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THE IMPACT OF SUPREME COURT MAKE UP
ON RULINGS TOWARDS ADMINISTRATIVE AGENCIES

by

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A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in International and Global Studies
in the College of Sciences
and in the Burnett Honors College
at the University of Central Florida
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ABSTRACT

This study investigated whether or not the membership of the United States Supreme Court affects the way the institution rules in cases regarding federal administrative agencies by collecting and comparing votes from 2018-2019 and 2020-2022. It found in the first section that justices showed an anti-deferential attitude towards agencies and in the second section a deferential attitude towards agencies, despite the conservative majority being larger in the second section. The result is likely due to the types of agencies and content of cases involved.

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TABLE OF CONTENTS

LIST OF TABLES	V
CHAPTER 1	1
Introduction.....	1
Literature Review.....	3
Methodology	9
CHAPTER 2	10
Analysis.....	10
<i>The Ginsburg Years</i>	10
<i>The Post-Ginsburg Years</i>	15
Conclusion	22
LIST OF REFERENCES	25
APPENDIX A.....	27

LIST OF TABLES

Table 1: Pro vs Anti-Government Power Votes by Justice, 2018	11
Table 2: Pro vs Anti-Government Power Votes by Justice, 2019	13
Table 3: Pro vs Anti-Government Power Votes by Justice, 2020	17
Table 4: Pro vs Anti-Government Power Votes by Justice, 2021	19
Table 5: Pro vs Anti-Government Power Votes by Justice, 2022	20
Table 6: Agency Support or Rejection by the Supreme Court, by Type	23

Chapter 1

Introduction

The power of administrative agencies has been a continuously controversial issue in American politics. Some believe that agencies are filled with experts in their field, who should be given significant leeway in rulemaking and enforcement in their specialized area. Others believe that elected officials and especially the judiciary should act as strong checks on agencies, since ambiguous mandates, can lead to abuses of power. The historical American tradition is to rein in the power and discretion that federal government can employ. The American system of federalism is premised on a limited national role; an idea that has loosened over time due to economic depression and war, but the traditional argument still very much exists that the government should be as reduced in scope as possible.

With the courts being the primary limiting tool on agencies, it is critical to have access to proven facts on how the judicial check is carried out practically. Many ideas about how the Supreme Court functions as an institution are assumed to be fact, but in reality, have yet to be proven or have found only partial or incomplete explanations.

The question that this research seeks to investigate is whether or not the political alignment of individual Supreme Court Justices affects how the institution as a whole reacts to federal administrative agencies. The analysis will take into account whether the court shows

trends of being for or against exercise of government administrative power, and whether or not this attitude towards varies over time.

This study's findings are significant, as they could be generalized across Supreme Court decisions as a whole to decipher if individual members change the direction of the court and if the institution tends to have a consistent attitude. These results could impact countless future political policies, such as how carefully the President chooses to nominate justices to the court, how friendly the Senate is in their confirmation process, and how open judges are about their opinions before they are appointed to the Supreme Court.

This study will collect data on Supreme Court decisions from 2018-2022 to determine if the attitude of the court towards administrative agencies changed with Justice Ginsberg's death and replacement by conservative Justice Barrett. One would logically expect a change in the institution's actions since 1/9th of it has converted to the opposite political perspective. With Justice Barrett's arrival on the Court the potential exists for a generational change in how the court shapes administrative agencies' future ability to conduct their business. Conservative justices have long argued that administrative agencies should be reined in and even reversed in terms of the scope of their power. The question then becomes has this change occurred, and to what degree

Literature Review

There has been previous research into the areas that this study covers, but rarely incorporating all of the elements that it simultaneously observes. Below is an analysis of past studies that act as the foundation of academic understandings related to this investigation. This analysis is kept at the more general level since this is not a detailed examination of specific agencies and their exercise of their statutory authority.

The analysis here focuses on several models of judicial behavior. Three distinct models attempt to predict the behavior of Justices. The first is Segal and Spaeth's Attitudinal model.¹ This model was created to predict future Supreme Court decisions and decipher if Supreme Court Justices make decisions based on their own explicit ideological policy preferences or solely on precedent and legal principle. Unfortunately, this model was created in a very unreliable manner, one difficult to replicate. The researchers used newspaper editorials written when each Justice was in the process of being confirmed in the Senate as the sole building blocks for the study. The idea was that these writers were able to seamlessly predict what kind of Justice the individual would be in the future from their past rulings. The assumption was that the editorials were completely accurate portrayals of the nominee's view prior to their nomination. However, when placed in a model based upon specific issues, the results did not closely align with the prediction. The attitudinal model does not appear to be reliable.

¹ Hume, Robert J. *Judicial Behavior and Policymaking: An Introduction*. Rowman & Littlefield, 2018. Pg. 33

This reflects the fact that analyzing the actual votes of the justices was much more precise than the editorial analyses which reflected the ideological proclivity of the individual newspaper editorial board or specific editors.

A more reliable approach would, similar to this study, focus on the actual votes the justices cast and the content of those cases. Actual votes represent when the justice's rhetoric translates into concrete decisions. Over a series of cases and terms, one can observe the patterns of a justice's decisions, identifying whether the votes or attitudes appear to evolve over time. Attitudes expressed verbally can be completely different from how the justice actually acts at the moment of decision, which is why it is important to collect the tangible data of votes instead of abstract unmeasurable opinions.

A number of scholars have collected the votes of the Supreme Court justices since the 1916 term of the U.S. Supreme Court; their findings consistently demonstrate that justices' votes correlate strongly to their policy views.² For example, Justice Felix Frankfurter suggested that he was a liberal justice in terms of several areas of constitutional law but in reality, his voting pattern demonstrated his consistent conservatism regardless of his rhetoric.³

² C. N. Tate and R. Handberg, "Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-1988," *American Journal of Political Science* 35 (May, 1991), 460-480.

Handberg, Roger "Decision-Making in a Natural Court: 1916-1921," *American Politics Quarterly* 4 (July 1976), 357-378.

³ C. N. Tate and R. Handberg, "Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-1988," *American Journal of Political Science* 35 (May, 1991), 460-480.

Handberg, Roger "Decision-Making in a Natural Court: 1916-1921," *American Politics Quarterly* 4 (July 1976), 357-378.

The second model is the Legal model⁴. This predicts that principled justices will behave in ways that promote legal stability. Meaning that they will mainly follow the precedent from previous decisions, also known as *stare decisis*. This model does not have much support as it was shown that most justices will not adjust their opinions or judgements to follow the majority's ruling (Only 13.4% of the time was this the case)⁵, meaning that legal precedent does not matter to justices as much as unanimity.

The last model of this series is the Strategic model created by Walter Murphy and later expanded upon by Lee Epstein and Jack Knight⁶. This model holds that Justices are influenced by outside forces, those primarily being other Justices. The theory is that Justices do not vote solely on legal principle but change their vote or the wording of their decision as part of a larger strategy to gain a desired outcome. This outcome could be for the case at hand, or a compromise to gain the vote of another Justice for an entirely different case. The Strategic model highlights cooperation between judges as the main decision-making motivator.

The Attitudinal, Legal, and Strategic models are three of the main models in predicting judicial action. In all cases, the strongest evidence of justices' views are their votes on cases raising issues regarding the administrative agency' exercise of its power and whether that exercise crosses some boundary the justice finds excessive or unsupported by the agency's authorizing statute of the U.S. Constitution.

A separate article by then sitting Supreme Court Justice Stephen Breyer (retired in 2022) attempts to lay out prerequisites on how administrative law cases should be managed⁷. The

⁴ Hume, Robert J. *Judicial Behavior and Policymaking: An Introduction*. Rowman & Littlefield, 2018. Pg. 69.

⁵ Hume, Robert J. *Judicial Behavior and Policymaking: An Introduction*. Rowman & Littlefield, 2018. Pg. 77.

⁶ Hume, Robert J. *Judicial Behavior and Policymaking: An Introduction*. Rowman & Littlefield, 2018. Pg. 105.

⁷ Breyer, Stephen. "JUDICIAL REVIEW OF QUESTIONS OF LAW AND POLICY." *Administrative Law Review*, vol. 38, no. 4, 1986, pp.

article's goal is to discover what degree of deference should be given to administrative agencies by the courts. Breyer states that legal precedent seems to have a central conflict. It, "1) requires courts to defer to agency judgments about matters of law 2) it also suggests that courts conduct independent, in-depth reviews of agency judgments about matters of policy." The disparity being that the court is somehow supposed to defer, yet simultaneously also review. This article shows that there is no clearly expected and accepted single way for Justices to decide administrative cases.

Another area of study related to the subject of judicial review of agency actions was done by McCann, Shipan, and Wang⁸. They coded judicial review provisions made by Congress from 1947-2016. The goal of this study was to systematically measure the degree to which Congress can impact judicial decision making regarding administrative agencies over time. The results of this research seem to indicate that Congress uses its legislative powers to somewhat shield agencies from judicial review. This finding relates to the proposed study in that Congress may be able to disrupt the natural course of a Supreme Court review of an agency's decision, disordering the collected data.

A study by Professor Judge-Lord⁹ showed that deference tends to be a general attitude of a justice. Those justices who defer to agencies have been shown to also defer to Congress. The study also found that the court tends to side with agencies when they fail to act, but against the

363–98. *JSTOR*, <http://www.jstor.org/stable/40709526>. Accessed 1 Oct. 2022.

⁸ McCann, Pamela J., Charles R. Shipan, and Yuhua Wang. "Measuring the Legislative Design of Judicial Review of Agency Actions." *Unpublished manuscript*. Harvard University. URL: https://scholar.harvard.edu/files/yuhuaawang/files/mccann_shipan_and_wang_2021.pdf (2021).

⁹ Judge-Lord, Devin. "Why Do Courts Defer to Administrative Agency Judgment?." *Midwest Political Science Association Annual Conference*. 2016.

agencies when they overstep their authority. The problem of this study is that it is unable to observe whether decisions are made out of pure legal principle or strategically. This research shows that Justices consciously choose whether or not they will defer to agencies. Deference is a choice of attitude and action by justices which has policy implications.

Research by Roger Handberg¹⁰ showed that, “Agencies were generally successful in their appearances before the Court but differences did occur across the different time periods.” This research was done by compiling data on supreme court decisions from the years 1947-1978. It was found that the Warren court was most supportive of agencies that regulated the economy, the transition between the Warren and Burger courts most supported economic and environmental agencies, while the Burger court most supported agencies covering individual procedural rights and human resources. The Handberg study shows a shifting in the opinion of the court over time. The research done in this study looks at the same idea, but focuses on the more recent years of the court.

A study by Joseph Tanenhaus¹¹ discovered that the Supreme Court tends to rule consistently in favor of administrative agencies. It also found that individual justices had consistent voting patterns over the time period studied. This study compiled cases from 1947-1957 and coded them based on several factors. It was limited in its access to cases only involving

¹⁰ Handberg, Roger. “The Supreme Court and Administrative Agencies: 1965-1978.” *Journal of contemporary law* 6, no. 1 (1979): 161–.

¹¹ Tanenhaus, Joseph. “Supreme Court Attitudes Toward Federal Administrative Agencies.” *The Journal of Politics*, vol. 22, no. 3, 1960, pp. 502–24. *JSTOR*, <https://doi.org/10.2307/2126894>. Accessed 2 Oct. 2022.

particular agencies. This research describes the institution of the Supreme Court and the Justices themselves as consistent and stable regarding administrative agencies. Tanenhaus' research has been important for demonstrating that the Court was previously supportive of agencies; the question now is, has that supportive posture disappeared? Some believe that the new generation of conservative justices will seek to reverse what is seen by many as a pattern of mistaken decisions since the New Deal. That attitude can be seen in Justice Alito's opinion overturning *Roe v. Wade* in the summer of 2022.¹²

There has been research touching on the pieces of what this study will cover, but never are all of the elements combined, creating a necessity for the knowledge that this study will produce. The first three models highlighted different approaches behind understanding the behavior of Justices. Other previous research shows that there is no particular way that the Supreme Court is required to rule on agency actions, however, overall, the court tends to consistently rule in favor of agencies though individual justices may differ. These studies touch on related areas, but there has yet to be a comprehensive modern study of the Supreme Court's consistency on administrative cases.

¹² *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022)

Methodology

This analysis was a quantitative observational time-series study. The method of study was collecting original data of Supreme Court rulings on administrative law cases from the Court terms 2018-2022. The data collected was the court's ruling on the case, and each Justice's individual votes in terms of support or rejection of the agency. These votes were then compared and charted to observe whether the justices and the court tend to rule in favor of government power or against. This data will provide insight into the degree to which each Justice and the court are supportive of administrative agencies. This data was collected through the Lexus Uni and Westlaw databases and cross referenced with the Supreme Court Blog, Cornell Legal Information Institute, and Oyez, all of which catalog Supreme Court cases.

Analysis also involved comparing the results from the court, before Justice Ginsberg's death, from 2018-2019 to the court after Justice Ginsberg's death from 2020-2022. The objective of this analysis was to compare the decisions from the two-time periods and determine whether or not there is any change in agency support over time, and by which justices.

The main constraint of this study is the limited number of cases from which to draw data. Since only a small number of cases concerning administrative agencies reach the Supreme Court, and data will only be drawn from those during the years 2018-2022, this is a very narrow sample from which to extract information.

Chapter 2

Analysis

The Ginsburg Years

The first section of data that will be analyzed is from the years 2018 and 2019. This corresponds with the time Justice Ginsberg was on the court before her passing in 2020. During this time, the court had a conservative majority of 5-4, which is the smallest conservative majority in the years we will be observing.

The year 2018 had a total of 12 cases concerning the subject matter, 2 were decided in favor of government power and 10 that were decided against government power as can be seen in Table 1. Justice Kagan wrote the majority of opinions on cases studied in this term.

This year had the most anti-government power votes made by conservative justices from the years that we are observing. Most cases were concerning economic or environmental issues as can be seen later in Table 6. None of these cases are particularly noteworthy. The environmental cases concerned jurisdiction¹³ and a land designation challenge¹⁴. The others involved the Social Security Administration claims procedures¹⁵ and court fees¹⁶. All of these

¹³ *Sturgeon v. Frost*, 587 U.S. ____ (2019)

¹⁴ *Weyerhaeuser Co. v. United States Fish and Wildlife Service*, 586 U.S. ____ (2018)

¹⁵ *Smith v. Berryhill*, 587 U.S. ____ (2019)

¹⁶ *Culbertson v. Berryhill*, 586 U.S. ____ (2019)

cases were decided unanimously. The 2018 term begins the anti-government power decision trend that we will see continue in future terms.

Table 1: Pro vs Anti-Government Power Votes by Justice, 2018

2018	Justice	Pro-Government Power Votes	Anti-Government Power Votes
Liberal	Ginsburg	2	10
	Breyer	4	8
	Sotomayor	1	11
	Kagan	3	9
Conservative	Roberts	2	10
	Thomas	1	11
	Alito	2	10
	Gorsuch	0	12
	Kavanaugh	1	7
12 Cases			

The year 2019 had 15 cases regarding federal administrative agencies, 5 cases were decided in favor of government power and 10 that were against government power. This year had the most anti-government power votes made by liberal justices, with cases mostly concerning economics, homeland security, and patent and trademarks.

One significant case from this term is *Seila Law LLC v. Consumer Financial Protection Bureau*¹⁷. This case decided that a federal agency which has only one head must be subject to removal by the president. The case was decided with a stark 5-4 split (For Sotomayor, with the majority composed of conservative justices.) between conservative and liberal justices, with the opinion being written by Chief Justice Roberts, who highlighted that agencies are under executive authority and it is the duty of the President to ensure that they are behaving properly¹⁸.

Another notable case is *Department of Homeland Security v. Regents of the University of California*¹⁹, in which the court decided that DHS's cancellation of the Deferred Action for Childhood Arrivals program was arbitrary and capricious. This was another 5-4 split (For Regents) with Chief Justice Roberts joining with the liberals and writing the opinion.

Two things that these cases have in common is the position of the President as the executive. Sotomayor determines that he must have removal power over the head of an agency and DHS rules that his removal of DACA was unlawful. This could be the factor that led liberal justices to vote in such an anti-government manner in this term due to who the President was at this time. With the high amount of publicity that the President's comments often had in cases regarding immigration, this could have led liberal justices to oppose government actions even more fervently due to public opinion. The 2019 term saw a continuation of the anti-government vote trend, however this time spearheaded by the liberal justices, likely due to specific content of the cases.

¹⁷ *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ____ (2020)

¹⁸ Sitaraman, Ganesh. "The Political Economy of the Removal Power." *Harvard Law Review*, 24 Mar. 2023, <https://harvardlawreview.org/print/vol-134/the-political-economy-of-the-removal-power/>.

¹⁹ *Department of Homeland Security v. Regents of University of California*, 591 U.S. ____ (2020)

Table 2: Pro vs Anti-Government Power Votes by Justice, 2019

2019	Justice	Pro-Government Power Votes	Anti-Government Power Votes
Liberal	Ginsburg	5	10
	Breyer	5	10
	Sotomayor	4	11
	Kagan	2	12
Conservative			
	Roberts	5	10
	Thomas	8	7
	Alito	6	9
	Gorsuch	7	8
	Kavanaugh	5	10
15 Cases			

Overall, in the observed years, the recorded votes have shown the Supreme Court as an institution to have an anti-deferential attitude towards federal administrative agencies and their exercise of government power. The results of votes by case are similar in 2018 and 2019, however, there was more unanimity in the anti-government power front in 2018. This is likely due to the non-controversial nature of the cases studied.

This is an important finding since it suggests that the U.S. Supreme Court is no longer deferential to government administrative agencies and the exercise of their power as was previously seen in the Tanenhaus study²⁰. In fact, this finding means that the understanding long held by scholars may be in transition. This could reflect the fact that the intrusiveness of the government may be generating a backlash across the ideological spectrum. If true, this pattern indicates that justices of all ideologies have moved to a more skeptical position in line with a secular change in society regarding government overreach. This data will act as the baseline to which the next section will be compared.

²⁰ Tanenhaus, Joseph. "Supreme Court Attitudes Toward Federal Administrative Agencies." *The Journal of Politics*, vol. 22, no. 3, 1960, pg. 514. *JSTOR*, <https://doi.org/10.2307/2126894>. Accessed 2 Oct. 2022.

The Post-Ginsburg Years

The second partition of data is the years 2020-2022. These are the years after Justice Ginsburg's passing. The court transformed from a 5-4 conservative majority to a majority of 6 conservatives to 3 liberals with Justice Barrett becoming the sixth conservative justice joining the bench.

The 2020 court term saw a total of 22 cases relevant to this study. 10 were decided as pro-government/agency power cases and 12 were anti-government power. A fairly even split. This year saw the most pro-government power votes made by the conservative justices. Some cases involved were regarding homeland security, of which 4 cases were decided in favor of the government and 1 opposed. On the other hand, there was also a high amount of anti-government votes by liberal justices, which can also be seen in the fact that 1 economic case was decided in favor of government power, while 4 were decided against. The 2019 results tend to see conservative justices supporting cases in homeland security, while liberal justices focused on withholding government action in economic related cases.

The cases related to economics involved categorizations for COVID-19 relief²¹, application of the Anti-Injunction Act and the reduction of tax shelters²², that the Federal Trade Commission cannot seek monetary restitution²³, Social Security claims procedures²⁴, and a similar case to *Selia*²⁵ in which the Federal Housing Finance Agency violated the separation of

²¹ *Yellen v. Confederated Tribes of Chehalis Reservation*, 594 U.S. ____ (2021)

²² *CIC Services, LLC v. Internal Revenue Service*, 593 U.S. ____ (2021)

²³ *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. ____ (2021)

²⁴ *Carr v. Saul*, 593 U.S. ____ (2021)

²⁵ *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. ____ (2020)

powers by only allowing the President to remove the head for cause²⁶. All of the cases were decided unanimously and against the government, except for *Yellen v. Confederated Tribes* (2021), which was 6-3 and pro-government.

The cases related to homeland security involved the decisions that a nonpermanent resident who is attempting to contest their lawful removal carries the burden of proof to show that their conviction was wrongful²⁷, a notice to appear must contain all material necessary for the removal hearing²⁸, and which code allows the government to detain those whose removal orders have been reestablished²⁹. Another decided that just because an immigration judge does not find an immigrant's testimony to be untrustworthy does not automatically make it trustworthy³⁰, and that an illegal immigrant is not eligible to become a U.S. citizen³¹. Most of these cases have a conservative majority or are unanimous. The 2020 term continued the anti-government trend on behalf of liberal justices, but likely due to the procedural nature of the homeland security cases, saw the conservative justices show an unusual pro-government stance.

²⁶ *Collins v. Yellen*, 594 U.S. ____ (2021)

²⁷ *Pereida v. Wilkinson*, 592 U.S. ____ (2021)

²⁸ *Niz-Chavez v. Garland*, 593 U.S. ____ (2021)

²⁹ *Johnson v. Guzman-Chavez*, 594 U.S. ____ (2021)

³⁰ *Garland v. Dai*, 593 U.S. ____ (2021)

³¹ *Sanchez v. Mayorkas*, 593 U.S. ____ (2021)

Table 3: Pro vs Anti-Government Power Votes by Justice, 2020

2020	Justice	Pro-Government Power Votes	Anti-Government Power Votes
Liberal	Breyer	6	11
	Sotomayor	5	12
	Kagan	5	12
Conservative	Roberts	10	7
	Thomas	8	9
	Alito	10	6
	Gorsuch	10	7
	Kavanaugh	11	6
	Barrett	10	6
17 Cases			

In 2021 there was a total of 14 pertinent cases. 8 were decided in favor of government power, 6 were opposed. These cases mainly concerned economics and homeland security. This year saw the most pro-government power and least anti-government power votes by liberal justices. This could be seen as surprising, as one might assume that this could be a reaction to Justice Barrett's replacement of Justice Ginsberg on the court, however, this took place an entire year after Justice Barrett was already on the court, so it is an unlikely cause.

2021 also saw the most inconsistencies in the otherwise constant voting pattern of the liberal Justices. Justice Kagan most drastically (and the other liberal justices as well) completely reversed her usual pattern of being fairly anti-government intervention to suddenly being pro-government power. So, what cases occurred in this year that could prompt this behavior?

The year 2021 included many important cases, several of which being *Biden v. Missouri*³², *National Federation of Independent Businesses v. OSHA*³³, and *Alabama Association of Realtors v. DHHS*³⁴. All of these cases revolved around the allowable scope of agency actions when it comes to COVID regulations. This issue was, and in some ways still is, and extremely volatile and public debate. In these cases, the votes were split, with conservative justices opposing, while liberal justices supported the government mandates.

It is possible, in these cases, that justices felt the need to join with those within their political orientation due to the public nature of the debate. However, in *Biden v. Missouri* Kavanaugh and Roberts both join with the liberal justices, approving that the DHHS order that facilities receiving funds for Medicare and Medicaid must have vaccinated staff. The opinions

³² *Biden v. Missouri*, 595 U. S. ____ (2022)

³³ *National Federation of Independent Business v. OSHA*, 595 U. S. ____ (2022)

³⁴ *Alabama Association of Realtors v. DHHS*, 594 U. S. ____ (2021)

for all three cases were per curiam, making it difficult to discern their reasoning as neither took part in a concurring opinion, but the written opinion seems to reference that this is within DHHS’s scope since the facilities are receiving government funds.

The years 2020 and 2021 were also Chief Justice Roberts’ most pro-deferential years. Which means that he slowly became more pro-government power. Some possible explanations for this could be that the cases mainly involved homeland security and COVID issues, it could be that with the new conservative majority he no longer felt it necessary to toe the line of his counterparts, or it could be that his mind on the general issue of deference changed over the years.

Table 4: Pro vs Anti-Government Power Votes by Justice, 2021

2021	Justice	Pro-Government Power Votes	Anti-Government Power Votes
Liberal	Breyer	11	6
	Sotomayor	11	6
	Kagan	13	4
Conservative			
	Roberts	10	7
	Thomas	7	10
	Alito	6	11
	Gorsuch	4	13
	Kavanaugh	10	7
	Barrett	7	10
17 Cases			

In contrast to the rest of the terms, where there were already few cases to draw data from, the 2022 term has only one relevant case at the time of this study’s completion. This case was unanimously decided in favor of government power. The conclusion from this information could be one of several options 1) The 2022 Supreme Court term is not yet finished, so there may be more data to draw from in future studies. 2) That the court is no longer interested in agency-related issues and has moved on to matters it deems more important for the present. Whereas previous courts were more concerned with cases surrounding administrative law, but the current court is more focused on other issues.

Table 5: Pro vs Anti-Government Power Votes by Justice, 2022

2022	Justice	Pro-Government Power Votes	Anti-Government Power Votes
Liberal	Jackson	1	0
	Sotomayor	1	0
	Kagan	1	0
Conservative	Roberts	1	0
	Thomas	1	0
	Alito	1	0
	Gorsuch	1	0
	Kavanaugh	1	0
	Barrett	1	0
	1 Case		

In the years 2020-2022 the court has shifted to rule slightly more in favor of administrative agencies and the exercise of government power than as before, when it acted slightly opposed. It is not by a large margin, but this finding is somewhat surprising, as the court membership has shifted to be more conservative and not more liberal. The traditional thinking would have it that more conservative justices would make the court act in a more anti-government manner, which does not seem to be true according to the data collected.

One possible explanation is the COVID-19 outbreak, which resulted in more exercise of government power for public safety, which the court may believe is justifiable. A second possibility is that ideological leanings do not actually affect justices' rulings, that they are merely voting off of legal principle and precedent, and these are the decisions that result. Another, and the most likely factor, is the possibility is that it is the agency type and case content that is the largest factor. Lastly, it could be that the sample size is simply too small for accuracy.

Conclusion

Overall, the court seems to have ruled during the Ginsburg years (2018-2019) against agency exercise of government power, many times unanimously. While, in the post-Ginsburg years (2020-2022), the court shifted to ruling slightly more pro-government, for the possible reasons discussed above that were public safety, legal principle and precedent, agency type and case content, and sample size.

It appears that Conservative justices are against deference to agency rulings in cases regarding environmental and economic issues, but pro-deference in homeland security cases. Liberal justices appear to be anti-agency deference in economic, and patent and trademark cases, and somewhat in homeland security cases in 2019, but pro-deference in economic and homeland security cases in 2021. It seems to be the content within a case itself that causes the judges to change their votes.

Conservative justices appear to have a much less consistent voting pattern than liberal justices. They are consistent in unanimity, but inconsistent in pattern throughout the years. Liberals on the other hand are both consistent in unanimity and throughout each term (With the exception of 2021 spoken about previously).

In Table 6, agencies have been split into three categories: National Security, Economic/Domestic, and Individual. National Security includes agencies like the FBI and Department of Homeland Security. Economic/Domestic includes census, communication, economic, health, utility, railroad, and patent & trademark related agencies. Lastly, Individual encompasses elections and Veteran's Affairs.

The court in general tends to rule in favor of agencies when they involve security. Cases show a rate of 3:1 total, and more so in the second period of data. Economic and Domestic cases are mainly decided against the government and fairly consistently throughout both periods. Individual cases are close, but still majority anti-government. In this data, the court shows itself to be pro-national security

Table 6: Agency Support or Rejection by the Supreme Court, by Type

Agency type	Aggregate	First court period	Second court period	Total cases
National security	12/4	3/2	9/2	16
Economic/domestic	11/27	4/15	7/12	38
Individual	2/3	0/2	2/1	5

This chart depicts what has been discussed in previous sections, but seems to be the summary of the study. This is that agency type and case content is the main factor in determining the direction of a justices vote, or case decision. Table 6 shows this to not only be the case, but also that it is consistent over both periods.

This study has covered the question “Does the opinion of individual justices affect how the Supreme Court rules on cases regarding federal administrative agencies?”, which has never been answered in its fully synthesized form in recent years. Elements have been answered in past

research, as well as a similar study carried out from the 1940's through the 1970's³⁵. The data showed the court during the Ginsburg Years to rule against agency action and exercise of power, meanwhile the Post-Ginsburg Years saw the opposite, despite the greater conservative majority. This data shows that the court from 2020-2022 tends to somewhat rule against federal agencies' use of government power, which is the opposite of what was found in the studies covered in the literature review.

This information could lead to the conclusion that the individual membership of the court does not tend to impact the direction of the institution's attitude towards agencies. It is agency type and case content that effects the way that the institution rules. It slightly differs with the political orientation of a justice, but overall is a fairly clear pattern. It is also possible that the publicity of certain cases could cause justices to rule in a more polarized manner, due to possible public scrutiny.

It is also possible that this is an inaccurate read since it is conceivable that the sample size is too small making the subject matter is too niche to gain an accurate picture of the situation.

Future research could be done over a longer period of time, or with a broader scope to either confirm or deny this thesis. For example, including cases that involve state agencies, and over a larger number of terms to gain more data, or combining this data with that gathered in previous studies to paint a more clear and accurate picture.

³⁵ Handberg, Roger. "The Supreme Court and Administrative Agencies: 1965-1978." *Journal of contemporary law* 6, no. 1 (1979): 161-.

LIST OF REFERENCES

- Alabama Association of Realtors v. DHHS, 594 U. S. ____ (2021)
- AMG Capital Management, LLC v. Federal Trade Commission, 593 U.S. ____ (2021)
- Biden v. Missouri, 595 U. S. ____ (2022)
- Breyer, Stephen. “Judicial Review of Questions of Law and Policy.” *Administrative Law Review*, vol. 38, no. 4, 1986, pp. 363–98. *JSTOR*, <http://www.jstor.org/stable/40709526>. Accessed 1 Oct. 2022.
- Carr v. Saul, 593 U.S. ____ (2021)
- CIC Services., LLC v. Internal Revenue Service, 593 U.S. ____ (2021)
- C. N. Tate and R. Handberg, “Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-1988,” *American Journal of Political Science* 35 (May, 1991), 460-480.
- Collins v. Yellen, 594 U.S. ____ (2021)
- Culbertson v. Berryhill, 586 U.S. ____ (2019)
- Dobbs v. Jackson Women’s Health Organization, 597 U.S. ____ (2022)
- Garland v. Dai, 593 U.S. ____ (2021)
- Handberg, Roger “Decision-Making in a Natural Court: 1916-1921,” *American Politics Quarterly* 4 (July 1976), 357-378.
- Handberg, Roger. “The Supreme Court and Administrative Agencies: 1965-1978.” *Journal of Contemporary Law* 6, no. 1 (1979): 161–.
- Hume, Robert J. *Judicial Behavior and Policymaking: An Introduction*. Rowman & Littlefield, 2018. Pg. 105.
- Johnson v. Guzman-Chavez, 594 U.S. ____ (2021)

Judge-Lord, Devin. "Why Do Courts Defer to Administrative Agency Judgment?" *Midwest Political Science Association Annual Conference*. 2016.

McCann, Pamela J., Charles R. Shipan, and Yuhua Wang. "Measuring the Legislative Design of Judicial Review of Agency Actions." *Unpublished manuscript. Harvard University*. URL: https://scholar.harvard.edu/files/yuhuawang/files/mccann_shipan_and_wang_2021.pdf (2021).

National Federation of Independent Business v. OSHA, 595 U. S. ____ (2022)

Niz-Chavez v. Garland, 593 U.S. ____ (2021)

Pereida v. Wilkinson, 592 U.S. ____ (2021)

Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. ____ (2020)

Sanchez v. Mayorkas, 593 U.S. ____ (2021)

Sitaraman, Ganesh. "The Political Economy of the Removal Power." *Harvard Law Review*, 24 Mar. 2023, <https://harvardlawreview.org/print/vol-134/the-political-economy-of-the-removal-power/>.

Smith v. Berryhill, 587 U.S. ____ (2019)

Sturgeon v. Frost, 587 U.S. ____ (2019)

Tanenhaus, Joseph. "Supreme Court Attitudes Toward Federal Administrative Agencies." *The Journal of Politics*, vol. 22, no. 3, 1960, pp. 502–24. *JSTOR*, <https://doi.org/10.2307/2126894>. Accessed 2 Oct. 2022.

Weyerhaeuser Co. v. United States Fish and Wildlife Service, 586 U.S. ____ (2018)

Yellen v. Confederated Tribes of Chehalis Reservation, 594 U.S. ____ (2021)

APPENDIX A

Agency	Pro-Government Power Decisions	Anti-Government Power Decisions
Board of Immigration Appeals	3	2
Consumer Financial Protection Bureau	0	1
Department of Commerce	0	1
Department of Health and Human Services	1	4
Department of Homeland Security	4	1
Department of the Treasury	1	1
Department of Veteran's Affairs	2	2
Environmental Protection Agency	1	0
Equal Employment Opportunity Commission	1	0
Federal Bureau of Investigation	2	1
Federal Communications Commission	1	0
Federal Deposit Insurance Corporation	0	1
Federal Election Commission	0	1
Federal Trade Commission	0	1
Fish and Wildlife Service	1	1
Forest Service	1	0

Immigration and Customs Enforcement	2	0
Internal Revenue Service	0	2
National Parks Service	0	1
Rail Road Retirement Board	0	1
Security and Exchange Commission	1	1
Social Security Administration	3	3
Tennessee Valley Authority	0	1
U.S. Agency for International Development	1	0
U.S. Census Bureau	0	1
U.S. Patent and Trademark Office	1	4
U.S. Postal Service	0	1
U.S. Trustee Program	0	1
Total	26	33