The Effect of Ideological Divergence on Agency-Judicial Interactions

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Introduction

Under what conditions do administrative agencies attempt to influence decision-making and pursue policy change in the courts? If agencies pursue their policy goals strategically, they may attempt to influence the federal courts. One implication of pursuing influence may be a systematic filing of briefs of *amicus curiae*[1] by agencies in patterns that reflect goal-seeking, strategic behavior. In order to test this, I analyze the frequency of *amicus* filings in the U.S. Courts of Appeals for several agencies and under what conditions these agencies file.

Most research on interactions between the executive and judicial branches has focused on the relationship between the U.S. Supreme Court and Solicitor General, particularly in terms of Presidential preferences as represented by the Solicitor General. The judicial politics literature, however, lacks systematic examination of non-Presidential executive branch influence on lower federal appellate courts. Scholars who do examine bureaucratic-judicial interactions tend to view government agencies as subordinate to the courts, with courts acting as an additional policy-maker or possessing some manner of authority over agencies. The most visible piece of literature on this, for example, focuses on bureaucratic compliance with court opinions (Spriggs 1997). Very little, if any, research has focused on bureaucratic-judicial interactions from the perception of that the entities as equals. What literature there is that focuses on this equal relationship centers on the Solicitor General and her influence as a representative of the President.

The Solicitor General, while technically a member of the bureaucracy, does not occupy the same position as a majority of agencies. The main purpose of the Solicitor General is to represent the executive branch, and in particular, the preferences of the President (Bailey, Brian, and Forrest 2005; Black and Owen 2012; Meinhold and Shull 1998; Wohlfarth 2009). Despite the political power the President holds over bureaucratic agencies, it is problematic to assume that the preferences of the agencies and the President are completely congruent. Agencies are allowed a degree of independence from the President

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[1] *Amicus curiae* briefs, translated as "friend of the court," are legal briefs filed by a party that usually supports the respondent or petitioner, though occasionally the brief makes an argument that supports neither side of the case.

and are typically considered the stable and expert portion of the executive branch. This implies that, over time, agencies may develop policy goals that are independent of the current President, and will take initiative to affect policy changes in the desired direction. There is the additional fact that the Solicitor General rarely, if ever, interacts with the lower federal courts. Mainly, the focus of the Solicitor General literature is on the Supreme Court. The Supreme Court is the main venue for large-scale, national policy change, which is generally the goal of the President and thus the goal of the Solicitor General.

The Supreme Court, however, is an unlikely venue for agencies to pursue policy change. The Supreme Court's discretionary jurisdiction ensures that justices will not hear an overwhelming number of cases, unlike overworked lower courts. The cases heard by the Supreme Court are of unusually high salience and visible to the public in ways lower courts cases are not. The public is aware of the Supreme Court's docket, and given the potential political repercussions of the opinions, Congress and the President will likely pay more attention to those cases. The political costs of attempting to pursue policy independent of executive or Congressional direction alongside the potential for attracting negative public attention create a high cost environment with a low chance of successfully moving policy. Moreover, there are likely norms preventing government agencies from becoming involved in Supreme Court cases without permission from the President and Department of Justice.

Government agencies should weigh cost against potential benefit when deciding to file an *amicus* brief.[2] The agency's perceived probability of success in influencing a judge's decision will be impacted by a number of factors, key among them ideology. Ideological distance between the agency and the circuit should influence the probability of success but not the filing costs. Analogous to the ally principle, agencies should enjoy more influence in circuit similar in ideological perspective. This implies that agencies should file more *amicus* briefs in Courts of Appeal with similar ideological perspective.

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[2]This paper says nothing direct about what specific policy agencies want to influence with an *amicus* brief. Data collection for that question is not presently feasible.

Courts of Appeals

The U.S. Courts of Appeal are split into thirteen circuits. The first through eleventh circuits and D.C. circuit are divided by geographical region and coincide with the federal district courts. The Federal Circuit Court has nation-wide jurisdiction over specialized cases, such as those appealed from the Court of International Trade and the Court of Federal Claims. Each circuit has a set number of authorized judgeships, which is the number of maximum active, official judges that sit on the circuit, as well as clerks, staff, and senior judges. [3]

The first twelve Courts of Appeal hear cases appealed from the lower federal district courts, as well as appeals from administrative agency courts. The Courts of Appeal do not hear the facts about the case but instead rule on the constitutionality and procedural correctness of lower court's handling of the case. The judges are partitioned into panels of three via a random selection process.

The specialized nature of the Federal Circuit Court makes it unlike the other twelve Circuit Courts, and thus subject to different theoretical expectations. Due to the specialization and data constraints of the Federal Circuit Court, all observation of *amicus* briefs in the Federal Circuit will be dropped from my dataset.

The Courts of Appeals has a higher volume of cases due to a lack in discretionary jurisdiction. This higher workload results in both increased opportunities for agencies to impact judicial decisions and an increased informational advantage. *Amicus curiae* briefs, translated as "friend of the court," are legal briefs filed by a party that usually supports the respondent or petitioner, though occasionally the brief makes an argument that supports neither side of the case. *Amicus* briefs are generally regarded as a way to reduce information costs for the court (Caldeira 1990). On the Supreme Court, *amicus* briefs at the petition stage are likely to influence whether or not the Court grants a *writ of certiorari*. A large number of *amicus* briefs inform justices that a case is particularly important and that the law needs clarification (Caldeira 1990). The source of

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[3]Senior judges are those who have formerly presided in an authorized judgeship but have since retired. These senior judges may still be active and preside over cases, though senior judges can also fully retire. This means that the First Circuit, for example, may only have five of the six authorized judgeships filled, but three senior judges may be actively taking up cases.

amicus briefs likely conditions the influence. Past research examines the Solicitor General's influence on case outcomes on the Supreme Court through both *amicus* briefs and litigation (Wohlfarth 2009; McGuire 1998; Bailey 2005; Caldeira 1990; Black and Owens 2012). The Solicitor General's advantage is generally considered to stem from her status as a repeat player, the expertise associated with the office, and the position's political power and Presidential support.[4]

Bailey (2005) and Wohlfarth (2009) both find empirical support for certain limitations on the Solicitor General's influence over Supreme Court justices. The Solicitor General's ideological proximity to the Supreme Court can mitigate her impact on the justices. The larger the ideological distance between the Solicitor General and the justices, the less influential the Solicitor General becomes (Bailey 2005). The dynamics observed for the Solicitor General and Supreme Court intuitively apply to other information-disadvantaged courts (Courts of Appeals) and similar information-advantaged government players (agencies). While circuit judges are more constrained in their decision-making than Supreme Court justices, I expect that circuit judges view ideologically similar sources as more credible than ideologically dissimilar ones. This implies that strategically-behaving agencies will consider the ideology of the circuit court before attempting to influence its judges.

Bureaucratic Agencies

One of the underlying assumptions of the paper is bureaucratic agencies have policy preferences that are distinct from the President, either in the content of the actual preference or the importance placed on the preference. The President, as a four-year elected representative charged with leading the entire country, has a much stronger re-election agenda and a wider, more general scope of policy preferences. This implies that the Solicitor General, as the President's representative, will have the same broad preferences.[5] Government agencies, however, are generally created with a singular purpose in mind.

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[4]It is worth noting that the judicial branch has no enforcement power but instead must rely on the executive branch, both the bureaucracy and the President, in order to implement opinions.

[5]The President also appoints the Solicitor General with "advise and consent" from the Senate. This further endorses the idea that the Solicitor General acts in the line with the President's preferences, though it could be mitigated by the presence of a unified or divided government.

This gives agencies a much small scope, which in turn generates more intense and specific policy preferences. The other assumption is that bureaucratic organizations, much like interest groups and the Solicitor General, consider the court system a venue for policy change.

The agencies analyzed in this paper are the Federal Trade Commission (FTC), Securities and Exchange Commission (SEC), Department of Labor (DoL), Department of Justice (DOJ), and Equal Employment Opportunity Commission (EEOC). In terms of the Departments, I will use the DOJ's Antitrust and Civil Rights divisions and the DoL's Occupational Health and Safety, Plan Benefits Security, and the Fair Labor Standards divisions. Rather than coding the two cabinet departments as one agency, each division inside the departments will be considered a unique agency.

Having two cabinet agencies and four independent agencies presents a good comparison. Cabinet agencies may be more susceptible to political sways and the President's preferences, the independent agencies should be less so. Moreover, by using the Civil Rights division of the DOJ and the EEOC, I have an independent agency and a cabinet department with similar purposes. The FTC, SEC, and the DOL divisions deal with economic matters, and given there are three divisions and two larger independent agencies, it should also provide a good comparison. The diversity in agency independence and similarity in purpose will ideally allow for a measure of control over the role agency independence plays in filing *amicus* briefs.

Theory

The choice of filing an *amicus* brief should be influenced by several factors. The ideological distance between an agency and a circuit is the main explanation of my theory. If a agency and circuit share similar ideological perspectives, then an agency should be confident that the case will be ruled in the agency's preferred direction without interference. The agency should not accept the cost of filing when the case will already be decided in the desired direction. If the ideological distance is too large, however, an agency is

wasting resources by filing in a case that will almost assuredly be decided in an undesired direction. There is an optimal ideological distance, then, where an agency perceives the circuit as persuadable and the costs as well-spent.

Other factors include judicial productivity, agency purpose, and the actual resources of an agency. The reason agencies do not file briefs in all cases is the time and financial costs of filing. As a control and test of this assumption, I include an agency's budget for that year. As budget increases, so should the number of filings. The purpose of an agency should play a role—agencies with a goal of protecting individual rights should be more willing to interject on a single person's behalf. Civil rights agencies are tasked with protecting victims of discrimination, and in a court case, the person discriminated against probably has limited resources.[6] Some types of agencies may feel that it is in the best interest of the court, the agency, and the individual to become involved and provide aid. The last major theoretical piece is judicial productivity. A judge can only educate herself on so many types of case matters before becoming overwhelmed, even with an army of clerks. As the number of filed cases per judgeship increases, productivity decreases and informational costs increases, agency see the circuit as more easily persuadable with a more certain payoff.

Cost of Filing

Filing an *amicus* brief is costly to an agency. Time, capital, and effort must be invested in the process in order to learn case facts and draft the brief. There is also a reputation cost—agencies are repeat players in the court system and must maintain a professional, credible reputation. When an agency files an excessive number of briefs, that agency may lose credibility and value as an informational source (Beim et al. 2014). This should prevent agencies from filing a high volume of briefs in a single circuit. Moreover, agencies are not generally created as purely legal organizations. An agency's ability to file briefs and act as a liaison to the courts is constrained by the fact that it is not the main purpose

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[6]This is conjecture and logic on my part. Generally, a person with power and prestige is less likely to be fired for being a different race or gender, turning down sexual advances, being of an advanced age, or to be racially and/or sexually harassed. Logically, people do not typically target those who have the ability or resources to fight back.

of an agency. Instead, agencies must go out of their way to file these briefs and influence judges. Filing *amicus* briefs is peripheral to organizational tasks for most agencies. By diverting resources and investing time and effort into filing briefs, the agency is not able to use those resources and time to complete tasks more in line with the agency's purpose. If the cost of filing a brief exceeds the expected influence, then it is not in an agency's best interest to file.

Influence and Informational Costs

While filing *amicus* briefs is a peripheral task for most agencies, federal circuit courts are still a policy-making venue and a valuable tool for agencies to use. Agencies have policy preferences and file *amicus* briefs in an attempt to influence opinions to push policy closer to the agency's preference. Part of an *amicus* brief's ability to influence judges rests on whether the filing entity has an informational advantage over the circuit.

The idea of *amicus* briefs as information tools for the courts underlies much of the past research on these types of filings (Caldeira and Wright 1990; Spriggs and Wahlbeck 1997). Judges cannot be experts on even a fraction of the topics they encounter. Circuit judges hear a variety of cases, and the caseload in relation to the number of judges per circuit is too large to reasonably assume judges can adequately learn about every topic without assistance. *Amicus* briefs are theoretically capable of solving this information problem. By providing new information, policy knowledge, and outlining legal arguments, organizations or individuals can educate judges about the true state of the world.

Additionally, unlike the Solicitor General's purpose of representing Presidential and executive branch preferences in court, agencies are created with specific policy goals in mind. This creates policy expertise and allows agencies to have policy preferences that do not merely reflect ideological biases, but instead are responses to the state of the world. This policy expertise, while not always technical in nature, reflects the ability of the agency to know the state of the world and formulate an appropriate response. In other words, the agency knows better than the court about the nature of the optimal policy. Agencies are also in charge of enforcing the policy that the circuits are ruling on

and translating the ruling into action. When the circuit is an increasing informational disadvantage, agencies with a higher informational advantage should attempt to persuade the circuit by filing more briefs.

> Hypothesis 1: Informational costs increase when the judicial workload increases. When informational costs are higher, agencies perceive a higher probability of successfully persuading judges and are more likely to file briefs of *amicus curiae*.

Perception of Ideology of the Courts

My fifth assumption is that agencies are aware of circuit ideology. Under the previous assumptions, when ideological distance increases past a critical point, agencies are likely to see the costs as outweighing potential benefits. Moreover, when an agency is reasonably confident that a circuit has a similar, if not completely convergent, ideology, then that agency is also reasonably confident that circuit shares the desired policy preferences. In other words, if the circuit is already going to reach the decision that the agency wants to promote due to ideological congruence, there is no reason for the agency to waste resources and file a brief. In this case, when an agency and a circuit decrease in ideological distance, then there will be a decreasing likelihood that an agency will file an *amicus* brief. The agency's confidence in the circuit's similar policy preference implies agencies view filing a brief as a wasted cost.

Another effect of increasing ideological distance is the decreasing perception of agency legitimacy by the court. Black and Owens (2013) examine the effect of workload and ideological distance on opinion bargaining between judges in the Courts of Appeals. They find that greater ideological divergence between an opinion author and a judge requesting change to the opinion decrease the changes of bargaining success. However, when an opinion author is ideologically similar to the judge requesting opinion changes, there is a higher chance of successful bargaining. While the relationship between judges on a panel is different than an agency and the court, the underlying principle is applicable.

As agencies increase in ideological divergence, there will be a decreasing probability that the circuit will view the information provided by the agency as valid and authentic. The information will be considered purely ideological and polarized rather than a reflection of the state of the world.

> Hypothesis 2: There is an optimal ideological distance in which an agency is most likely to file *amicus* briefs—when ideological distance is too great or when there is no distinguishable ideological difference, an agency is less likely to file.

Agency Type

Government agencies are agents to the President, but these agencies also serve outside entities. The type of client that an agency caters to depends on the goal and purpose of the agency, and the client group effects the actions and tasks of an agency (Wilson 1898). The EEOC and DoJ's Civil Rights division are both charged with protecting individuals against discrimination and civil rights violations. Agency leadership can effect the ability of the agencies to undertake tasks to reach the goal, but the agencies will always exist for civil right protection. Similarly, the FTC, SEC, and DoJ's Antitrust division are easily seen as economic-minded agencies. These agencies deal with a different group of clientele altogether–these agencies deal more in terms of white-collar crime and unfair business practices than representing individual victims of discrimination. The EEOC and Civil Rights division have specialized programs that can be accessed online by individuals who would like the agencies to get involved with federal appellate cases. These agencies reach out because their client base are generally those without the means to fight discrimination themselves, or have been otherwise disenfranchised by a system.

I theorize that given the two different fundamental realms that the agencies operate in, there should be a significant difference in the agencies likelihood of filing *amicus* briefs.*Amicus* briefs are a way for parties outside the case to get involved and support one of the parties in the case. Given that the goal of civil rights agencies is protection

of civil rights, it seems logical that these agencies are more likely to get involved in the court cases of those whose rights have been violated. Economic agencies, on the other hand, exist to regulate the market place and ensure that industry is behaving at least mildly well. These agencies might protect individuals from industry, but the main goal does not lie in individual protection. For this reason, we should see fewer *amicus* briefs and less individual intervention by economic agencies.

> Hypothesis 3: Agencies whose goals include protecting civil rights are more
> likely to file amicus briefs than agencies whose goals are economic.

Data

My data spans 2000 to 2012 over eight agencies. The dataset is formatted so each agency has an observation of zero for each year and circuit, and when the agency files an *amicus* brief, the observation is changed from zero to reflect the number of filed briefs in the circuit-year. The cabinet departments were disaggregated to the agencies inside the departments responsible for the actual filings. The total number of observations is 1,248 (12 circuit, 13 years, with 8 agencies).[7]

Amicus Briefs

The dependent variable is the count of *amicus* briefs filed by an agency in a specific circuit-year. The *amicus* brief itself, the case name and number, the circuit, the date, and other relevant information was collected and aggregated up to a count. The briefs are self-reported by the agencies on their website, which limited the number of agencies I could include.[8]

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[7]In the original draft of this paper, there were 9 agencies. The division of Black Lung and Longshore Legal Services in the Department of Labor was dropped from the analysis, given that there was only one filing by that division in the thirteen years. Moreover, the Fair Labor Standards division possesses the same budget, overall agency ideology score, and until 2011, was inside the same upper agency. After 2011, the BL&LLS was shifted into a different agency, but this is after the division's singular *amicus* filing.

[8]The outcomes of the cases could not be feasibly collected over the semester, but it can be done with enough time and may provide a future project.

Agency-Level Data

The EEOC (1), FTC (2), and SEC (3) are easily coded. The Department of Labor and Department of Justice, however, are slightly more difficult given that the dependent variable is measured by agency division, rather than the entire department. However, the divisions that I specifically gather *amicus* brief data for are coded separately. Within the DoJ, I code the Antitrust Division (4) and the Civil Rights Division (5), which are both housed in the same DoJ agency. The FLS Division (6) is currently housed inside the Wages and Hour division but was previously inside the Employee Standards Administration until 2009. The OSH (7) and PBS (8) Divisions are housed in the Occupational Safety and Health and Employee Benefit Securities respectively.

Budget

Given the costs of filing an *amicus* brief is a key assumption in my theory, I include a control variable for agency budget. The budgets are taken from the agency websites and reflect the money allocated by Congress. These are broken down further for the Departments of Justice and Labor, in which I found the actual division budget in the Department of Justice and the overhead agency budget for the Department of Labor divisions. I expect that as agency budget increase, so do the number of *amicus* briefs filed.

Civil Rights/Economic

I include a civil rights dummy variable. The Civil Rights division and the EEOC are considered civil rights agencies, while the FTC, SEC, Antitrust division, and Department of Labor agencies are considered economic agencies. Both the civil rights agencies have outreach *amicus* programs, which allow individuals to suggest a court case that the agency should become involved with. Moveover, both agencies are charged with protecting individual rights and thus are more likely to become engaged in a court case regarding an individual than economic agencies. Economic agencies are more concerned with regulating the market and less likely to have individuals come forward who need said agency

to become involved. These business-oriented individuals are less likely than those who approach civil rights agencies need agency support.

Ideology

The key explanatory variable for Hypothesis 2 is the relative difference between a given agency's ideology and the ideology of the circuit in which an *amicus* brief is filed. The hypothesis also states that there is an optimal ideological distance in which an agency is most likely to file. This means that the ideological distance variable will need to be squared in order to measure this quadratic relationship. Ideology scores need to be comparable and on the same scale for both agencies and circuit in order to create these measurements, so I chose to use ideology scores for both the bureaucracy and judiciary that are anchored to the Nominate scale.[9]

Bureaucracy Scores

I use the Chen and Johnson (2014) agency ideology scores, which are bounded between -1 (liberal) and 1 (conservative) and anchored to the first dimension of the DW-NOMINATE scale. The data spans over the Clinton administrations, both George H. W. Bush administrations, and the first Obama administration. Agency ideology scores are measured by via data on campaign contributions from agency employees to elected officials. The mean DW-Nominate scores for officials receiving those contributions are calculated and applied to the agency. Of the 72 agencies included in the dataset, I could only locate *amicus* brief data for the DoL, DoJ, EEOC, FTC, and SEC. Since the Chen and Johnson (2014) scores are anchored on the Nominate scale, they are comparable to Nominate scores for the President, Congress, and most importantly for this project, judicial scores.

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[9]I use scores based off the first dimension rather than the second, given that the usefulness of the second dimension, which measures regional/racial/social issues, is inferior to the first dimension. The first dimension concerns the government's role in the economy on a liberal-moderate-conservative scale. The second dimension issues have been rebranded over time as economic issues (Poole, Rosethal, and Hare 2016).

Circuit Scores

Circuit ideology scores are gathered from the Judicial Commonspace database (Epstein et. al. 2007). The dataset includes judicial ideology scores for Supreme Court justices, Courts of Appeal judges, and the medians for the Supreme Court and each circuit on the Courts of Appeal between 1937 and 2014.[10] A circuit's ideology score is taken as the ideology score of the circuit's median judge, which is consistent with existing judicial literature.[11]

The Judicial Commonspace scores are Martin-Quinn ideology scores transformed through a non-linear method and anchored to the DW-Nominate scale on the first dimension. By anchoring the scores to the Nominate scale, Epstein et. al (2007) allows for judicial ideology to be comparable to other institutions.

Caseload

Hypothesis 1 predicts that as judicial caseload increases, an agency perceives a greater probability of influencing the circuit's decision. To measure circuit workload, I gathered the number of pending, filed, and terminated cases per year in a circuit from the Caseload Judicial Management Caseload Statistics (2000-2015) website. The number of cases filed is determining judicial workload.

I then took the natural log of the caseload data in order to ease interpretation and normalize the distribution. The Ninth Circuit has the highest volume of cases, while the First and D.C. Circuits receive the least. The distribution of newly filed cases can be seen in the Appendix, Figures 6 and Figure 7.

The case data is used when calculating the judicial workload variables. The logged number of new cases filed is divided by the official number of judgeships that exist in a circuit.[12] If budgets and clerkships mirror the number of existing judgeships, rather than actual number of judges in the circuit, then a case can be made for measuring caseload

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[10]The data does exclude the Federal Circuit Court, since that particular circuit is unique in function. This is unfortunate, considering that the FEC filed in the Federal Circuit, but unavoidable for now.

[11]The underlying assumption is that the median justice is the swing vote on the Supreme Court. On the circuit courts, the median justice is likely to be the best representative of the entire circuit.

[12] There is also a list of the number of authorized judgeships in the Appendix in Figure 8.

by official judgeships rather than judges. Moreover, senior judges may step up their role in the circuit should a judgeship be vacant.

The importance of caseload is a) it reflects the size of a circuit in terms of work and b) it provides a way to gauge an agency's perception of how likely the court is to benefit from supplemental outside information. In other words, a court with an extreme workload to judge ratio is at a higher informational disadvantage than a court with a less extreme workload to judge ratio. If a circuit has a high ratio, then an agency may see an opportunity to help mitigate the circuit's information disadvantage by filing an *amicus*. If a court has a smaller case to judge ratio, however, an agency may perceive the court as more able to gather information internally, with less reliance on information provided by agency briefs.

Methodology

Models

The distribution of the *amicus* brief counts are listed in the histograms included in the Appendix (Figure 2 lists the overall distribution). The minimum value is 0, which comprises roughly 70% of the observations, and the maximum value is 8, though only one observation in all the data takes on this maximum value. The most frequent, non-zero observations are 1, which appears 215 times, and 2, which appears 92 times. In total, there are 369 non-zero observations. The data is censored toward the left, and requires the use of a specialized model. The more problematic part of the distribution is that, of the 369 non-zero values, there are only 25 instances of more than 4 *amicus* briefs being filed in a single circuit-year. This questions the amount of leverage that I have over these higher-value occurrences. It may be that I can speak to what causes filing versus not filing at all, but not what causes an increase in the number of filings.

The first model is a zero-inflated negative binomial. The zero-inflated negative binomial is optimal over a zero-inflated Poisson, a regular negative binomial, or a regular Poisson model. I ran a Vuong test that confirmed a zero-inflated model as the best

choice[13]. The likelihood-ratio test of alpha being equal to zero is also highly significant, indicating that a zero-inflated negative binomial is preferred over a zero-inflated Poisson model.[14] The covariates are budget, which is a control for resources, ideological distance, ideological distance interacted with itself, judicial productivity[15], and a dummy variable for civil rights agencies.

$$Y = \alpha + \beta_2 Distance + \beta_2 (Distance * Distance) + \beta_3 Productivity$$
$$+ \beta_4 Budget + \beta_5 CivilRights + i.agency + i.circuit + i.year \tag{1}$$

The second model is a multinomial logit, with zero representing no filings, one representing a singular filing, and two representing multiple filings. The mlogit equation uses the same covariates as the mutlinomial logit, but with the inclusion of the inflation equation.

$$Y = \alpha + \beta_2 Distance + \beta_2 (Distance * Distance) + \beta_3 Productivity$$
$$+ \beta_4 Budget + \beta_5 CivilRights + i.agency + i.circuit + i.year \tag{2}$$

Fixed Effects

I generated three separate groups of histograms for the dependent variable distribution by agency, circuit, and year (Figure 3, Figure 4, Figure 5 respectively). The histograms show that the distributions and frequencies of filing for agencies is varied, with the EEOC filing the most and the OSH filing the least. There are very clearly differences among the agencies that may go beyond ideological distance, clientele, and budget. Potential reasons could be the type of employee that the agency attracts, the number of field offices in the circuit area, the leadership, or the independent of the agency, among so many others.[16] For this reason, I choose to include fixed effects for agencies, in hopes that I can control

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[13]The z-score is 2.86, which is highly significant.

[14]The ZIP test reported back a Chi^2 statistic at 2.89, which is highly significant.

[15]Measured as the logged number of filed cases divided by the number of judgeships in a circuit.

[16]While it may be an interesting future project to look at the impact of these other potential variables, I am only concerned here in specific covaraites.

for these agency-level factors.[17] The same conclusion can be made looking at the year and circuit histograms, and so I include fixed effects for agencies, years, and circuits.[18]

Results

Interpretation of Zero-Inflated Negative Binomial

See Table 3 for Results

In the zero-inflated negative binomial count equation, I find that my first hypothesis, which stated higher judicial information costs increases the number of agency filings, does receive some support. The productivity variable is significant at the 0.05 level and positive. The marginal effects report that for every one increase in standard deviation, we see an increase of filings by roughly 0.113. Substantively, this effect is small, but not necessarily meaningless. Agencies do increase filings in circuit where the judges seem to be at an informational disadvantage, even controlling for other circuit-level factors. It adds weight to the idea that bureaucratic agencies view *amicus* briefs as a means to cut informational costs for judges.

The budget control variable is worth discussing, given that the count-equation coefficient is significant at the 0.01 level, and unexpectedly, negative. The marginal effects reveal that as the budget increases by one standard deviation, the number of filings decreases by about 0.13. In essence, as the budget increases, the average number of briefs filed in a circuit-year decrease by about 0.13. For every ten agencies whose budget increases, we should see the number of briefs filed decrease by one. Again, this is contrary to expectations. The theorized costs of an agency in filing briefs should be decreased by an increased budget, but the results show that the increased budget *decreases* filings. It could be that agencies who receive higher budgets utilize that money to pursue other policy-change venues, such as case litigation or lobbying. Alternatively, the raw budget

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[17]In a previous draft, I have rulemaking, party balancing, agency independence, and litigating authority as control variables. These are time-invariant and should be controlled for in the fixed effect for the agencies.

[18]In the zero-inflated negative binomial, I only include the fixed effect for the count equation, not the inflation equation. The model would not converge with fixed effects in both parts.

of an agency could be too noisy as a variable. Larger agencies that have a larger scope, such as the Department of Labor, may receive a higher budget that is spread around, while agencies that receive a lower budget do not have to spread that money as far. In essence, it could be that higher-budget agencies have less money to spend on pursuing policy preferences due to a larger scope of work and organizational structure, agencies with lower budgets do not face these same constraints.

In the count equation, the civil rights coefficient is significant at the .001 level and positive. Civil right agencies are, on average, likely to file .263 more briefs in a circuit-year than non-civil rights agencies. This does conform to my hypothesis that civil rights agencies deal with a different clientele and have a distinct purpose that affects the actions of those agencies. These civil rights agencies offer outreach program for individuals who want the agency to become involved in a court case through *amicus*. This, along with the effects of the variable, imply that agencies with a goal of protecting individuals from discrimination may be more willing to become involved in individual-level cases that otherwise would not warrant government attention. Economic agencies, on the other hand, may not feel the same need to become involved in the micro-level cases that are not of large-scale importance. Rather, these economic agencies view their "client" as the market and interact more-so with individuals who have either violated business regulation or are reporting those violations. It is a more market-scale issue rather than an individual-level issue.

Ideological distance and ideological distance squared are neither significant nor in the expected direction. The plot in Figure 10 shows the marginal effects of ideological distance and ideological distance squared. My hypothesis stated that agencies were more likely to file briefs when the circuit was at a moderate ideological distance, but less likely when the circuit is extremely distance or ideologically the same. The plot, however, shows the exact opposite. The lowest number of filings actually occurs when the agency and circuit at an ideologically moderate distance. The high number of filings occur when the ideological distance between the agency and circuit is large and small. In practical terms, this means that agencies are filing more briefs in circuits that are ideologically opposite or

ideologically the same as the agency. Agencies file fewer briefs, however, when the circuit is at a moderate ideological distance, indicating that agencies are either not perceiving the briefs as a way to persuade moderate circuits or do not view moderate court as more persuadable than non-distance or extremely distance circuits.

Ideological distance is insignificant in both the squared and non-squared term. The sign for ideological distance is positive and the sign for squared ideological distance is negative. The confidence intervals for ideological distance are large and overlap zero, though it does lean more toward positive values. The confidence intervals squared term, inversely, lean more toward negative values, though it still does cross zero. On Figure 9, we can see the confidence intervals are very large. Without more data and further analysis, we can make no conclusive comments on the relationship between ideology, ideology squared, and number of briefs an agency files.

Interpretation of Multinomial Logit Model

See Table 4 for Results

In the multinomial logit, the baseline outcome is zero filings, while outcome one is a singular filing and outcome two is multiple filings. The full margin plots are listed in the Appendix in Figure 9, subfigures a through h.

Ideological distance, both the normal term and the squared term, are insignificant for all outcomes. For the second outcome, both coefficients are negative. For the first outcome, ideological distance is negative while ideological distance squared is positive. This is opposite of the zero-inflated negative binomial, but the confidence intervals mean that these signs could be an artifact of the data. The sample size and the non-zero observations would need to be expanded before any conclusions can be made.

Judicial productivity is not significant in determine whether outcome one, a singular filing, occurs. The sign is positive, however, in both outcomes one and two. In outcome two, the coefficient is significant at the .05 level. Increasing judicial workload does seem to increase the likelihood of filing multiple briefs, though strangely this did not carry over to filing a a single brief. In terms of marginal effects, Figure 9.e and Figure 9.f present

the different marginal effects for productivity among non-civil rights agencies and civil rights agencies, all other covariates are held at the mean. Non-civil rights agencies have a much higher probability of not filing at all (outcome zero, the baseline). When moving from the minimum to maximum judicial workload in millions in economic agencies, we see the probability of outcomes one and two increasing, though outcome two increases at a much slower rate. After reaching the mean workload, economic agencies see a sudden increase in likelihood that a single brief will be filed. In civil rights agencies, we see a steeper increase in the probability of outcome two and outcome one as circuits move from the minimum to maximum workload. There is not the same sudden jump after the mean workload is achieved for civil rights agencies. However, again, the only significant result is outcome two. As the number of cases per judgeship increase, there is an increased probability that agencies will file multiple briefs. This supports hypothesis one and the results from the zero-inflated negative binomial.

Agency budget is negative and significant at the .001 level in both outcome one and two. The budget marginal effects for non-civil rights agencies and civil rights agencies are shown in Figure 9.g and Figure 9.h, with all other covariates are held at the mean. Non-civil rights agencies have a higher probability of not filing at all at the minimum budget, but that probability is around .7. The probability of a non-civil rights agency filing a single brief at the minimum budget is about .2, while the probability of multiple filings is slightly before that of a single filing. The probability decreases of filing single or multiple briefs as the budget increases, until the probability of both outcomes is close to 0. In civil rights agencies, the probability of filing nothing, one, and multiple hover around between .2 and .4 at the minimum budget. Interestingly, filing more budgets is more likely than filing one until we move into the hundred millions. After than, the probability of filing one brief supersedes the probability of filing multiple. Again, though, as the budget increases, so does the probability of filing nothing, from .4 at the minimum budget to .9 at the maximum budget. The budget control, much like in the zero-inflated negative binomial, runs contrary to expectations.

The civil rights coefficient was positive and significant at the .001 level for both

outcome one and two. The is similar to the zero-inflated negative binomial and suggests that my third hypothesis is correct. The marginal effects plots are in Figure 9.a and Figure 9.b. Civil right agencies are as equally likely to file nothing (probability at .5) as they are to file a single or multiple briefs when all other covariates are held at the mean. The likelihood of filing one brief is roughly .3, while the likelihood of filing multiple briefs is roughly .2. In non-civil rights agencies, this pattern remains, though there is a higher probability (.8) of filing nothing, near .1 probability of filing one brief, and less than .1 probability of filing more than one brief. In essence, civil rights agencies are just as likely to file nothing than file something, and when those agencies do file, it is more likely that the agencies file one rather than many. Non-civil rights agencies are less likely to file nothing than to file something, and more likely to file one than multiple.

Implications, Limitations, and Future Research

The lack of significance for the ideological distance covariate indicates that either the data needs to be expanded or that ideology plans very little part in the decision of an agency to file an *amicus* brief. Considering the normative implications of this, it may be better for ideology to not influence these decisions. If *amicus* briefs are filed in order to decrease the informational costs of an overworked judiciary, which is suggested by the results, it may be that these briefs should remain as non-ideological as possible. This could be of greater importance given the role that civil rights seems to have in the relationship. Civil rights matters are occasionally controversial, and expert agencies providing unbiased, expert advice and information on the true state of the world would be normatively good. However, because the number of agencies is so small, it is hard to apply this logic, based off the results, to agencies outside my sample. It could be that these agencies, which self-reported the *amicus* filings, are particularly non-ideological when filing these briefs. There is a potential normative conclusion, but it is ill-advised to make a claim that reaches over the eight sampled agencies.

The use of *amicus* briefs as informational tools has been proven incorrect when the

filer is an interest group. Briefs filed by the Solicitor General, however, do make an impact. Given that the bureaucratic agencies I have chosen seem to respond to increased workload for judges, it may be that these agencies view the briefs as an informational source. Further research should look at the content of circuit opinions and impact that the agency filings have on rulings. This project presents a small kernel of evidence that the bureaucracy, or at least the eight agencies included in the data, act more like the Solicitor General than interest groups and private *amicus* filers. It would be interesting to find out if this view of the agency as a quasi-Solicitor General and representative of the government, rather than as an interest group, holds from the court perspective.

The role of the agency's client group and organizational purpose is perhaps the most concrete finding. These outreach programs and the attempts these agencies make to become involved in individual-level cases is significant and should be further investigated. By adding more civil rights and protection agencies into the sample, especially those agencies without outreach programs, the impact of those programs can be discovered. If it is normatively desirable to have civil rights agencies protect the individuals on a micro-level, then these programs are effective and adding value to the bureaucracy. It may also be that these programs, which do seem to affect the number of filing, increase the confidence and legitimacy of the agency in the eyes of the public.

However, due to the limitation of the study, there can be no real discussion of normative or theoretical implications past the eight agencies that were in the analysis. There simply is not enough data or leverage over the question. The data provides both an opportunity for future research and a limitation on this particular study. The number of agencies included in the dataset were constrained by several factors: the existence of ideology scores, self-reported *amicus* brief data, and no comprehensive third-party list by which verify that the small group of agencies I chose are not selectively reporting *amicus* briefs. The chance that an agency might not report a brief is more impact for any future research that considers the impact of the particular brief or anything else that has the brief as the unit of analysis. However, the small amount of non-zero events (filings) and the limited number of agencies narrows the generalizability of the study. Future work

would best be focused on the arduous task of data-collection directly from the circuit court PACER websites and resources like Westlaw or Bloomberg, which cost money but are more comprehensive and not subject to same self-reporting selection problem.

The dataset used for this project has potential for future projects, even as limited as it is. The dependent count variable in my models is aggregated up from individual, case-level data. The case number, name, circuit, and date are included in my files, as well as the agency who filed and, for most of the agencies, the general statute/reason and supported party. An interesting study would the impact of the filing in terms of decision-making–do circuit judges use the bureaucratic agencies as cues in the same way the Supreme Court uses the Solicitor General? Given that I have access to most of the pdf files of the briefs, and may be able to gain access to others through legal resources, text analysis could be used to determine what portions, if any, of the legal arguments agencies make in the briefs appear in opinions. There is existing research that determines whether party briefs influence opinion content, but there is little on the influence of bureaucratic agency *amicus* briefs on opinion content (Corley 2008).

Another avenue for future research involves revisiting this question of when agencies file briefs. A large part of this paper focused on the ideological reasons that agencies could undertake these tasks. The results, as we have seen, do not support my theory or even the idea that there is a relationship between ideological distance and filing. However, the clients and purpose of an agency, as well as the budget, do impact the number of filing. The budget is an interesting result: instead of seeing an increase in budget increase the number of filings, we see the increase in budget decrease filings. A further exploration of this finding may unearth either the alternative routes that more-funded agencies undertake to influence policy, such as lobbyists or actual litigation, or reveal a different rational completely. As for the influence of agency clientele and purpose, this is something I would want to gain more leverage on by increasing the number of agencies. It would also be interesting to see if the data on how many briefs the Civil Rights division of the Department of Justice and EEOC were requested by individuals versus filed independently by the agency without prompting.

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Appendix

Table 1: Variable Table

Variable	Measurement	Expected Sign
Count of Amicus Briefs Filed	Count, 0-8	DV
Independence	Dummy, 0 or 1	Positive
Circuit Agency Ideology Diff.	Absolute value(circuit-agency ideology)	Quadratic.[19]
Productivity	Judicial workload divided by circuit judges.	Positive
Budget	Actual dollar of Congressional money	Positive
Civil rights agency	Dummy, 1 for civil rights agency	Positive

Figure 1: Frequencies of Count Dependent Variable

Count of Filings	No. of Obsv.	Prct. of Obsv.
0	879	70.43
1	215	17.23
2	92	7.37
3	37	2.96
4	13	1.04
5	9	0.72
6	2	0.16
8	1	0.08

Histogram of the Count of Amicus Briefs

Figure 2: Distribution of the Dependent Variable Overall
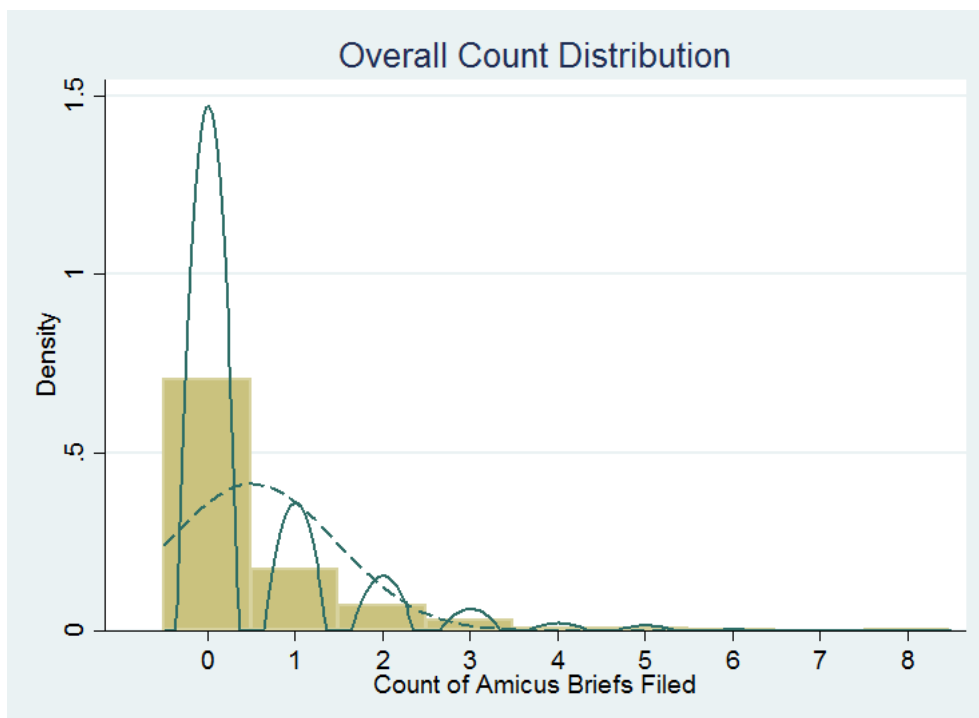
Figure 3: Distribution of *Amicus* Filings by Agency
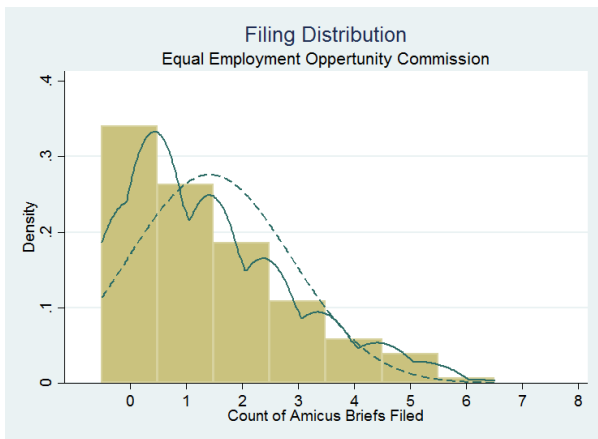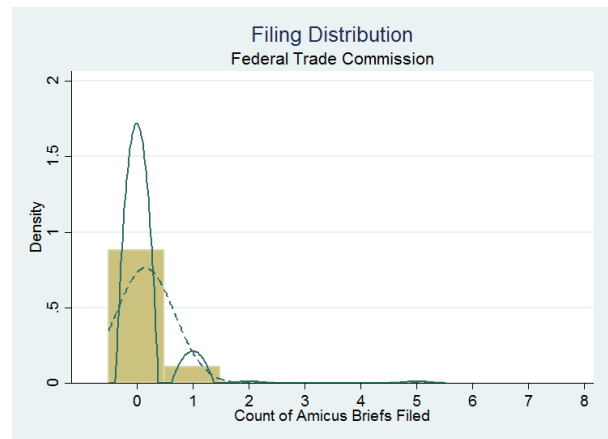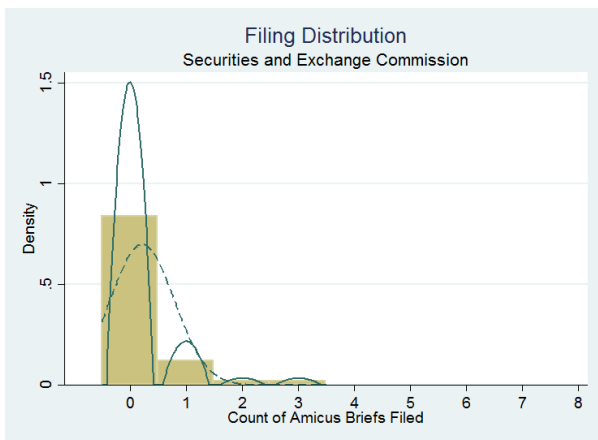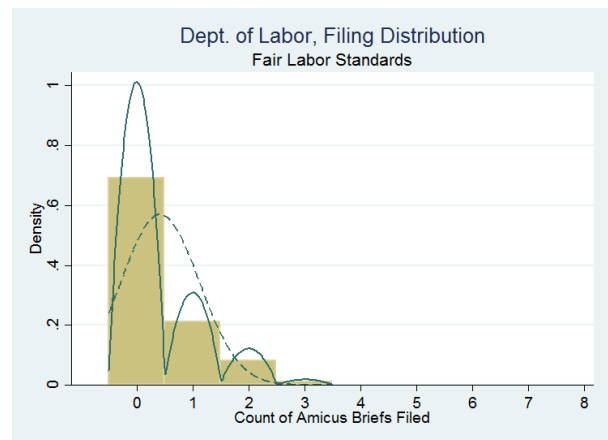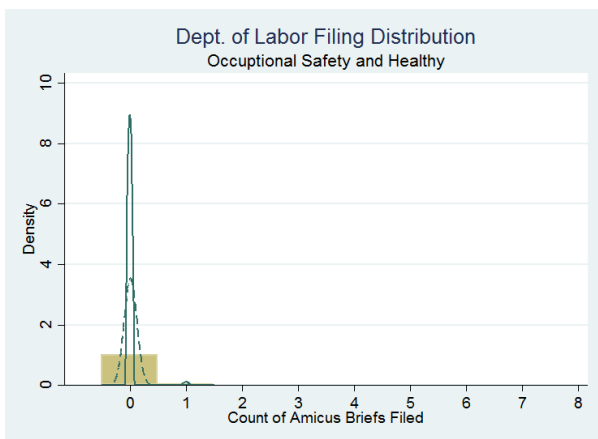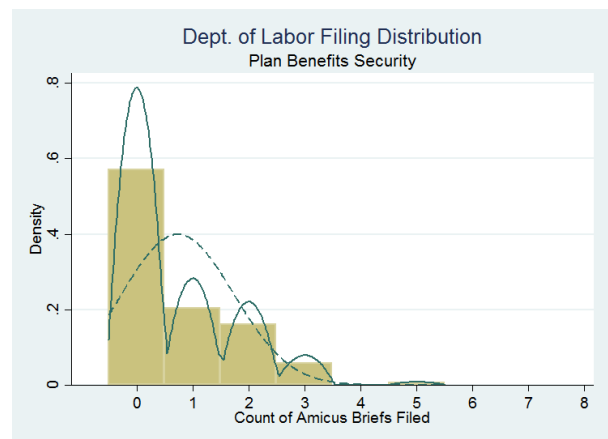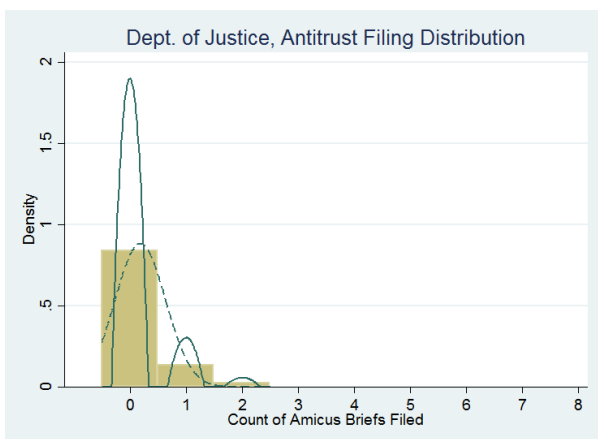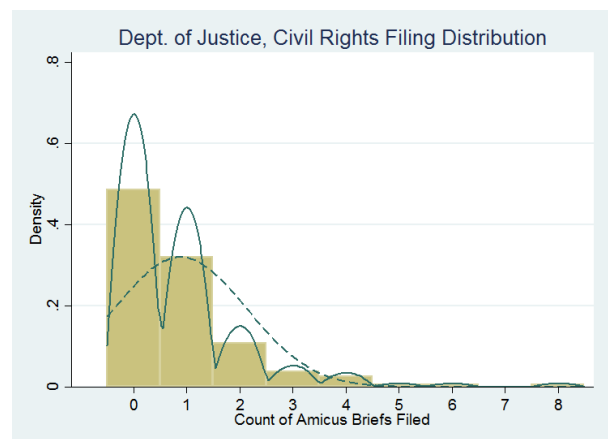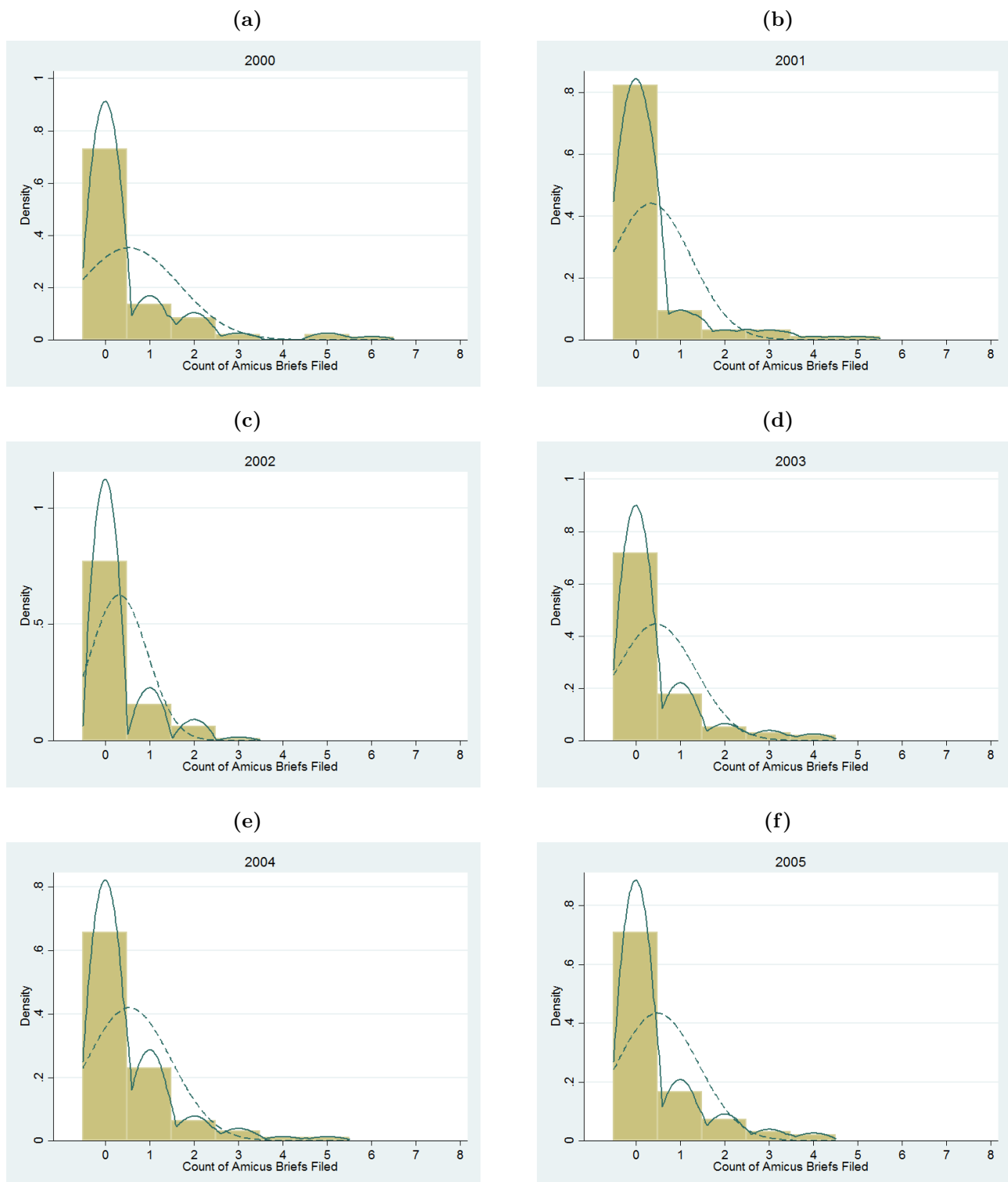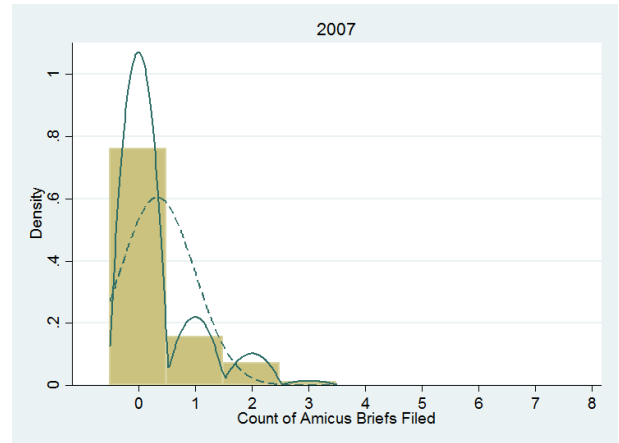
Figure 4: Distribution of *Amicus* Filings by Circuit
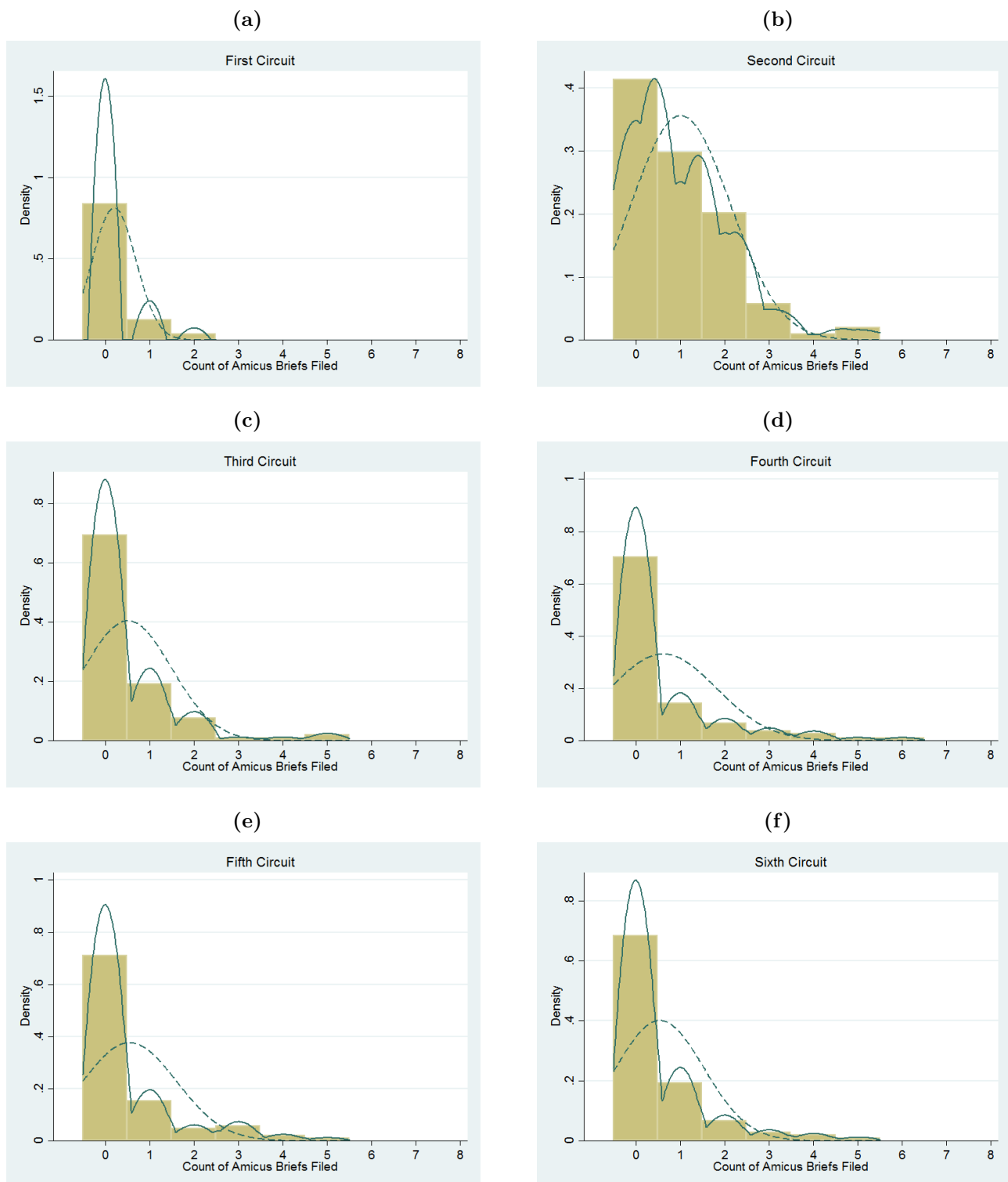
Figure 4: Distribution of *Amicus* Filings by Circuit, Continued

(g)

Seventh Circuit

(h)

Eighth Circuit

(i)

Ninth Circuit

(j)

Tenth Circuit

(k)

Eleventh Circuit

(l)

D.C. Circuit
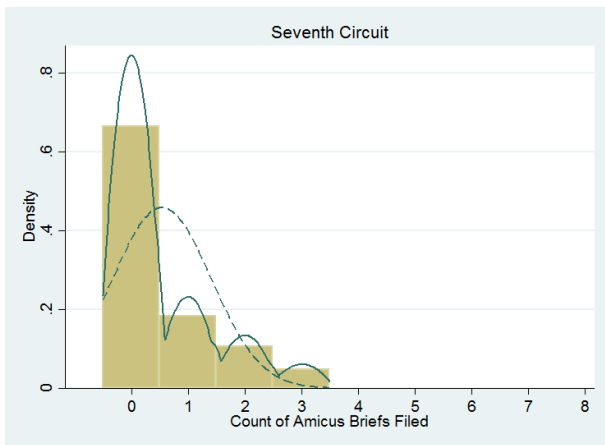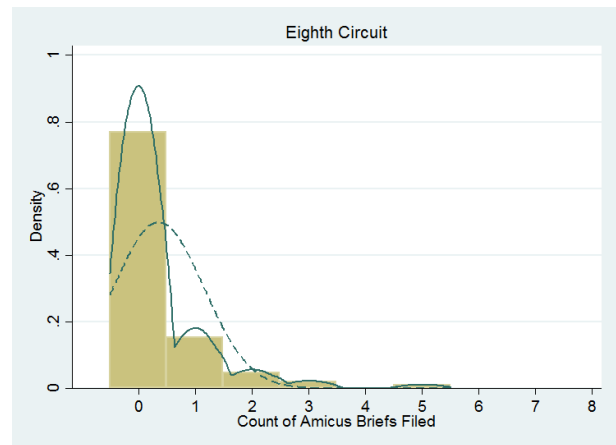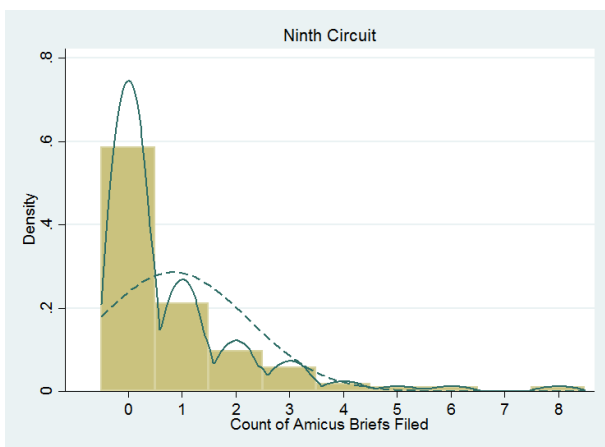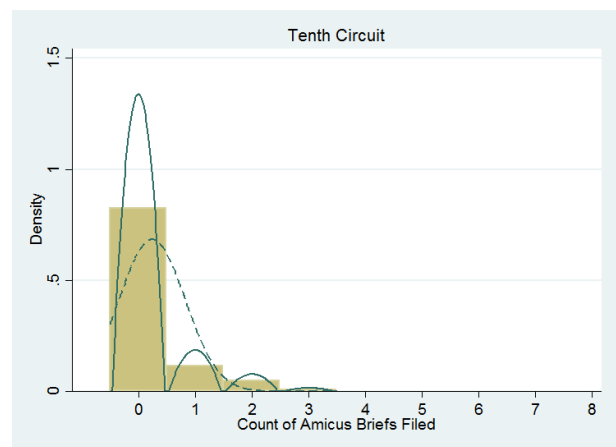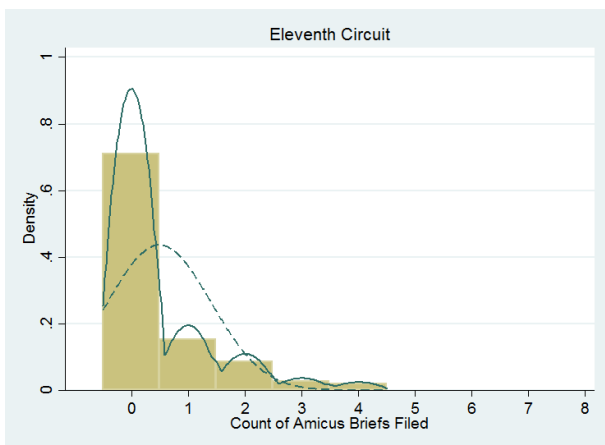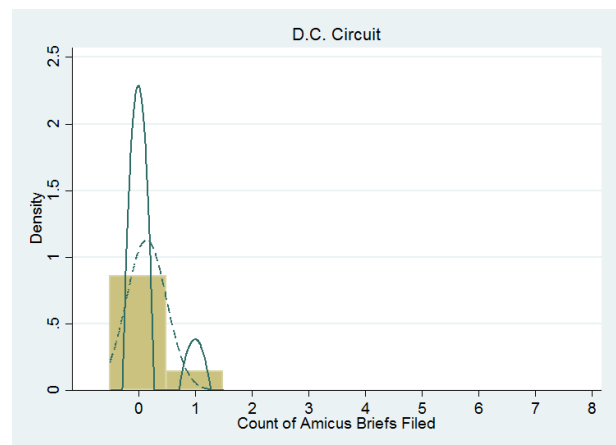
Figure 5: Distribution of *Amicus* Filings by Year

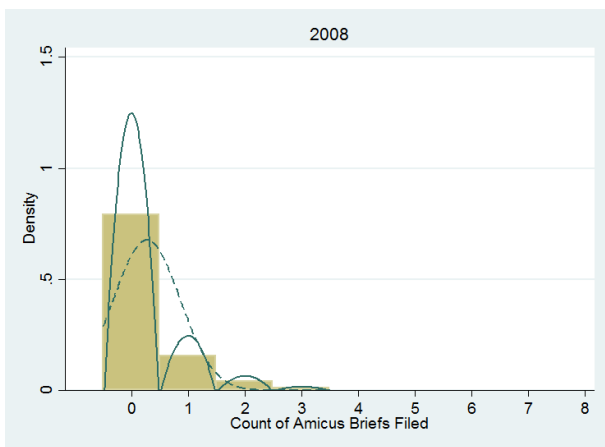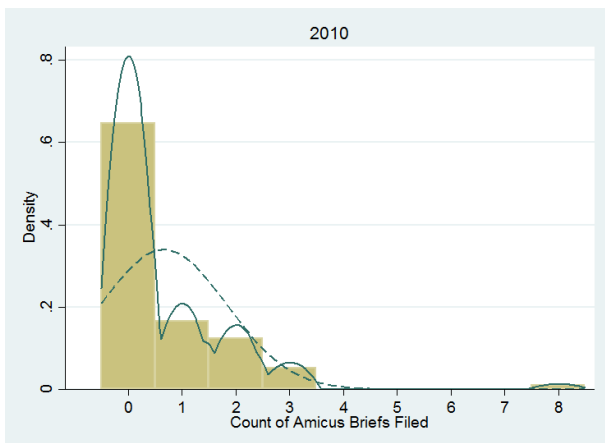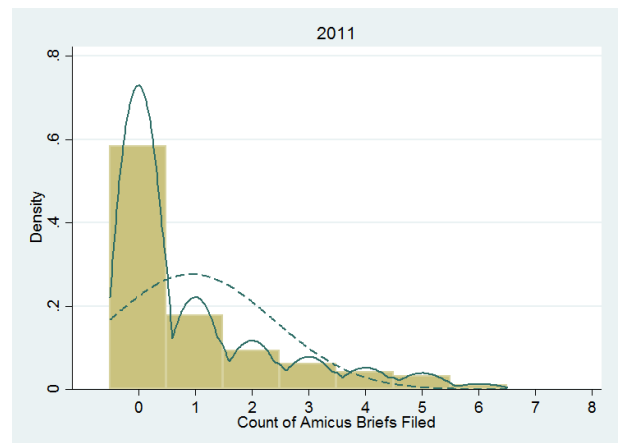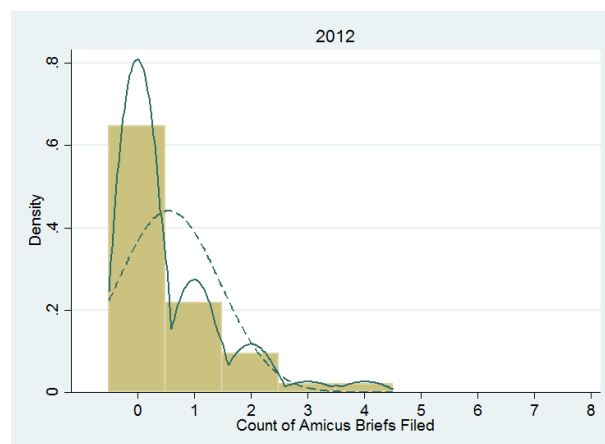Figure 5: Distribution of *Amicus* Filings by Year, Continued

Histograms of Judicial Workload

Figure 6: Distribution of Judicial Workload

(a)

(b)

Figure 7: Distribution of Filed Cases

(a)

(b)
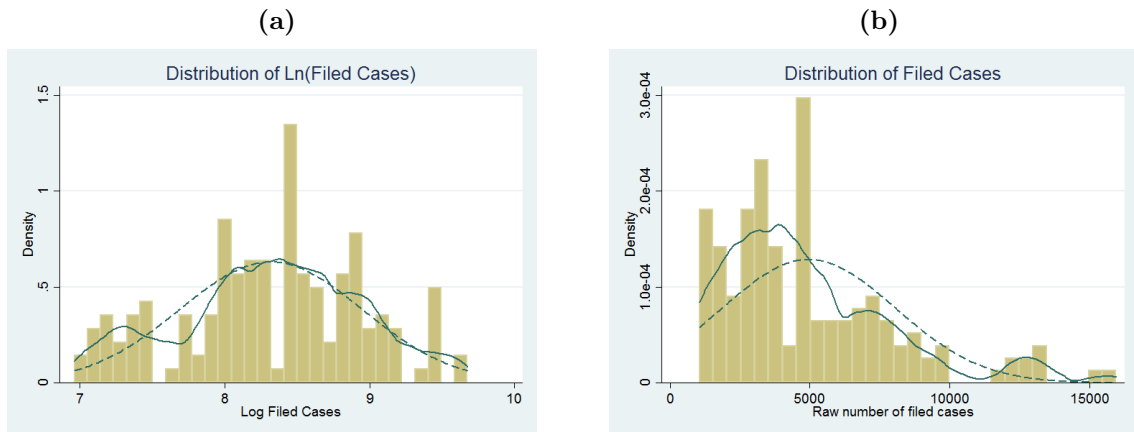
Figure 8: Authorized Judgeships

Circuit	Authorized Seats	Notes
First	6	
Second	13	
Third	14	
Fourth	15	
Fifth	17	
Sixth	16	
Seventh	11	
Eighth	11	
Ninth	28	2000-2008
Ninth	29	2009-2012
Tenth	12	
Eleventh	12	
D.C.	12	2000-2007
D.C.	11	2008-2012

Zero-Inflated Negative Binomial Model Results

Table 2: Zero-Inflated Negative Binomial Model

	(1) Count of Amicus Briefs Filed
Count of Amicus Briefs Filed	
Ideo. Dist., Agency-Circuit	1.305
	(1.754)
Ideo. Dist., Agency-Circuit × Ideo. Dist., Agency-Circuit	-1.401
	(1.963)
Log of Prod. by Judgeships	0.999*
	(0.456)
Civil Rights Agency	1.003***
	(0.201)
Budget in Millions	-0.00195**
	(0.000705)
Constant	-6.761**
	(2.556)
inflate	
Ideo. Dist., Agency-Circuit	395.3
	(235.0)
Ideo. Dist., Agency-Circuit × Ideo. Dist., Agency-Circuit	-439.7
	(256.4)
Log of Prod. by Judgeships	5.286
	(3.653)
Civil Rights Agency	-3.944***
	(1.184)
Budget in Millions	0.00000703
	(0.00143)
Constant	-118.4
	(74.64)
lnalpha	
Constant	-2.258*
	(0.914)
Observations	1248
AIC	1847.8
BIC	1888.8

Standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Multinomial Logit Model Results

Table 3: Multinomial Logit Model

|	(1) 0=none, 1=one, 2=greater than 1
1	
Ideo. Dist., Agency-Circuit	-2.165
	(1.899)
Ideo. Dist. Sq., Agency-Circuit	0.960
	(3.070)
Log of Prod. by Judgeships	2.305
	(1.749)
Civil Rights Agency	1.618***
	(0.116)
Budget in Millions	-0.00259***
	(0.000616)
Constant	-14.13
	(9.870)
2	
Ideo. Dist., Agency-Circuit	-0.203
	(2.538)
Ideo. Dist. Sq., Agency-Circuit	-0.770
	(3.544)
Log of Prod. by Judgeships	2.174*
	(0.918)
Civil Rights Agency	2.557***
	(0.398)
Budget in Millions	-0.00510***
	(0.00126)
Constant	-14.35*
	(5.649)
Observations	1248
Pseudo R^2	0.268
AIC	1491.7
BIC	1532.7

Standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Marginal Effects for Both Models

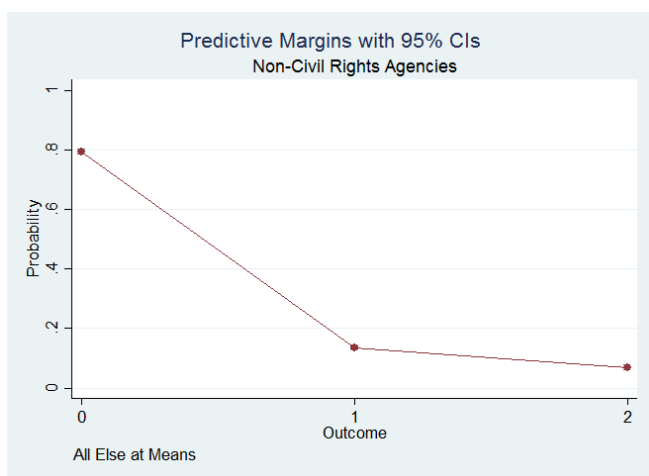## Zero Inflated Negative Binomial: Ideological Distance
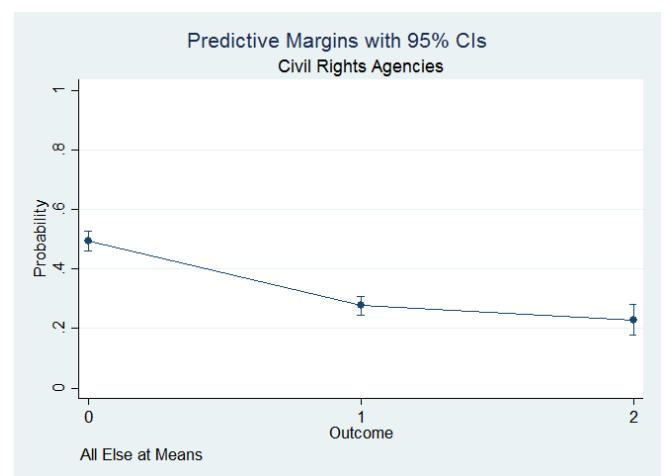
Figure 9: Single-Peaked Point of Ideological Distance
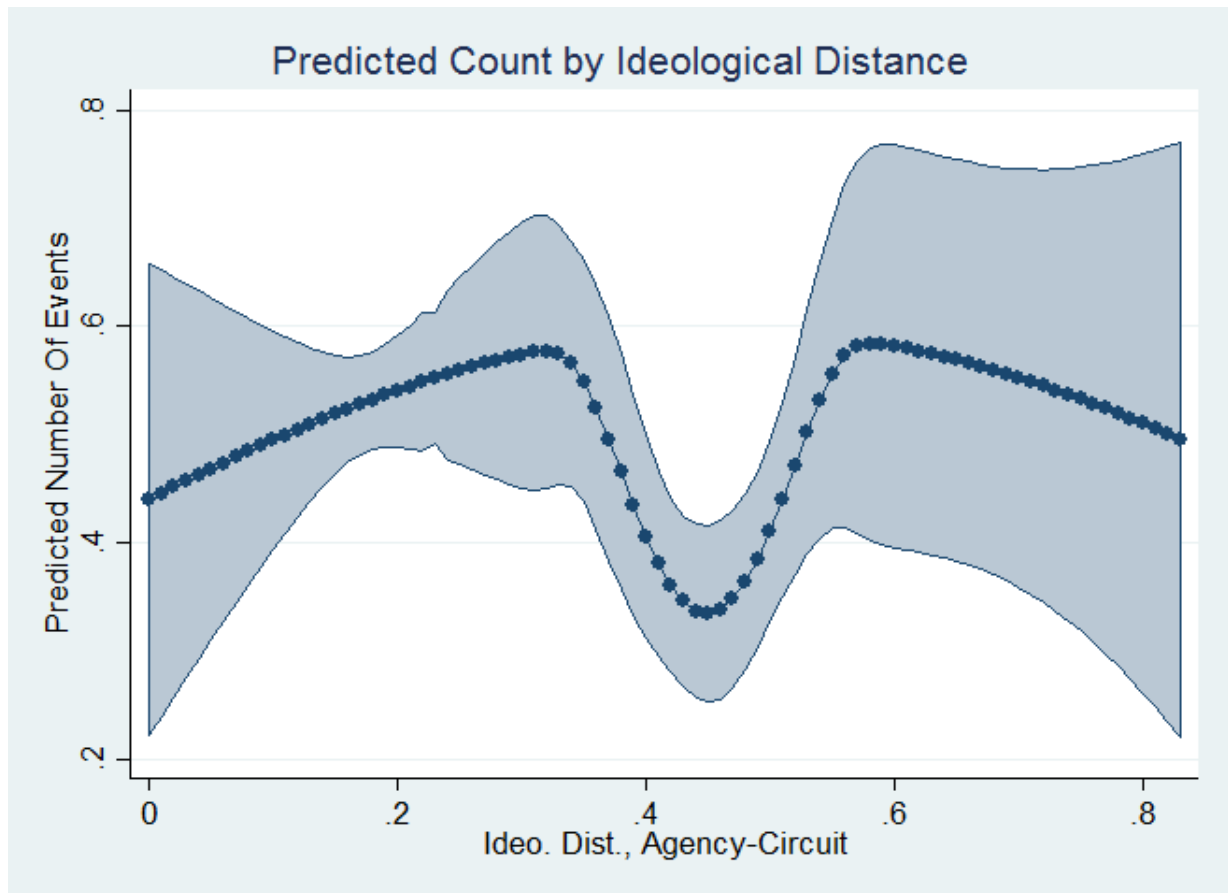
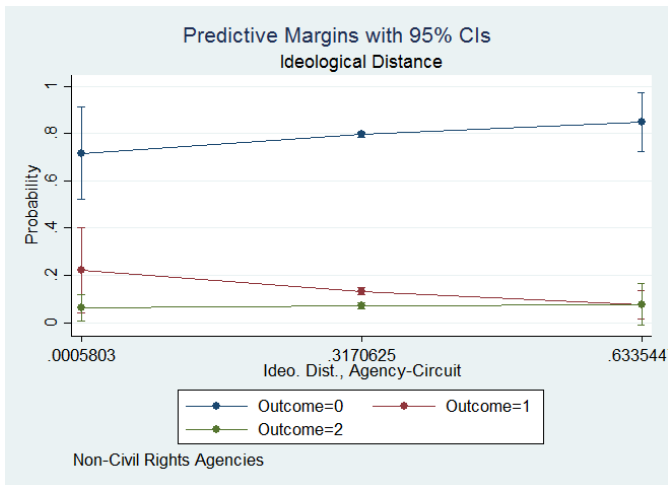## Multinomial Logit: Marginal Effects
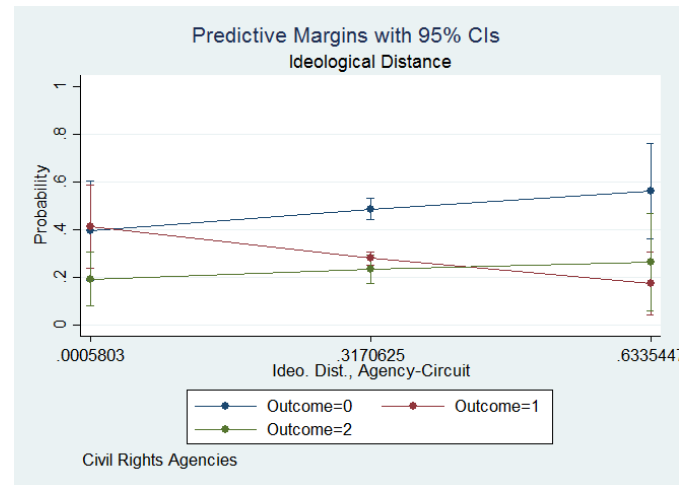
Figure 10: Marginal Effects

(a) Civil Rights = 0

(b) Civil Rights = 1

(c) Ideology, Civil Rights = 0
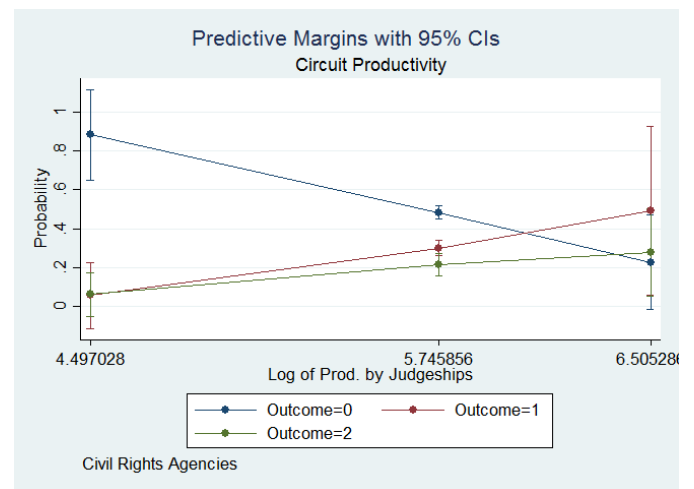

Predictive Margins with 95% CIs
Ideological Distance
Non-Civil Rights Agencies

(d) Ideology, Civil Rights = 1

Predictive Margins with 95% CIs
Ideological Distance
Civil Rights Agencies

(e) Caseload, Civil Rights = 0

Predictive Margins with 95% CIs
Circuit Productivity
Non-Civil Rights Agencies

(f) Caseload, Civil Rights = 1

Predictive Margins with 95% CIs
Circuit Productivity
Civil Rights Agencies

(g) Budget, Civil Rights = 0

Predictive Margins with 95% CIs
Agency Budget
Non-Civil Rights Agencies

(h) Budget, Civil Rights = 1

Predictive Margins with 95% CIs
Agency Budget
Civil Rights Agencies

35