway companies that jointly owned the line. (Handler, Pitofsky, Goldschmid, and Wood 1990)

Nevertheless, the per se rule did not last long and Supreme Court abandoned it in *Standard Oil Company of New Jersey v. United States*.[19] Although in this case the Supreme Court affirmed the lower court's decision of striking down *Standard Oil's* business practices as violations of both Section 1 and 2 of the Sherman Act, Chief Justice White's opinion indicated that the Court's interpretation of the Sherman Act began to shift to the rule of reason.

> …although the state, by the comprehensiveness of the enumerations embodied in both the 1st and 2d sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduely or improperly exercised, was the most efficient means for the prevention of monopoly…221 U.S. 1 (1911) (Handler, Pitofsky, Goldschmid, and Wood 1990, 87)

After *Standard* Oil, The development of the rule of reason in merger prosecution went through two contradicting periods where during the first period the rule was stretched to the extent that it almost became a per se legality rule favoring the business. During the second period after Congress amended the Section 7 of the Clayton Act, the Court changed its application of the rule of reason and made it almost per se illegality that favored the government.

The first twist of the rule of reason was made clear by the Supreme Court in *United States v. United States Steel Corp*.[20] United States Steel Corporation was a holding company that through asset acquisition had controlled 12 manufacturers in the

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[19] John D. and William Rockefeller established Standard of Ohio in 1870 and eventually controlled 90 percent of the petroleum industry through acquiring refineries and obtaining preferential rates and rebates from the railroads. In 1899, Rockefeller set up Standard Oil of New Jersey as a holding company to replace Standard of Ohio and continued unfair business practices. (Stelzer 1986, 4).

[20] 251 U.S. 417 (1920)

iron and steel industry which occupied 80 to 90 percent of the market. The government charged that the corporation's activities from 1901 to 1911 had violated the Sherman Act. The Court, however, ruled that first, market power itself did not necessarily constitute monopoly;[21] and second, an examination of the purpose and effect of Steel Corporation's successive acquisition of iron and steel manufacturers indicated that the corporation had abandoned the illegal practices such as fixing and maintaining prices. Since the Court did not see any probability that the corporation would resume price fixing, dissolving the corporation would actually hurt public interest for the corporation was considered as "a beneficial instrumentality in the trade of the world."

As I explained in the previous section of this chapter, the rule of reason adopted by the Supreme Court in *Standard Oil* to interpret the Sherman Act attracted criticism from all sides. As a result, Congress passed the Clayton Act and the FTC Act to restrain the judicial influence on the development of antitrust legal standard. Section 7 of the Clayton Act specifically deals with merger but Congress left a loophole in the law for limiting the jurisdiction of the act only to acquisition through stock.[22] Because of the loophole and of the Court's friendly approach to the big business under the rule of reason as demonstrated by *United Steel*, Congress during the 1940's held a serious of

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[21] "We have pointed out that there are several of the government's contentions which are difficult to represent or measure, and the one we are now considering-that is, the power is 'unlawful regardless of purpose '- is another of them. It seems to us that it has for its ultimate principle and justification that strength in any producer or seller is a menace to the public interest and illegal, because there is potency in it for mischief. The regression is extreme, but [251 U.S. 417, 451] short of it the government cannot stop. The fallacy it conveys is manifest."

[22] "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired an the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce…." (Section 7 of the Clayton Act).

hearing in hoping to pass stricter merger laws. The tension over the application of the rule of reason to merger cases culminated after the government lost again in the *United States v. Columbia Steel Co*.[23] The Supreme Court not only rejected the government's argument that vertical merger should be illegal per se but also ruled that both vertical merger and horizontal merger should be subjected to the same rule of reason test.[24] Finally, Congress in 1950 passed the Celler-Kefauver Act that amended the Section 7 of the Clayton Act and made it cover all types of merger.[25]

Brown Shoe Co. v. United States [26] was the first Supreme Court case that interpreted the amended Section 7 of the Clayton Act. Although the Supreme Court still used the rule of reason, it became favoring of the government and ruled against the challenged mergers by incorporating a new doctrine into the rule of reason.

Brown Shoe, the nation's third largest seller of shoes, acquired G.R. Kinney Company, which was the nation's eighth largest seller. The government brought suit to

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[23] 334 U.S. 495 (1948) In this case, the United States Steel Company attempted to acquire Consolidated Steel through its wholly owned subsidiary, Columbia Steel. This case touched on both vertical merger and horizontal merger issues because while United States Steel Company and Columbia Steel produced rolled steel products for Consolidated Steel's manufacturing of fabricated steel plates and shapes, Columbia Steel itself also sold products of steel fabrication.

[24] The rule of reason as applied to merger cases was explained by the Court as follows: "it is first necessary to delimit the market in which the concerns compete and then determine the extent to which the concerns are in competition in that market. If such acquisition results in or is aimed at unreasonable restraint, then the purchase is forbidden by the Sherman Act. In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probably development of the industry, consumer demands, and other characteristics of the market" (Handler, Pitofsky, Goldschmid, and Wood 1990, 862).

[25] The amended Section 7 now reads: that no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly….(Handler, Pitofsky, Goldschmid, and Wood 1990, 867)

[26] 370 U.S. 294 (1961)

the district court to enjoin the merger for it resulted in anticompetitive effect at both the manufacturing level and the retail level.[27] The district court rejected the government's claim at the manufacturing level but ruled that the merger had an anticompetitive effect on retail sales. The Supreme Court affirmed the district court's ruling and interpreted the Section 7 of the Clayton Act as not making unlawful all vertical mergers but only those that lessen competition within a relevant geographic market.

What makes *Brown Shoe* sharply different from *United Steel* is that the Supreme Court ruled against the merger in *Brown Shoe* when the two companies only had about 5 percent share of the shoe retailing network, whereas United States Steel controlled 80 to 90 percent of the iron and steel product market but was not ordered to dissolve.[28] One thing that is consistent in the Court's application of the rule of reason to these two cases is that the Court made it clear that market share alone did not suggest any monopolistic or anticompetitive effect. The Court ruled in favor of United States Steel under the rationale that it did not see any danger of the company resuming anticompetitive practices that it had abandoned before the lawsuit. In *Brown Shoe*, however, the Court introduced the incipiency doctrine and argued that a 5 percent control of the market indicated a trend toward concentration of firms. Since it is difficult to undo mergers, it is then rational to block it before any anticompetitive effect can emerge (Hylton 2003, 320).

[27] So this was a case involving both horizontal merger and vertical merger.
[28] In *Columbia Steel*, the Court also ruled in favor of the defendant when the share of the market involved was around 13 to 25 percent.

Such a rationale, however, directly contradicts the Court's reasoning in *Columbia Steel*, which also concerned vertical merger and horizontal merger at the same time. On vertical mergers, the Court ruled in *Columbia Steel* that it would not strike it down unless anticompetitive evidence was presented. On horizontal mergers, the Court ruled that the combined market share between Consolidated Steel and Columbia Steel at the 24 percent level was not significant, let alone resulting in anticompetitive effect.

In addition to the fact that the incipiency doctrine developed in *Brown Shoe* contradicts with the Court's previous rulings, the doctrine itself is also problematic. According to Hylton (2003), the doctrine prohibits companies from taking advantage of economies of scale, which results in an increase in competition despite of a higher level of concentration. Since the Court only speculates that higher concentration will lead to possible anticompetitive effect, stopping a merger when the market share involved is small basically "forgo[s] a certain gain today in order to avoid a very uncertain, quite speculative harm in the future" (Hylton 2003, 321).

Despite the fact that the incipiency doctrine is problematic in the sense that it is not built on a strong economic ground, i.e. it is not economically reasonable, the Court kept using and refining the doctrine in its merger decisions from 1962 to 1966. In *Brown Shoe* where the incipiency doctrine was introduced, the shoe retail market was highly fragmented. In addition to the justification of the incipiency doctrine mentioned above in terms of preempting any anticompetitive effect, the incipiency doctrine was also justified partly on the ground that a move towards concentration in a fragmented market proposes more danger of anticompetitive effect than a similar trend in a concentrated market. In

Brown Shoe, the Court did not answer how it would rule on concentrated market. Such a question was dealt with in *United States v. Philadelphia National Bank.* [29] The Court ruled that an undue percentage market share in a concentrated market is highly likely to produce anticompetitive results and hence is a violation of the Section 7 of the Clayton Act unless there is clear evidence to the contrary.[30] In other words, the incipiency doctrine was extended to concentrated markets, and a market share beyond a certain threshold makes a merger presumptively illegal as long as it indicates a trend toward concentration. Finally in 1966, the Court reaffirmed its application of the incipiency doctrine to mergers in fragmented markets by enjoining merger in *United States v. Von's Grocery Co*.[31]

As pointed out by Hylton (2003), the Court's extensive application of the incipiency doctrine eventually reached a point where it lost its appeal to economic reasonableness even though it was developed as part of the rule of reason test. Since *Brown Shoe*, the Court had left no room for efficiency defense or considered the competitiveness of a market in the first place. As I explained before, the rule of reason test always dictates a consideration of justifications that the defendant can offer to legitimize the anticompetitive effect. Given that the defendant's justification is legitimate, such as the efficiency defense, the courts then need to consider whether they should accept the plaintiff's claim that the practice of restraint is unreasonable in the sense that the overall cost to competition outweighs the efficiency gain. By adopting the

[29] 374 U.S. 321 (1963) In this case, Philadelphia National Bank acquired Girard Bank that were the second and third largest commercial banks in the Philadelphia area, respectively.
[30] In this case, the market share is about 30 percent of the relevant market.
[31] 384 U.S. 270 (1966) In this case Von's Grocery acquired Shopping Bag, and combined share of the market was about 7.5 percent.

incipiency doctrine, the Court essentially turned the rule of reason into the per se illegality rule and ruled against mergers when the level of concentration among firms suggested a danger of anticompetitive effects. As a result, we see “economically unreasonable” decisions in which the Court enjoined mergers when the market share was less than 10 percent.

Such a restrictive application of the rule of reason was finally abandoned by the Court in *United States v. General Dynamics Corp*.[32] In this case, General Dynamics Corporation became the nation’s fifth largest commercial coal producer after a serious of acquisition of other coal companies. In spite of acknowledging the government’s claim that acquisitions by General Dynamics had lead to undue concentration of firms in the coal industry, the Court ruled that such concentration did not lead to lessening of competition because the acquired companies were not regarded as a significant competitive force.[33] By allowing mitigating factors to be considered in merger cases, the Court eventually rejected the incipiency doctrine and returned to the rule of reason, even though it had always suggested that mergers are subjected to the rule of reason test since *Standard Oil*.

Legal Uncertainty and Antitrust Prosecution

As Hylton and other scholars’ review indicates, the antitrust agencies’ push for per se illegality in general has not been very successful. Rule of reason not only dominates the antitrust legal domain but also gives the judiciary plenty of maneuvering

[32] 415 U.S. 486 (1974)
[33] Technically, a coal company is judged as competitive if it has large uncommitted coal reserves. Acquired companies in this case did not have large reserves.

room to make inconsistent decisions by claiming to apply the same legal standard. In addition, as shown in Table 3.1, in legal areas such as excluding rivals and market division, the courts can apply either the rule of reason or per se illegality to their decisions. The choice between two rules itself creates uncertainty for the agencies.

It goes without saying, however, that legal uncertainty in litigation is not confined to antitrust litigation only. As a general matter, the courts' interpretation of laws is unpredictable because of ambiguous legal text, "the disorderly conduct of words" (Carter and Burke 2005, 23). The inherent ambiguity of legal rules makes it possible for judges to reach different conclusions in similar cases. Although precedents may provide some stability to the legal system, the practice that judges are free to choose precedents based on their reading of case facts makes legal decision unpredictable despite precedents. In addition, the fact that judges can treat each precedent differently by distinguishing, limiting, ignoring, or extending a precedent also means that judges can manipulate precedent to achieve desirable results (Murphy, Pritchett, and Epstein 2002). Cross and Tiller's (1998) study of appellate court judges, for example, indicates that circuit judges tend to manipulate precedents in order to achieve their respective political values so long as their colleagues do not expose the practice.

Legal Uncertainty and Forms of Judicial Review

Besides general unpredictability of the law and the room for manipulating precedents, a specific type of legal uncertainty is the courts' choice of forms of judicial review. Along with the development of an administrative state in the U.S., administrative law scholars have engaged in searching for a proper form of judicial

review of the bureaucracy. Since the Great Depression, the Supreme Court has adopted three different forms of judicial review. Nevertheless, due to the diametrically opposed political values under which the bureaucracy is required to serve, the scholars have yet to settle on the best form of judicial review. The Supreme Court has shifted from examining the bureaucracy's delegated authority to its enforcement procedure and finally to the reasonableness of the bureaucracy's action. Nonetheless, the development of different forms of review appears to have drawn a circle and the discussion is back to where it started: how the bureaucracy, under judicial constraint, can properly serve two conflicting sets of political values while at the same time we can avoid undue judicial interference.

According to Shapiro and Levy (1987), the development of judicial review of bureaucracy reflects the tension between two political values in American government. "Liberal" values restrict government action in order to preserve individual freedoms and are reflected in the constitution through principles such as representative government, separation of powers, and due process. "Progressive" values promote government action in order to relieve social problems, and are implemented through delegation of legislative and judicial powers to unelected administrators functioning outside of the political and constitutional limitations originally established for the exercise of those powers (Shapiro and Levy 1987, 389).

These two sets of values are not necessarily compatible with each other from the perspective of the administrative law "because the governmental institutions which implement progressive values do not operate in a manner that is entirely consistent with

the constitutional framework designed to implement liberal values" (Shapiro and Levy 1987, 390). Liberal values emphasize a limited government supported by individual consent whereas progressive values rely on a professional bureaucracy to solve social problems through empirical and objective inquiry. The existence of unelected administrators with legislative and judicial powers threatens the liberal tradition of separation-of-powers and due process. In response, the development of judicial review of bureaucracy has taken three different forms: structuralism, proceduralism, and rationalism.

The structuralist model, as the first judicial review model, is developed on a strict basis of separation-of-powers but fails to apply the principle to limit agency discretion. Before it adopted the structuralist model, the Supreme Court used economic substantive due process to rollback progressive programs. After *West Coast Hotel Co. v. Parrish* (1937), the Court accepted the regulatory power of the administrative agencies and shifted its review of agency actions to whether agencies acted within their scope of authority as mandated by Congress. Delegation of legislative and judicial powers to administrative agencies was generally accepted by the Court so long as the "core functions" of each branch remain separated. In other words, the structuralist model essentially transforms the question of maintaining separation-of-powers into a question of statutory interpretation regarding agencies' scope of authority.

The difficulty associated with the structururalist model is that the Supreme Court faced a dilemma regarding to what extent it should defer to agencies' statutory interpretation of their authority. Progressive values ask for a broad reading of agencies'

scope of authority whereas liberal values demand a limited approach. As a result, "the Court has vacillated between accepting and restricting agency discretion and often displays considerable deference toward agencies" (Shapiro and Levy 1987, 403). Also, even if the Court wants to adopt a narrow construction of an agency's mandating statute, it is not always available, and a narrow reading of bureaucratic authority tends to "destroy the very advantages of efficiency, expertise and discretion which justify administrative government" (Shapiro and Levy 1987, 404).

Because of the deficiencies of the structuralist model, by the end of the New Deal era the Court turned to the proceduralist model to search for a reconciliation between the liberal values and progressive values. Procedural safeguards against bureaucratic abuse in the form of due process were accepted as a way of legitimizing the administrative agencies regarding the liberal values. In fact, Congress in adopting the Administrative Process Act of 1946 (APA) went beyond the requirement of due process. The Due Process Clause requires agency hearing only when a property or liberty interest is involved. The APA requires, however, adjudicatory procedures whenever a hearing on the record is demanded by Congress.

This model, however, also faces a practical difficulty. Under the proceduralist model, there is no guarantee that procedural safeguards will necessarily lead to rational decision-making or prevent the abuse of bureaucratic power. Moreover, reversing agencies' decisions on the basis of procedural deficiency only asks for additional procedures, which compromises the efficiency and expertise of the administrative agencies. On this point, Magat and Schroeder (1984) expressed similar views. In

reforming administrative procedures, attention should not be limited just to the goals of "fairness, accuracy, and procedural efficiency." Social consequences of administrative rulemaking need to be taken into consideration because procedures influence the choices made by agencies. In this regard, Magat and Schroeder's expansive view of procedural requirement moves back to substantive review, however.

Unlike the structuralist model and proceduralist model that try to avoid substantive review of agency decisions, the rationalist model requires agencies to establish a connection between facts on the record and their decisions. At the very beginning, the Court had a very deferential view of the rationalist model under which agencies needed only to demonstrate that a reasonable person might accept the "substantial evidence" provided by the agencies as adequate to support a decision. In Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co. (1983), however, the Court required that a rational connection be established between facts and decisions, indicating a much stricter view of the rationalist model. A side note here is that the structuralist model and proceduralist model also have a reason requirement. The difference, however, is that the reasons requirement in the first two models asks whether a reason is given to support a decision whereas in the rationalist model the focus is on whether the reason given is adequate enough to support the decision.

Shapiro and Levy argue that substantive review focusing on the adequacy of reasons can protect liberal values and realize progressive values both theoretically and practically. Theoretically, the rationalist model recognizes that legislators and

bureaucrats occupy different positions in the constitutional scheme. Bureaucrats should not be entitled to the same level of presumption of rationality as given to Congress because bureaucrats are not elected. A heightened scrutiny would guarantee that administrative decisions reflect public values. At the same time, the separation-of-powers doctrine is protected when the courts carry out meaningful and effective check on agency actions.

Practically, the courts are given more leverage under the rationalist model in reviewing agency actions because it is the burden of agencies to approve the adequacy of their action, demonstrating that their expertise is properly applied, and that the solution is reasonable. Also, the rationalist model promotes progressive values because it corresponds with the underlying purposes of administrative state.

Administrative agencies were premised upon the Progressive's belief that regulatory decisions should be the product of rational bureaucratic processes or the dispassionate application of expertise. By focusing on the reasoning used to justify an agency decision rather than the result of the decision, rationalism reinforces this progressive ideal without granting judges a license to substitute their judgment for that of the agency (Shapiro and Levy 1987, 432).

Despite the rationalist model's theoretical superiority over the other two forms of review, it raises the danger of undue judicial interference with the bureaucracy. A heightened scrutiny may compromise agencies' expertise when judges are invited under this model to substitute their own policy preferences for that of agencies'. While Shapiro and Levy admit such a possibility, they argue that a carefully defined adequate reasons

requirement would minimize the possibility. When the courts are required to focus on the reasons given to support an agency decision in stead of the result of the decision, judges are less likely to be able to impose their own policy preferences. Moreover, even when judges do impose their own policy preferences, Shapiro and Levy suggest that the damage is less severe than applying either the structuralist model or the proceduralist model. A reverse under the structuralist model means either invalidating an agency's statue or narrowing its mandate. A reverse under the proceduralist model asks for additional procedures which hinders agency efficiency. A reverse under the rationalist model, however, is on a case-by-case basis, and the damage from judicially imposed policy preferences is limited to the reversed case. But as my review of doctrinal indeterminacy in the next section will demonstrate, there is plenty of room for judges to maneuver in administrative law cases due to indeterminate legal doctrines.

As a result, we can clearly see that none of the judicial review models completely solves the fundamental problem faced by the administrative law scholars. On the one hand, we need judicial review to keep a proper balance between effective bureaucratic service and protection of individual liberties. On the other hand, we also need to prevent undue judicial influence on the bureaucracy. From the bureaucracy's point view, the practical result of the dilemma is that it creates uncertainty in judicial review of bureaucratic behavior by creating room for judicial discretion. On a case-by-case basis, it is unclear to the bureaucracy which form of judicial review is going to be applied. The reviewing court can choose to either examine whether an action is within the mandated legal authority under the structuralist model, or to scrutinize the procedure of

enforcement, or to analyze the adequacy of the reasons provided by the bureaucracy in support of its action. The addition of judicial ideology further complicates the selection of the forms of review by transforming it from a legal question into a political one.

Legal Uncertainty and Doctrinal Indeterminacy

In addition to uncertainty created by unknown forms of judicial review that the courts are going to adopt in each individual case, another source of legal uncertainty in prosecution concerns indeterminate legal doctrines in the administrative law. Like the existence of different forms of judicial review, indeterminate doctrines create uncertainty for the bureaucracy in prosecution by creating room for judicial discretion.

One good example of these indeterminate rules is the landmark case *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.* (1984).[34] By designing a two-step test for the judiciary in reviewing bureaucratic interpretation of statutes, the Supreme Court intended in this case to force the lower courts to pay as much deference as possible to the bureaucracy. Step one of the *Chevron* test inquires whether Congress has indicated any clear intent about the question at issue. If the answer is no, the courts in step two shall defer to any "permissible construction of the statutes" by the bureaucracy. Since few statutes passed by Congress are written with absolute clarity, *Chevron* would have made judicial review determinate and less uncertain if judges were forced to move to step two and pay greater deference to agency decisions. As a result, there would not have been much room for judges to impose their own policy preferences. In reality, however, judges make a twist in step-one analysis and move to step-two only when no

[34] 467 US 837

congressional intent can be determined by using statutory interpretation cannons. Since those interpretation cannons are inherently imprecise, judges, as a result, are in effect given considerable leeway to promote their own policy preferences (Shapiro and Levy 1995).

If we view *Chevron* as a fault of the Supreme Court for not making the test determinate, an examination of *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.* (1983)[35] indicates that even determinate legal doctrines cannot prevent judges from imposing their own political values in administrative cases. According to McFeeley (1984), *State Farm* validates the hard look review of informal rulemaking, prohibits lower courts from using subsequent legislative history to infer a mandate for or against a rule, and insists that at least in the area of safety regulation the amorphous public interest be considered in agency rulemaking. Also according to Shapiro and Levy (1995), *State Farm* offers a more determinate arbitrary and capricious standard than previous cases because a reviewing court is asked to look at four aspects of an agency's informal rulemaking: "whether the agency relied on factors that Congress had not intended it consider; whether the agency failed to consider "entirely" an important aspect of the problem it was solving; whether the agency offered an explanation for its decision that ran counter to the evidence; and whether the agency's decision was so implausible that it could not be explained as a product of agency expertise or a difference in view" (1066-1067). Despite the determinacy of the rule, however, Shapiro and Levy (1995) find that *State Farm*'s effort

[35] 463 US 29

to make the arbitrary and capricious standard more determinate has been ignored by judges. Of the 118 cases they surveyed, the circuit courts only cited State Farm forty-five times and only thirteen of those forty-give cases specifically referred to the State Farm criteria. Although their inquiry has a time limit and they only examined the cases decided between November 1992 and November 1993, the preliminary results still indicate that appellate court judges are not constrained by determinate doctrines such as the State Farm criteria and there is plenty of room for judges to maneuver in order to further their respective political goals.

As a result, just like the selection of forms of judicial review is contaminated by judges' ideology and creates room for judicial discretion, indeterminate legal doctrines encourages the influence of judicial ideology and determinate doctrines do not necessarily constrain judicial ideology. While Hylton's explanation of contradicting judicial rules in antitrust relies heavily on the nature of the rule itself, what has been ignored is the role of institutional uncertainty within the judiciary. As a general matter, although choosing appropriate forms of judicial review and applying legal doctrines properly can be understood as pure legal matters and they alone create legal uncertainty in the judicial process, the introduction of judges' political preferences in terms of judicial discretion into the courts' choices creates additional uncertainty for the bureaucracy. As my discussion in Chapter IV will show, depending on how judicial ideology operates with respect to the legal framework within which the judiciary functions, the levels of political uncertainty caused by judicial ideology and institutional uncertainty created by random assignment of judges vary on top of the legal uncertainty.

CHAPTER IV

THEORY: INSTITUTIONAL UNCERTAINTY AND IDEOLOGICAL VARIANCE

In this chapter, I develop a theory of the effect of judicial uncertainty on bureaucratic prosecution. My theoretical framework emphasizes the reciprocal nature of the interaction between courts and the bureaucracy (Wood and Waterman 1994). Both the judiciary and the bureaucracy actively affect each other. Three concepts are fundamental in defining this relationship: judicial discretion, judicial uncertainty, and bureaucratic discretion. Judicial discretion creates judicial uncertainty, which, while constraining bureaucratic discretion, also determines the nature and number of cases to be prosecuted that in turn ultimately shapes the nature and scope of judicial review of bureaucratic prosecution.

Judicial discretion and bureaucratic discretion, of course, are fundamental since without them we would not see any dynamic interaction between the courts and the bureaucracy. Without bureaucratic discretion, external actors such as the courts cannot exert any meaningful influence. Without judicial discretion, rulings would be strictly legal and independent of the role of personal judicial ideologies on court decisions (Canes-Wrone 2003). What has not been thoroughly examined by scholars, however, is the impact of judicial uncertainty in this reciprocal relationship between the courts and the bureaucracy.

For example, Canes-Wrone (2003) in her study of wetland permits ignores judicial uncertainty. She assumes that appellate courts dominated by liberal judges will

always impose a tougher review of the wetlands permits issued by the Army Corps of Engineers than a conservative court. As a result, the likelihood that the Corps will issue a become more liberal. Canes-Wrone's approach essentially assigns point estimates to the courts' preferences and she assumes away the possibility that the courts' choices can shift within a range because of the random assignment of judges to panels and that the bureaucracy may not be able to anticipate these shifts.[36]

By shifting the focus to judicial uncertainty as indicated by the variance in the courts' choices, I develop a theory that emphasizes the appellate courts' ideological heterogeneity. In general, there are three aspects of the variance in ideological heterogeneity: legal uncertainty, political uncertainty, and institutional uncertainty. As my discussion in Chapter III indicated, legal uncertainty originates in the ambiguity of the law which creates room for judicial discretion. Political uncertainty, as demonstrated by small group studies of judges, emerges from the judges' individual ideologies that motivate how they use their discretion under the law. Each judge votes differently because of different political background and beliefs. Equally important, the collective decision-making process that is a major characteristic of appellate judicial institutions amplifies political uncertainty due to face-to-face interaction among judges within panels. The focus of my theory, however, centers on the institutional uncertainty that is created by the appellate courts' practice of random assignment of judges and cases and

[36] Canes-Wrone argues that her measure of the appellate courts' ideology as percentage of judges appointed by Democratic presidents captures the likelihood of encountering a panel with a majority of liberal judges. As my discussion in this chapter demonstrates, such an approach relies on two restrictive assumptions that are not necessarily realistic.

changing pool of judges with different ideological background due to presidential appointments.

I argue that a valid gauge of institutional uncertainty is provided by ideological variance among judges for an entire appellate court. The contribution of my theory builds upon the introduction of ideological variance as a new variable in studying the interaction between the judiciary and the bureaucracy.

Bureaucratic Discretion and Judicial Review

In this project, I model antitrust agencies as forward-looking and risk-averse institutions that base their prosecution decisions on the expected likelihood of victory in appellate courts. This approach is common in the positive political theory (PPT) studies of the interactions between the courts and agencies. Spiller and Tiller (1997), for example, treat agencies as forward looking institutions that base their actions on judicial preferences, the decision costs of litigation, and institutional strategies adopted by courts. With regard to agencies' risk type, risk-averse simply means that when facing comparable results, agencies pick the alternative with the least risk. Weaver's (1977) discussion of antitrust prosecution and Hawkin's (2002) view that prosecution is the choice of last resort both suggest that it is reasonable to assume that antitrust agencies are risk-averse. In other words, given the opportunity to achieve the same policy result through more certain enforcement means, such as settlements, the agencies will refrain from prosecuting cases. By adopting this bottom-up perspective, I should note, I can explore more effectively the interactive relationship between the appellate courts and agencies.

As suggested by Wood and Waterman (1994), the bureaucracy and its political principals also share a reciprocal relationship. In addition to responding to directions and guidelines set by political principals, the bureaucracy has the power required to independently influence its interaction with the principals. For example, the bureaucracy can dominate the policy-making process through its expertise and greater knowledge of policy issues. Staff and personnel who are committed to bureaucratic interests that are inconsistent with those held by their political principals can resist changes demanded by the principals. Finally, the bureaucracy can mobilize constituency support to influence political principals' decisions. Wood and Waterman conclude that "the relations between politicians and the bureaucracy are bidirectional, with politicians sending signals and bureaucracies responding at some times and with bureaucracies sending signals and politicians responding at other times" (Wood and Waterman 1994, 126).

When it comes to the interaction between the appellate courts and the bureaucracy, the reciprocal relationship becomes even stronger because the bureaucracy has the discretion not to act. By making choices between action and inaction, the bureaucracy to a large extent determines what can be reviewed by the courts, which in turn influences the scope and depth of judicial review. This aspect of bureaucratic discretion, however, is generally ignored by a majority of studies that investigate bureaucratic control issues.

In the conventional literature, bureaucratic discretion usually means two things (Spiller 1992, Spiller and Tiller 1997, Tiller 1998). First, bureaucratic discretion can mean "the departure of agency decisions from the positions agreed upon by the

executive and legislature at the time of delegation and appointment" (Calver, McCubbins, and Weingast 1989, 589). Second, it can mean that agencies have endogenous preferences over the policy space (Gely and Spiller 1990, Spiller 1992b). The focus, as these two aspects of bureaucratic discretion suggest, is on policy outcomes produced by agencies. Empirical evidence shows that the president, Congress, and courts all affect agencies' policy choices (e.g., Wood and Waterman 1994). For courts specifically, judicial rulings made by the Supreme Court are found to have had a significant effect on agencies' policy outcomes (Wood and Anderson 1993, Wood and Waterman 1994).

One aspect of discretion that is generally ignored by scholars, however, is the discretion associated with inaction: the decision not to deal, not to investigate, or not to prosecute. According to Davis (1969), the discretion of inaction is where the bureaucracy is most likely to produce injustice for the public because these decisions are largely not reviewable by the courts. As a result, Davis (1975) and Warren (1988) conclude that judicial control of bureaucracy is not very effective.[37]

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[37] Another aspect of bureaucratic discretion that has been generally ignored by scholars is the bureaucracy's selection of enforcement tools. A pioneer work done by Tiller and Spiller (1999) demonstrate that agencies have the discretion to choose from a variety of enforcement tools, which in general consist of rulemaking and adjudication. Under adjudication, agencies can choose to settle cases which to a large extent prevent any oversight including judicial review. In their model, rulemaking is considered by agencies as a low-cost decision instrument, whereas adjudication is regarded as a high-cost means. Agencies tend to choose adjudication over rulemaking when "(1) the decision-making resources of the agency increases (agency's decision costs decrease); (2) the decision-making resources of the courts increase (court's decision costs decrease); and (3) the distance between the agency's ideal point and the court's ideal point increases" (361). Tiller and Spiller (1999) demonstrate that agencies use rulemaking and adjudication interchangeably in order to maximize their success in judicial review. Although the selection of different enforcement tools is an interesting topic to pursue, the focus of this project is on the choice between prosecution and non-prosecution. Therefore, I ignore this aspect of bureaucratic discretion and focus on the discretion of inaction.

I argue, however, that the appellate courts affect the bureaucracy's choice of inaction because of the institutional uncertainties created by the courts' random assignment of judges and cases to the three-judge panels that hear cases as well as the continually changing composition of judges on the courts that reflect presidential appointments. According to Tiller and Spiller (1999), the bureaucracy's choice between action and inaction depends on factors such as the ideal policy positions and the decision costs of courts and the bureaucracy, respectively.

> [T]he likelihood of agency inaction increases as (1) the distance between the agency's ideal point and the status quo decreases; (2) the distance between the agency's ideal point and the court's ideal point increases; (3) the agency's decision costs increase; and (4) the court's decision costs decrease (Tiller and Spiller 1999, 358).

What Tiller and Spiller (1999) overlook is the uncertainty embedded in the appellate courts' institutional decision-making process.

First of all, decisions to prosecute or not touch on the issue of agency inaction. When agencies choose not to prosecute, the appellate courts have no ground to impose judicial review, which means that bureaucratic discretion constrains judicial review. On the other hand, when agencies choose to prosecute to obtain the benefits associated with prosecution, they do so only when they can be fairly certain that the courts will agree with the agencies' action should the case be appealed. It goes without saying that no agencies will prosecute when the likelihood of failure is high. As a result, although the bureaucracy's choice constrains the power of judicial review, the courts also influence the process through judicial uncertainty. High uncertainty in prosecution should discourage prosecution. Therefore, I contend that uncertainty generated from within the

appellate courts is a predominating factor in the reciprocal relationship between the courts and the bureaucracy. As I argue below, there are three different sources of uncertainty and the uncertainty created by the appellate courts' collective decision-making process is critical to agencies' prosecution decision.

Uncertainty in Bureaucratic Prosecution

Given that judicial uncertainty plays a fundamental role in my theory, the question then turns to how to measure uncertainty in prosecution. As a general matter, uncertainty is an integral part of administrative decision-making. Simon (1997), for example, points out that the bureaucracy, when attempting to make rational choices, can only form "expectations of future consequences" associated with choices based on knowledge about the existing situation" (Simon 1997, 78).

In the choice between prosecution and non-prosecution, judicial uncertainty takes the form of variance in the appellate courts' choices regarding prosecuted cases with respect to the bureaucracy's position.[38] Theoretically, the courts' choices can be located at an infinite number of locations on a policy continuum in addition to their decisions to uphold or strike down bureaucratic decisions. Uncertainty as to where the courts will locate their decisions in this ideological space, I argue, results from the appellate courts' changing pool of judges due to presidential appointments and the practice of randomly assigning judges and cases.

[38] Other types of uncertainty include sufficiency and reliability of evidence, the persuasiveness of witnesses, the legal strength of the defense, etc. (Hawkins 2002). I consider these issues as secondary because they can all be subsumed into the courts' final ruling.

Uncertainty in the form of variance in judicial choices originates in the legal, political and institutional characteristics of appellate courts: legal uncertainty concerns indeterminate doctrines in administrative law and different forms of judicial review that the courts can take. Political uncertainty concerns ideological differences amongst judges on an appellate court. Judges make different judicial choices due to different policy preferences. Although both of legal and political uncertainties play an important role in bureaucratic prosecution, I argue that institutional uncertainty as it emerges from the appellate courts' changing membership and random assignment of judges to panels plays a far more critical role.

Essentially, the bureaucracy faces these three types of uncertainty at different levels. Legal uncertainty is equivalent to the legal environment within which the bureaucracy prosecutes cases. Because of the ambiguity of the law and the existence of indeterminate legal doctrines, the bureaucracy always faces legal questions such as what form of judicial review a court will adopt and what rules a court will apply. Moreover, legal uncertainty relates to political uncertainty in the sense that without the former the latter cannot exist. In other words, legal uncertainty generates political uncertainty because it provides room for judges to maneuver according to their own political preferences. With regard to appellate courts, political uncertainty develops from panel decision-making where face-to-face interaction among judges creates uncertainty about judicial rulings. Finally, the bureaucracy faces institutional uncertainty. If we take legal uncertainty as a macro-level uncertainty and political uncertainty as a micro-level uncertainty, the institutional uncertainty can be regarded as the meso-level uncertainty.

As I argue below, such meso-level uncertainty plays a critical role in determining bureaucratic prosecution and the court members' ideological diversity can be employed as a proxy for measuring variance in the courts' choices. Ideological diversity leads to variance in judicial outcomes with respect to the bureaucracy's position and hence higher uncertainty in prosecution, which in turn discourages prosecution.

Judicial Goals and Political Uncertainty

It has long been established in judicial politics that Supreme Court justices' ideologies significantly affect their personal behavior in judicial decision-making (e.g. Segal and Spaeth 1993). When it comes to appellate court judges, Cross's (2003) study, for example, also indicates that judges' political preferences play an important role in judicial decision-making at the appellate court level. Unlike the legal model's claim that judicial decision-making should be free from judges' ideological influence (Sullivan 1992, Kronman 1993, Rosenberg 1994), the political theory of judicial decision-making or the attitudinal model never excludes completely the influence of legal facts and the law. Segal and Spaeth (1993), for example, suggest that the Supreme Court, under the attitudinal model, "decides disputes in light of the facts of the cases vis-a-vis the ideological attitudes and values of the justices" (Segal and Spaeth 1993, 65). Regarding appellate court judges, Klein (2002) suggests that they usually pursue four goals, including both legal and political objectives:

- Promote policies consistent with their policy preferences
- Reach decisions that are legally sound
- Maintain coherence and consistency in the federal law

- Limit the time spent deciding any one case (Klein 2002, 11)

Judges, however, cannot pursue these goals simultaneously; one goal may take precedent over another depending on the circumstances.

> [T]he various goals can come into direct conflict. It is not always possible for judges to reach desired outcomes through reasoning they view as legally sound. The desire for consistency must sometimes yield to the need to limit the time spent on a case. Hence, by the time a decision is reached, often one goal will dominate the others. This simplified final result should not blind us to the complex of motivations with which the judge first approached the decision (Klein 2002, 26).

Shapiro and Levy (1995) suggest that while the conflict between legally sound decisions and those decisions that satisfy judges' policy preferences are reconcilable, judges' policy preferences nevertheless usually determine the final outcome. In the context of administrative law, Shapiro and Levy (1995) explain why judges' desire to reach decisions consistent with their policy preferences often takes precedence over producing legally sound rulings and maintaining legal consistency. They divide judicial decision-making into two related component: "craft" and "outcome." Craft refers to "the well-reasoned application of doctrine to the circumstances of a particular case" (Shapiro and Levy 1995, 1053). While this appears to suggest that craft is equivalent to the goal of reaching legally sound decisions, they extend the meaning of craft and include the goal of consistency: "Craft reflects the values of consistency with constitutional and statutory provisions and continuity with prior case law, but permits interstitial evolution and, in exceptional cases, overruling precedent" (Shapiro and Levy 1995, 1053). By outcome, they mean "the result in a given case and its implications for the parties and society as a whole" (Shapiro and Levy 1995, 1053).

The relationship between craft and outcome, according to Shapiro and Levy (1995), is not exclusive.

> Neither a pure craft nor a pure outcome orientation exists in practice. All judges value both craft and outcome to some degree, and many decisions involve some combination of craft and outcome. The value that a judge accords craft and outcome in a particular decision reflects the utility that the judge gains from a particular orientation (Shapiro and Levy 1995, 1054).

However, because the payoff in reaching an outcome consistent with one's political preferences is always higher than the cost of applying inconsistent legal doctrines, Shapiro and Levy (1995) suggest that judges' political goals usually dominate the desire to reach consistent decisions over time.

While this conclusion is similar to the argument made by proponents of the attitudinal model, who argue that judges' political preferences are predominant factors in judicial decision making, the legal model of judicial politics suggests the contrary. It directs our attention to legal factors such as forms of review and indeterminate legal doctrines. In my view, the critical difference between the legal model and the attitudinal model lies in the contention as to whether or not judges act within boundaries of the law. While the legal model suggests that judges definitely act and should act within boundaries of the law, the attitudinal model suggests that judges are political actors and can expand the application of the law by interpreting the law in innovative ways. For the purpose of this project, both models are valid because whether or not judges, motivated by their political preferences, act within or beyond legal boundaries is just a matter of different degrees of political uncertainty faced by the bureaucracy. In other words, if we take the legal environment as a framework within which judges can exercise its political

preferences, the level of political uncertainty created by judges based on their political preferences can vary, depending on whether judges choose to act within such a framework or expand it.

Steven Burton (1992), for example, favors the legal model, although he admits that there is discretionary space within which judges can maneuver due to indeterminate legal standards. Even though he argues that judges, despite such discretionary power, should act in a “good faith’ and reach decisions that are most legally sound, the existence of discretionary space indicates that at least theoretically judges’ political preferences can play a role in judicial decision-making even under the legal model. Similarly, Cross (2005) contends that appellate courts judges can achieve ideologically desirable and legally sound outcomes simultaneously. Given that the Supreme Court’s decisions and ambiguous legal texts usually do not dictate the lower courts’ decisions, there exists a range of possible choices within which lower courts can choose. “Lower courts may take any point within that range and appear to be compliant and even sincerely believe themselves to be compliant. They will subconsciously choose the place in the range of compliance that is most ideologically acceptable to them” (Cross 2005, 393). As a result, even though judges’ discretion under the legal model is constrained by the law, they still can reach decisions according to their political preferences without the appearance of judicial activism. The political uncertainty created in this scenario, however, is lower than the uncertainty created under the attitudinal model.

In the scenario suggested by the attitudinal model, the bureaucracy faces higher uncertainty because judges motivated by their political preferences may actively change

the boundaries of the law. Shapiro and Levy (1995), for example, suggest that while the conflict between legally sound decisions and decisions that satisfy judges' policy preferences are reconcilable, judges' policy preferences usually determine the final outcome. Given that judges are outcome oriented and prefer to reach decisions consistent with their political preferences, judges in administrative law are motivated to create and maintain indeterminate doctrines.

> Courts will create indeterminate craft norms when judges are particularly concerned about outcomes in present cases, especially if their concern for influencing future decisions is limited. Judicial behavior in substantive review of administrative decisions is consistent with this prediction (Shapiro and Levy 1995, 1062).

In other words, judges under the attitudinal model will seek to increase the flexibility of the law in order to create more discretionary space for themselves to realize political goals. Compared with political uncertainty created under the legal model where judicial ideology is constrained more by legal concerns, uncertainty created in the attitudinal model is obviously greater.

Regardless of the result of the debate between the legal model and the attitudinal model, however, judges' political preferences certainly play a critical role in creating uncertainty for the bureaucracy, albeit the degree of uncertainty differs under the two models. Nevertheless, my discussion so far considers just the relationship between legal uncertainty and political uncertainty, i.e. macro-level uncertainty and micro-level uncertainty. What has not been considered is institutional uncertainty as the meso-level uncertainty created by the appellate courts' changing membership and random assignment of judges and cases, which is the focus of my theoretical argument.

Ideological Composition of Appellate Courts and Institutional Uncertainty

Given that an individual judge's policy preferences contribute to political uncertainty, the range of uncertainty can be small if all judges on the appellate courts share the same preferences and vote together. An examination of the partisan composition of the circuit courts indicates that the appellate court judges are not only ideologically diverse but that they vote across the political spectrum.

Table 4.1 Partisan Composition of the Federal Appellate Courts

	Active Judges (%)	Active Judges (N)
G.W. Bush	20.4	34
Clinton	32.9	55
Bush	15	25
Reagan	16.2	27
Carter	5.4	9
Ford	0.6	1
Nixon	0.6	1
Vacancies	9	15

Source: Sheldon Goldman, Elliot Slotnick, Gerard Gryski, and Sara Schiavoni. 2005. "G.W. Bush's Judiciary, The First Term Record." *Judicature* 88 (May-June): 244-275.

As shown in Table 4.1, 52.8 percent of judges of the 152 active judges serving on the appellate courts were appointed by Republican presidents and 38.3 percent were appointed by Democratic presidents. Table 4.2 indicates that while judges appointed by Democratic presidents in general are more likely to reach liberal decisions than judges appointed by Republican presidents, a significant portion of the judges' decisions does

not correspond with judges' partisan affiliation. As a result, even if all the appellate court judges were to share the same political background, they would not necessarily reach identical conclusions about the law and vote identically. This of course creates political uncertainty in the judicial process from the perspective of the bureaucracy.

Table 4.2 Percentage of Liberal Decisions by Case Types

Appointing President	Civil Liberties & Rights	Criminal Justice	Labor & Economic Regulation	All Cases
G.W. Bush	27.9	33.3	52.5	36.1
Clinton	42.1	39	54.3	44.7
Bush	32.2	29.9	50.6	37
Reagan	32.3	25.3	48.7	35.8
Carter	51.3	38.4	61.3	51.6
Ford	40.3	34.9	52.5	43.5
Nixon	37.9	26.9	48.5	38.1
Johnson	58.1	36.4	63.1	51.9

Source: Kenneth L. Manning, and Ronald Stidham. 2004. "The Decision-Making Behavior of George W. Bush's Judicial Appointees." *Judicature* 88 (July-August): 21-28.

The degree of ideological diversity varies within the circuit courts because of presidential appointments. Presidents since World War II select judicial appointees to courts of appeals according to their policy preferences whenever they are not constrained by senatorial courtesy (Giles, Hettinger, and Peppers 2001). From Roosevelt to Reagan, if we examine the proportion of partisan judges appointed to appellate courts as a

measure of change in the ideological composition of the courts, as shown in Table 4.3, there is great fluctuation in the level of ideological diversity within the courts.

Table 4.3 Partisan Appointment by Presidents

	FDR	HST	DDE	JFK/LBJ	RMN/CF	JC	RR
Democratic	96%	88.5%	6.7%	95.1%	7.0%	82.1%	
Republican	4%	11.5%	93.3%	3.3%	93%	7.1%	96.2%

Source: Sheldon Goldman. 1997. *Picking Federal Judges: Lower Court Selection from Roosevelt Through Reagan.* New Haven: Yale University Press.

While such fluctuation creates institutional uncertainty and makes it more difficult for the agencies to predict the direction of the courts over time, when it comes to decision-making in individual cases, a more important source of institutional uncertainty is the appellate courts' practice of randomly assigning judges and cases to panels. Unlike the Supreme Court, decision-making in the appellate courts occurs in panels of three judges who have been randomly assigned to these panels, which in turn hear randomly assigned cases (Cohen 2005).

The institutional uncertainty created by the appellate courts' doubly random assignment process is twofold. First, as indicated in Table 4.4, parties in an appeal do not know which judges will hear their case before they decide to appeal. This obviously creates uncertainty for the litigants because there is very little ground for making projections about the possible decisions of the courts without knowing the identities of the judges. Second, random assignment of judges makes the ideological diversity amongst judges more dynamic in the sense that levels of ideological diversity within

each panel differ from each other which affects judges' voting pattern. As Revesz (1997) reveals, varying panel composition significantly affects the likelihood with which appellate court judges will vote ideologically. "Judges are likely to vote less ideologically when the panel is heterogeneous (containing members of both political parties) than when it is homogenous" (Revesz 1997, 1732). As a result, the random assignment of judges enlarges the group effect of panels on judicial outcomes. As consequence, the bureaucracy is not certain which panel is going to review its decision before filing an appeal. From the bureaucracy's perspective, this creates institutional uncertainty. The question for the bureaucracy arises as to how to gauge such institutional uncertainty and prosecute accordingly.

Bureaucratic Prediction of Judicial Ruling

As my previous discussion demonstrates, agencies face different types of uncertainty in the appellate courts. Legal uncertainty refers to different forms of judicial review and the legal standards a court can choose and apply. Political uncertainty refers to the fact that judges' ideological positions affect their judicial choices and that interaction among judges on panels influences the final outcome. Finally, institutional uncertainty refers to the situation where the appellate courts randomly assign their judges to panels and do not reveal the identity of the panels to litigants until after a case is filed. In addition, appellate courts' membership changes due to presidential appointments. As a result, for agencies seeking to minimize the cost of prosecution, i.e. being overturned by an appellate court, and develop proper expectations of appellate

courts possible rulings, they need to take into consideration these three types of uncertainty.[39]

Table 4.4 Disclosure of Panel Composition to Attorneys

Circuit Courts	Timing of Disclosure (Number of Days before the Argument)
1	7
2	Thursday before the week in which the court meets
3	>10
4	Not disclosed until morning of the argument
5	>7
6	>14
7	Not disclosed until morning of the argument
8	28
9	Not disclosed until morning of the argument
10	Monday before each session of argument
11	7
D.C.	Disclosed after the cases have been assigned to panels

Source: Professor Stefanie Lindquist at Vanderbilt University kindly provided the information.

With regard to legal uncertainty, I assume in this project that it is stable. As my previous discussion indicates, legal uncertainty is equivalent to the legal environment within which the courts and the bureaucracy interact. The institution that has the most influence on this legal framework is Congress. By passing new laws, Congress can

[39] I assume that there is no uncertainty at the district court level. Given that a single judge runs a district court, it is much easier for experienced bureaucrats to predict the district court's decision.

modify the legal framework by making it either more flexible or restrictive. The second important player that can affect the scope and nature of the legal framework is the courts themselves. As my discussion of the disagreements between the legal model and the attitudinal models has shown, judges can choose to either act within the existing boundaries of the law or expand it on the basis of their own political preferences through innovative interpretation of the law. Given the ambiguous nature of the law and opinions of the Supreme Court, it is clear that the judiciary has played an active role in determining the boundaries of the law. At any one time, however, my theory assumes a constant level of legal uncertainty. Agency decisions to prosecute take into account the level of uncertainty at the particular time it makes the choice to act or not. While levels of uncertainty change over time, agency choices to prosecute occur at moments in time when legal uncertainty is stable.

With regard to political uncertainty created by judges' policy preferences and their interaction, i.e. the level of uncertainty at the panel level, I follow the conventional approach adopted by scholars such as Spiller and Tiller (1997) and Tiller and Spiller (1999) and treat panels as unitary institutions whose preferences can be represented by their median members. Although the bureaucracy does not know the identity of the panel at the time of the decision to prosecute, the assumption that the bureaucracy can predict the panel's decision through its median member's policy preferences once it knows the identity of the panel that is going to review its cases facilitates the development of a measure to gauge institutional uncertainty within the appellate courts, which is the focus of this project's inquiry.

Since I model the bureaucracy as forward-looking and risk-averse, the most critical type of uncertainty is institutional uncertainty created by the appellate courts' random assignment of judges into panels. In other words, before the bureaucracy can rely on the median voter theorem to predict a specific panel's decision, it needs to develop a sense of the range of differences among panels because it does not know which panel is going to hear the case. In other words, because the appellate courts randomly assign judges into panels and cases to panels, the bureaucracy first faces the task of developing expectations of the range of medians before it can predict decisions made by any specific panels. Nonetheless, the conventional approach in the study of appellate courts' influence on the bureaucracy, represented by Brandice Canes-Wrone's work (2003), ignores institutional uncertainty in terms of ideological differences among median judges. Specifically, Canes-Wrone measures the appellate courts' ideology as the percentage of full-time judges appointed by a Democratic president and equates the measure with panel preferences. Her approach is problematic for two other reasons.

First, the ideological composition of an appellate court is not a reliable predictor of the court's decision in a specific case due to an assumption that can be traced back to the origin of the attitudinal model. The two variants of the attitudinal model developed specifically for the Supreme Court both argue that attitudinal factors independent of legal factors play a role in influencing individual justices' voting behavior. Glendon Schubert (1965, 1974), by analyzing "the frequencies of voting agreement and disagreement across all issues by pairs of the justices" and constructing ideal-points for justices in a psychological space, argues that "differences in ideology (which are

differences in their attitudes toward particular issue aggregates) cause the justices to vote differently in decisions of the Court in which such issues are at stake" (1974, 18). Schubert's purpose was to demonstrate that justices' positions in a psychological space correspond with attitudes/ideologies underlying their votes. His analysis of non-unanimous decisions made by the Supreme Court on the merits of substantive issues demonstrates that "there is complete isomorphism between the configuration of ideal-points in the psychological (called in the present study joint scalar, factorial, or smallest) space and the belief systems of the justices that motivate their voting in Supreme Court decisions" (Schubert 1974, 18).

Portraying justices as utility maximizers with policy goals, Rohde and Spaeth (1976) and Segal and Spaeth (1993) develop the second variant of the attitudinal model and argue that justices further their policy goals "by considering the facts of the case in light of their ideological attitudes and values" (Segal and Spaeth 1993, 73). The hypothesis derived from this model is that justices' a priori policy preferences determine the way they make decisions on the merits. Evidence from the search and seizure cases illustrates that knowledge of justices' attitudes greatly enhance one's ability to predict their votes.

Both approaches of the attitudinal model establish a direct relationship between individual judge's ideology and his or her votes. In order to make a connection between individual judge's ideology and a court's collective decision, a critical assumption is needed according to Ulmer (1966).

> Since any given case may present several issue elements, judicial response may be the result of combining reactions to various factors to produce a single choice,

> i.e., a vote pro or con the plaintiff in the case. Assuming that all judges in a collegial court agree in their identification of the issue elements (a rather large assumption), the acceptability of each singly and in combination is attitudinally determined" (Ulmer 1966, 199).

Even if such an assumption can be hold, for agencies to make correct predictions of individual cases on the basis of the ideological composition of a court it is necessary that the agency knows prior to prediction the issue on which the court is going to make a decision, which in reality such information is usually not available.

The second flaw in Canes-Wrone's approach is that judges' ideologies have become increasingly complicated, especially in economic cases. A single dimension of economic liberalism no longer catches all the concerns by judges in economic decision-making. Schubert (1965) argued that in economic cases, such as anti-trust prosecutions, justices demonstrate a high degree of consistency in their attitudes which implies, he claimed, an "economic scale related to conflicts of interest between the economically affluent and the economically underprivileged" (127-128).

> The economic liberal would support the claims of the economically underprivileged, while the conservative would stand pat and resist economic change that would benefit the have-nots. Hence the economic liberal would uphold the fiscal claims of injured workers (or their widows); he would support unions, who could be assumed to function (in general) as the agents of workingmen to improve their economic status; he would support government regulation of business, in order to maintain competition and protect consumers; and he would uphold state taxation, both because state tax laws often have the direct function of regulating enterprise, and also because an adequate program of state financing is a precondition to an effective state program of economic controls and services (Schubert 1965, 128).[40]

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[40] The economic cases collected by Schubert involved "disputes between unions and employers; governmental regulation of business activities; fiscal claims of workers against employers; and disputes between small businessmen and their large corporate competitors" (127). In an earlier paper, Schubert (1962) suggests that "the basic value that permeates the issues of economic liberalism is that of favoring claims of underprivileged economic interests as against those of affluence and monopoly power" (100).

Schubert’s economic scale, a measure of economic liberalism, explained justices’ behavior well in economic cases. However, the utility of using economic liberalism scores to predict justices’ votes has decreased, according to Hagle and Spaeth (1993) Apparently since the start of the Burger Court

> the shift in the focus of much agency action itself, the increased complexity of government regulation, the impinging of noneconomic concerns on economic actors (e.g. environmental protection, commercial speech) now preclude the reliable categorization of business cases on the overarching dimension of economic liberalism/conservatism (hereafter, economic liberalism) (Hagle and Spaeth 1993, 492).

Hagle and Spaeth (1993) demonstrate that individual justices’ voting in economic cases in the Burger Court were influenced by their concerns over federalism, the Court’s exercise of power, the relationship of the individual vis-à-vis the government, deference to agencies, and the direction of the lower court’s decision. As a result, in stead of having only one dimension in the psychological space to represent justices’ positions on economic issues, the configuration of justices is based upon several dimensions.

> The three most antibusiness justices-Brennan, Marshall, and White-along with Rehnquist and O’Connor, support government regulation. Three others are libertarian; Powell, who is most probusiness, Stevens and Stewart. O’Connor and Rehnquist are states’ righters, while Blackmun, White, and Stewart are national supremacists. Marshall is a judicial activist, Rehnquist and Stewart are judicial restraintists. Brennan and Marshall, along with White and Blackmun, also uphold agency action. Stevens, O’Connor, and Stewart appear hostile to agency action. Chief Justice Burger, who was second of the 10 justices in support of business, was the only one who displayed no distinctive behavior on any of the independent variables.
>
> Viewed from a regulatory perspective, the justices divide themselves in this manner: three support business regulation (Marshall, Brennan, and White); two are states’ righters (Rehnquist and O’Connor); three are libertarians (Powell, Stevens, and Stewart); and one is a national supremacist (Blackmun). The votes

> of the remaining justice, Burger, fit none of these patterns (Hagel and Spaeth 1993, 502-503).

Since numerous factors now enter individual justice's decision-making process in addition to economic liberalism and since individual differences exist among justices who are grouped together as "conservatives" or "liberals," it becomes increasingly difficult to predict even just individual justices' votes in an economic case on the basis of a general measure of their ideology in terms of economic liberals vis-à-vis economic conservatives, let alone to predict a court's collective outcomes.

This does not necessarily mean that general measures of judicial ideology are rendered useless. As Hagel and Spaeth (1993) point out, "when the percentage of pro- and anti-business votes cast by each of the justices is considered, our results generally comport with commonly accepted labels for the justices' ideological positions." Nevertheless, knowing how a justice in general is going to vote in economic cases is not equivalent to knowing how a justice is going to vote in a specific economic case. Moreover, information as to how members of a court characterize an economic case is not revealed to outsiders prior to the final decision. An economic case can be defined in numerous ways based on different issues. It can be viewed as a regulation case, a case involving national supremacy, a case concerning federalism, or a case regarding the exercise of judicial power. As Hagle and Spaeth (1993) demonstrate, different characterization of a case will lead justices in the same group, either liberal or conservative, to vote differently.

In summary, agencies need to satisfy two conditions in order to predict an appellate court's decision in economic cases. First, they need to know the principle

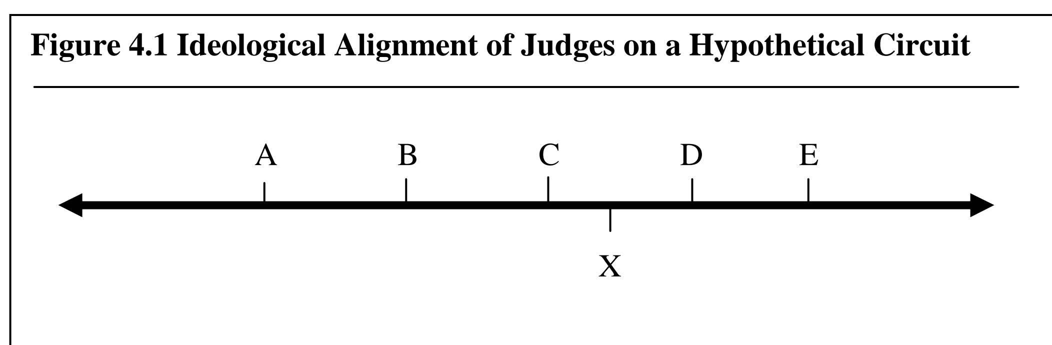
ideological dimensions involved in each legal area and judges' ideological positions on each dimension. Secondly, they need to know the issue the court will select as the basis of its decision in order to make a prediction. Hagle and Spaeth's (1993) study indicates that it is possible, albeit difficult, to satisfy the first condition. In economic cases, the principle ideological dimensions are economic liberalism, federalism, national supremacy, the exercise of judicial power, and deference to agency. It is the second condition that is almost impossible to satisfy. Other than judges themselves, outsiders will only know the issue on which a court makes a decision until the court's opinion is released. Without knowing the issue before the final decision, the prediction of the court's decision on the basis of individual justices' ideology is prone to contain a great deal of error. More importantly, this approach ignores the fact that the bureaucracy faces institutional uncertainty in terms of the necessity to deal with a group of panels with different policy preferences.

Ideological Variance and Institutional Uncertainty

To tackle the deficiency in the conventional approach, I develop for this project a simple measure of institutional uncertainty. As my discussion has shown besides legal uncertainty at the macro-level and political uncertainty at the micro-level the bureaucracy also needs to consider institutional uncertainty at the meso-level in terms of ideological differences among panels. In other words, when the bureaucracy decides to prosecute, it needs to consider the possible decisions an appellate panel will make given that the decision from a district court is appealed to a circuit court. Since appellate courts randomly assignment judges into panels and cases to panels, the bureaucracy does not

know which panel will hear the appeal. Given that each panel's decision can be represented by the choice of its median judge, depending on the number of panels a circuit can have and the level of ideological differences among the panels, the range of possible judicial choices can vary with respect to agencies' positions. The variance in judicial choices, as Figures 4.1 and 4.2 show, depends on the ideological variance among judges on a circuit.

Figure 4.1 Ideological Alignment of Judges on a Hypothetical Circuit



Figures 4.1 shows a hypothetical circuit court with five judges aligned on an ideological spectrum from left to right. Judge C is the median judge for the entire court and X represents an agency's position. Given that there are five judges, when the court randomly assigns three into a panel, there are a total of 10 possible ways of having panels with different membership.[41] Within these 10 panels, judges B, C, and D function as median judges in respective panels. The ideological differences among B, C, and D essentially determine the range of variance in judicial choices with respect to the agency's position. As Figure 4.2 below demonstrates, when the ideological diversity of

[41] 5!/3!*2!=10. These panels are ABC, ABD, ABE, ACD, ACE, ADE, BCD, BCE, BDE, CDE.

the entire court increases, the variance in judicial choices with respect to the agency's position will increase accordingly.

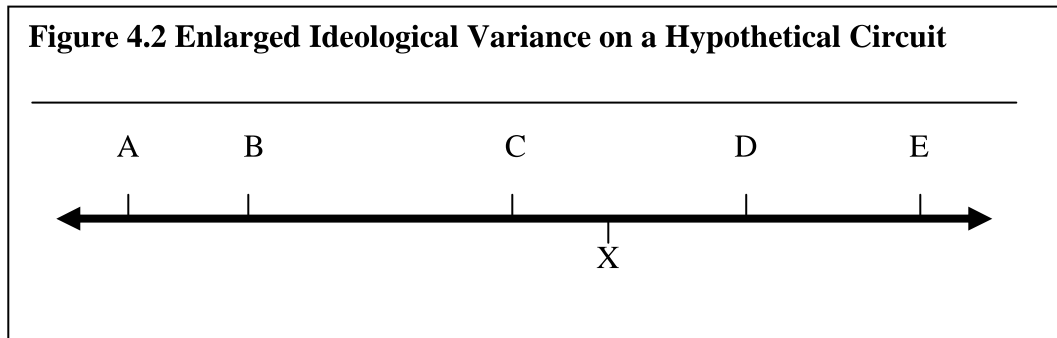


Figure 4.2 Enlarged Ideological Variance on a Hypothetical Circuit

Figure 4.2 depicts the same hypothetical circuit court with the only difference that the ideological variance among judges is larger than the court in figure 4.1. In reality, this can happen as judges leave the bench and are replaced by presidential appointments with different partisan and ideological preferences. In this case, judges B, C, and D will still function as median judges in those 10 panels with different combination of judges. Nevertheless, the ideological differences between these median judges with respect to X is larger, meaning that the variance in judicial choices is larger, which increases institutional uncertainty for the bureaucracy.[42]

My theory argues that the ideological variance within an appellate court functions as a better indicator of how accurately we can explain the bureaucracy's likelihood of choosing between prosecution and settlement. Knowledge about each judge's economic ideology may enable an agency to accurately predict each judge's vote

[42] The only scenario under which enlarged ideological variance of the whole court does not have an impact on the differences among the medians is that only judges A and E are replaced by even more radical judges and judges B, C, and D remain. In the case, the court's overall ideological variance is larger, but the differences among B, C, and D remain the same.

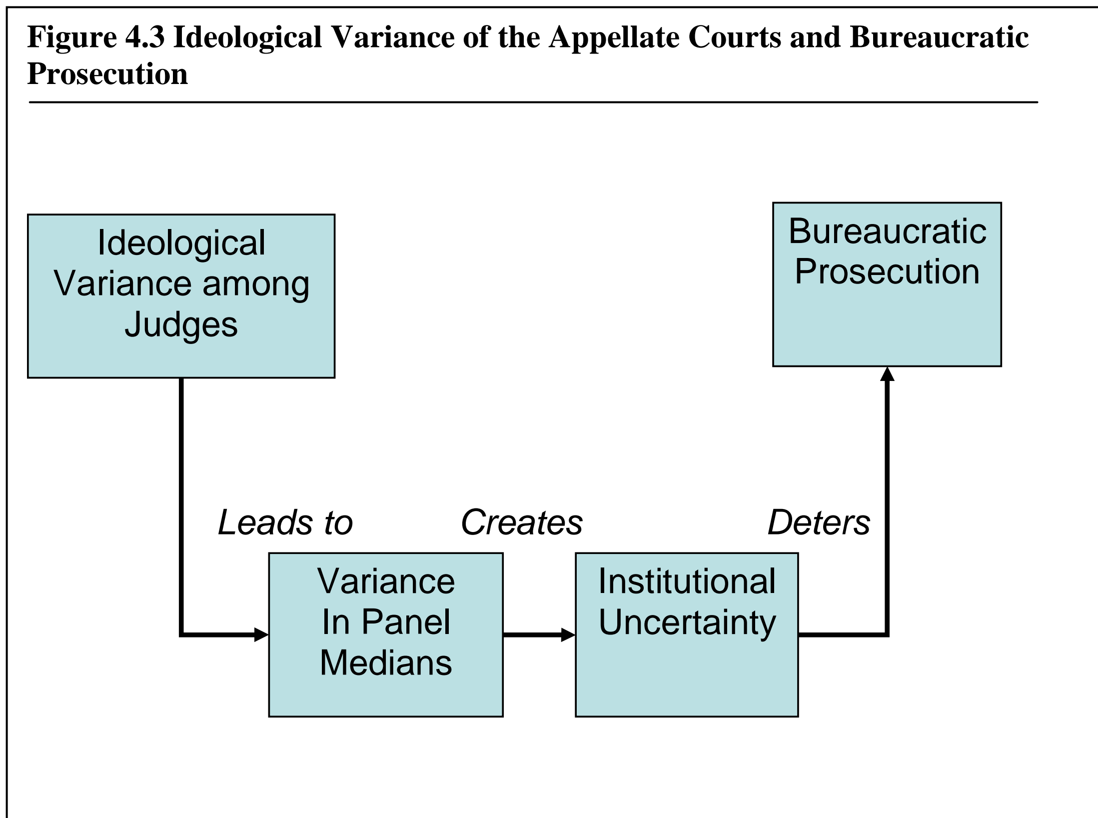
individually, but this does not necessarily mean that collectively the agency can accurately predict the court's outcome. Still, even if the direction of a court's decision could be predicted, agencies are necessarily also concerned about the accuracy of the prediction. This latter concern is even more important than the prediction of direction because a prediction with low accuracy is almost meaningless. Therefore, my theory argues that because of the collective nature of the appellate courts' decision-making process and the random assignment process knowledge of the ideological variance within an appellate court indicates how accurately we can gauge the bureaucracy's likelihood of success in the court. The argument is two fold. First, ideological variance within an appellate court influences an agency's prosecution decision. As the measure of the court's internal group context, the ideological variance functions as a proxy for the courts' collective decision-making dynamics. The larger the ideological variance, the more complex the internal dynamics are. As a result, there is more uncertainty over the court's final decision, which consequently reduces the likelihood of prosecution by the bureaucracy. In other words, as shown in Figure 4.3, ideological diversity within an appellate court leads to variance in judicial outcomes in terms of panel differences with respect to the bureaucracy's position, creates more institutional uncertainty from the perspective of the bureaucracy, and eventually deters bureaucratic prosecution. The first hypothesis based on this argument is that

> When an appellate court's ideological variance increases, an agency reduces its number of prosecution (H1)

The second aspect of my argument is that ideological variance has an intervening effect on the use of an appellate court's ideological composition to predict its decisions.

While a liberal appellate court in general is going to favor government regulation, due to the court's collective decision-making process and random assignment practice,

Figure 4.3 Ideological Variance of the Appellate Courts and Bureaucratic Prosecution



differences among judges on the court mediate the court's final decision. As a result, even though in general an agency is more likely to prosecute when facing a liberal appellate court, a large ideological variance within the court increases uncertainty in agencies' prediction of the court's decision in specific cases due to enlarged differences among panels. Therefore, agencies are less likely to prosecute even when facing favorable appellate courts. My second hypotheses, consequently, is that

> When an appellate court's ideological variance increases, an agency reduces its number of prosecution even though the court in general favors the agency (H2).

Summary

The purpose of this chapter is to develop a theory that establish a causal relationship between institutional uncertainty generated by the appellate courts' random assignment of judges and the likelihood of bureaucratic prosecution. My central argument is that ideological diversity within the appellate courts can function as a measure of the courts' internal group decision-making dynamics in terms of differences among panels. Compared to the ideological composition measure, ideological variance is a better measure that not only takes the courts' random assignment process into consideration but also gauges the dynamics of that process. I propose that large ideological variance leads to more institutional uncertainty in prosecution in terms of larger variance in the courts' choices with respect to the bureaucracy's position. As a result, we should see fewer prosecutions when the bureaucracy faces an ideologically diverse appellate court. The foundation of the theory is built upon the lessons from the literature of administrative law, public administration, and judicial politics. Two aspects of the theory, however, make it distinctive from previous studies. First, unlike a majority of studies that take a top-down view of judicial control of bureaucracy, this theory examines the interaction between the courts and the bureaucracy with a bottom-up perspective. Second, while not ignoring the role played by judicial ideology based on individual judges, this theory emphasize the appellate courts' institutional decision-making process, which is ignored by most scholars.

CHAPTER V

EMPIRICAL TESTS

As I argued in the preceding chapters, the research question for this dissertation is how the federal appellate courts' institutional decision-making process affects bureaucratic agencies' prosecution decisions. According to my theory, the probability of agency prosecution depends on the likelihood of victory in an appellate court. Agencies make better predictions of an appellate court's decisions if the court displays a smaller variance in its range of choices with respect to agencies' positions. From the agencies' perspective, regardless of the appellate courts' policy positions, it is much easier to predict their decisions if that variance is small. I argue that an appellate court's ideological variance determines the range of choices the court can make. A court with a large ideological variance among judges will have a more dynamic decision-making process in terms of differences among panels, which creates more institutional uncertainty for the bureaucracy. Therefore, my theory proposes that large variance within an appellate court will discourage agency prosecution. In addition, I argue there is an interaction effect between an appellate court's ideological variance and its overall ideological predisposition. Given an appellate court that favors government regulation, which should otherwise encourage agency prosecution, large ideological variance within the court reduces the probability of agency prosecution because of the uncertainty introduced by disagreement among panels. To test this theory, I chose the Antitrust Division of the Department of Justice and the Federal Trade Commission to examine the two agencies' choice of enforcement tools under the influence of ideological variance

within the federal appellate courts. My research design focuses on the agencies' choice of enforcement tools in dealing with their investigations, i.e. whether or not to turn an investigation into a prosecuted case. The unit of analysis for both agencies is individual investigations.

The Antitrust Division and Appellate Courts

Data were collected through a FOIA request for the Division's workload statistics. The dependent variable is a binary measure that indicates whether or not an investigation is prosecuted. Investigations that are prosecuted in the federal district

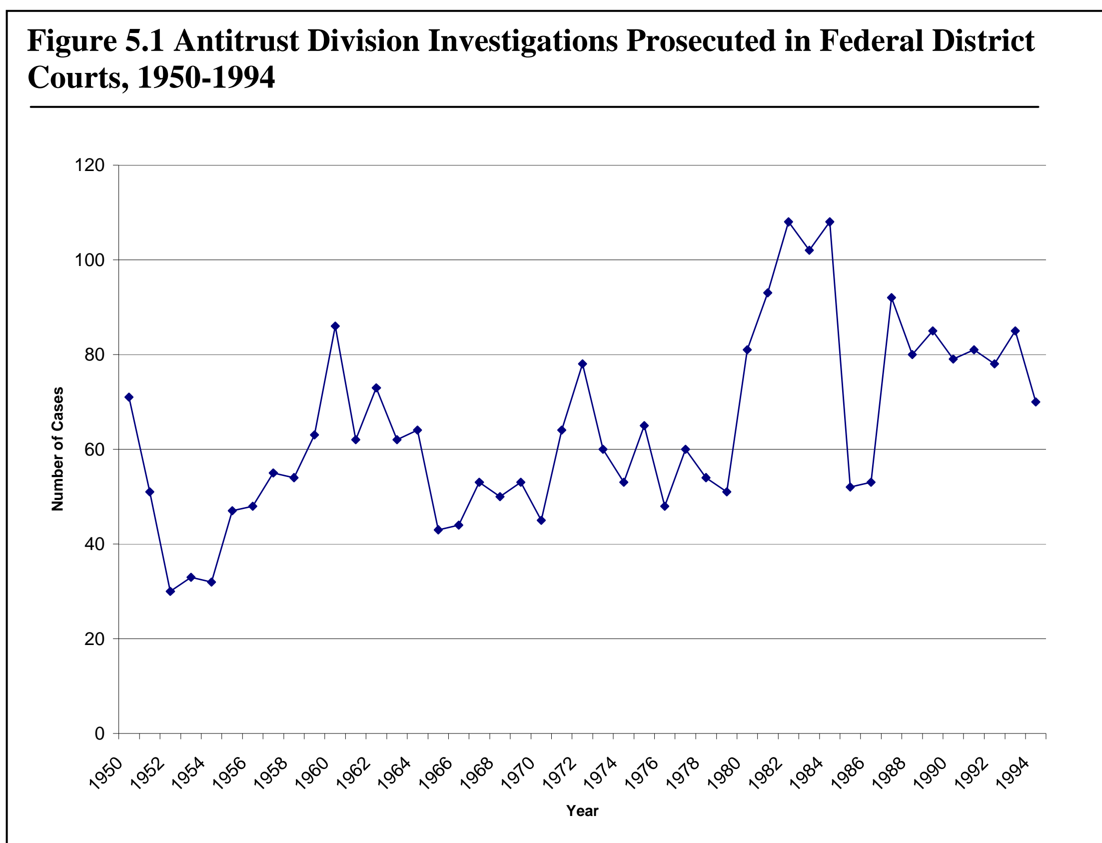


Figure 5.1 Antitrust Division Investigations Prosecuted in Federal District Courts, 1950-1994

courts are coded as 1, and non-prosecuted investigations are coded as 0.[43] The data span from 1950 to 1994.

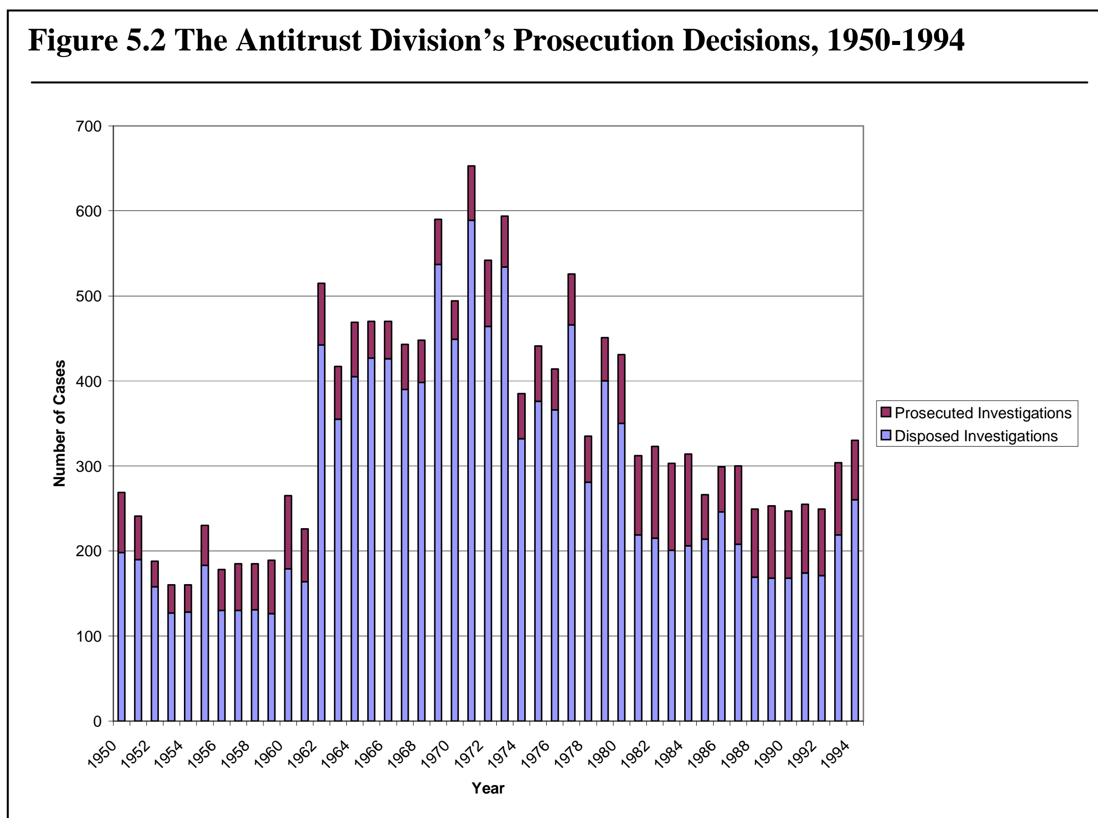


Figure 5.2 The Antitrust Division's Prosecution Decisions, 1950-1994

As shown in Figure 5.1, the number of cases prosecuted by the Antitrust Division varies across the years. But as indicated by Figure 5.2, the number of prosecution remains relatively stable compared to the total number of disposed investigations, especially for the 1960s and 1970s. A number of possible explanations can account for such a phenomenon (Eisner 1991). As a general matter, the Division rarely prosecutes

[43] Prosecuted investigations include both civil and criminal cases filed in the district courts. Non-prosecuted investigations include both settled and closed investigations.

more than 50 percent of its investigations, which confirms Hawkins's (2002) argument that bureaucratic agencies usually take prosecution as last resort.

Court Variables

The most important independent variable of interest is the measure of ideological variance within the federal circuit courts. I constructed the measure for the circuit courts on the basis of the Appeals Court Database collected by Songer (SES-8912678) and the Attributes of Appeals Court Judges Database collected by Zuk, Barrow, and Gryski (ICPSR 6796). I followed three steps to construct aggregate measures of ideological variance for the circuit courts. The first two steps were necessary to establish individual judge's economic ideology, and the final step was to calculate each circuit's ideological variance based on its judges' ideologies.

In the first step, I used the Zuk, Barrow, and Gryski dataset to establish membership for each circuit court from 1925 to 1994. Next, each circuit judge was paired with his or her voting score on economic issues, as reported in Kuersten and Songer (2001), which was based on the Songer dataset. These voting scores are measured as the percentage of aggregate liberal voting by each judge in economic cases during his or her tenure. An ideal measure would be the one that assigns an ideological score to a judge for each year on the bench, and thus reveal whether or not a judge's position changes over time. However, these data do not exist. As a result, the Kuersten

and Songer dataset requires the assumption that judges on the appellate courts from 1925-1994 have constant ideological positions in economic cases during their careers.[44]

After obtaining ideological scores for each judge, in the final step, I calculated for every year in the study period and for each circuit the standard deviation of these scores. This exercise yielded twelve measures of variance for each year in the study period; one for each circuit court. I then calculated the annual averages of these twelve scores to create a generic circuit court score for the entire appellate court system. Average standard deviations for all twelve circuits are necessary because the Antitrust Division's investigations and prosecutions cannot be broken down geographically. Consequently, the variance scores for individual or specific circuit courts cannot be used in the test.

In addition to the aggregate measures of ideological variance for all twelve circuits from 1925 to 1994, I also constructed a variable to measure aggregated, circuit-wide levels of economic liberalism among the judges from 1925 to 1994. Each circuit's economic liberalism was calculated on the basis of the average of its judges' economic scores. After obtaining twelve scores for each year, the mean value of these scores was used as a generic measure of economic liberalism for the appellate court system.

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[44] A longitudinal study of Supreme Court justices' ideologies in civil liberties cases demonstrates that justices display various patterns of ideological change, i.e. some do not change, other change linearly, and still others change nonlinearly (Epstein, Hoekstra, Segal and Spaeth 1998). When it comes appellate court judges, they may display more ideological stability than Supreme Court justices due to the fact that the appellate courts are hierarchically under the Supreme Court's control. Without further empirical examination, the author has no other choice but to keep the assumption that appellate court judges remain constant in their economic ideology during their tenure.

Figure 5.3 Ideological Variance within the Federal Circuit Courts, 1925-1994

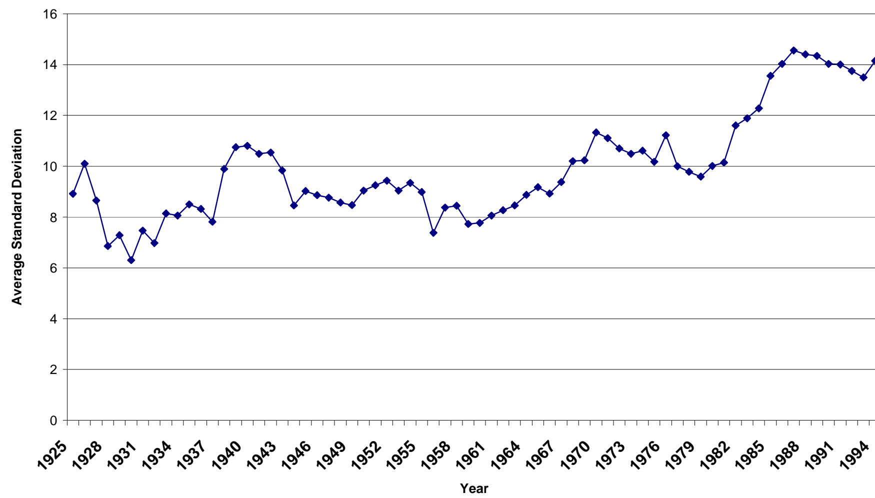
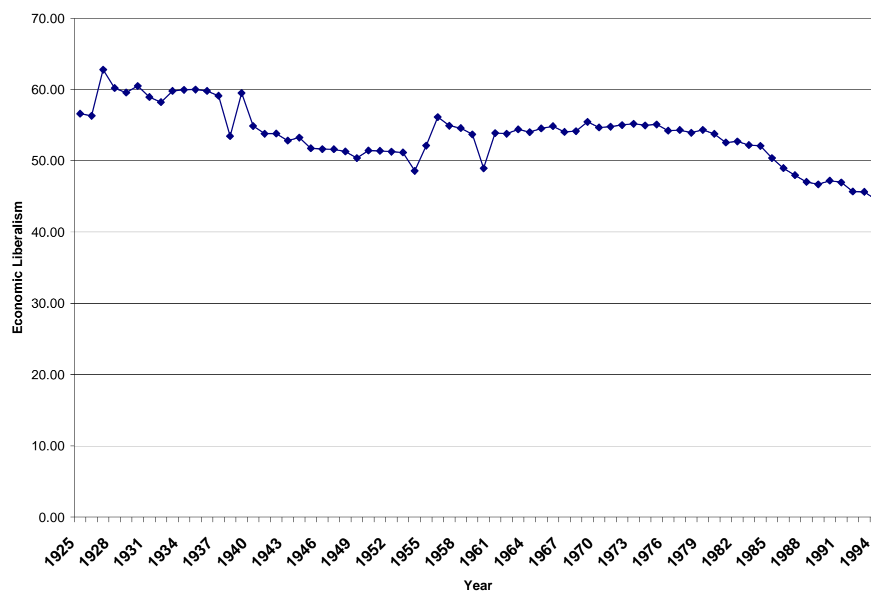


Figure 5.4 Circuit-Wide Economic Liberalism, 1925-1994



Since each judge's economic score represents the percentage of aggregate liberal voting in economic issues, the final ideological scores in effect measure the circuit level of economic liberalism. High values in this variable represent high levels of economic liberalism, which in general favors government regulation (Hagel and Spaeth 1993, Schubert 1965). A comparison of Figures 5.3 and 5.4 clearly illustrates that even though the circuit courts' overall economic liberalism has been declining since 1925, the ideological variance among judges has been increasing.

For the Supreme Court, there are also two measures, one for its ideological variance and the other for its overall ideological position. The Court's ideological variance from 1937 to 2003 is measured with the standard deviations of justices' dynamic ideal points, as developed by Martin and Quinn (2002). Since these ideal points have a high correlation with justices' votes on economic and regulatory issues (Canes-Wrone 2003), the standard deviations of justices' ideal points capture the extent to which justices disagree with one another in economic cases. With regard to the Supreme Court's overall ideological position, I adopted Martin and Quinn's scores for the Court's median justices from 1937 to 2003. Since the Supreme Court only reviews antitrust cases on rare occasions, I use these two measures simply to control for any potential effect that the Court may have on the two agencies.[45]

[45] Theoretically, Spiller and Tiller (1997) suggest that agencies take the Supreme Court into consideration in decision-making. When it comes to antitrust cases specifically, since antitrust cases only occupy a small portion of the Supreme Court's agenda, I include the Court simply as a control variable.

Figure 5.5 Ideological Variance within the Supreme Court, 1937-2003 (Standard Deviation of Justices' Dynamic Ideal Points)

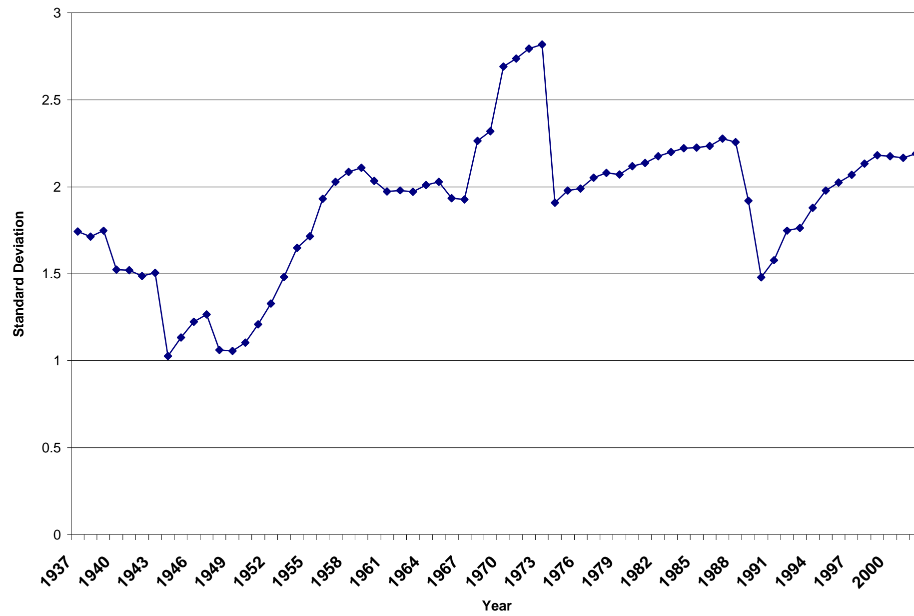
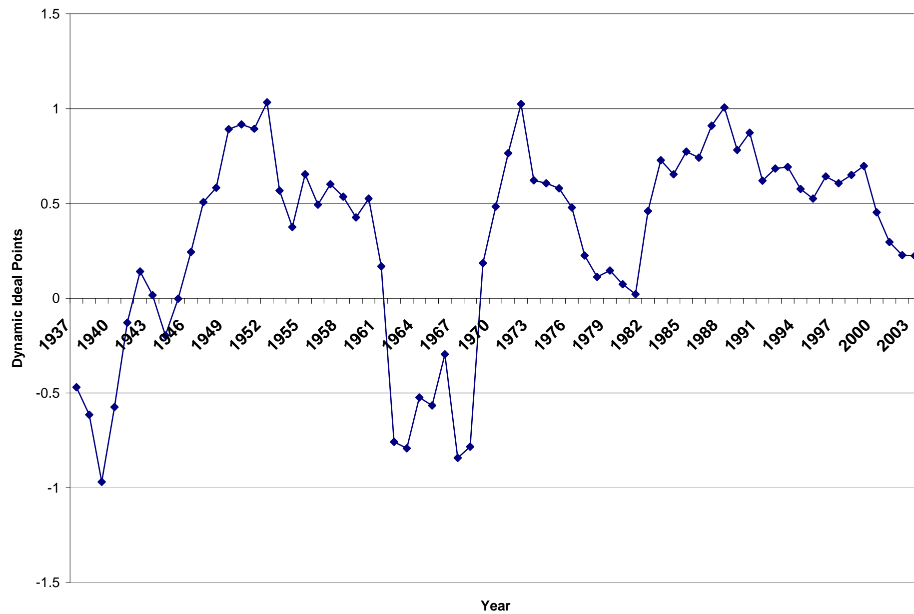


Figure 5.6 Median Justices' Dynamic Ideal Points, 1937-2003



As shown in Figures 5.5 and 5.6, the median justices' dynamic scores display a much more volatile trend than the Court's ideological variance among justices. The ideological variance remained relatively stable during the Warren and Burger Courts. Nevertheless, significant membership change during the early Warren and Burger Courts led to surges in ideological variance as justices with opposite ideologies joined the Court. By the same token, retirement of liberal justices such as Douglas, Brennan, and Marshall during the mid-1970s and early 1990s contributed to a reduction in ideological variance. After Clinton's appointees joined the Court, the ideological variance within the Court increased again and went back to its previous level during the Warren and Burger Courts. Furthermore, a comparison of the Supreme Court and the circuit courts shows that while ideological variance within both the circuit courts and Supreme Court increases overtime, the Supreme Court shows a much more volatile trend, which offers indirect support to the assumption that circuit judges' ideologies remain relatively stable compared to Supreme Court justices who are more volatile as found by Epstein et al.(1998).

In addition to the measures for the circuits and Supreme Court, I also included a measure for the federal district courts in order to control for any possible effect from district court judges. The data provided by the Antitrust Division include the number of civil and criminal cases won and lost in district courts each year from 1950 to 1994. I constructed a winning ratio measure for the Antitrust Division on the basis of the percentage of the Divisions' cases that were won. A high winning ratio indicates that the district courts favor the Division. Since such winning ratios are not available to the

Division until the end of each year, I lagged this measure in the test in order to catch any of its temporal effect on the Division's prosecution decisions. A high winning ratio in a previous year should encourage more prosecution by the Division. As shown by Figure 5.7, the Division has a very high winning ratio in the district courts.

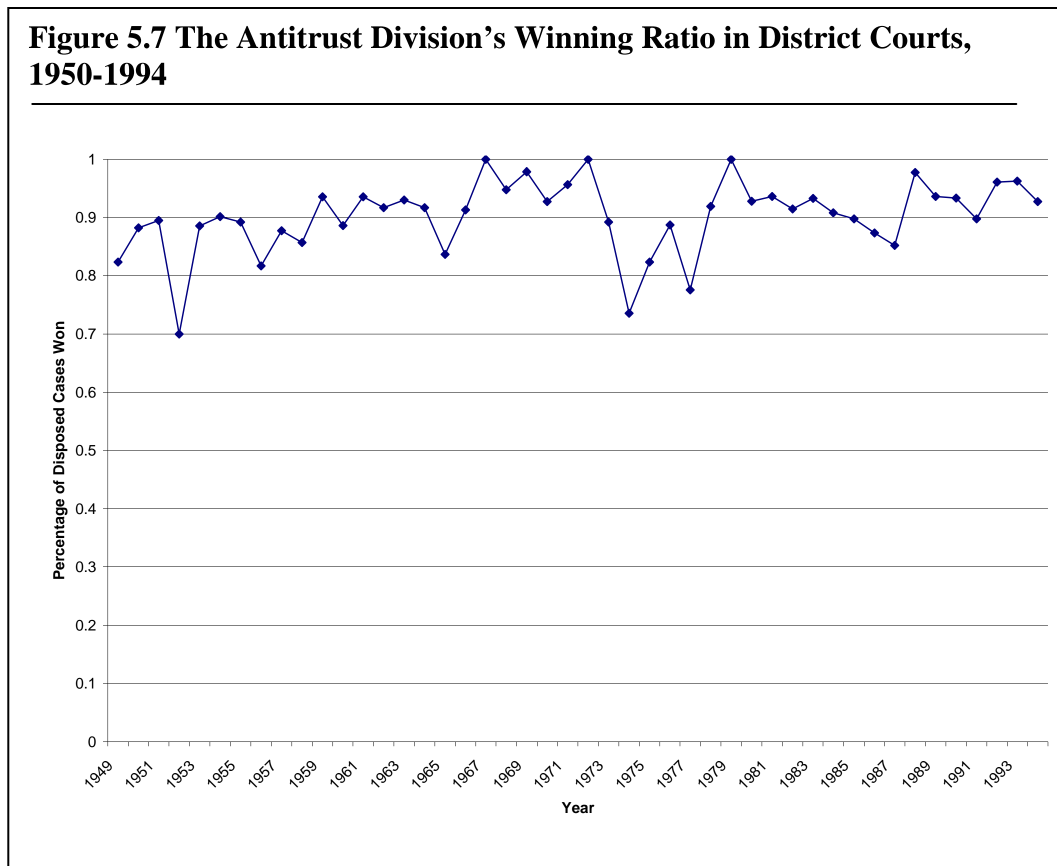


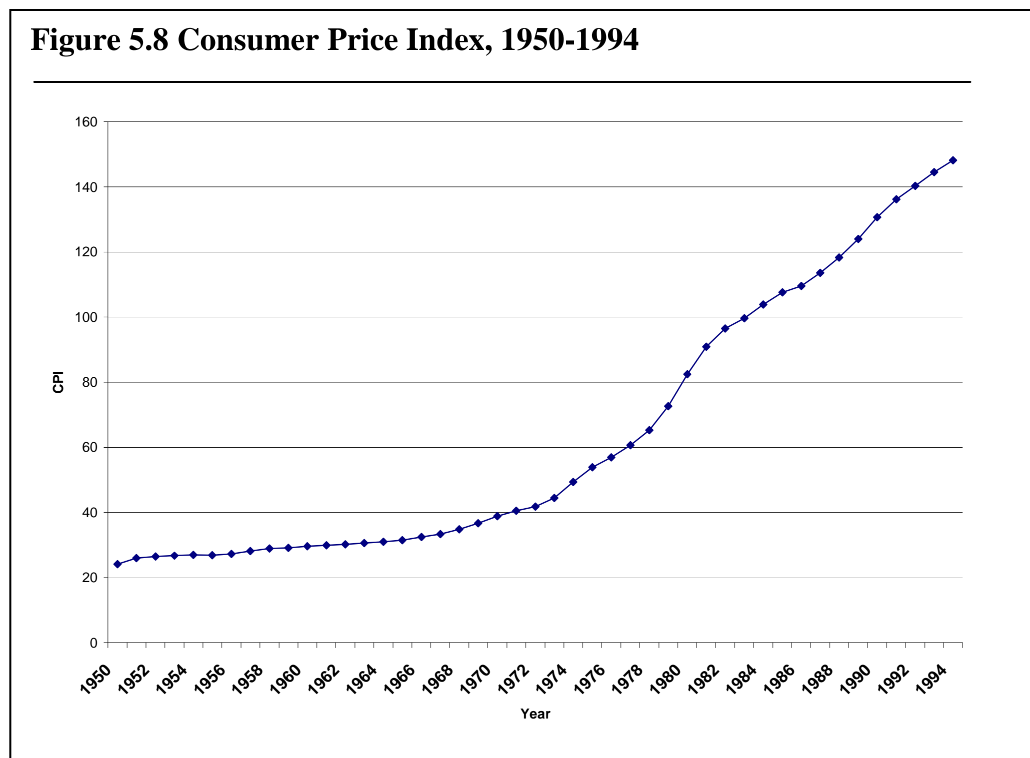
Figure 5.7 The Antitrust Division's Winning Ratio in District Courts, 1950-1994

Control Variables

Following Eisner and Meier (1990), I divide the control variables into three clusters: exogenous economic forces, external political forces, and internal bureaucratic forces (278). The exogenous economic variables include the consumer price index, as

shown in Figure 5.8, and the national unemployment rate, as shown in Figure 5.9 The focus of Eisner and Meier's study is on how the Antitrust Division's choice of antitrust cases in different legal areas, such as monopoly, mergers, and price fixing, is influenced by internal and external factors. In other words, their focus is on explaining the Divisions' policy changes. Eisner and Meier find that except for the consumer price index which has no effect on the filing of cases in all three policy areas, the unemployment rate has a significant impact on the percentages of filed monopoly and mergers cases. Even though my dissertation has a different focus and examines the Division's choice of enforcement tools, i.e. whether or not the agency chooses to prosecute its investigations, these two external economic variables are included because theoretically both variables might have a significant impact on the Divisions' prosecution decisions.

Figure 5.8 Consumer Price Index, 1950-1994



According to Eisner and Meier, the consumer price index is a measure of inflation, and a rising inflation rate should trigger more antitrust actions to "counter the inflationary effects of monopolistic behavior" (Eisner and Meier 1990, 278). The unemployment rate on the other hand has only an indirect effect on antitrust actions since the political pressure to reduce unemployment "might translate into a greater willingness to file antitrust actions, especially during Democratic presidential administrations" (ibid.).

Figure 5.9 National Unemployment Rate, 1950-1994

A further consideration is that the Division may achieve symbolic goals by increasing its antitrust actions when facing high unemployment and inflation rates.

According to Hawkins (2002), prosecution not only has an instrumental purpose in terms of remedying problems but also an expressive purpose. The agency can use prosecution "as a forceful and dramatic way of making a moral statement about an undesirable or offensive matter—a deliberate flouting of the law, a particularly nasty act, or perhaps a neglect of one's obligations" (Hawkins 2002, 5). Finally, the agency may use prosecution as an organizational device to display "their activity, their responsiveness to the concerns of the public, and their ability to make a difference" (ibid.). Since I do not distinguish between prosecutions in different policy areas, the inclusion of these two external economic variables controls for whether or not the Division uses prosecution as a symbolic gesture in response to the economic pressure from the public.

Besides these economic variables, I consider the impact of Congress and the president. Regarding the effect of these two political principals on the Division's policy choices in terms of prosecuting different antitrust cases, Eisner and Meier (1990) and Wood and Anderson (1993) reach very different conclusions. Eisner and Meier find no significant influence from either Congress or the president on the Division's policy choices. Alternatively, Wood and Anderson demonstrate that both Congress and the president significantly affect the Division's policy choices in terms of pursuing different types of antitrust cases. Since my model focuses on the Division's prosecution decisions in general, i.e., regardless of policy area, it offers no additional test to verify either study. I included these two variables because I suspected that any significant influence from Congress and the president on the Division's decisions to prosecute reflect more of the agency's desire to use prosecution as an expressive device than using it in an

instrumental sense that satisfies either Congress or the president's preferences in a specific policy area.

As shown in Figures 5.10 and 5.11, there are two measures for the Congress, one for the House and the other for the Senate. I used Poole-Rosenthal DW-NOMINATE scores for members of Congress who served on the judicial committees in both chambers from 1950 to 1994. For each committee each year, I used an average NOMINATE score to measure the level of liberalism for the whole committee. I did not use the scores for the subcommittees on antitrust because they were not available in these data. For presidential influence, I created dummy variables to represent different administrations.

Figure 5.10 Senate Judiciary Committee DW-NOMINATE Scores, 1950-1994

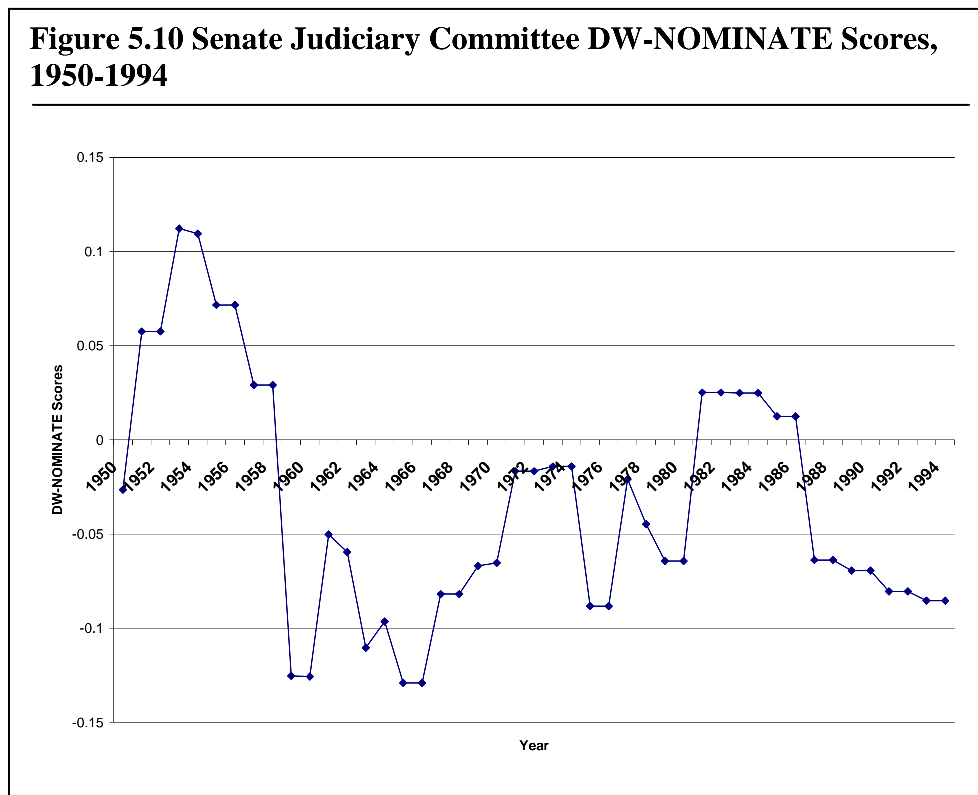
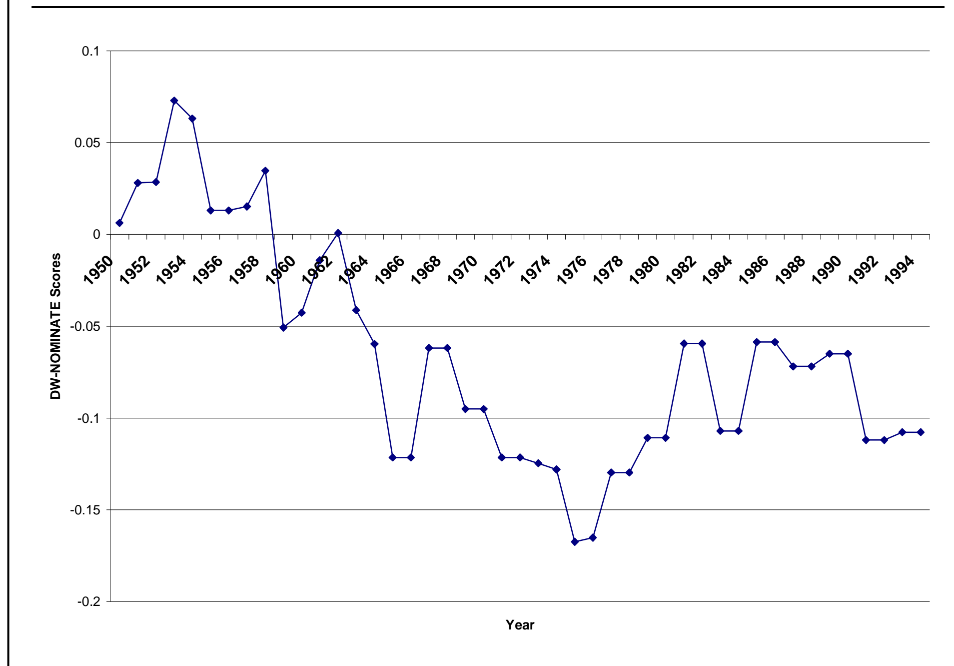
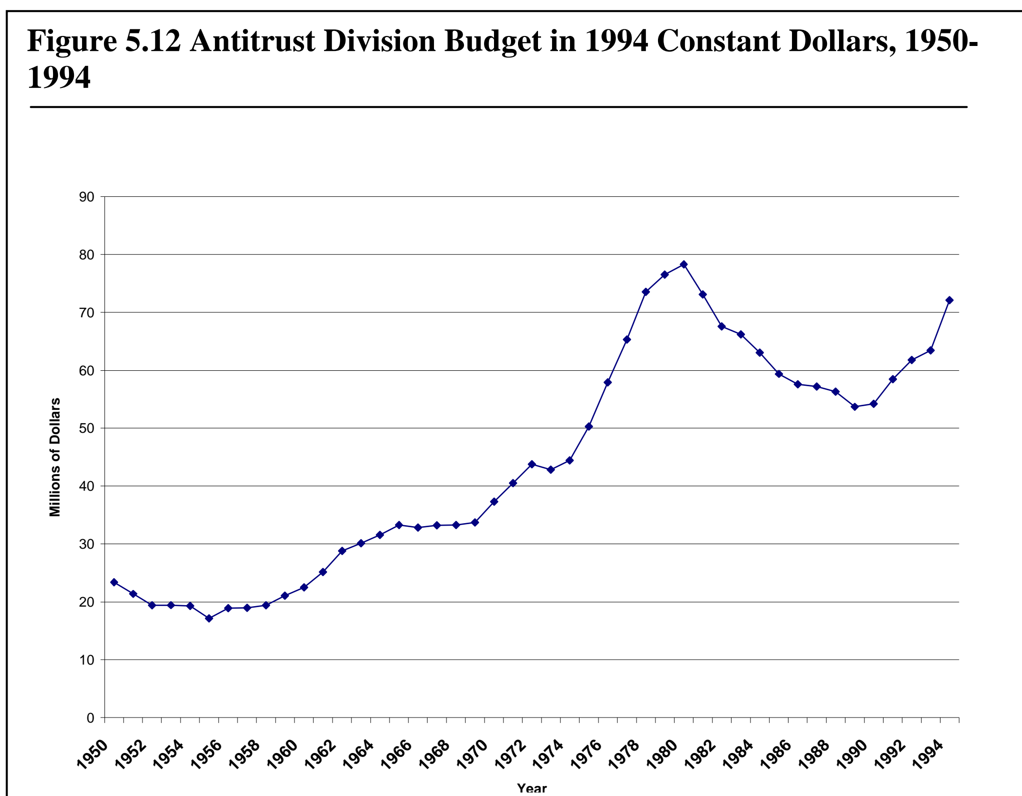


Figure 5.11 House Judiciary Committee DW-NOMINATE Scores, 1950-1994



The two internal bureaucratic variables are budget and the ratio of lawyers to economists. Budgets have been demonstrated to be an effective control mechanism of the bureaucracy by political principals since agencies are very sensitive to changes in their administrative resources (e.g., Wood and Waterman 1994). Since prosecution requires much more resources than other informal enforcement methods, I hypothesize that the Antitrust Division will increase prosecution along with an increase in its budget. As shown in Figure 5.12, the Division's budget for each year was standardized as constant-dollar budget on the basis of its 1994 allocation.

Figure 5.12 Antitrust Division Budget in 1994 Constant Dollars, 1950-1994



I included the ratio of lawyers to economists because whether of the different effects of these professions on the agency. According to Weaver (1977), lawyers in the Division "were too exclusively concerned with the actual, current behavior of business firms and with winning the case at hand, not concerned enough with the economic impact of their work" (Weaver 1977, 30). Winning the case at hand, in the eyes of the lawyers in the Division, is closely related to the agency's reputation and has an impact on future cases.

> The staff lawyers themselves value what they think of as a reputation for "solid" legal work and for winning the cases they bring. And those who are most rigorous in their criticism of weak cases believe that by their rigor they are in the

> long run strengthening the division's prosecutorial power. They fear the effect of too many acquittals on the number of cases the division will be able to bring successfully in the future, as well as on the business behavior that they think the division's reputation affects (Weaver 1977, 112).

In addition, since new lawyers in the Division often share a goal of obtaining prosecution experience in order to enhance their market value to private employers, they usually prefer to win cases within a short period of time, meaning that they would choose the most legally sound cases to prosecute even though they may not have an as good economic impact.

Economists, on the other hand, have a different priority. When Thomas Kauper introduced professional economists into the Antitrust Division and created the Economic Policy Office (EPO) in 1972, staff economists during initial investigations "would reveal that a potential case lacked economic merits, even if it could be won before the courts" (Eisner 1991, 140). Not long after, however, economists began to play a much more positive role: "By the middle of the decade [1970s], economic analysis was being used to generate cases by identifying sectors of the economy where various competitive problems were likely to be found" (Eisner 1991, 140). Since 1978, according to Eisner, economists have assumed responsibilities in every aspect of the agency's enforcement from selection of investigations to prosecution, and, ultimately, to judgment enforcement.

Although the aforementioned studies have demonstrated that lawyers and economists have different priorities, there is no clear answer to how lawyers and economists act differently in turning an investigation into a prosecuted case. Although lawyers are mostly concerned with winning cases in a quick manner, they are also aware

of the legal cost of prosecuting the wrong case. Economists, who now play an equally important, if not more, role in prosecution, also understand that an *economically* sound case is not necessarily *legally* sound. Differences in priorities by lawyers and economists may lead them to prosecute substantively different cases. In terms of prosecution, however, as a general matter, there is no theoretical reason to propose that lawyers are more likely to prosecute than economists or vice versa, especially when, today, the two groups are cooperating with each other closely. Since the data for the number of lawyers and economists hired by the Division before 1970 are not available, I used a dummy variable that designated 1972 as the starting year in which economists began to exert an influence on prosecution. The last control variable is a dummy variable created for the Antitrust Procedures and Penalties Act of 1974. According to Wood and Anderson (1993), "the clear intent of Congress was for the Antitrust Division to enforce the law more vigorously through criminal prosecutions" (Wood and Anderson 1993, 13). As a result, the agency may increase its prosecution in response to such a structural change. Table 5.1 provides descriptions of the variables used in this analysis.

Empirical Results and Discussion

To examine the relationship between federal courts and the Antitrust Division, I run four models with different court measures. The first three models test the first hypothesis, and the fourth model tests the second hypothesis, which can also be seen the fully specified model compared to the first three. Due to the binary nature of the dependent variable, logit analysis was used.

Table 5.1 Means and Standard Deviations for Variables Used		
Variable	Mean	Standard Deviation
Winning Ratio in District Courts	0.9	0.06
Economic Liberalism of the Circuits	52.08	3.2
Median Justice's Dynamic Ideal Point	0.39	0.52
Ideological Variance within the Federal Circuit Courts	10.61	2.14
Ideological Variance within the Supreme Court	1.99	0.39
Constant-Dollar Budget (in Millions)	43.95	19.42
National Unemployment	5.8	1.6
Consumer Price Index	63.57	40.87
Judiciary Committee of the Senate	-0.03	0.06
Judiciary Committee of the House	-0.07	0.06

In the first model (Table 5.2), I employ the measures that assess the courts' levels of economic liberalism. For the circuit courts, the measure is based on individual judges' percentage of aggregate liberal voting in economic cases. For the Supreme Court, the measure is median justice's dynamic ideal point constructed by Martin and Quinn (2002). Higher scores, however, are associated with higher levels of conservatism. The purpose of running this model is to verify whether the conventional wisdom about the relationship between judicial ideology and bureaucratic regulation is empirically substantiated in the area of antitrust law.

The results, as shown in Table 5.2, are mixed. For appellate courts, the level of economic liberalism has a significant influence on the Antitrust Division's prosecution decisions, which confirms the conventional wisdom in judicial politics that high levels of economic liberalism in appellate courts represent a tendency to favor government regulation.

Table 5.2 Judicial Liberalism and Antitrust Division Prosecution, 1950-1994

	Coefficient	Marginal Effect on Predicted Probability
Economic Liberalism of the Circuits	0.076***	0.04
Median Justice's Dynamic Ideal Point	0.388*	0.04
District Court Winning Ratio Lagged	0.565	0.0
Internal Bureaucratic Variables		
Budget	0.004	0.01
Lawyer-Economist Ratio	0.297*	0.02
Exogenous Economic Variables		
Consumer Price Index	-0.010	-0.06
National Unemployment	0.103***	0.03
Political Variables		
Senate Judiciary Committee	-5.141***	-0.05
House Judiciary Committee	3.724*	0.03
Truman	1.079***	0.04
Eisenhower	1.483***	0.07
Kennedy	0.459**	0.02
Johnson	0.073	0.0
Nixon	-0.119	-0.0
Ford	-2.223***	-0.1
Carter	-1.904***	-0.1
Reagan	-0.205	-0.01
Bush	0.399*	0.01
Authority to Prosecute		
Antitrust Procedures and Penalties Act	2.189***	0.17
Constant	-6.973***	

legend: * $p<0.05$; ** $p<0.01$; *** $p<0.001$
Number of Observations = 12669
Wald Chi2 Test of Joint Significance of Coefficients $\chi^2 = 1063.39$ ($\rho = 0.000$)

A one standard deviation increase in the appellate courts' *liberalism* leads to a 4 percent increase in the probability of prosecution by the Division. The Supreme Court, however, has a significant but opposite effect. As the Court becomes more conservative, the Antitrust Division is more likely to prosecute. A one standard deviation increase in the median justice's *conservatism* results in a 4 percent increase in the Division's likelihood of prosecution. Such conflicting empirical results indicate that judicial ideology, alone, is not necessarily a good indicator of the possibility that the Antitrust Division would prosecute. In addition, a test of measures of fit suggests that a model without the two court measures is more likely to have generated the observed data. Furthermore, as predicted by my theory, the sensitivity measure of the model is rather low. This first model only correctly predicts 2.17 percent of investigations that were actually prosecuted by the agency.

The second model tests my first hypothesis with two measures of ideological variance for the appellate courts and the Supreme Court, respectively. Statistics shown in Table 5.3 provide direct support for my first hypothesis. The ideological variance within the circuit courts has a significant and negative impact on the Antitrust Division's prosecution decision. A one standard deviation increase in the circuit court's ideological variance leads to an 8 percent decrease in the probability of prosecution by the Division. Compared to the first model, this second model has a sensitivity measure of 4.86 percent, meaning that it correctly predicts 4.86 percent of the investigations that were actually prosecuted by the agency, more than double the same measure in the first model with economic liberalism measures. Moreover, the measures of fit test indicates that the

Table 5.3 Judicial Uncertainty and Antitrust Division Prosecution, 1950-1994

	Coefficient	Marginal Effect on Predicted Probability
Ideological Variance within the Circuits	-0.270***	-0.08
Ideological Variance within the Supreme	0.539**	0.03
District Court Winning Ratio Lagged	-0.792	-0.0
Internal Bureaucratic Variables		
Budget	-0.016*	-0.05
Lawyer-Economist Ratio	0.173	0.01
Exogenous Economic Variables		
Consumer Price Index	0.020**	0.12
National Unemployment	0.132***	0.03
Political Variables		
Senate Judiciary Committee	-2.418**	-0.02
House Judiciary Committee	2.325	0.02
Truman	1.355***	0.05
Eisenhower	0.938***	0.04
Kennedy	-0.061	-0.0
Johnson	-0.130	-0.0
Nixon	-0.051	-0.0
Ford	-0.585	-0.03
Carter	-0.476	-0.02
Reagan	0.524*	0.03
Bush	0.730***	0.03
Authority to Prosecute		
Antitrust Procedures and Penalties Act	0.451	0.04
Constant	-0.391	

legend: * p<0.05; ** p<0.01; *** p<0.001
Number of observations = 12669
Wald Chi2 Test of Joint Significance of Coefficients $\chi^2 = 1074.08$ ($\rho = 0.000$)

second model with ideological variance measures is more likely to have produced the observed data than a model without such measures.

Regarding the ideological variance within the Supreme Court, it also has a significant influence on the agency. Contrary to the impact of ideological variance within the circuit courts on the agency, however, a one standard deviation increase in the ideological variation among justices leads to a 3 percent increase in the probability of prosecution by the Division. Although my theory does not offer any hypotheses regarding the influence of the Supreme Court, one possible answer to such a phenomenon lies with the Supreme Court's authority to control its own agenda. When the ideological variance within the Supreme Court increases, it means that justices are less likely to agree with one another in terms of what cases merit the Court's attention. In other words, as a general matter, the Court may review fewer cases than it normally does if the ideological variance within the Court is large. As a result, a large ideological variance reduces the possibility that the Antitrust Division's prosecution is going to be reviewed by the Court. Consequently, the agency is more likely to prosecute. Whether or not such an explanation holds water depends on future empirical studies.

The third model combines the previous two models by including both the judicial ideology variable and ideological variance variable. Although the second model provides empirical support to my theory, it faces the danger of misspecification for not controlling the effect of judicial ideology. As pointed out by Kennedy (1998), logit models are sensitive to misspecifications in the sense that estimators will be inconsistent when explanatory variables are omitted (Kennedy 1998, 240).

Table 5.4 Antitrust Division Prosecution, 1950-1994

	Coefficient	Marginal Effect on Predicted Probability
Ideological Variance		
Ideological Variance within the Circuits	-0.313***	-0.09
Ideological Variance within the Supreme Court	0.23	0.01
Judicial Ideology		
Economic Liberalism of the Circuits	0.017	0.01
Median Justice's Dynamic Ideal Point	0.615**	0.06
District Court Winning Ratio Lagged	0.285	0.00
Internal Bureaucratic Variables		
Budget	-0.007	-0.02
Lawyer-Economist Ratio	0.066	0.01
Exogenous Economic Variables		
Consumer Price Index	0.013	0.08
National Unemployment	0.092**	0.02
Political Variables		
Senate Judiciary Committee	-3.590***	-0.03
House Judiciary Committee	4.326**	0.04
Truman	0.524	0.02
Eisenhower	0.599*	0.03
Kennedy	0.075	0.0
Johnson	0.14	0.01
Nixon	-0.105	-0.01
Ford	-0.822	-0.04
Carter	-0.824	-0.04
Reagan	0.423	0.02
Bush	0.667***	0.02
Authority to Prosecute		
Antitrust Procedures and Penalties Act	0.917	0.07
Constant	-1.052	

legend: * $p<0.05$; ** $p<0.01$; *** $p<0.001$
Number of observations = 12669
Wald Chi2 Test of Joint
Significance of Coefficients $\chi^2 = 1074.07$ ($\rho = 0.000$)

Theoretically, my theory does not eliminate the role of judicial ideology in affecting agency prosecution. I therefore added the two ideology measures for the circuits and the Supreme Court and ran the third model as a better specified model. As reported in Table 5.4, my theory's argument about the influence of ideological variance within the circuit courts still receives support from empirical results. A one standard deviation increase in the circuit courts' ideological variance leads to a 9 percent decrease in the probability of prosecution by the Division, holding all other variables at their means. The level of liberalism within the circuits does not appear to have any significant influence on the Division's prosecution decision. With regard to the Supreme Court, however, the pattern of influence is the opposite compared to the circuit courts. While the ideological variance within the Supreme Court does not significantly affect Division prosecution, the median justice's ideology does. A one standard deviation increase in the justice's conservatism results in a 6 percent increase in the probability of prosecution.

Such a pattern may be a result of the structural differences between the Supreme Court and the circuit courts. In terms of court size, the First Circuit is the smallest court of twelve circuits, with ten judges (six active and four senior). The Ninth Circuit is the largest circuit, with twenty-eight active judges. As shown earlier in Table 5.1, the ideological variance within the circuits has a much larger standard deviation than that of ideological variance within the Supreme Court. As a result, the Supreme Court's smaller size compared to the circuit courts may attenuate the influence of its ideological variance among justices on the Division's prosecution.

The second structural difference between the circuit courts and the Supreme Court is the circuits' random assignment of judges and cases. Even though each circuit panel consists only of three judges, random assignment makes it impossible for agencies to know which panel of judges will hear an appeal before filing. This makes the knowledge about judges' ideologies of less value compared to the knowledge about the ideological variance among judges within a specific circuit. As a result, the structural differences between the circuit courts and the Supreme Court may contribute to the different patterns of influence by the two types of ideological variance measures reported in Table 5.1. Because of the contradictory results from Tables 5.3 and 5.4 regarding the Supreme Court, more study is clearly needed to explore how the Supreme Court's unique agenda setting procedure and its size make the role of ideological variance function differently when compared to the circuit courts.

Empirical Test of the Second Hypothesis

To test the second hypothesis, which states that when an appellate court's ideological variance increases, an agency reduces its number of prosecution even though the court in general favors the agency, I created two interaction variables by multiplying the courts' ideological measures with their ideological variance measures. Due to the standard practice that individual terms of an interaction variable need to be included in a empirical testing, this model can be seen the fully specified model among the four.

Table 5.5 Antitrust Division Prosecution (Complete Model), 1950-1994

	Coefficient	Marginal Effect on Predicted Probability
Ideological Variance		
Ideological Variance within the Circuits	-1.01*	-0.3
Ideological Variance within the Supreme Court	-1.232**	-0.08
Judicial Ideology		
Economic Liberalism of the Circuits	-0.074	-0.04
Median Justice's Dynamic Ideal Point	-3.803***	-0.35
District Court Winning Ratio Lagged	0.175	0.00
Interaction		
Economic Ideology*Economic Variance of the Circuits	0.012	0.15
Median Dynamic Ideal Point*Ideological Variance	2.158***	0.42
Internal Bureaucratic Variables		
Budget	-0.015	-0.04
Lawyer-Economist Ratio	-0.179	-0.01
Exogenous Economic Variables		
Consumer Price Index	0.021*	0.12
National Unemployment	0.055	0.01
Political Variables		
Senate Judiciary Committee	-4.58***	-0.04
House Judiciary Committee	4.244**	0.04
Truman	1.235**	0.04
Eisenhower	0.637*	0.03
Kennedy	0.034	0.0
Johnson	-0.017	-0.00
Nixon	0.069	0.00
Ford	-1.02	-0.05
Carter	-0.942*	-0.05
Reagan	0.373	0.02
Bush	0.606***	0.02
Authority to Prosecute		
Antitrust Procedures and Penalties Act	1.494*	0.12
Constant	7.273	

legend: * $p<0.05$; ** $p<0.01$; *** $p<0.001$
Number of observations = 12669
Wald Chi2 Test of Joint Significance of Coefficients $\chi^2 = 1086.92$ ($\rho = 0.000$)

Although my argument with regard to the relationship between federal appellate courts' ideological variance and antitrust prosecution has received consistent support from the second and the third model, the relationship between the Supreme Court and the Antitrust Division appears to be problematic. As the median justice's conservatism increases, the Division is more likely to prosecute, which contradicts the conventional wisdom in judicial politics. Such an anomaly, however, could be the result of model misspecification. In addition, the ideological variance with the Supreme Court has a positive impact on the Division's prosecution decisions. Larger ideological variance within the Supreme Court encourages prosecution. Although I have argued that the Supreme Court's agenda setting power may play a role in such a phenomenon, such a result could also be the result of model misspecification. The fourth model provides me an opportunity to examine the strength of the first three models.

As shown in Table 5.5, the ideological variance within both the appellate courts and the Supreme Court has a significant impact on the likelihood of prosecution by the Antitrust Division. A one standard deviation increase in the ideological variance within the appellate courts leads to a 30 percent reduction in the likelihood of prosecution. With the Supreme Court, even though the ideological variance still significant affects prosecution, the effect is much smaller. A one standard deviation increase in the ideological variance within the Supreme Court only results in about 1 percent reduction in the prosecution likelihood. Although such a result contradict the result regarding the Supreme Court in the previous models, the first hypothesis in my theory about the relationship between ideological variance and prosecution decisions receives consistent

support from the empirical test with regard to the appellate courts. The ideological variance within the appellate courts has a significant and negative impact on the Antitrust Division' prosecution decisions.

When it comes to the courts' ideology alone, the appellate courts' level of liberalism does not significantly influence prosecution. On the contrary, the Supreme Court's overall ideology represented by its median justice is statistically significant. A one standard deviation increase in the median justice's conservatism contributes to a 35 percent reduction in the likelihood of prosecution. An interesting pattern emerges if we compared the appellate courts to the Supreme Court. From the Antitrust Division's perspective, the ideological variance within the appellate courts plays a much more significant role in the agency's prosecution decisions. For the Supreme Court, the effect of ideological variance and ideology is exactly the opposite. Although the ideological variance within the Supreme Court is still a significant factor, its effect is much smaller than the Court's overall ideology. I suspect that the structural differences between the appellate courts and the Supreme Court may contribute to such a pattern.

Since every appellate court adopts the rather secretive random process of assigning judges to reviewing panels, the Antitrust Division does not know which panel of judges will review its cases given that it is appealed. As a result, a general knowledge about the ideological variance within a circuit becomes a better indicator of the court's behavior than the knowledge about the court's overall ideology. The Supreme Court, however, is relatively small and has stable membership. As a result, the ideology of its median justice plays a more important role than the ideological variance. Again, the

focus of my dissertation is not on the differentiate role played by the appellate courts and the Supreme Court on agency prosecution. Nevertheless, the pattern I just discussed can be a subject for future research.

With regard to my second hypothesis which states that ideological variance within an appellate court reduces prosecution even when the court favors government regulation, the empirical result is mixed. The interaction variable for the appellate courts is not significant and in the wrong direction. With respect to the Supreme Court, however, the ideological variance within the Court indeed alleviates the effect of median's justice's conservatism. Large ideological variance within the Court encourages agency prosecution despite that the median justice is conservative. Because of the mixed result, further analysis is needed to test the rigorousness of the second hypothesis.

Regarding the control variables, the only variables that perform consistently and have significant impact on the Antitrust Division's prosecution decisions are the following: the Senate Judiciary Committee, the Eisenhower administration, and the first Bush administration. Contrary to the findings by Wood and Anderson (1993),[46] the Senate Judiciary Committee has a negative impact on the possibility of prosecution. A one standard deviation increase in the committee's liberalism reduces the probability of prosecution from 2 to 5 percent. One possible explanation is that the Division shifts its resources away from prosecution to other informal enforcement tools such as consent agreement in order to meet a high demand from the Senate Judiciary Committee as it

[46] In their study, the ADA scores for both congressional subcommittees are positively related with the Division's total number of prosecutions, although not in a significant manner.

becomes more liberal and requires more antitrust actions. Compared to prosecution, settlement produces more quick results.[47]

With regard to presidential influences during the Eisenhower administration and the first Bush administration, the Division is more likely to prosecute compared to the Clinton administration, which is the reference administration in the model. While such a result contradicts with the common view that a Republican administration is more favorable toward business than a Democratic administration, one possible explanation that may account for such an anomaly is that only two years of Clinton era enforcement data are included in the model. Coincidently, the antitrust enforcement during the first two years of Clinton administration is relatively low compared to the Eisenhower and Bush administration as shown in Figure 5.1. In addition, according to Litan and Shapiro (2001), although "antitrust policy turned more activist during the Clinton years than in the prior Bush Administration, and sharply more active than during the Reagan Administration," most of the increase in antitrust activities happened during the years from 1995 to 1998 (1). Therefore, the statistical finding for the Eisenhower and first Bush administration might be a result of not having complete data about antitrust prosecution during the Clinton administration.

Even though the empirical test offers support to my theory, the adjusted count R^2 measures for the four models indicate that the models as a whole do not increase the likelihood of success in predicting the Antitrust Division's prosecution decisions.[48] In

[47] Unfortunately, such an explanation contradicts with the signs of the House Judiciary Committee which are positively related with the Division's prosecution decisions, although the House factor is significant only in the first and the third model.
[48] The adjusted count R^2 measures for all four models are 0.

the data, 77.12 percent of cases are not prosecuted, which means that if one predicts non-prosecution on the basis of such information, 77.12 percent of time the prediction is going to be correct. In addition, since none of the sensitivity measures are close to 22.88 percent, which is the percentage of cases that are prosecuted in the data, it indicates that more information is needed in addition to knowledge about the courts' ideological variance and level of economic liberalism. One possible answer is that case facts matter in prosecution decision. In this project, all the case facts are consumed by the error term in the model, and I assumed that they only had random effect on prosecution decisions. In practice, the Division may distinguish between different types of cases and make prosecution decisions accordingly. Despite such a drawback, empirical evidence from the Antitrust Division offers significant support to the theory.[49]

The Federal Trade Commission and the Appellate Courts

The empirical test of the Federal Trade Commission is not as comprehensive and conclusive as that of the Antitrust Division due to the lack of reliable data for the entire study period. Again, the dependent variable for the FTC is a binary measure that indicates whether or not a case is decided by the FTC's administrative law judges. Cases decided by the ALJs are coded as 1, and settled cases coded as 0.[50] The data are based on the FTC's annual reports.

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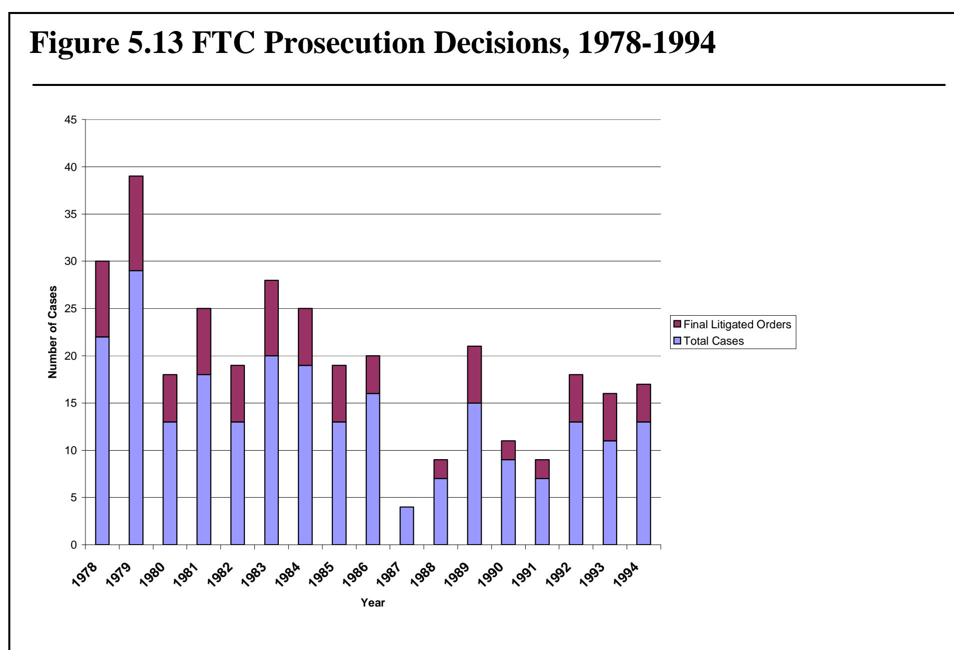
[49] I also tried to take into consideration the effect of time and Solicitor Generals. Multicollinearity, however, prevents me from having meaningful test.
[50] This includes both Part II and Part III settlements.

Figure 5.13 FTC Prosecution Decisions, 1978-1994



As shown in Figure 5.13, the FTC prosecutes only a small percentage of its investigations as well. Since no reliable information is provided in the annual reports prior to 1978 regarding the number of cases settled or prosecuted in front of ALJs, the empirical test of the FTC only covers the period from 1978 to 1994. Similar to the test of the Antitrust Division, I run four models with different court measures. Control variables are the same as those used in the Antitrust Division models except for the dummy variables of lawyers-economists ratio and the Antitrust Procedure and Penalties Act of 1974.[51]

[51] I failed to obtain information about the number of lawyers and economists hired by the FTC from either the agency itself or from the center at St. Louis. With regard to the APPA Act, since it was passed in 1974, and my test only covers the period from 1978 to 1994, there is no structural change from the passage of the act regarding the test.

Empirical Results and Discussion

As shown in Tables 5.6 through 5.9, none of the court measures have significant impact on the FTC's decision to prosecute, except for the ideological variance within the Supreme Court that is significant at the 10 percent level. A one standard deviation increase in the Supreme Court's ideological variance among justices leads to a 10 percent increase in the probability of prosecution by the FTC's Administrative Law Judges. Similar to the possible explanation offered in the discussion of the Antitrust Division, the FTC may also increase its prosecution when the chances of review by the Supreme Court are slim.

Explanation for Differences between the Two Organizations

Although the test of the FTC limits the application of my theory, it offers an opportunity to explore why the two agencies react to courts differently. Numerous studies have examined the differences between administrative agencies and independent commissions (e.g., Foote 1988, Jaffe 1973, and Robinson 1988). According to Verkuil (1988), two major features that separate independent commissions from departmental agencies are "decisional independence" and "collegial decision-making." Compared to departmental agencies, independent commissions enjoy more decisional independence due to unique statutory arrangements. Independent commissions are usually bipartisan and include commissioners from both parties. Commissioners serve fixed terms and cannot be removed by the president without express causes. When it comes to decision-making process, the purposes and effects of independent commissions' collegial

Table 5.6 Judicial Liberalism and FTC Prosecution, 1978-1994

	Coefficient	Marginal Effect on Predicted Probability
Economic Ideology of the Circuits	-0.130	-0.05
Median Justice's Dynamic Ideal Point	0.081	0.0
Internal Bureaucratic Variable		
Budget	0.020	0.05
Exogenous Economic Variables		
Consumer Price Index	-0.001	-0.0
National Unemployment	0.171	0.02
Political Variables		
Senate Judiciary Committee	18.710	0.09
House Judiciary Committee	-1.604	-0.04
Carter	0.550	0.03
Reagan	-0.544	-0.03
Bush	0.006	0.0
Constant	2.406	

legend: * $p<0.05$; ** $p<0.01$; *** $p<0.001$
Number of observations = 565
Wald Chi2 Test of Joint
Significance of Coefficients $\chi^2 = 30.4$ ($\rho = 0.000$)

Table 5.7 Judicial Uncertainty and FTC Prosecution, 1978-1994

	Coefficient	Marginal Effect on Predicted Probability
Ideological Variance within the Circuits	-0.029	-0.0
Ideological Variance within the Supreme	3.617	0.1
Internal Bureaucratic Variable		
Budget	0.082	0.19
Exogenous Economic Variables		
Consumer Price Index	0.095	0.3
National Unemployment	0.195	0.03
Political Variables		
Senate Judiciary Committee	20.713	0.1
House Judiciary Committee	-6.850	-0.01
Carter	2.611	0.12
Reagan	0.845	0.05
Bush	1.542	0.08
Constant	-29.722	

legend: * p<0.05; ** p<0.01; *** p<0.001
Number of observations = 565
Wald Chi2 Test of Joint
Significance of Coefficients $\chi^2 = 31.52$ ($\rho = 0.000$)

Table 5.8 FTC Prosecution, 1978-1994

	Coefficient	Marginal Effect on Predicted Probability
Ideological Variance		
Ideological Variance within the Circuits	0.107	0.02
Ideological Variance within the Supreme Court	3.761	0.10
Judicial Ideology		
Economic Liberalism of the Circuit	-0.007	-0.00
Median Justice's Dynamic Ideal Point	-0.741	-0.03
Internal Bureaucratic Variable		
Budget	0.077	0.18
Exogenous Economic Variables		
Consumer Price Index	0.087	0.27
National Unemployment	0.231	0.03
Political Variables		
Senate Judiciary Committee	19.158	0.09
House Judiciary Committee	-9.123	-0.03
Carter	2.421	0.11
Reagan	0.855	0.04
Bush	1.542	0.08
Constant	-30.073	

Legend: * $p<0.05$; ** $p<0.01$; *** $p<0.001$
Number of observations = 565
Wald Chi2 Test of Joint
Significance of Coefficients $\chi^2 = 32.33$ ($\rho = 0.0012$)

Table 5.9 FTC Prosecution (Complete Model), 1978-1994

	Coefficient	Marginal Effect on Predicted Probability
Ideological Variance		
Ideological Variance within the Circuits	-5.975	-0.97
Ideological Variance within the Supreme Court	-3.28	-0.09
Judicial Ideology		
Economic Liberalism of the Circuit	-1.532	-0.65
Median Justice's Dynamic Ideal Point	-21.646	-0.79
Interaction		
Economic Ideology*Economic Variance of the Circuits	0.111	0.77
Median Dynamic Ideal Point*Ideological Variance	10.34	0.81
Internal Bureaucratic Variable		
Budget	0.079	0.18
Exogenous Economic Variables		
Consumer Price Index	0.097	0.31
National Unemployment	0.151	0.02
Political Variables		
Senate Judiciary Committee	21.966	0.10
House Judiciary Committee	-2.527	-0.01
Carter	2.885	0.13
Reagan	0.54	0.03
Bush	1.674	0.09
Constant	67.138	

Legend: * p<0.05; ** p<0.01; *** p<0.001
Number of observations = 565
Wald Chi2 Test of Joint Significance of Coefficients $\chi^2 = 37.89$ ($\rho = 0.0005$)

decision-making is different from the process followed by departmental agencies headed by a single administrator.

> It is meant to be consensual, reflective and pluralistic. It expresses shared opinions rather than decisive ukases. In this sense, collegial bodies express deeply felt values about the decisional process. They are more concerned with the values of fairness, acceptability and accuracy than with the single dimension of efficiency (Verkuil 1988, 260-261).[52]

Drawing upon Verkuil's discussion of independent commissions' collective decision-making process, I propose that independent commissions and department agencies react differently to judicial influence due to the differences between their decision-making processes.

Borrowing from Shughart, Tollison, and Goff's (1986) model with a slight modification,[53] I contend that the variance of predictions made by independent commissions about possible judicial outcomes is smaller than that made by department agencies. A basic assumption of my argument is that a reviewing court's choices of policy outcomes over a unidimensional issue[54] are distributed on the closed interval $[X_L, X_R]$, by which X_L is the most liberal decision a court can make and X_R the most conservative decision. Agencies' expectation of the court's choice, as a result, is a proper subset of $[X_L, X_R]$ and distributed on the closed interval [a, b]. Under the assumption that such a distribution of expectation is single-peaked with finite mean and

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[52] Based on such distinctions, Verkuil suggests that independent commissions and departmental agencies should be given different tasks. While the former is best suited to make factual decisions, the latter functions the best in implementing broad programs.

[53] Shughart et al. examine the agencies' policy output, I study agencies' expectation of the courts' choice of outcomes.

[54] Shughart et al. choose unidimensional issue to simplify the model.

variance, the calculation made by a department agency led by a single head will have a mean of μ with variance σ^2.

With regard to independent commissions with n members, assuming that each member's variance of expectation equals to that of a single-head administration, i.e. $\sigma^2_i = \sigma^2$, the central limit theorem dictates that the mean for the independent commission's calculation would be $\mu^* = (\mu_1 + \mu_2 + \ldots + \mu_n) / n$ with a variance σ^2 / n, which is smaller than the variance for departmental agencies. In other words, independent commissions' prediction of judicial outcomes is more efficient than that of departmental agencies due to a smaller variance.

I contend that such a difference in variance induces different reaction to judicial influence by agencies. A smaller variance in the prediction of courts' choice of possible outcomes means more certainty. In other words, independent commissions tend to be less uncertain about possible judicial outcomes than departmental agencies. Because of such a higher level of certainty about judicial outcomes, I contend that a selection effect in independent commissions' prosecution decisions may have obscured any manifest influence from appellate courts. When uncertainty about an appellate court's judicial rulings is removed from an independent commission's decision-making process, the commission will make decisions between settlement and prosecution in a manner that does not contradict judicial preferences. As a result, it is empirically difficult to discover any manifest influence from the appellate courts on commission's prosecution decisions.

Summary

In this chapter, I test the influence of ideological variance within appellate courts on agency prosecution with the data from the Antitrust Division and the Federal Trade Commission. The evidence from the Antitrust Division's prosecution decisions from 1950 to 1994 provides direct support to my theory's major argument that the ideological variance within the federal appellate courts has a significant impact on agencies' decisions to prosecute. Large ideological variance within appellate courts discourages prosecution because it makes difficult for agencies to predict the courts' choice of outcomes. Although the empirical results from the FTC fails to provide additional support to my theory and limits its generalization, my examination of the differences between departmental agencies and independent commissions illustrates that future studies of the interaction between the judiciary and bureaucracy needs to take into consideration the structural factors that distinguish departmental agencies from independent commissions. Finally, my study of the Antitrust Division reveals that ideological variance within the appellate courts and the Supreme Court plays a different role in determining the Division's prosecution. Rather than discouraging prosecution, large ideological variance within the Supreme Court encourages prosecution.

CHAPTER VI

SUMMARY AND CONCLUSION

The central problem of this project is one that scholars in judicial politics, administrative law, and public administration have studied since the New Deal: How we can establish meaningful judicial oversight of the bureaucracy so that its agencies serve the citizenry with efficiency and efficacy without infringing upon individual liberties and creating individual injustice? Behind the question are the conflicting values that the bureaucracy is asked to serve by the American people. On the one hand, progressive values require the bureaucracy to solve and alleviate social problems. To do so, delegation of legislative and judicial powers becomes necessary. On the other hand, liberal values place restrictions on bureaucratic power. Delegation of powers to the bureaucracy cannot disrupt fundamental principles such as representative government, separation of powers, and due process. Because of citizens' general distrust of centralized bureaucracy and fear of intrusive bureaucracy, the judiciary is empowered to oversee the bureaucracy nation wide. "The Supreme Court established standards for lower courts in their oversight of federal agencies who regulate state and local agencies who in turn establish standards for the behavior of private individuals" (Melnick 2006).

Faced with such a complex problem, scholars have yet to provide definitive answers to questions such as what is the best form of judicial review, how to contain the influence of judges' personal policy preferences, and how to minimize the negative impact of bureaucracy's discretionary power of inaction. The focus of this project, the interaction between the federal appellate courts and regulatory agencies in bureaucratic

prosecution, offers a vehicle to piece together the previous research on these questions. The ultimate goal of the project is to shed some light on the possible ways of improving judicial oversight of the bureaucracy.

In Chapter I, I discuss the normative, theoretical and empirical motivation behind this project. Studying bureaucratic prosecution under judicial restraints offers me a unique perspective to examine one aspect of bureaucratic discretion that is generally ignored by scholars in the bureaucratic control literature, i.e. the discretion of inaction (Davis 1969). The bureaucracy has the power to choose not to act, not to deal, not to investigate, or not to prosecute, which has a special implication for judicial control of the bureaucracy. The appellate courts lose significant ground for imposing judicial review if the bureaucracy does not initiate prosecution. By focusing on bureaucratic selection of prosecution versus non-prosecution, I explore the role of the judiciary in prosecution with respect to the courts' institutional characteristics, i.e. the appellate courts' institutional practice of randomly assigning judges into panels and cases to panels.[55] The normative implication of this project is that its findings can point us to the ways through which we can improve judicial review of the bureaucracy.

The theoretical motivation behind this project stems from the simplified treatment of the appellate courts in the judicial politics literature. Even though small group studies of the appellate courts have demonstrated that judges in a collective setting behave differently than if they were acting alone, judicial scholars have not considered

[55] I omit the role of the district courts in this project and focus exclusively on the federal appellate courts. One of the assumptions of the theory is that there is no uncertainty at the district court level and the bureaucracy is certain about the judicial outcome to be made by a district court judge.

the effect of the larger group context of circuit courts on bureaucratic decision-making. In other words, judicial scholars have not examined how circuit courts' random assignment of judges and cases affect bureaucratic decision-making. On the other hand, scholars who study the interaction between the appellate courts and the bureaucracy usually assume that the courts are unitary institutions by equating the median judge's policy preference with the courts' preference. Such a practice, while permissible and popular, ignores the fundamental institutional feature of the courts as well: the random assignment of judges and cases. By considering the effect of this institutional practice on bureaucratic prosecution, this projects bridges the gap between the judicial politics literature and the bureaucratic control literature.

Chapters II and III establish the knowledge base for studying the Antitrust Division of the Department of Justice and the Federal Trade Commission. Chapter II reviews the agencies' organizational structure and enforcement procedure. The selection of these two agencies allows me to test the applicability of my theory to departmental agencies and independent commissions while controlling for policy domains. Chapter III reviews the antitrust laws and the conflict between the antitrust agencies and the courts over the application of rules in horizontal mergers. While the agencies in general want the courts to expand the application of per se illegality to more antitrust behavior, the courts' concern with maintaining the rule' s reasonableness not only limits the application of per se illegality but also forces the courts to oscillate between the rule of reason and per se illegality. The result, of course, is legal uncertainty for the agencies.

Chapter III demonstrates that the inherent ambiguity of the law creates room for judicial discretion that generates legal uncertainty for the bureaucracy. The courts' inconsistent rulings regarding the rule of reason and per se illegality in horizontal merger is but one example. In addition, the courts' selection of different forms of judicial review and the existence of indeterminate legal doctrines create further or additional room for judicial discretion as well. Although administrative law scholars argue that the rationalist model of judicial review fares better than either the structural model or the procedural model in terms of satisfying both liberal and progressive values, the existence of judicial ideology makes it unclear whether that argument can hold water.

The rationalist model, by focusing on whether the bureaucracy can provide adequate reasons for its action, invites judges to substitute their own policy preferences for that of agencies, which is exactly what the structural model and the procedural model try to prevent. Nevertheless, the structural model fails to strike a proper balance between separation-of-powers and delegation of powers to the bureaucracy. The procedural model, on the other hand, involves the danger of imposing unnecessary procedural requirements on the bureaucracy and stifling its efficacy and efficiency. As a result, the bureaucracy in prosecution does not know with certainty which part of its action is going to be reviewed by the courts, being its scope of delegated power, enforcement procedure or reasons for its enforcement.

Regarding indeterminate legal doctrines, my review of the application of *Chevron* doctrine demonstrates that appellate court judges can defy the Supreme Court's mandate of granting the bureaucracy broad discretion in statutory interpretation by

making a twist in step-one analysis of the doctrine. The original doctrine demands that the appellate courts respect the bureaucracy's interpretation of statutes whenever Congress does not have a clear intent in the statutes. In practice, however, judges always "discover" congressional intent, albeit vague, in statutes and refuse to allow the bureaucracy's interpretation to prevail without judicial review. As a result, indeterminate legal standards like the *Chevron* doctrine create room for judicial discretion and enable judges to advance their own policy preferences.

Chapter IV is the theory chapter and expands the realm of uncertainty from legal to political uncertainty and institutional uncertainty. As I argue, even though the bureaucracy has the discretion of not prosecuting, it is constrained by judicial discretion. Uncertainty created by the exercise of judicial discretion as measured by ideological variance in judicial choices affects the likelihood of prosecution. The bureaucracy is more likely to prosecute when it is relatively certain that it can win the appeal. As a result, gauging uncertainty generated by the appellate courts becomes critical in the bureaucracy's prosecution decision.

The bureaucracy faces two other types of uncertainty: political uncertainty and institutional uncertainty. The basic finding in judicial politics points out that judges' policy preferences significantly affect their votes. Under the influence of different ideologies, judges can maneuver within the boundaries of the law or even expand the law's boundaries to achieve what for them are desirable political outcomes. Given that individual judges can make decisions according to their policy preferences because of the ambiguity of the law and indeterminate legal standards, the appellate courts'

collective decision-making process amplifies the political uncertainty due to face-to-face interaction among judges. Numerous studies have demonstrated that inter-judge communication and bargaining is an important part of the decision-making process of the Supreme Court and appellate courts (e.g., Maltzman, Spriggs and Wahlbeck 2002, Murphy 1964, and Revesz 1997). In other words, the final outcomes reached by the courts reflect negotiations that are more than a simple ideological lineup of judges. To simplify my theoretical argument, however, I adopt the median voter theorem and assume that the median judge's policy preferences of a panel can represent the panel's judicial choices.

The key part of my theory hinges on the institutional uncertainty created by random assignment of judges and cases by the circuit courts. The existing literature simplifies the internal dynamics created by the random assignment process (e.g., Canes-Wrone 2003). Courts dominated by liberal judges will make liberal decisions and vice versa for the courts dominated by conservative judges. This approach is theoretically naïve because it requires two rather restrictive assumptions. We need to know first the ideological dimensions in each legal area and how judges are aligned on each dimension. Secondly, we need to know the issues on which the courts' decisions hinge. While it is not entirely impossible for the bureaucracy to obtain information about these two requirements, it can be very costly to do so. As a result, I argue in my theory that a better way is to rely on the courts' ideological variance among judges.

Ideological diversity within an appellate court means that the ideological locations of the median judges on panels will vary across panels and be different from

one another; the result is variance in judicial choices. The bureaucracy can be more certain about a panel's choice of final outcome when variance between panels is smaller, which should in turn encourage prosecution. Therefore, my theory argues that ideological variance within an appellate court has a negative impact on the likelihood of prosecution: the larger the variance, the fewer number of prosecution. I also hypothesize that ideological variance interacts with the courts' ideological disposition. Even if a court in general favors the government, ideological differences among judges make the final outcome uncertain. As a result, we should also observe fewer numbers of prosecutions as well.

The empirical test of the theory, reported in Chapter V, yields mixed results. The test based on the Antitrust Division's prosecution record from 1953 to 1994 provides strong support to the theory's major argument regarding the relationship between ideological variance within the appellate courts and the likelihood of prosecution. Large ideological variance within the federal appellate courts discourages prosecution by the Division. The interaction between ideological variance and ideological disposition, however, does not significantly affect the likelihood of prosecution. Nonetheless, the comparison of the models with and without ideological variance of the courts clearly indicates that the model with the ideological variance variable allows us to make better predictions of the Division's prosecution decisions.

Future Research Agenda

Theoretically, this project points out a much more dynamic and complex relationship between the courts and the bureaucracy than previous studies. The finding

that ideological variance within the appellate courts is negatively associated with the likelihood of prosecution by the bureaucracy examines only one aspect of the dynamic influence of uncertainty on prosecution, i.e. the likelihood of prosecution under high uncertainty. Although the bureaucracy's willingness to prosecute decreases when uncertainty within the appellate courts increases, this does not necessarily mean that the bureaucracy will prosecute when uncertainty is low. Given that the bureaucracy knows the result of prosecution, it may lose the incentive to pursue such an expensive enforcement tool and resort to less expensive tools such as settlement. As a result, it is possible that there exists an optimal *range of institutional uncertainty* that, at minimum, does not deter bureaucratic prosecution. From the courts' perspective, searching for the optimal level of uncertainty can avoid a Catch-22 issue. On the one hand, a high level of uncertainty within the courts deters bureaucratic prosecution, forcing the bureaucracy to use informal enforcement measures, which benefits the courts by reducing their workload. On the other hand, the cost to the courts is reduced policy control of the bureaucracy. Nevertheless, a low level of uncertainty within the courts means that the necessity of prosecution by the bureaucracy is reduced, given the high cost of prosecution and judicial outcomes with certainty. In other words, at either end of the uncertainty spectrum, the ground for judicial review is significantly reduced. I contend, therefore, that there is a curvilinear relationship between uncertainty within the courts and the probability of prosecution by the bureaucracy. Moreover, the cost of prosecution may play a significant role in this curvilinear relationship. Cost considerations of the bureaucracy become more important when uncertainty is extremely low or high. Its

significance drops, however, when uncertainty is within the optimal range and the bureaucracy is relatively certain about the judicial outcome.

In addition to uncertainty within the courts and the cost of prosecution, another factor that may affect the likelihood of prosecution by the bureaucracy is its risk type. In this project, I model the bureaucracy as a risk-averse institution. Agencies, however, could be risk-neutral or risk-seeking. In other words, when facing choices with comparable returns, agencies may choose alternatives depending on their taste for different levels of risk. In short, the optimal range of uncertainty is different for different types of agencies. While risk-averse agencies are very sensitive to uncertainty in prosecution, risk-seeking agencies may be much more tolerant of high uncertainty. As a result, there may exist three different optimal ranges of uncertainty for agencies with three different risk types. Although this project has moved the research on the interaction between the courts and the bureaucracy a step closer to understanding the full picture, it is clear from the above discussion that a much more dynamic relationship requires exploration. The proposed curvilinear relationship between the courts and the bureaucracy under the combined influence of uncertainty within the courts, the cost of prosecution, and the bureaucracy's risk type is but another small step.

Ideological Variance and Judicial Politics

Ideological variance may also be valuable in studying the courts themselves. On the Supreme Court, for example, the current literature on the certiorari game focuses on whether or not the certiorari votes by justices are strategic. Provine (1980) argues that certiorari voting is a non-strategic, legalistic process. Perry (1991) claims that although it

is essentially non-strategic, there are occasions when justices engage in defensive denials and aggressive grants. Palmer (1982) finds strategic voting but does not distinguish between defensive denials and aggressive grants. Schubert (1959) likewise claims that certiorari voting is a strategic process but one in which justices engage in defensive denials only. Krol and Brenner's (1990) work argues that justices often times adopt an error correction strategy.

A key factor in these arguments is justices' calculation concerning the Court's likely decision on the merits. Caldeira, Wright, and Zorn (1999), for example, argue that the likelihood of strategic voting depends on Justices' expectation of the outcome on the merits. They, however, did not examine the effect of ideological variance within the Supreme Court on its final decisions on the merits. If my theory is correct and ideological variance can function as a good indicator of the Court's group decision dynamics, the strategic nature of certiorari voting can vary corresponding to the ideological variance within the Court. Justices may choose to conduct strategic voting or sincere voting depending on the ideological variance within the Court. When the ideological variance is small, the justices are more certain about the Court's decisions on the merits. As a result, they can choose to conduct either defensive denial or aggressive grant to maximize their policy gains. If the ideological variance is large and the Court's decision on the merits is uncertain, justices may engage in sincere voting at the agenda setting stage given that it is almost impossible to predict the Court's final decision.

Another area of Supreme Court study where the introduction of ideological variance can contribute to our understanding of the Court is the study of the Supreme

Court justices' confirmation process. The focus of the study has centered on factors such as the composition of the Court, the median justice's position, the timing of retirement, and interest group activity (e.g. Calderia and Wright 1998, Hagle 1993, Segal, Cameron, and Cover 1992).Given my theory's argument about the relationship between ideological variance and the Court's group decision dynamics, future studies of confirmation of justices may need to take the Court's ideological variance at the time of nomination into consideration. Such variance may play a more important role in the Senate's consideration of nominees than the Court's ideological composition and its median member's position. After all, Justices make decisions under the influence of each other.

With regard to the appellate courts, Kevin Klein's path breaking work explores the factors that influence rule adoption and rejection among appellate courts. He did not examine, however, the strength of the rule itself, which should have an impact on the likelihood of rule adoption and rejection. Intuitively, appellate court judges are more likely to adopt strong rules made by others as opposed to weak rules. I suspect that ideological variance might be a good indicator of rule strength in the sense that a widely divided court needs more compromise to reach a decision, which makes the rule weak. As a result, other appellate courts are less likely to adopt the rule.

In summary, the key theoretical contribution of this project hinges on the employment of ideological variance within the courts as a new concept in the study of the interaction between the courts and the bureaucracy. Used as a measure of the courts' internal group decision-making dynamics in terms of ideological diversity among panels, I demonstrate that this concept not only broadens our theoretical understanding of

judicial oversight of the bureaucracy but also increases the predictive power of our model. In addition, this project provides a stepping stone for future studies along several different dimensions. Given further empirical evidence and theoretical development, I certainly hope that ideological variance can become a standard variable in both judicial politics and bureaucratic control studies.

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