Introduction

My research approaches the theme of today’s panel from a very specific perspective, looking at how one particular type of organization, federal agencies, react when courts rule against them.

Understanding how agencies respond to courts is important because it provides information about the effectiveness of courts in keeping administrative organizations in check. More broadly, understanding how agencies respond to courts helps us to understand the conditions under which judges are more likely to influence the behavior of other government actors.
Research Question

The piece of my research that I want to present today is one that I think relates most directly to the theme of the panel:

• Panel Theme: Do companies and governments, economies and markets behave like machines or living organisms?
• Hume: Do federal agencies, when responding to courts, use formal procedures or informal procedures?

The answer to this question matters because I maintain that how an agency responds to a court is likely to be influenced by what procedure the agency uses to review a court decisions and who at the agency is primarily responsible for formulating the response.

Depending on the procedures used and the individuals involved, you are likely to get very different responses.
What procedures does your agency use to respond to an adverse court decision?

- “I would sit down, read the case, and decide what to do. There was no process. You don’t need a huge bureaucracy to read a court decision.”
- “It’s such a small agency. You walk upstairs, say, ‘Here’s the deal.’ You know.”
- “Some agencies are more formal than others. Ours was more informal than not. I don’t think the process is written down anywhere. You read the decision before the press cycle starts up and you either seek further review or you decide to live with the decision.”
- “I was at the Board for many years and I did see circuit court decisions circulated, but I’m not sure it was done in any kind of very orderly way. We’ve been looking at a more coordinated mechanism.”
- “People sit around and talk about this for several hours. And this is where the importance of personality comes in. The people in the enforcement division know and respect the people in the General Counsel’s office and they care about the law. They work together to come to a decision.”

Methodology

To give some insight into my research question, I want to share some excerpts from approximately three dozen interviews that I conducted with federal administrators. These interviews were funded in part by a Faculty Research Grant and cover individuals working at fourteen agencies. These are agencies that interact the most frequently with the U.S. Courts of Appeals, the middle tier of the federal judiciary and the courts at the center of my study.

[Go through the quotes on this slide and the next one.]
Who is responsible for developing the agency’s response to an adverse court decision?

- "The Chairman runs the office from day to day, but legal matters are mostly the General Counsel’s decision with the Chairman participating on tough calls."
- "So much is a function of personality, expertise, influence, and interest in legal matters. Some of the Commissioners are lawyers, some are not lawyers, and they have varying interests in legal doctrine. There may be smart Commissioners and there are dumb Commissioners and both have an influence on the outcome. Some care about the issue and some do not. They have their own views and may think they have their own expertise."
- "Note every case is brought to the administrator’s attention. When they are, sometimes it is purely informational, sometimes it is because of a particular interest."
- "You cannot generalize. It depends on the interests of the agency head. There is more work to do than you can possibly do. The agency head focuses on matters of their choosing, delegates others, and only gets involved if there is a problem. It is the rare case that an agency head gets involved. That reflects their confidence in the General Counsel."

Interpretation

Substantively, why does it matter whether administrative responses are formal or informal? Why does it make a difference whether there is consistency in terms of who within an organization is formulating a response to a court?

I maintain that understanding procedures matters because who responds to a court decision is likely to influence what the response to a decision is likely to be. General counsels are legal professionals who bring to their organizations professional legal values, such as respect for precedent and deference to legal authorities. Agency heads are likely to be responsive to their constituents, which might include the public, politicians, and the industry. These individuals are likely to bring very different values to determining how to respond to a court.

So, when there is informality in the procedures that agencies use to respond to courts, it becomes more difficult to make systematic predictions about which factors are likely to influence an agency’s response to a court. If agencies behaved more like machines, the impact of courts on these organizations would be more predictable.

I will stop here because of time. This is just a flavor of my research, but of course I am happy to talk about my research further in the comment period.