

JURISDICTION STRIPPING: CONGRESS, COURTS, AND LITIGATION

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JURISDICTION STRIPPING: CONGRESS, COURTS, AND LITIGATION

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Congress regularly, and with increasing frequency, removes jurisdiction from the federal courts. This dissertation argues that the underlying motivation for doing so is to deny litigants access to the judicial system in response to the costs and policy disruption created by lawsuits filed against the federal government. This assertion runs counter to two longstanding assumptions held by most scholars: Congress rarely removes court review, and manipulations to judicial procedure are a congressional reaction to court ideology. The judiciary is a creature of the litigation process. In fundamental terms, this means that the incentives and economics of litigation are an integral part of institutional behavior whenever the judiciary is involved. Drawing upon two separate literatures, law and economics and strategic institutionalism, this dissertation argues that when it comes to congressional reaction to the courts, in particular congressional manipulation of court structure and procedure, the strategy, process, and economics of litigation must be considered.

The research presented establishes the growing prevalence of jurisdictional removals, examines the underlying causal factors, and considers specific case studies of these trends. Jurisdiction stripping is largely an unstudied phenomenon, at least from an empirical perspective, and so this dissertation addresses the issues in two first-order contexts: legislation that removes court jurisdiction from the entire federal system, and legislation that functionally eliminates jurisdiction from all other federal courts by allowing review only in the courts of the D.C. Circuit. The research

is based upon two newly created databases which identify all such jurisdiction stripping public laws enacted from 1943 to 2004. A case study of jurisdiction stripping statutes in a single policy area, Forest Service wilderness designations, augments the empirical analyses. The research concludes that the operative variable in jurisdiction stripping is litigation pressure, captured by case filings, and the attendant costs imposed on a wide range of institutional actors when the government is forced to defend itself in court.

BIOGRAPHICAL SKETCH

Dawn M. Chutkow holds a B.A. from Duke University and a J.D from the University of Chicago Law School. Prior to beginning her Ph.D. studies, she practiced and taught law.

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CHAPTER 1

CONGRESS AND THE COURTS

Congress regularly, and with increasing frequency, removes jurisdiction from the federal courts. This fact runs counter to longstanding assumptions, held by most scholars, that while Congress may threaten to strip court jurisdiction, Congress rarely removes court review. Not only does Congress engage in jurisdiction stripping, but the underlying motivation for doing so is an attempt to control the policy disruption and costs created by lawsuits filed against the federal government. This litigation based analysis challenges the dominant account of court-Congress interactions, offered by strategic institutionalism, which assumes that congressional manipulation of jurisdiction, if any, is driven primarily by ideological differences between the branches. That assumption is questioned in the following chapters.

This dissertation establishes the growing prevalence of jurisdictional removals, examines the underlying causal factors, and provides specific case studies of these trends. Jurisdiction stripping is largely an unstudied phenomenon, at least from an empirical perspective, and so this dissertation addresses the issue in two first-order contexts: legislation that removes court jurisdiction from the entire federal system, and legislation that functionally eliminates jurisdiction from all other federal courts by allowing review only in the courts of the D.C. Circuit.

The research is based on two newly created databases which identify all such jurisdiction stripping public laws enacted from 1943 to 2004. An extensive case study of jurisdiction stripping statutes in a single policy area, Forest Service wilderness designations, augments the empirical analyses. The problem is viewed from the congressional perspective: what stimuli might drive Congress to remove jurisdiction from the courts? The research concludes that the operative variable in jurisdiction

stripping is litigation pressure on the federal government, captured by case filings, and the attendant costs imposed on a wide range of institutional actors when the government is forced to defend itself in court.

As the size and reach of government has expanded, with the advent of the New Deal, the rise of the administrative state, and the exponential increase in legislation aimed both at the regulation of society and the provision of social benefits, the federal courts became a point of access for the public to challenge and influence government policy. This access – easily engaged by filing a lawsuit – is encouraged by a confluence of factors. Congress very often tackles complex regulatory or benefit conferring policies through generalized laws that delegate significant authority to administrative agencies, tasked with using their policy and technical expertise to formulate and carry out the specifics of broad legislative directives. So, for example, as the case study discussed later in the dissertation shows, the Department of Agriculture and the U.S. Forest Service are directed to manage national forests for “multiple use” with limited guidance as to how the allocation between preservation, recreation, and commercial activity on public lands should be made.

Judicial review, as practiced by the federal courts and framed by the Constitution, allows litigants to demand judicial examination of both the contours and underlying legitimacy of executive and legislative action as well as the enforcement of legislative rights conferred on individuals by the growing catalog of public laws. In the administrative context, by both case law and statute, the federal courts may be used to police agencies to assure that policy follows legislative intent. When legislative language is not specific, and legislative intent is expressed in broad terms, as is so often the case, space is created for litigants, dissatisfied with policy as effectuated, to engage court review. This is done by filing lawsuits against the federal actor responsible for policy implementation. The comprehensive nature of judicial

review, the lack of clearly expressed legislative intent, and the sheer number of public laws all contribute to the growth of these suits.

Jurisdiction stripping is a targeted response to the burgeoning pressures created by litigation against the federal government. Litigation imposes costs on the government both in real terms and in terms of policy distortion and delay. These costs attach and grow from the time a case is filed in federal court, and impact a broad range of government actors, including courts, Congress, and agencies, regardless of final case disposition or institutional ideology. From this perspective, jurisdiction removal is not a congressional reaction to the judiciary or to judicial ideology, as suggested by standard institutional accounts. Instead, jurisdiction stripping is designed to control litigant access to the federal court system and protect government institutions and policy from public interference.

The judiciary is a creature of the litigation process. In fundamental terms, this means that the incentives and economics of litigation are an integral part of institutional behavior whenever the judiciary is involved. Theories addressing interactions among Congress, courts, and agencies often overlook this basic fact. Drawing upon two separate literatures, law and economics and strategic institutionalism, this dissertation argues that when it comes to congressional reaction to the courts, in particular congressional manipulation of court structure and procedure (such as jurisdiction stripping), the strategy, process, and economics of litigation must be considered.

Incorporating insights from law and economics, into theoretical studies of Congress and court interactions has important implications for political science and institutional studies. Traditional accounts of inter-institutional behavior misidentify the full nature of institutional incentives where courts are concerned. This is because scholars assume ideological preferences are the operative motivators for strategic

positioning among Congress, courts, and agencies. This is a problematic assumption on several levels, particularly with respect to manipulation of federal court jurisdiction. First, unlike Congress, the president, or agencies, the judiciary cannot instigate action. It operates from the bottom up, activated by outside parties, litigants, through the filing of court cases. These case filings can occur in any federal court across the system, depending on where the parties reside, and where the dispute arose, matters not within the government's control. This makes it very difficult to identify, ex ante, the court actor whose preferences or ideology will impact a particular policy, and accordingly, very difficult to craft specific structural controls aimed at reigning in court actors whose ideology diverges from congressional or agency preference. Although the Supreme Court is often identified as the relevant actor against whom Congress and agencies react, that court's docket is a miniscule percent of filed cases, and is a docket, by Court intent, declining rapidly over time. In addition, across the entire judicial system, the rarity of court decisions, and hence court expressions of preference, as compared to other case dispositions, further argues against congressional reaction to courts based on judicial policy interference. Each of these factors strongly suggests that congressional manipulations of court jurisdiction are a response to something other than ideological positioning.

Litigation economics offers an alternative way of looking at institutional response to the courts by providing insight into the litigation process, including the dynamics of individual incentives and aggregate effects created by the costs and benefits of an adversarial dispute resolution system. Law and economics literature rarely applies these observations to strategic inter-institutional behavior or congressional changes to court jurisdiction. In this context, institutional studies and law and economics have much to contribute to one another. What the strategic

explanation lacks, and law and economics can provide, are the insights derived from the study of litigation effects.

The nature of litigation, and its attendant incentives, shapes the behavior of courts, parties, and potential parties. Increasingly, these parties include government defendants, brought into the judicial system by challenges to government policies and behavior. Court action instigated against the federal government imposes costs on all three branches at the point of filing regardless of where a case is introduced in the federal system and regardless of differing institutional ideology. These costs accrue at the time of filing and increase as the case progresses whether or not a case proceeds to trial or appeal. Increasing litigation against the government implicates policy implementation by creating delay and expense. These factors, across the board litigation expense, increased implementation costs, and policy delay, result in strategic attempts by government actors to reduce litigation-based costs in ways that are independent of ideological preference and theoretically consistent with the way courts operate and dispose of cases.

This entire dynamic is triggered by private actors making the affirmative decision to sue the government. Unlike a private defendant, however, the government, through Congress, has unique powers over the structure and procedure of dispute resolution in the federal courts, including the ability to manipulate litigant access to the judicial system by stripping courts of jurisdiction or funneling cases into a specific court within that system. If courts do not have jurisdiction over a policy area, litigants cannot sue, or if they do sue, their legal action is subject to rapid dismissal. If litigants are forced to file in only one court, and as a result incur increased costs, the incentives to bring suit are significantly reduced. Under either scenario, the federal government's overall litigation costs alleviate if the jurisdiction removed implicates the public's ability, or willingness, to sue government actors. From this perspective, jurisdiction

stripping and exclusive jurisdictional grants are a response to increased costs, both in terms of resources and policy delay, caused by litigation against the federal government.

The nature and growth of the U.S. political system, and of judicial review, result in the default position that most government action can be challenged by the public in court. Whether or not this is a positive state of affairs can be debated. Jurisdiction stripping selectively removes or discourages this public access, particularly so since courts generally acquiesce to these limitations. This raises several legitimate concerns. Should certain governmental actions be removed from judicial scrutiny? When one group is treated differently than the public at large, what characteristics distinguish these group members from their fellow citizens, and what justification does the government have for differentiating in this way? How these questions are answered depends largely on both the nature of jurisdiction stripping laws as well as on how one views the role of the courts. The judiciary has a strong part to play in assuring that the basic constitutional structure and parameters of individual rights are protected from overreaching by the elective branches. But this is a different thing than using the judicial process to thwart properly enacted laws and regulations. Too often, parties who lose in the legislative process turn to the courts as an alternative way to affect policy.

It is true, that jurisdictional removals do not occur uniformly with respect all government action, appearing instead in specific policy areas. This raises the specter of interest or industry group influence over these legislative enactments designed to deliver specific advantages and benefits to the groups with adequate control over the jurisdictional language in question. Of course, this happens throughout the legislative process in a myriad of ways, but in this instance, the advantage is gained by selectively removing (or discouraging) public access to the very branch of government

designed to oversee the behavior of the elective branches. In practice, jurisdictional removals do not fully remove court involvement, even if they do preclude litigation based on a particular legislative enactment. Instead jurisdiction stripping gives the courts, institutions that are often at the forefront of the messy business of applying generalized policy in real world contexts, an additional tool to control excessive litigation that interferes with policy outcomes. If jurisdictional removals are designed to prevent litigation-based legislative bargaining that has reached a certain tipping point with the courts, Congress, and agencies, then jurisdiction stripping is a positive contribution to the appropriate balance of powers in the federal system.

The dissertation is organized as follows. Chapter One considers strategic institutionalism, the prevailing model for court-Congress interactions, and discounts it as an explanation for jurisdiction stripping. Strategic institutionalism's failure to capture the litigation process, including the extreme rarity of judicial opinions as compared to case filings, is discussed. Chapter Two discusses economic and political incentives generated by litigation against the federal government, including the costs imposed on Congress, courts, and agencies by increasing litigation levels in the past sixty years, the unique nature of governmental defendants, and the institutional effects of these incentives. Litigation based economic models for both full jurisdictional removal and selective jurisdictional assignments to the D.C. federal courts are presented. Chapter Three presents the results of a 62-year study identifying all public laws that completely remove jurisdiction from the federal courts. The nature and characteristics of these laws are presented and discussed. Case filing, economic, and ideological causes for jurisdictional removal are empirically tested. The results show that jurisdiction stripping is strongly related to the pressures created by cases filed against the federal government, but is not related to ideology. Chapter Four presents the results of a second 62-year study identifying all public laws that grant jurisdiction

exclusively to the federal courts in the D.C. Circuit, thereby effectively stripping jurisdiction from all other federal courts. The content and characteristics of these laws are presented and discussed. This congressional action is modeled as a type of government forum selection designed to increase costs of litigation to private actors and decrease government costs thereby damping case filings against the federal government. This thesis is empirically tested. The results show exclusive grants to the D.C. Circuit are related to case filings against the federal government, but not related to ideology. Chapter Five presents a case study analysis of jurisdictional removals in response to the environmental litigation opposing logging in national forests. It analyzes the interests, both private and public, that generated, and had a stake in, this litigation, statements of congressional intent behind jurisdiction removal, and the legislations' impact on litigation dynamics in this policy context. Chapter Six discusses the implications of this research, including the role of interest group influence over jurisdiction stripping legislation, considers remaining questions, and makes recommendations for future study.

The Existing Institutional Paradigm

Strategic institutionalism, the dominant paradigm in institutional studies, falls short as a way to explain jurisdiction stripping, although it does provide valuable insights into Congress-court relations. This theory blends rational actor assumptions, agency theory, and lessons learned from strategic games, concluding, and rightly so, that institutional behavior cannot be explained in isolation from the incentives and actions of other actors in the institutional setting. As a model, its strength lies in the interactive mechanisms it identifies, and its weakness lies in its application which often entails an almost exclusive focus on ideology, a broad heuristic for policy preferences, as the operative force behind cross-institutional behavior.

As an explanatory paradigm for congressional response to the judiciary this approach stumbles on two fronts. First, strategic institutionalism's emphasis on the salience of ideologically based preference as the wellspring for institutional behavior is problematic when it comes to the courts because expression of judicial preference requires some kind of dispositive judicial action on the merits, and the vast majority of cases leave the court system well before trial, and well before any indicia of court policy preference. Second, for Congress to react strategically to the judiciary, Congress must identify a specific actor with control over congressional policy. This is not possible in a federal judicial system where the Supreme Court is rarely a participant, litigants choose the legal forum, and any lower level court in the country has the power to hear federal cases. With respect to jurisdiction stripping in particular, strategic institutionalism as applied ignores the role of litigants, focusing instead on judicial decision makers, and misses the cooperative and common interests shared by government actors faced with the disruptive costs and effects of litigant access to the courts.

Institutional Preferences. The lynchpin of strategic institutionalism, and one of its most powerful and useful contributions, is the assertion that institutions, acting through their median members, seek to imprint their preferences upon public policy (Epstein, Knight, and Martin 2001; Weingast 2002). Institutional behavior can be explained as a response to member preference, more specifically median member or (in the case of the executive branch) dominant member preference (Cox and McCubbins 1993, Epstein, Knight, and Martin 2001; Weingast 2002; Weingast and Marshall 1998). Scholarship in this vein is legion. Congressional studies identify congressional preference based on the policy outcomes preferred by the median participating member, be it the majority party (Aldrich 1995; Aldrich and Rohde 2001), chamber floor or Senate cloture pivot (Krehbiel 1998), veto override point

(Cameron 2000), or policy-controlling committee (Kiewiet and McCubbins 1991). Agency behavior is explained as an attempt to maximize the preferences of a variety of principal actors dominated by theories of executive control (Calvert, McCubbins, and Weingast 1989; Eskridge and Ferejohn 1992; Moe 1987, 1990; Spence 1997; Wood and Anderson 1993; Wood and Waterman 1991), but at various times in the scholarship's history also including Congress and oversight committees (McCubbins, Noll and Weingast 1987, 1989; Weingast and Moran 1983), the independent interests of agency actors (Carpenter 2001; Dodd and Schott 1979; Macey 1992; Niskanen 1971), or a combination of multiple principal influences (Huber 2007).

By the same token, the bulk of judicial system's scholarship assumes rational, preference maximizing behavior on the part of the judges and Justices (Epstein and Knight 1997; Segal 1997; Segal and Spaeth 1993, 2002; Weingast 2002). The modern conception is that judicial decisions are a product of individualized judicial preference or ideology, moderated by the median justice when cases are heard in front of a panel. This is the contemporary wisdom even for those who dispute courts' ability to act in an unconstrained manner (Epstein and Knight 1997; Maltzman et al. 2000). The vast majority of judicial studies attempt to determine the effects of this preference based behavior on legal decisions and other government actors, covering such diverse topics as court review of agency action (Cross and Tiller 1998; Humphries and Songer 1999; Revesz 2001; Sheehan 1992), civil rights cases (Eskridge 1991a), court oversight of environmental regulation (Revesz 1997), and litigant characteristics affecting case success rates (Sheehan, Mishler and Songer 1992).

The primary insight, that institutions are rational actors driven by some form of collective preference, is an important part of understanding government actions. However, much institutional scholarship relies too heavily on quantifiable measures of preference, often called ideology, which have become both the heuristic for

institutional interests and the presumptive explanation for much government behavior. This is a critical weakness in current institutional studies because it makes it very easy to bypass close examination of the nature and structure of the institution being studied, in favor of a quick reduction to an ideologically identified median member. This is the case with respect to treatment of the courts, which are too often considered only in terms of the ideology score of a median judge or justice, rather than seen as part of a broad based dispute resolution process driven by litigant access and litigant choices.

The Role of Preference and Ideology. As the scholarship on rational actors and institutions matured, ideological measures replaced the concept of preference. This is true despite the fact that there is no agreed upon meaning of what constitutes ideology or ideological behavior. Instead, in many instances, the measurement itself has become the meaning. This is, in part, a function of both the way the literature developed and the limitations inherent in operationalizing preference. Congress was the primary focus of much early writing in this area, and the strong domination of party mechanisms in congressional behavior made it natural to speak of preference in terms of party affiliation. Since the party system in Congress operates to bundle preferences into a cohesive group identifier, with distinct, albeit evolving, platform positions and policy prescriptions, the concept of party and preference intermingled and transformed into a single heuristic, often referred to as ideology. This transformation was aided by the work of Poole and Rosenthal (1997), who developed an algorithm demonstrating that congressman's voting behavior aligns the members along a continuous, primary dimension from left to right that is remarkably stable over time, and that correlates with party affiliation.

In a similar fashion, party, and then ideology, became synonymous with preference in judicial studies, aided in no small part by the Supreme Court Database created by Harold Spaeth and used as the source for Spaeth and Segal's work arguing

that Supreme Court Justice's decisions are a function of individualized ideological characteristics that operate consistently across cases and within subject areas. With the Spaeth database and Poole and Rosenthal Common Space Scores (Poole 2005; Poole and Rosenthal 1997) as source material, scholars had a quick shortcut for operationalizing preference in the form of either party or a liberal to conservative numeric ranking for each government actor. Giles et al. (2001, 2002), Martin and Quinn (2002, 2005), and Epstein et al. (2007) aided in this empirical project by providing ideological rankings for Supreme Court, appellate, and lower court judges, premised either on the party identifiers of home state senators, or algorithmic calculations similar to those created by Poole and Rosenthal.

The availability of quantifiable measures for preference (now largely referred to in the literature as ideology), that exist on a single dimensional scale and can be applied across issue areas, allows for easy calculation of the relevant median member in whatever institution is studied, as well as establishing some kind of distance between the preferences of various government actors. As a result, the terms "ideology" and "preference" are used interchangeably in most of the institutional literature, although they represent arguably different concepts. Much of the scholarship identifies preference as a quantifiable measurement, used to align members of the relevant institutions along a one dimensional scale that is either dichotomous (with Democrat representing left, or liberal, and Republican representing right, or conservative) or continuous, also ranging from liberal to conservative. Both measurement rubrics represent a general ideological assessment which purports to predict some kind of systematized behavior across a broad range of issues.

Adversarial Institutions. Most institutional studies also assume that government actors compete against each other to gain control over policy outcomes. While this has much explanatory power, provided that the salient actors affecting

institutional behavior are properly identified, in the context of court-Congress interactions, this assumption often fails to capture the vital role of litigants both in controlling and in shaping the judicial process. Congressional studies have long recognized that few laws are self-executing, and increasingly the nuts and bolts of legislation, from its practical application to its adaptation and refinement over time, are left to the discretion of executive agencies and their attendant bureaucracies (Eskridge and Ferejohn 1992; Spence 1997). This opens opportunities for judicial review, which is analyzed in terms of judicial preference as opposed to litigant behavior.

Broad legislative delegation to agencies provides the courts with additional avenues to influence policy through review of both agency action and the underlying enabling statutes. The result is congressional policy subject to both agency and court influence. Institutional scholars argue that delegatory legislation presents a classic control problem in which Congress, as principal, must seek ways to reign in agents' deviating preferences to assure that policy implementation reflects congressional wishes. This engenders a game of strategy between entities with the ability to affect policy outcomes, with the powers, incentives, structures, and dynamics of Congress, courts, agencies, and the executive all used to arrive at some kind of policy stasis.

Strategic institutionalism rightly notes that Congress is uniquely positioned to influence bureaucratic and judicial policy-making through the use of procedural requirements. Because Congress cannot anticipate all possible agency or judicial decisions in a policy area, Congress steers policy by using the initial legislation or later corrective legislation, to set up processes that either favor enacting coalitions, or influence decision making in such a way that favors certain types of outcomes or interests. This accommodates both the need for flexible policy responses, often in areas which are highly technical, and the need to control agent behavior (Bawn 1995).

In the bureaucratic context, McCubbins, Noll, and Weingast (1987, 1989) maintain that Congress imposes decision making processes (“deck stacking”) upon agencies so that they will act in ways that align with congressional preferences. The *Freedom of Information Act* and the *Administrative Procedure Act* mandate that agency records and rules be publicly available and agency actions and data gathering be regularly reported, reducing agencies’ control over information, and allowing outside interest groups to intervene earlier in the process. Notice and comment periods for proposed agency actions ensure input from affected organizations (Spence 1999). *National Environmental Policy Act* environmental impact statements, force agencies to consider the views and concerns of the environmental lobby whenever engaging in major federal actions (McCubbins, Noll, and Weingast 1987). Substantial evidence requirements for agency decisions can be used to lock in original legislative compromises and limit later agency discretion.

Control of Court Jurisdiction. Institutional scholars took the lessons learned in the context of agency studies and expanded the theories of structural control to Congress-court interactions. There is an inherent sensibility in this extrapolation. Congressional power to establish the federal court system includes the power to define, and even deny, courts’ jurisdiction (Gunther 1984). The extent and nature of this authority is the subject of a voluminous theoretical literature by legal scholars, in no small part driven by concerns that if Congress has the unfettered ability to remove courts from the review of congressional or presidential actions a significant check on legislative and executive power will be lost. Control over court jurisdiction also implicates the degree to which Congress can insulate policymaking from judicial oversight, an action which allows administrative agencies greater latitude. And, although often given short shrift in the literature, it affects citizen’s ability to challenge government action through the courts. While the seminal case law in this area is over

100 years old,¹ in recent years, the debate over congressional authority to strip federal court jurisdiction resurfaced in the context of military tribunals at Guantanamo Bay, proposed legislation opposing same-sex marriages, and arguments over federalized rights to school-prayer (Pfander 2007).²

There is no consensus on the scope of Congress's plenary authority over court jurisdiction (Sager 1981). Some scholars argue that essential functions of constitutional review must remain, at least with respect to certain primary constitutional protections (Friedman 1990; Hart 1953), while others argue that the language of the Constitution clearly allows complete congressional discretion over most court jurisdiction, particularly the lower federal courts (Bator 1982; Cherminsky 1989; Gunther 1984).³ Still other theorists assert that constitutional structure and language allows Congress to curtail, but not eliminate, federal jurisdiction even with respect to the lower federal courts (Ratner 1960; Sager 1981; Tribe 1981). Regardless of perspective, one general consensus does emerge: Congress rarely eliminates judicial review (Fallon et al. 2003; Gunther 1984; Peretti 1999; Resnik 1998).⁴ Despite (or,

¹ *Ex Parte McCordle*, 74 U.S. 506 (1868) involved congressional repeal of a statute granting jurisdiction to federal courts to hear certain appeals, an action taken because Congress was concerned that the Supreme Court would overturn certain provisions of the Reconstruction Acts. McCordle, a newspaper publisher, wrote editorials critical of Reconstruction. He was imprisoned by the military, and sought a writ of *habeas corpus* claiming that the Reconstruction Acts that allowed his arrest and confinement were unconstitutional. In *United States v. Klein*, 13 Wall 128 (1872), Congress passed legislation removing the Supreme Court's jurisdiction to hear a case involving presidential pardons to confederate sympathizers. The legislation further dictated that any recitation in the pardon that an individual had been involved in an insurrection against the United States disqualified that person from reclaiming property seized during the war.

² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) both address whether and how the Detainee Treatment Act of 2005 can remove judicial review from Article III courts with respect to certain issues arising in connection with Guantanamo Bay military commissions. The Marriage Protection Act of 2004, which passed the House but not the Senate, was designed to prevent courts from insisting that gay marriages performed in one state be recognized throughout the country. The Act was reintroduced as the Marriage Protection Act of 2007, and referred to the House Committee on the Judiciary without further action.

³ With the exception of Supreme Court appellate review over areas specifically listed in Article III of the Constitution.

⁴ This view is held despite a fairly extensive administrative law literature addressing the Administrative Procedure Act which abrogates the presumption of judicial review where the "statute precludes judicial review" *Administrative Procedure Act, U.S. Code* 5 (2000) §701(a)(1)-(2).

perhaps, because of) the assumed rarity of these cases, while there is a substantial theoretical literature addressing congressional authority and motivation to remove federal court jurisdiction, little systematic, empirical attention is paid to these congressional actions, commonly known as “jurisdiction stripping.”

From an institutionalist perspective that relies on ideology as a key explanatory factor, congressional manipulation of court jurisdiction turns on the ideological proximity of Congress, courts, and agencies, with Congress choosing rules which result in greater discretion to either court or agency depending on which entity aligns best with congressional preferences. The underlying principle is that that when court system goals are in opposition to Congress, the legislature is less likely to rely on procedural controls of agencies, based on the theory that Congress cannot rely on the judiciary to enforce legislative terms in a way satisfactory to congressional preferences (Gely and Spiller 1990; Hill and Brazier 1991).

According to strategic institutionalism, jurisdictional removal, when it does occur, therefore is driven by a desire to limit the courts’ ability to influence policy. When Congress removes jurisdiction it eliminates the court entirely from the strategic dynamic of policy implementation. Smith (2006) finds Congress expands and contracts citizen suit provisions in response to court ideology. Spiller and Tiller (1997) model the cost-benefit trade-offs inherent in agency or court decision making and conclude that Congress strategically manipulates the costs associated with agency policy formation or judicial review to assure that greater policy control sits with whichever actor most closely aligns with Congress. Shipan (1997, 2000) argues that Congress shapes judicial review provisions by anticipating the agencies’ and courts’ preferences and legislating broader latitude in judicial review when Congress believes the courts will protect congressional interests.

Problems with Congressional Control of the Courts

There are several primary problems with applying agency theories and related models of strategic control mechanisms to the interactions between Congress and the federal judiciary, particularly when it comes to the revocation or allocation of jurisdiction. First, unlike agencies, which have relatively identifiable jurisdictional parameters and organizational arrangements that allow for some direct hierarchical control, the judiciary is a diffuse and structurally generalized organization, with multiple actors, and a weak system of hierarchical control. In a model where strategic behavior is premised upon identifying salient institutional policy preferences, this poses a significant problem, since it is difficult for Congress to identify one primary judicial actor, or group of actors, whose ideology either represents or controls the courts. Second, even if Congress could identify the salient court - and most studies assume that this is the Supreme Court an assumption challenged by its limited docket - enormous countervailing forces, primarily self-selective, result in the vast majority of disputes leaving the court system long before judges express any ideological preference. If and when Congress does remove jurisdiction from the federal courts, the lack of one court to react to and the high pre-trial disposition rate for most filed cases, strongly suggests that the impetus behind jurisdictional controls is not ideological.

Congress Cannot Identify a Primary Judicial Actor. Courts cannot act until a case is filed. Unlike Congress, the executive, or agencies, no court can independently act on government policy, nor can a court choose a particular policy to challenge. Litigants determine both the parameters of a dispute, and, with certain limitations generally outside government control, what court actor is involved.⁵ Federal court

⁵ Some policy areas are assigned by Congress to specialized courts, such as Court of Federal Claims which hears money claims against the federal government, but as a general matter all other issues appropriately before the federal courts may be heard in any district or circuit, subject to certain venue rules.

jurisdiction, which is largely constrained to issues arising under the Constitution, statutes, or treaties of the United States,⁶ or disputes between citizens of different states above a minimum value,⁷ equally applies to each of the 94 district courts, and 678 related judgeships, which are the first points of entry into the federal judicial system. Appeals from district court decisions are taken in the appellate court geographically connected to the initial district court filing. Currently there are thirteen such courts of appeals, and 179 judgeships.⁸ Final appeal may be had, if accepted, by the Supreme Court, of which, of course, there is only one. Until a case is filed, Congress does not know which district court in the federal system will hear a particular policy challenge or which appellate court will receive any appeal.

This would be less of a road block to ex ante congressional controls if the judges, Justices, and therefore the courts they serve, were all ideologically uniform. This is not the case. These numerous federal courts vary not only in location, but - using the terms and measures favored by many institutionalists - in ideological make-up as well. For example, The Judicial Common Space scores developed by Epstein, Martin, Segal, Westerland (2007), range from -1 (liberal) to 1 (conservative). The current Supreme Court's median member is Anthony Kennedy, a Republican appointee with a Judicial Common Space score of 0.03, which identifies him as a moderate and centrist. The median Common Space score for the 4th Circuit in 2006 was 0.31, a conservative ranking. The 9th Circuit's 2006 median score was -0.22, considered liberal. The U.S. District Court for the District of Columbia has 15 authorized and 12 sitting trial court judges, any one of whom could hear a case filed in that district. The Chief Judge, Royce C. Lamberth, a Reagan appointee, has a very

⁶ U.S. Constitution, art. 3, sec. 2; *Judiciary and Judicial Procedure*, U.S. Code 28 (2004) §1331.

⁷ U.S. Constitution, art. 3, sec. 2; *Judiciary and Judicial Procedure*, U.S. Code 28 (2004) §1332.

⁸ Including the U.S. Court of Appeals for the Federal Circuit which hears patent cases and monetary claims against the federal government.

conservative Common Space Score of 0.567, while Emmet G. Sullivan, a Clinton appointee serving on the same court, has a Common Space score of -0.441, identifying him as strongly liberal. The wide range and variety of these ideological ratings, at the appellate level, is set forth in Table 1.1, below.

Table 1.1. Appellate Court Median Ideological Scores, 2004

Circuit	Common Space Median	Ideological Characterization	Party Median
First	0.26	Conservative	Republican
Second	-0.28	Liberal	Democrat
Third	0.03	Moderate	Republican
Fourth	0.31	Conservative	Republican
Fifth	0.39	Conservative	Republican
Sixth	0.01	Moderate	Neither party
Seventh	0.31	Conservative	Republican
Eighth	0.31	Conservative	Republican
Ninth	-0.27	Liberal	Democrat
Tenth	0.25	Conservative	Republican
Eleventh	0.33	Conservative	Neither party
D.C.	0.47	Conservative	Republican

Source. Epstein, 2008, "Judicial Common Space Scores," <http://epstein.law.northwestern.edu/research/JCS.html>

Uncertainty as to which court or trial judge will control the policy outcome of a case might not be an issue if all cases ultimately ended up in the Supreme Court. Strategic modeling often focuses on the Supreme Court because it is assumed to be the court most likely to provoke congressional and executive action (Epstein, Segal, and Victor 2002; Eskridge 1991a, 1991b). However, the Supreme Court has authority over its own docket, and accepts very few cases for review, despite a voluminous number

of litigant petitions. During the Court's 2007 term, the Court issued written opinions in 67 cases. The cert pool, or number of cases requesting Supreme Court consideration, in 2007 was 8,241 (Roberts 2008). In the last 50 years the Supreme Court's plenary docket ranged from between 75 to 150 cases per annum (Cordray and Cordray 2001), making the Court a sporadic participant in policy oversight and implementation at best. This leaves the appellate courts, with their largely mandatory appellate jurisdiction and their widely divergent political and ideological make-up, as the true courts of last resort. This means, that in crafting a response to the judiciary, Congress cannot tell which court or courts will be involved until litigation is under way. This makes ex ante structural controls a highly inefficient strategic choice.

Few Cases Result in Judicial Policy Expression. Congress cannot predict whether a particular policy challenge will generate a judicial expression of preference, even if Congress could anticipate which court will hear a case. This is because vast numbers of cases leave the judicial system both well before significant court involvement and well before appeal (Diamond and Bina 2004; Higginbotham 2002; Yeazell 1994). Close to 98% of federal civil cases filed either settle⁹ or are dismissed prior to trial (Clermont 2008; Shavell 2003). The incidence of pre-trial disposition is growing over time, with the number federal civil cases resolved by trial seeing a 60% decline since the mid-1980s (Galanter 2004).¹⁰

Even if a case does go to trial, very few are appealed. Only about one in eight tried cases advance to the appellate courts (Eisenberg 2004; Galanter 2004). This is a

⁹ Settlements rates are high, but do vary by district and case type (Clermont and Schwab 2008; Eisenberg and Lanvers October 1, 2008; Galanter and Cahill 1994)

¹⁰ It can be argued that Congress can predict which cases will result in a judicial decision, by applying the various cost benefit assessments just as litigants do when deciding whether to proceed or settle. In this way Congress could react only to the cases it knows are likely to stay in court. The specifics of this assessment are discussed later in the dissertation. The counter to this point is that these calculations are very fact specific, depending, among other things, on litigant resources, legal doctrine, and potential judicial preferences. The litigant involved knows these intimately. It is unlikely that Congress has access to the same kind of information, or that the information could be broadly summarized in a way that makes it applicable to a large group of cases.

function of the cost of appeal, the likelihood that a litigant will prevail, and explicit economic calculations made by the losing party. Appeals courts tend to defer to trial court decisions (Eisenberg and Miller 2008; Guthrie and George 2005). The affirmance rate in federal court, the rate at which the appellate court supports the decision of the trial court, is approximately 80% (Clermont 2008), making it economically irrational in most cases for a losing litigant to expend the resources to continue a case. This is particularly true if the prevailing party at the trial level is the government, since appellate courts tend to rule in the government's favor (Crowley 1987; Songer, Sheehan, and Haire 1999).

In sum, these facts challenge the ideological explanation for congressional manipulation of court jurisdiction in three ways. First, it is difficult to predict which issues will make it to appeal since close to 88% of the tried cases stop at the district court level, making *ex ante* jurisdictional manipulation at the appellate level an overly broad and inefficient tool to use in an attempt to control ideological behavior. Second, of the small number of cases that do proceed to an appeal, the appellate court is very likely to express a preference that does not deviate from the court below, a fact that undercuts the argument that the appellate court is behaving ideologically. Third, appellate courts tend to side with the government, an outcome that the government should favor rather than curtail. If Congress chooses to remove jurisdiction, either entirely or partially through exclusive jurisdictional grants, reaction to judicial ideology is not a satisfactory causal explanation, given the uncertainty as to which court will be engaged in litigation and the precipitous drop off between filed and tried cases.

Another approach, then, is needed to understand why Congress might remove judicial review: one which draws upon strategic institutionalism's insights about the rational and strategic nature of institutional actors, but avoids the difficulties presented

when institutional behavior is seen primarily as an expression of ideological preference. Chapter Two argues that law and economics satisfies these conditions by offering an alternative motivation to ideology, a motivation based on the costs and delay imposed by litigation against the government. These costs cut across institutions and create broad-based incentives for Congress to eliminate access to the courts. In this model, the relationship between government actors is often less adversarial than it is accommodating, with Congress, courts, and agencies all reacting, in one form or another, to interference with their duties by the public. This is a state centered view, where competition between branches and strategic behavior certainly can exist, but very often the strategic actor on one side is the government and on the other is society. From this perspective, it is possible to see that actions, such as jurisdiction stripping, which might otherwise be cast as congressional constriction of the courts, are in fact actions designed to insulate agency policy and court resources from litigants using the judiciary as a mechanism to burden and delay the business of government.

CHAPTER TWO

JURISDICTION STRIPPING AND LITIGATION ECONOMICS

Institutional theories that focus on judicial ideology as expressed through final court decisions are an unsatisfactory basis for understanding jurisdiction stripping. This is because they ignore a critical feature of the judicial system: denying court review denies litigants a judicial forum, an action with ramifications for caseload pressures, litigation costs, and congressional behavior, in ways only diffusely related to institutional ideology or final case disposition. When Congress removes jurisdiction from the federal courts it is likely doing so in reaction to litigation costs imposed on the federal system, and not court ideology. These costs include not only the direct economic impact of defending lawsuits, but also policy delay, resource diversion, and litigation avoidance behavior by institutional actors, all of which interfere with the government's ability to implement and carry out public policy. Two key features of the litigation process are salient to this perspective of jurisdiction stripping: the significant increases over time in federal court case filings, particularly civil filings against the United States, and the attendant costs these increases visit on all branches of the federal government. Institutional actors exhibit numerous behaviors designed to avoid or reduce this litigation related cost and interference, including the structural manipulation of procedure to reduce a plaintiff's incentives to file suit. The law and economics literature on case selection provides a theoretical basis for understanding these behaviors, in particular, jurisdiction stripping and exclusive jurisdiction grants.

Increasing Caseloads

Caseloads in federal court fall into two basic categories: cases brought by the federal government, primarily criminal prosecutions and regulatory actions, and civil cases brought by private actors. Civil litigation instigated by parties outside the

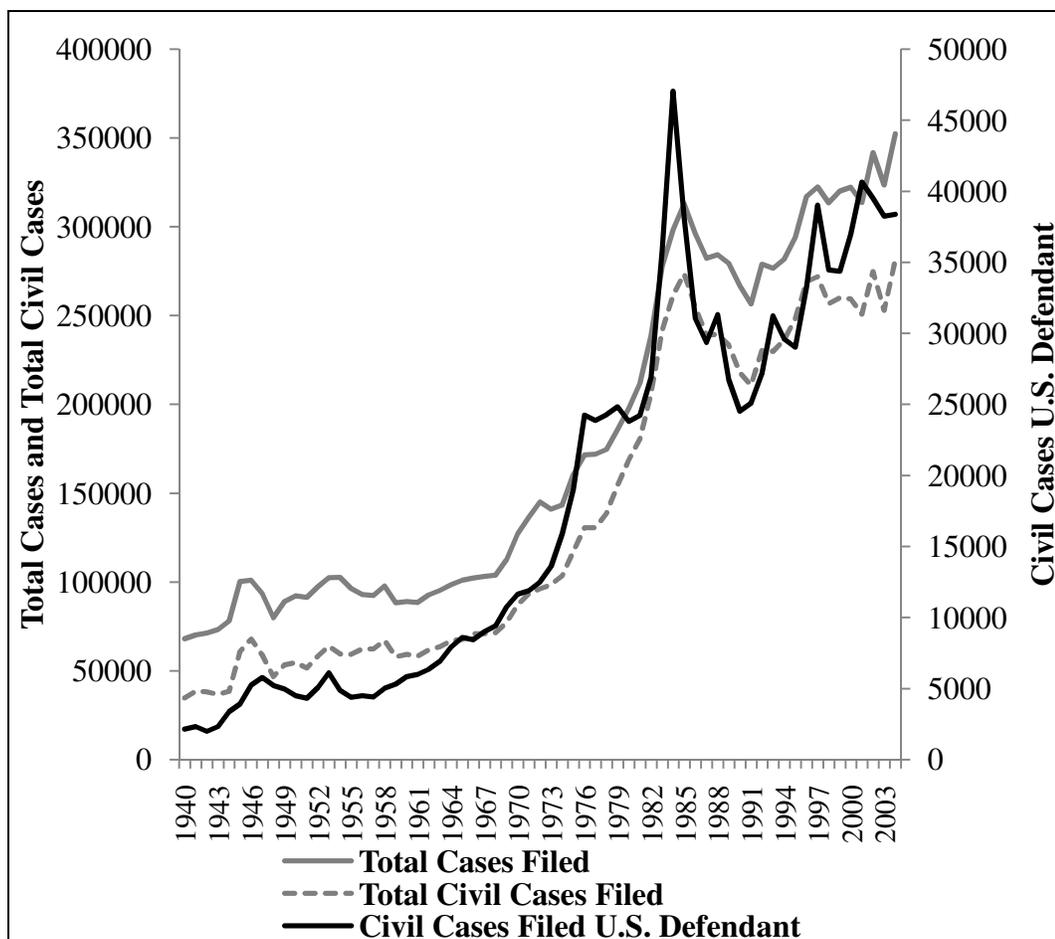
government includes disputes between private parties, litigation challenging state action, and litigation against the federal government. Of these case types, only one, suits against the federal government, imposes costs directly on federal actors in ways that cannot easily be controlled by the government. The first category, government instigated criminal or regulatory actions, depend upon an affirmative decision by federal actors to either prosecute or file a regulatory enforcement action. This kind of litigation, and the costs it imposes on government institutions, can be controlled directly by changing the number of prosecutions, an act wholly within the purview of the Department of Justice and various regulatory agencies. Within the second category, civil actions instigated by private parties, the sub-categories of state action challenges and private litigation do not directly impact federal actors, nor do they impose costs on all three branches, although these cases do affect the judiciary by taking up court time and resources. The final category, litigation against the federal government, is the one area that both imposes costs directly and broadly across governmental institutions, and, because the decision to litigate is made by third parties, the attendant costs and delay cannot be easily circumscribed before the fact by government actors. It is this area, suits in which the federal government is a defendant, which invites structural institutional responses, such as jurisdiction stripping.

Federal court caseloads increased exponentially over the past several decades. From 1940 to 2004, annual district court case filings in the federal system rose from 68,135 to 352,360.¹¹ The reasons for this growth are myriad, including the advent of notice pleading, increased legislative output, private attorney general laws passed in the 1970s, the rise of rights-based litigation, and increased use of litigation by interest groups as an alternative to engaging the legislative process. Civil case filings increased

¹¹ Administrative Office of the United States Courts, *Proceedings of the Judicial Conference of the United States, Annual Report of the Director* (Washington, D.C., 1940-200) (“AO Reports 1940-2008”).

during this period in every case category, rising from 34,734 filings in 1940 to 281,338 filings in 2004. This increase occurred despite an attendant decline in trials, and at a rate that cannot be explained by general population growth (Galanter 2004). Civil filings in which the United States was a defendant, the category that includes challenges to government policy that are not easily curtailed through government action, increased nineteen-fold between 1940 and 2004, from 2,171 to 38,391.¹²

Figure 2.1 shows these trends.



Source. Administrative Office of the U.S. Courts (1940-2004).

Notes. U.S. Civil Defendant Filings on Secondary Axis.

Figure 2.1. Annual U.S. District Court Caseloads, 1943-2004: Total Case Filings, Civil Filings, U.S. Civil Defendant Filings

¹² Ibid.

The number of lawyers in the United States also grew during roughly the same time period. According to statistics kept by the American Bar Foundation (1988, 2000), the number of practicing attorneys, in all areas of the law, was 221,605 in 1951 and 909,019 in 2000.¹³ Overall percentages of lawyers in various practice areas has remained stable over time, with between 9% and 10% of the bar working for the government (both state and federal) from 1960 to 2000. However, in absolute terms, this means the number of government attorneys went from about 28,000 in 1960 to almost 82,000 in 2000. Table 2.1 below, shows these trends.

Table 2.1. Attorneys Practice Area Employment, as a Percentage of Total Attorney Population, 1960 to 2000

	1960	1970	1980	1990*	2000
Private Practice	72	68	68	73	74
Judicial	3	3	4	3	3
Government	10	10	10	9	9
Private Industry	10	11	10	10	9
Other	1	2	3	1	1
Retired	5	6	5	5	5
Total	285,933	355,242	542,205	805,872	909,019

Source. American Bar Foundation 1988, 2000. Notes. *1991 data.

Institutional Costs and Responses

Increasing caseloads where a federal actor is a named defendant create costs and delay across all branches of the government. Institutional litigation costs, in terms of time, resources, and policy interference, attach at the time a case is filed in federal

¹³ Although, as a ratio of the overall United States population, these numbers dropped from 696 to 1 in 1951 down to 264 to 1 in 2000, with the decline starting in earnest in the early 1980s.

court.¹⁴ For the judiciary these costs stem from its role as a dispute resolution system. For agencies, usually the targets of litigation when the federal government is a named defendant, the costs arise from their status as litigants. For Congress, litigation against the government creates disruption to legislative bargains and resource demands from the other branches.

Each institution crafts a variety of individualized responses to these costs. Each institutional reaction alters underlying litigation incentives. Courts encourage settlement or push cases out of the system prior to trial, thereby making the value of many lawsuits a function of early stage litigation positioning and strategy as opposed to trial outcomes. Agencies seek to avoid litigation, actions that often encumber policy implementation and create incentives for policy opponents to threaten suit to instigate protective and dilatory agency response. Congress, because of its unique ability to affect the structure and procedure of litigation, responds by both providing more resources to agencies and courts as well as placing structural limitations on litigation. Jurisdiction stripping is one such structural constraint.

Courts and Litigation. The number of federal court judges has not increased apace with case filings, resulting in a significant rise over time in judicial workload coupled with a significant erosion in judicial salaries.¹⁵ The American Bar Association and Federal Bar Association Report (2001) conducted for the federal judiciary's Administrative Office, estimates that the average district court judge's caseload increased from 339 to 526 cases per year between 1969 and 1999. The average

¹⁴ Cases can also be filed in state court. The only change in the analysis is that, should a case against the government remain in state court, the costs accrued do not include those visited on the federal judiciary. However, given a defendant's right to remove cases brought in state court that could have been originally filed in federal court, and this includes all cases brought against the federal government, virtually all such cases proceed in the federal system.

¹⁵ There is some contention that if the federal judiciary's benefits, including retirement and pension, are factored in to the equation then judicial compensation is comparable to private sector legal occupations. This is in some dispute, and regardless, the federal judiciary itself has long taken the position before Congress that judicial pay should be higher.

appellate judge's caseload increased from 123 to 363 cases. During roughly the same time, the report estimates an average judicial salary reduction in purchasing power of about 25%. Chief Justice Roberts' Year-End Report on the Federal Judiciary (2008) reiterated the need for judicial cost of living salary adjustments, a plea that appears in almost every such year-end report since the 1980s. These trends, increasing per judge caseload and decreasing real salary levels, continue unabated (Galanter 2004, Roberts 2008).

Courts, by their very nature, are constrained in their ability to adjust output in response to increasing caseloads because there is a limit in time and energy to the number of cases a single judge can manage. Due to the judicial system's structure, unlimited increases in the number of judges, particularly at the appellate level, creates significant organizational problems, making panel hearings cumbersome, and interfering with the system's ability to produce legal uniformity across – or even within – the circuits (Nihan and Rishikof 1994; Posner 1996). In addition, although adding new judges to the system may ease workload, it is often perceived by the sitting judiciary as an action that will dilute the current judiciary's professional stature (Meador 1983; Posner 1993; Richmond and Reynolds 1996).

The judiciary's response to caseload pressures is both practical and policy based. The federal courts increasingly emphasize active case management and disposition by motion prior to trial (Cecil, Eyre, Miletich, and Rindskopf 2007). Some scholars note a greater use of judicially imposed barriers to litigation, including ripeness and mootness standards (concepts which define when a case is appropriately mature and an injury appropriately concrete to sustain litigation), along with the increased application of summary judgment and other pre-trial measures to reduce case load pressures (Burbank 2004; Hadfield 2004; Miller 2003). Case termination

through judicial grants of summary judgment and 12(b)(6)¹⁶ motions continue to rise steadily, making up no small portion of pretrial terminations (Cecil, Eyre, Miletich, and Rindskopf 2007). In 2005, roughly 21% of federal civil cases were disposed of pretrial through summary judgment or Rule 12 (Clermont 2008). From 1960 to 2000 the summary judgment rate increased from 1.8% of filed civil cases to 7.7% (Burbank 2004).¹⁷ Judges also use case management techniques to encourage settlement and quick disposition prior to trial, including alternative dispute resolution, mandatory pretrial conferences, discovery limitations, and a growing reliance on magistrates to handle pretrial matters (Robel 1993; Stern 2003).

On the policy front, federal courts have long called for Congress to restrict federal jurisdiction as a way of controlling the judiciary's growth and workload (Judicial Conference 1995; Nihan 1995; Nihan and Rishikof 1994; Resnik 1998). This approach is both comprehensive and efficient. Unlike pretrial disposition and settlement, when a court has no jurisdiction cases either are not filed, or exit the system very early, well before any substantial time or resource investment by the judiciary. Indeed, the federal courts' support for the creation of the Federal Judicial Center in 1967 was strongly related to the need for objective statistical information on caseloads that could be used to both increase organizational efficiency and bolster arguments before Congress that the federal courts needed some form of manpower or jurisdictional reprieve from caseload pressures (Fish 1973).

Agencies and Litigation. The mere initiation of a lawsuit against an agency can affect policy by delaying ongoing policy formation and implementation and imposing litigation costs in terms of agency time and resources (Levin 1996; Meltzer

¹⁶ Federal Rules of Civil Procedure, Rule 12(b)(6), is failure of the nonmoving party to state a claim that can be legally adjudicated.

¹⁷ Summary judgment rates are variable across district and case types (Burbank 2004; Eisenberg and Lanvers 2008).

1998; Wald 1996). These costs attach despite the high litigation success rates of government parties (Crowley 1987; Songer, Sheehan, and Haire 1999), since it is participation in, and reaction to, the litigation process that is at issue. While it is difficult to assess litigation's full impact on the government, it is possible to measure the magnitude of litigation through case filings. Scholars estimate anywhere from 26% to 80% of agency rulemaking is subject to court challenge, depending on the agency in question and the nature of the rule (Coglianese 2002; Prizker and Dalton 1990; Wilson 1989).¹⁸ Appeals from administrative adjudications filed in the federal circuit courts increased from 800 in 1940 to 10,382 in 2007, although this underestimates litigation levels as many challenges to agency action can be filed directly in federal district court.¹⁹

An agency's status as defendant requires agency staff and agency counsel to devote time and resources to court processes, including responding to discovery requests and providing the information necessary to craft motions, pleadings and pre-trial settlement negotiations. This diversion of resources towards litigation and away from other agency mandates creates "agenda disruption" (Cross 2000; McGarity 1992). With very few exceptions, it appears that this is part of a zero sum resource game. Agencies, for example, do not get additional resources to deal with judicial decrees (O'Leary 1993).²⁰ Case studies of various agencies indicate participation in

¹⁸ Some scholars dispute the existence of rising challenges to regulatory policy (Shapiro 1968), but their focus is often more specific than general case filings as discussed here, analyzing, instead, administrative appeals or judicial decisions neither of which capture the full impact of litigation against the federal government.

¹⁹ Absent a specific legislative directive, district courts have initial appellate jurisdiction over challenges to administrative action. As a percentage of overall appeals filed in the federal system administrative appeals have varied considerably over time, constituting 23.2% of all appeals filed in 1940, dropping to a low of 5.3% in 1996, and then rising again to 19.5% in 2004, and 17.8% in 2007 (Administrative Office of the U.S. Courts 1940-2008).

²⁰ However, some studies find that state agencies use the threat of litigation as a way to increase their share of the state budget (Hanssen 2000).

court hearings are often viewed as a significant inconvenience by agency workers, although how onerous these costs are may depend on the agency.²¹

Nor are litigation costs, imposed by suits against the government, the agencies' alone. The Department of Justice (“DOJ”) is responsible, in varying degrees depending on the agency and the issue, for representing agencies in court, with United States Attorneys and Assistant United States Attorneys conducting and coordinating agency litigation (Johnston 2002; Sisk 2006).²² The DOJ’s Environmental and Natural Resources Division defends federal agencies and agency programs in connection with the management of federal land and federal resources, including defense of the U.S. Fish and Wildlife Service, and National Marine Fisheries Service determinations of endangered species. The DOJ’s civil division defends the government actors in civil suits spanning almost the entire range of government activities. The Federal Programs Branch represents roughly 100 federal agencies in legal challenges to the administration of agency programs, including, among many, the departments of Veterans Affairs, Health and Human Services, Education, Interior, Energy, Agriculture, and Housing and Urban Development. As a result, the DOJ is involved in suits defending government obligations to public housing authorities, and claims of discrimination in federal employment. The Office of Consumer Litigation acts as defense counsel (and civil prosecutor) in connection with consumer based government programs administered by the Food and Drug Administration, Federal Trade Commission, Consumer Product Safety Commission, and the Department of Transportation’s National Highway Traffic Safety Administration. The Office of Immigration Litigation responds to all suits involving the regulation of aliens both in

²¹ There is some evidence, that the Environmental Protection Agency, for example, cooperates with interest group litigation against the agency in order to streamline the rulemaking process (Coglianese 1996).

²² Limited authority over litigation is granted to specific independent agencies, such as the Consumer Product Safety Division (Berger and Edles 2000; Sisk 2006).

admission and removal from the United States. The Tort Branch represents the government when claims are brought under the *Federal Tort Claims Act*. These suits not only demand damages, but often are a method for challenging government policies that give rise to the legal claim. Litigation such as suits against the Mine Safety and Health Administration for failure to implement stringent enough inspection procedures fall into this category. As these examples make clear, suits against agencies are part of the DOJ's business and accordingly impact resource allocation for DOJ lawyers (United States Department of Justice 2009, "DOJ Agencies").

DOJ involvement creates additional issues for agency control over policy, since litigation outcomes, either through negotiated settlement or judicial case disposition, are at least partially controlled by DOJ attorneys (Devins 2003). These outcomes can create policy precedent that is not fully in line with agency mandates or wishes, increases implementation costs, skews future policy development, or diminishes agency and executive power (Herz and Devins 2000; Zorn 2000).²³ As a result, while agency out-of-pocket litigation costs may be reduced by DOJ participation, these savings are offset by the need to monitor, oversee, and assist in litigation in order to ensure that agency policy interests are represented (Harvey 1996; Olson 1984). The presence of multiple lawyers from both the agency and DOJ results in inefficiencies, task duplication, and process delay (Devins 2003; Habicht 1985).

In response to judicial (and litigant) access to review, agencies often adopt highly inefficient and cumbersome means of regulating (Pierce 1988; Tiller and Spiller 1999; Wilson 1989). This can result in delay and distortion of policy (de Figueiredo and de Figueiredo, Jr. 2002). Scholars credit defensive agency behavior, such as extensive procedure, documentation, and fact-finding, with causing the virtual

²³ Sisk (2006, 57-59) notes that even settlement approval required by the DOJ may result in different (broader) policy perspectives than might be the case if the outcome was determined by the line attorney alone.

“ossification” of notice and comment rulemaking (McGarity 1992). Alternatively, agencies may dispense with rulemaking altogether, taking action instead in the form of “guidances” (Mendelson 2007). Accordingly, agency attempts to avoid litigation can result in static and unresponsive policy, often contrary to Congress’s broad delegatory intent (Breyer 1993; Hamilton and Schroeder 1994). Exacerbation of the 1990s electricity crises, and inefficiencies in agency oversight of vehicle safety standards, for example, are both attributed, in part, to agency reaction to litigation (Mashaw and Harfst 1987; Pierce 1991).

The case of the National Highway Traffic Safety Administration’s (“NHTSA”) choice in the late 1970s to switch emphasis from vehicle safety rulemaking to individualized automobile recalls illustrates this dynamic. The *National Traffic and Motor Vehicle Safety Act* was intended to turn the agency away from case by case decision making and toward the creation of broad, industry wide rules that would result in the production of safer automobiles. As the agency began promulgating rules, the rules were challenged in court and periodically overturned. For example certain rules requiring re-treaded tires meet specific performance standards were challenged by the tire industry, and struck down in court.²⁴ Of particular concern to the agency, were court decisions striking down or delaying rules requiring manufacturers to adopt technologically advanced safety mechanisms, and the prospect of continued litigation in this regard (Mashaw and Harfst 1987). This kind of rulemaking received close scrutiny by the courts and, because of its proactive and technical nature, was often difficult to defend by the agency as a solution to safety issues.²⁵ Case by case recalls,

²⁴ *H & H Tire Co. v. Department of Transportation*, 471 F.2d 350 (7th Cir. 1972).

²⁵ *Chrysler Corp. v. Department of Transportation*, 472 F.2d 659 (6th Cir. 1972); *PACCAR, Inc. v. National Highway Traffic Safety Administration*, 573 F.2d 632 (9th Cir. 1978) *cert denied* 439 U.S. 862 (1979); *National Tire Dealers and Retreaders Ass’n v. Brinegar*, 491 F.2d 31 (D.C. Cir. 1974).

on the other hand, while still generating some litigation, were easier to defend in court, in part because they were premised on demonstrable safety hazards, and did not require the agency to solve the problem by demanding a specific type of technology be put in place by all manufacturers. As a result, NHTSA shifted its behavior from rulemaking to recalls (Bagley and Revesz 2006; Cross 2000; Mashaw and Harfst 1987, 1990).²⁶

Congress and Litigation

To the extent Congress wishes legislative bargains to adhere, agencies to function smoothly, and courts to process cases with alacrity, Congress has reasons to damp excess litigation against the government. The political time and resources expended to pass legislation give Congress an interest in not being forced to revisit policy arrangements as a result of litigation. Nor does Congress wish to see legislative bargains disrupted through the diversion of resources that attend defending lawsuits, response to legal rulings, or agency attempts to avoid litigation. These changes in policy happen outside the congressional system, hence bypassing the dynamics and gains to congressional members that derive from constituent service.²⁷

Congress is both aware of and subject to political pressures concerning litigation's costs and policy disruption through a variety of sources. Pressures arise from other institutional actors, including the judiciary, agencies, and the Department of Justice, as well as interest groups negatively affected by the various inefficiencies and policy changes engendered by litigation and caseload increases. And Congress does take systematic action designed to reduce litigation against the government,

²⁶ But also see Coglianese (2002) who argues that litigation may not have had as dire an effect on agency behavior as some scholars claim.

²⁷ Congress's attitude toward policy litigation is not necessarily one of universal discontent. It is likely that in some instances Congress views litigation as a way to gauge a policy's effect (Smith 2006). Congress also may use the courts to flesh out the specifics of legislation either because full articulation comes at too high a political cost, or as a way to avoid responsibility for later constituent dissatisfaction (Arnold 1987).

although the congressional picture is a complex one, with new legislation increasing the public's access to the courts at the same time that other legislative provisions discourage such litigation.²⁸

The legislative histories of some jurisdiction stripping statutes, analyzed in more detail in Chapters Three through Five, evidence concerns expressed by and before Congress with the policy cost and delay caused by litigation. For example, in legislation designed to allow the Federal Housing Administration (“FHA”) to correct structural defects in property bought with FHA insured loans, provisions were added to remove judicial review of certain FHA decisions. At issue were “fears expressed that agencies will be inundated, that claims will be phony,”²⁹ resulting in “tremendous pressures which would be directed at the Congress and the FHA to tap the FHA insurance fund for the means to correct defects or other major and minor shortcomings in residential property. There would be no end to the controversies generated.”³⁰ Similar concerns arose in connection with the *Regulatory Flexibility Act of 1980* designed to allow the waiver of certain regulatory rules’ application to small businesses. The analyses prepared in anticipation of these waivers were not subject to judicial review so that, as one congressman noted, agencies would “not be bogged down with lawsuits before the agencies have even finished their rulemaking.”³¹ A second member observed that the cost of such policy delay meant that “[m]any valid

²⁸ Statutes, such as the *National Environmental Protection Act*, are often enacted that increase the cost of agency action. *NEPA*, which requires environmental impact statements for major government actions, is the source of considerable litigation against government agencies and is discussed in greater detail in Chapter Five.

²⁹ Carey Winston, President of the Mortgage Bankers Association of America, speaking before the Senate Subcommittee of the Committee on Banking and Currency, *Housing Legislation of 1964: Hearing Before the Subcommittee of the Committee on Banking and Currency*, 88th Cong., 2nd sess., 1964, 585. Testimony was in opposition to the provision.

³⁰ Statement of Senator Javets speaking before the Senate Subcommittee of the Committee on Banking and Currency, *Housing Legislation of 1964: Hearing Before the Subcommittee of the Committee on Banking and Currency*, 88th Cong., 2nd sess., 1964. Statement in opposition to the jurisdictional removal.

³¹ Congressman Bedell, speaking on the Regulatory Flexibility Act on September 16, 1980, 96th Cong., 2nd sess., *Cong. Rec.* 126, pt. 8456, Daily ed. (Sept. 8, 1980): H8461.

regulations are tied up in years of litigation, and small businesses often cannot afford the legal costs to participate. The judicial review standard in this bill is carefully designed to avoid needless litigation.”³²

Budget Pressure. The appropriations and budget process provides litigation information to Congress in the form of budgetary demands from agencies, the Department of Justice, and the judiciary. Whether Congress is responsive to fiscal and budgetary constraints given other political imperatives, including the desire to distribute benefits to constituents, is a matter of some contention (Ferejohn 1974; Maass 1951; Schick 1980). It is clear, however, that the demands of funding government operations are a matter of congressional concern, if only because political economy dynamics limit appropriations (Alvarez and Saving 1997; Fisher 1983; Ferejohn and Krehbiel 1987).

Operational costs for the federal judicial system have grown at a rate above federal budgetary growth in the last several decades. From 1985-1995 both the judiciary’s and the DOJ’s budgets each increased approximately 170%, about four times the overall rate of the federal budget during that same period (Judicial Conference 1995; Longan 1997). Although Congress may be aware of the financial needs of the judiciary and the burdens of rising caseloads, increased funding is often remedial at best. Additional budgetary appropriations did little to alleviate shortfalls in judiciary operational funding, with budget deficits ranging from \$100 million to \$400 million between 1988 and 1994, and similarly significant shortfalls continuing thereafter resulting in hiring freezes, non-judicial staff reductions, delayed facilities repair, suspension of certain court related post-conviction programs, and other cost cutting actions. These deficits are part of a longstanding pattern (George 2006; Longan

³² Congressman Rodino, speaking on the Regulatory Flexibility Act on September 16, 1980, 96th Cong., 2nd sess., *Cong .Rec.* 126, pt. 8456, Daily ed. (Sept. 8, 1980): H8474.

1997; U.S. Supreme Court, Chief Justice 1988-2004), suggesting that if Congress responds to caseload demands, increased funding to the judiciary is a constrained, and perhaps not favored, option.

Judicial Pressure. The judiciary regularly interacts with Congress regarding both the effects of increased caseloads and the potential legislative responses, urging Congress to take legislative action, specifically advocating restrictions on federal jurisdiction to reduce litigation flowing into the federal courts, as well as requesting increases in the judiciary's financial resources. These contacts come from the Administrative Office of the United States Courts ("Administrative Office"), the Chief Justice's year-end report, and congressional appearances by members of the Judicial Conference, the judicial organization that represents the federal courts' interests. To this end, the Administrative Office and the Judicial Conference coordinate regular testimony by members of the judiciary before congressional committees. The judiciary communicates its positions on a broad range of topics this way, including court workload, case filing patterns, jurisdictional issues, court efficiency and judicial system costs. These contacts are not sporadic. In the roughly 20 years covered by one study, Judicial Conference committee members appeared before or reported to Congress 211 times. Of these interactions, 59 were procedural rules-based reports and amendments transmitted for congressional approval and 152 represent committee member testimony before Congress on pending legislation or other legislative matters, in particular budgetary, workload, and jurisdictional issues (Chutkow 2008).³³

The Judicial Conference actively supports restrictions in federal jurisdiction, urging Congress exhibit jurisdictional restraint in new legislation. In this regard, the Judicial Conference took positions on such widely divergent legislative issues as

³³ These statistics underestimate the number of times Congress is lobbied by the judiciary, since the data only includes appearances by member of the Judicial Conference.

restrictions on social security claims, diversity jurisdiction, class action rights, NAFTA, asbestos related claims, habeas jurisdiction, medical privacy issues, governmental taking of private property, and animal research (Administrative Office 1994, 1999, 2005; Nixon 2003; Resnik 2003). Diversity jurisdiction, where disputes between private citizens of different states may be heard in federal court, has been a subject of judicial dissatisfaction since at least the 1950s (Resnik 2003).

Agency Pressure. Agencies and Congress continuously interact, through informal contacts, legislatively dictated reports, and congressional hearings and testimony. One study, for example, found that congressional committees engaged with the Environmental Protection Agency between 92 and 213 times a year (Lazarus 1991). Agencies are an important source of both technical and policy-based information for Congress and the relevant committee overseeing agency action (Balla and Wright 2001; Banks and Weingast 1992; Ripley and Franklin 1990). This includes not only are budgetary concerns, but also a wide variety of other subjects that relate to policy implementation and agency operation, including legal challenges to agency policy.

As organizations, agencies seek to maximize their budgets, their resources, and their control over policy (Macey 1992; McChesney 1990), and are incented to lobby Congress for increases in each. To the extent that federal litigation against agencies increases uncertainty over policy outcomes, by interjecting a potential third party arbiter, the courts, depletes resources, and does not contribute sufficiently to budget increases, agencies have an interest in pushing Congress for a respite from litigation. Agencies support streamlined agency-based adjudication procedures outside of the cumbersome processes required by the *Administrative Procedure Act* for just these reasons (Funk 1993; Howarth 2004; Levy and Shapiro 2003). In addition, any congressional action that increases the barriers to suit accomplishes some of this task.

These are discussed in more detail in the next section in the context challenging policy through litigation or lobbying. By way of initial example, sovereign immunity, the principle that the government cannot be sued while conducting government business, has been waived in multiple statutes thereby allowing administrative, tort and contract challenges to agency action. Congress could reinstate sovereign immunity in selected areas through legislation. And, due to their extensive contacts with agencies, congressional committees are kept informed of the policy and monetary implications when agencies are forced to defend lawsuits.

Interest Group Pressure. Actors with political access and sufficient resources to influence legislation have a strong incentive to lobby Congress for jurisdictional removal over a policy area if the legislative bargain struck is in their favor. This is particularly true if subsequent litigation disrupts (or is likely to disrupt) an advantageous policy arrangement. Controlling court access prevents other interest groups from using litigation threats, case filing costs, and potential case outcomes as a strategy to manipulate or delay policy.

Interest groups often use litigation either in conjunction with, or as an alternative to, lobbying. The calculus behind this choice is a function of interest group incentives and turns on resources, the costs of lobbying versus litigation, and the chances of a positive outcome given the chosen approach (Rubin, Curran, and Curran 1999). In this dynamic, politically disadvantaged groups often view litigation as a cost efficient alternative to the political process (de Figueiredo and de Figueiredo 2002; Scheppele and Walker 1991; Schlozman and Tierney 1986). This alternative can be used to change policy through court order, or to impose litigation costs and delay thereby gaining leverage over how a policy is implemented. For resource-rich groups, the costs to an agency of defending lawsuits can be an effective bargaining tool at the rulemaking stage (de Figueiredo and de Figueiredo, Jr. 2002). Or agencies and

interest groups can cooperate to reduce the number of actors with influence over agency policy by engaging in court action, thus limiting participation to the parties before the court (Coglianese 1996). If a group is able to successfully influence legislation in its favor, removing jurisdiction over specific policy areas protects that group's interests by removing the costs of threatened litigation from the arsenal of potential adverse interests seeking to change or delay policy implementation.

Table 2.2 sets out examples of policies that affect interest group decisions to litigate rather than lobby for policy change. Actions that restrict access to the judiciary are often those that either foreclose review entirely, or increase the costs of review. Jurisdiction stripping is one of these. Sovereign immunity is another, as are requirements that a litigant exhaust all administrative remedies before challenging agency policy in court. These exhaustion provisions, common in many administrative statutes, mean that the potential plaintiff must expend time and resources to seek review with the agency decision maker and any available agency tribunal before filing in federal court.

Policies that make litigation an attractive method for challenging government action operate in the opposite manner by reducing barriers to entry and reducing litigation costs. Federal courts operate under the concept of notice pleading,³⁴ which means filing a complaint in federal court requires little more than a statement of facts that can support a legal claim, an explanation of court jurisdiction, and a demand for relief. The *Administrative Procedure Act* waives sovereign immunity over agency actions. The *Federal Tort Claims Act* allows tort suits against government actors. The *Tucker Act* authorizes the court to hear contract disputes between public and private parties. Fee shifting provisions, such as the *Equal Access to Justice Act*, alleviate plaintiff litigation costs under certain circumstances when the government is sued.

³⁴ Rule 8, Federal Rules of Civil Procedure.

And broad statutes like the *National Environmental Policy Act*, coupled with court decisions such as *Chevron U.S.A. v. Natural Resource Defense Council* (1984),³⁵ provide the legal basis, and court access, for litigants to mount administrative challenges.

Similar principles operate with respect to lobbying. Anything that places entry barriers on lobbyists or limits the amount of money that can be donated to congressmembers operates to restrict lobbying access. This includes campaign contribution limits, disclosure requirements, and limits on lobbying by past government employees.³⁶ On the other hand, policies that allow the transfer of money or encourage contacts between trade associations or interest groups and members of Congress all make lobbying an attractive method for policy change. These latter include the unlimited activity of issue organizations (formed under section 527 of the Internal Revenue Code), notice and comment procedures adopted by agencies during rulemaking or other actions, and congressional reliance on interest groups for expertise and information regarding policy formation.

Congressional Response to Litigation

Congressional response to these multiple pressures, budgetary, inter-branch lobbying, and interest group constituents, results in a complex picture in which Congress legislates in reaction to increasing levels of litigation in the federal system, while at the same time passing public laws that by their very nature provide expanded public access to the federal courts. Given the nature of court jurisdiction, the default position is that virtually any piece of legislation can act as the basis for a lawsuit.³⁷

³⁵ Allows for review of agency action with level of deference depending on the language of the authorizing statute. *Chevron U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837 (1984).

³⁶ *Lobbying Disclosure Act of 1995*, as amended by the *Honest Leadership and Open Government Act of 2007*, Public Law 110-81, *U.S. Statutes at Large* 121 (2007): 735; *Ethics in Government Act of 1978*, *U.S. Statutes at Large* 92(1978):1824.

³⁷ The judicial power in Article III includes all cases and controversies arising under federal statutes, the Constitution, and treaties (U.S. Const. art. III). Broad waivers of sovereign immunity in the

Accordingly, patterns of increased legislative activity, including the growing use of omnibus legislation (Krutz 2001; Mayhew 1991; Oleszek 1996; Sinclair 1997), create new avenues for litigation. In response to political demands from constituents, Congress often explicitly increases federal jurisdiction. The influence of corporate interests and recent amendments to class action rules that favor federal court filings are one obvious example (Burbank 2008; Purcell 2008).³⁸

Table 2.2. Policies Affecting Litigation and Lobbying Choices

	Restricts Access	Opens Access
Litigation	Jurisdiction Stripping Sovereign Immunity Statute of Limitations Diversity Requirements Standing Requirements Government Privileges Exhaustion Admin Remedies	Notice Pleading Fee Shifting (<i>EAJA</i>) Sovereign Immunity Waivers <i>Chevron</i> Citizen Suit Provisions Class Action Rules Broad Statutory Language (<i>NEPA</i>)
Lobbying	Campaign Contribution Limits <i>(McCain-Feingold Act)</i> Federal Election Commission Internal Congressional Ethics Rules Past Gov Employee Lobby Limits <i>Lobbying Disclosure Act</i>	Campaign Contribution Loopholes (Soft Money Transfers -527 Orgs) (Political Action Committees) (Party Committee Donations) Agency Notice and Comment Congress Reliance Info/ Expertise

Administrative Procedure Act, Federal Tort Claims Act, and Tucker Act, to name a few, contribute to jurisdiction over government actors.

³⁸ The legislative fight over the Class Action Fairness Act of 2005 was long and complex, and while, as a general matter, business interests and the plaintiff's bar were on opposite sides of many aspects of the bill, in particular regarding federal jurisdiction, there were also many other provisions that represented a "win" for the plaintiff's side.

And there are many reasons why Congress might prefer to allow court and litigant involvement in policy-making: to avoid electoral consequences or take later political advantage of unpopular court decisions (Arnold 1990; Spence 1997), as an enforcement mechanism (Grant 1997; Spence 1999), or to provide information on how a policy actually operates once it is put in to effect (Smith 2006). However, it is clear that, despite reasons to expand court jurisdiction, Congress also acts in a number of ways designed to alleviate litigation's impact on government actors. These actions fall in to two general categories: resource expansion and procedural limitation.

Expanded Adjudication Resources. As the federal court's work load increases, Congress provides the judicial system with additional financial and personnel resources, as well as crafting dispute resolution alternatives that move cases out of the federal courts and into non-Article III adjudications, such as those conducted by magistrate, bankruptcy, or administrative law judges. Direct financial support for the Article III judiciary continues to grow.³⁹ Judiciary spending (in 2002 dollars) increased from about \$56 million in 1962 to roughly \$5 billion in 2002, an increase, as a percent of overall government spending, from 0.40% to 1.91% (Galanter 2004). Appropriations for the federal judiciary, exclusive of supplemental appropriations, reflect this trend, rising from \$1.192 billion in 1987 to \$6.246 billion in 2008.⁴⁰

The creation of non-Article III judges to resolve disputes is in many ways a cost savings device for Congress, as well as a way to alleviate work load pressures on the federal judiciary. Resnik (2002) estimates, for example, that the initial cost for a new district court trial judge, including salary, staff, facilities, and security is about

³⁹ Although, these increases still fail to cover the full financial needs of the courts system, as evidenced by persistent budgetary shortfalls.

⁴⁰ Administrative Office of the United States Courts, *Annual Reports of the Director*, 1987-2008, (Washington 2007).

\$849,572, with annual continuing costs of \$758,653. A newly appointed magistrate judge is a less expensive alternative to handle litigation demand, estimated to cost \$684,834 initially, with annual maintenance expenses of \$596,751. The political capital required for creating non-Article III positions is also less, since life tenure is not part of the equation (Resnik 2002).

In 1968, Congress passed the *Federal Magistrates Act*, in an attempt to address federal judges' burgeoning workloads, and in response to lobbying from the Judicial Conference and the Administrative Office (Robbins 2002; Silberman 1989). The Magistrates Act allowed judicial officers who were not Article III judges to take over some of the ministerial work of district courts, including pre-trial matters, motions work, discovery, and, with the parties' consent, certain civil disputes. From 1990-2007, authorized, full-time magistrate positions increased 53.5% from 329 to 505.⁴¹

The creation of bankruptcy courts also was a response to crowded federal court dockets, and political economy concerns. While bankruptcy referees were a part of the judicial landscape since 1898, the increasing volume of civil bankruptcy proceedings in the late 20th century resulted in a significant expansion of the bankruptcy judges' authority and autonomy (Countryman 1985; Resnik 2002).⁴² In the last decade alone, the number of authorized bankruptcy judges grew 21%, from 291 to 352.⁴³

Congress also created numerous Article I, administrative courts to handle disputes between the public and the government over regulations, policy, and benefits, although the scope and legitimacy of these courts gave rise to rather murky case law.⁴⁴

⁴¹ Administrative Office of the United States Courts, *Annual Report of the Director, Judicial Facts and Figures*, "Table 1.1: Total Judicial Officers, Courts of Appeals, District Courts, and Bankruptcy courts, 1990-2007," (Washington 2007) ("AO 2007 Report").

⁴² *Bankruptcy Reform Act of 1978*, Public Law 95-598, *U.S. Statutes at Large* 92 (1978): 2657, 2549; *Bankruptcy Amendments and Federal Judgeship Act of 1984*, *U.S. Statutes at Large* 98 (1984):333.

⁴³ AO 2007 Report, Table 1.1.

⁴⁴ Generally, legislative courts are legitimate when adjudicating public rights, but what those rights entail is not always clear. See, for example, *Northern Pipeline Construction Co. v. Marathon Pipeline Construction Co.*, 458 U.S. 50 (1982), *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

As the administrative state grew, so did the use of administrative law judges and other bureaucratic actors to resolve disputes over public law. In 2001, there were 1,370 administrative law judges as compared to 590 active district court judges and 281 senior court judges.⁴⁵ That year, administrative law judges in the Social Security Administration, Immigration and Naturalization Services, Board of Veterans' Appeals, and Equal Employment Opportunity Commission cumulatively disposed of close to 720,000 disputes (Galanter 2004; Resnik 2004). Frye (1992) estimates that by 1992, roughly 2700 administrative adjudicators, other than administrative law judges, handled about 343,000 cases covering such wide ranging topics as immigration disputes, social service benefits, and veterans' affairs.

Congress also increased the judicial system's workforce, at the judgeship, senior judge, and staff levels.⁴⁶ Authorized district court judgeships were 193 in 1943 and 678 in 2007, a 351% increase. Authorized appellate judge positions also increased roughly three times, from 58 in 1943 to 179 in 2007. At the same time, the use of senior judges expanded. These are judges who relinquish their seats on an appellate or district court, but continue to hear cases. In 1990 there were 201 active senior judges at the district court level, and by 2007 that number increased 54.2% to 310. The same increases occurred at the appellate level, where the number of senior judges increased 69.8% between 1990 and 2007, from 63 to 107. So too, Congress increased non-judicial support staff. In 1962, there were 18.9 non-judicial employees per Article III district court judge. By 1992, there were 45.9 such employees for each district court judge. There are no accurate figures after 1992 (Galanter 2004).

⁴⁵ Administrative Office of the United States Courts, *Annual Report of the Director, Judicial Facts and Figures*, "Table 1.1: Total Judicial Officers, Courts of Appeals, District Courts, and Bankruptcy Courts," (Washington 2005).

⁴⁶ All figures on authorized judges and senior judges are from the Federal Judicial Center, <http://www.fjc.gov>, (accessed January 21, 2009), or from the AO 2007 Report.

The problem with responding to increased workload in the federal courts by increasing resources, personnel, and creating alternative decision-makers is that it costs the government money. And as a strategy, while it may relieve court congestion, it does little to alleviate the costs, both policy-based and economic, imposed on agencies and Congress, by litigation that targets the federal government as a defendant.

Procedural Limitations. Procedural and structural impediments to litigation against the federal government (or advantages to government actors) offer an attractive alternative to greater resource allocation. First, they are largely revenue neutral ways to provide strategic or practical advantages to government defendants. Second, they can specifically target litigation against the federal government, and even specific policy areas. The operative strategy is to institute changes to the system that leverage off a potential litigant's incentive structure. This is well studied at the individual level in the law and economics literature, but can be applied with equal force as an institutional strategy.

An individual's decision to file a lawsuit against the government is a function of the plaintiffs' litigation costs, perceived probability of a trial, chances of winning, anticipated judgment value (be it economic or policy change), and the government's defense costs (Gould 1973; Landes 1971; Posner 1973; Priest and Klein 1984). A plaintiff becomes increasingly less likely to file suit against the government as her costs go up, as the chances of a trial increase, and as her chances of winning, the value of the judgment, and the government's defense costs go down (Eisenberg and Farber 2003).

The law and economics literature examines this dynamic with respect to individual litigation decisions in numerous contexts. Litigation rates and case filings are affected by changes in plaintiff's costs associated with counsel expense and

contingency fee arrangements (Dana and Spier 1993; Danzon 1983; Hay 1996; Miller 1987; Rubinfeld and Scotchmer 1993), fee shifting (Hughes and Snyder 1995; Kritzer 1984; Shavell 1982; Snyder and Hughes 1990),⁴⁷ and the provision of counsel to indigent criminal defendants (Schwab and Eisenberg 1988). Information asymmetries affect a plaintiff's calculus and can both decrease the chances of litigation by increasing the outcome uncertainty or can result in more litigation where the true range of settlement options is distorted (Bebchuk 1984; Hylton 1993; Reinganum and Wilde 1986; Schweizer 1989; Spier 1992). And control over the forum can decrease a party's litigation costs, and increase both a party's chances of winning and judgment size, conferring a significant tactical advantage (Algero 1999; Bassett 2006; Clermont 2008; Clermont and Eisenberg 1995, 1998; Eisenberg and LoPucki 1999; Juenger 1989; Maloy 2005).

Congress exploits this same dynamic with respect to litigation against the government in a variety of ways. Government actors are often favored in litigation through a series of piecemeal actions by Congress, including retention of basic immunities and privileges, relaxed procedural rules, jury trial limitations, administrative exhaustion requirements, statutes of limitations, and exemptions from legal liability.⁴⁸ Some of the procedural advantages for the government are rules derived from the common law, which Congress, by virtue of inaction, or only limited action, keeps in place. Government actors are entitled to a variety of privileges that prevent private litigants from obtaining information normally available at trial. From a

⁴⁷ Schwab and Eisenberg (1988) find, however, that fee shifting statutes do not appear to increase civil right filings.

⁴⁸ Much like increased legislative activity, these restrictions offer a complex and often contradictory picture in which Congress expands federal government liability generally, while removing or curtailing it in specific areas. The *Administrative Procedure Act* (U.S. Code 5 §701) expressly authorizes private action against government agencies. Numerous broad based waivers of sovereign immunity, including the *Federal Tort Claims Act*, open the government to suit in tort and contract (Jackson 2003; Sisk 2006). Actions under writs of mandamus, issued by the courts and directing action by government actors, also afford private citizens litigation rights.

plaintiff's perspective, this both increases discovery costs and decreases the chances of a positive outcome. These include executive communications of the president, insulation of senior government officials and agency heads from discovery requests covering their policy deliberations, and nondisclosure of national security or state secrets (factors confounding those challenging military tribunals at Guantanamo) (Amar and Katyal 1995; Kennedy 2005; Sisk 2005).

By the same token, government actors generally are immune from suit when acting in their official capacity, unless Congress expressly waives that immunity.⁴⁹ One underlying rationale for this principle stems from a desire to limit public interference with policy through the use of litigation (Chemerinsky 2001; Jackson 2003; Krent 1992; Randall 2002). Despite this protective default position, political expediency compelled Congress specifically to allow suits in a broad range of issue areas including tort, employment, and contract claims against the government (Jackson 2003; Sisk 2006).⁵⁰ With respect to agency policy-making and action, the *Administrative Procedure Act* anticipates judicial review absent congressional abrogation, and many agency enabling statutes and later amendments contain "sue or be sued" provisions that explicitly provide private citizens with access to federal courts to challenge agency policy (Pfander 1997).

However, these governmental immunity waivers often include restrictions on how litigation may proceed, which, at least in specific policy areas, increase plaintiff costs as compared to litigation not involving the federal government. As a general matter, no jury trial is allowed when a statute provides for civil litigation against the government (Sisk 2006), a condition which some scholarship suggests may advantage

⁴⁹ For claimed constitutional violations this immunity extends if the government actor was performing a discretionary governmental function and was acting at the time within a clearly established rule of conduct (*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

⁵⁰ *Federal Torts Claim Act*, U.S. Code 28 (2004), § 1346(b); *Equal Employment Opportunity Act of 1972*, U.S. Code 42 (2004), §2000; *Tucker Act*, U.S. Code 28 (2004), §1491.

the government due to judicial predilections in its favor (Songer, Sheehan, and Haire 1999).⁵¹ Many administrative challenges cannot be brought to federal court until all administrative review options are exhausted first, a requirement which vastly increases a plaintiff's overall litigation costs if they lose at the administrative level. This applies to Social Security disability claims, which constitute a significant source of litigation against the federal government (Sisk 2006). Statutes of limitation for bringing the government in to court are often short, as is the case with the *Federal Tort Claims Act*, which requires filing within two years.

Finally, some statutes create government exemptions from areas in which the government might otherwise be susceptible to suit. *The Americans with Disabilities Act of 1990* and *Age Discrimination in Employment Act of 1967* both exempt the federal government from the definition of "employer." This has a variety of ramifications, not least of which are limits on suits against the government under civil rights statutes (Sencer 2004).

The Litigation Economics Model

Litigation pressures created by lawsuits against the federal government cause Congress to respond in ways designed to mitigate litigation's impact. Altering the structure and process of litigation in a way that changes the incentive structure underlying a plaintiff's decision to file suit is one, economically efficient, congressional response. When Congress passes legislation that completely strips federal court jurisdiction over a specific policy area, a plaintiff's expected value of filing suit approaches zero.⁵² In this regard, jurisdiction stripping is a strategic behavior in which Congress manipulates the rules of litigation in a way intended to

⁵¹ Other scholars find the effect unclear (Eisenberg and Farber 1997).

⁵² Depending on the language of the statute, or perhaps despite the language, a plaintiff may still file a constitutionally based challenge over government action. This is explored in more detail in Chapter 5.

discourage certain suits against the federal government.⁵³ This dynamic can best be understood by first looking at the models that explore a plaintiff's incentives to engage in litigation and a defendant's incentives to settle, and then applying the insights to factors specific to legal action against the United States.

Case Selection. The basic case selection model presented here is drawn from Eisenberg and Farber (2003) which expands on the litigation models developed by Landes (1971), Gould (1973), Posner (1973), and Priest and Klein (1984), modified slightly to place the United States as defendant. This model posits that a plaintiff will not file a lawsuit unless the plaintiff's expected value of that suit, $E(V_p)$, exceeds zero. For the purpose of the model described here, it is assumed that the plaintiff and defendant are able to ascertain these values and are not operating under conditions of asymmetric information.⁵⁴ Litigation's expected value to the plaintiff is a function of the probability of winning, costs, and the value of the suit's outcome, as expressed in the following formula:

$$E(V_p) = V_p(\pi, J, C_p, C_d) \tag{1}$$

Where π is the probability that the plaintiff will win at trial, J is the value of the judgment for the plaintiff (whether it is monetary damages, delay of agency policy, or some other modification to the government action being contested), C_p is the plaintiff's litigation costs, and C_d is the United States defendant's costs of litigation.

The expected value of a lawsuit to the plaintiff is also a function of the probability that a case will go to trial (P) or settle ($1-P$) and the anticipated trial outcome (Y_t) or settlement outcome (Y_s). In other words,

$$E(V_p) = PY_t + (1-P)Y_s \tag{2}$$

⁵³ Again, whether it is effective in doing so is a separate question, and is reserved for later study.

⁵⁴ For models incorporating other conditions see Bebchuk (1984), Daughety and Reinganum (1994), Hylton (1993), Priest and Klein (1984), Reinganum and Wilde (1986), Shavell (1996), and Spier (1994).

Plaintiff's Anticipated Trial Outcome. In order to complete equation (2), one must determine P , Y_t , and Y_s . Both the plaintiff and the defendant will have their own unique assessments of the probability that the plaintiff will win at trial. These are denoted as π_p and π_d .⁵⁵ Calculation of Y_t is fairly straight forward for the plaintiff. It is the plaintiff's assessed likelihood of a trial win multiplied by the expected judgment (J) and reduced by plaintiff's litigation costs.

$$Y_t = \pi_p J - C_p \quad (3)$$

Plaintiff's Anticipated Settlement Outcome. The plaintiff's expected value of settlement (Y_s) is a function of what is often called the "contract set," or settlement zone, which identifies the minimum value a plaintiff must be offered and the maximum value a defendant is willing to provide in order to make settlement more attractive than trial for both parties. These values, in turn, are a function of the potential trial judgment (J), each party's assessment of the probability the plaintiff will win at trial, and each party's costs of litigation (C_p for plaintiff and C_d defendant). For the plaintiff this means that the minimum settlement offer must be equal to or greater than what she believes she can get at trial, $\pi_p J - C_p$.⁵⁶ For the U.S. defendant the maximum amount the defendant is willing to forgo in order to settle must be less than or equal to the defendant's expected loss at trial, $\pi_d J + C_d$. The settlement zone is depicted in Figure 2.2 below.

⁵⁵ Eisenberg and Farber (2003) note that the probabilities of trial or settlement are actually a function of the agreed upon probabilities plus an idiosyncratic assessment of the probabilities that is individual to the defendant and plaintiff. This can be due to asymmetric information, or other varying risk assessment factors. Since the idiosyncratic aspect of perceived probability arguably is unknowable, unless otherwise noted, this analysis treats perceived probability as a unitary concept, with the understanding that the differences in a defendant's or plaintiff's perception of probability is likely attributable to a variety of factors including possible asymmetric information, experiential differences, and idiosyncratic components.

⁵⁶ This analysis assumes that the cost of settlement is zero. See Hylton (1993).



Figure 2.2. Settlement Zone

In order for settlement to take place, the settlement zone must be weakly positive. Conversely, if the settlement zone is empty (less than or equal to zero) the plaintiff will choose to go to trial.

Y_s must be within the settlement zone, therefore

$$0 < \pi_p J - C_p \leq Y_s \leq \pi_d J + C_d \quad (4)$$

Solving for Y_s is a bargaining game using threat points of litigation and a Nash solution that maximizes settlement value for both parties. The solution (Eisenberg and Farber 2003) is

$$Y_s = \pi_p J + (C_d - C_p) / 2 \quad (5)$$

This means that the maximum value of an efficient settlement rises as plaintiff's assessment of her trial chances and potential judgment rise, as defendant's costs of litigation rise and as plaintiff's costs of litigation fall.

Plaintiff's Anticipated Probability of Trial. Given the location of Y_s in equation (4), we can derive the components (and their directionality) that comprise plaintiff's assessment of the probability of trial (the last term needed to determine the expected value to plaintiff of filing suit). Since Y_s must be a positive number for

settlement to occur, the plaintiff will find trial more attractive than settlement under the following conditions.⁵⁷

$$J (\pi_d - \pi_p) + (C_d + C_p) < 0 \quad (6)$$

This formula can be used to identify the components (and their directionality) that comprise plaintiff's assessment of the probability of trial (P). Assuming the plaintiff knows her own assessment of winning at trial, rearranging equation (6) provides the plaintiff's with a formula for estimating the defendant's assessment of plaintiff's chances for trial success (a necessary piece of information for plaintiff to decide whether or not to litigate). From plaintiff's perspective, a trial will occur when the following condition is satisfied.

$$\pi_d < \pi_p - (C_d + C_p)/J \quad (7)$$

The probability (P) of a trial therefore becomes a function of $\pi_p - (C_d + C_p)/J$, with P increasing as plaintiff's individual assessment of winning (π_p) increases, the potential judgment (J) increases, and the costs of litigation to both plaintiff and defendant decrease.

Plaintiff's Expected Value of Filing Suit. Returning to plaintiff's litigation decision, modeled in equation (2), the formulas for plaintiff's expected value of trial (equation 3) and expected value of settlement (equation 5), we find the following

$$E(V_p) = PY_t + (1-P)Y_s \quad (8)$$

$$\begin{aligned} &= P(\pi_p J - C_p) + (1-P) (\pi_p J + (C_d - C_p)/2) \\ &= \pi_p J + (C_d - C_p)/2 - P (C_d + C_p)/2 \end{aligned} \quad (9)$$

Holding P constant, plaintiff's expected value of trial, and the probability that a plaintiff will instituted litigation, decreases as plaintiff's assessment of potential success decreases, as the potential judgment decreases, as defendant costs decrease,

⁵⁷If $\pi_d J + C_d - (\pi_p J - C_p) < 0$ then no settlement and trial. Rearranging the equation, $\pi_d J - \pi_p J + C_d + C_p < 0$; $(\pi_d - \pi_p) J < - (C_d + C_p)$; $\pi_d - \pi_p < - (C_d + C_p)/J$

and as plaintiff costs rise.⁵⁸ Table 2.3 shows the factors that influence a potential plaintiff's decision to file suit.

Table 2.3. Factors in Plaintiffs Decision Not to File Suit

Factor	Symbol	Increase in Factor = ↓ E(Vp)	Decrease in Factor = ↓ E(Vp)
Plaintiff's assessed chances of winning at trial	π_p		x
Anticipated Judgment Value	J		x
Plaintiff's Litigation Costs	C_p	x	
Defendant's Litigation Costs	C_d		x
Probability of Trial	P	x	

Notes. $E(V_p)$ is plaintiff's expected value of litigation such that $\pi_p J + (C_d - C_p) / 2 - P (C_d + C_p) / 2$

Case Selection and Complete Jurisdiction Stripping

Congressional actors know that reducing the chances of success in a lawsuit against the government reduces a plaintiff's incentives to sue. As the prior section demonstrates, a plaintiff's decision to file suit is affected by the parties' litigation

⁵⁸ If P is not held constant, equation (7) shows that there are indirect effects of case characteristics on the probability of trial (P) and hence on plaintiff's expected value of filing suit. In particular, as J increases and C_p decreases the effect is to increase P. However, equation (9) shows that when P fluctuates, if all other terms are held constant, an increase in P will reduce $E(V_p)$. When the other terms are taken in to consideration, this only poses an issue with respect to C_p and J. Their direct effect on the equation (9) results in a countervailing increase in the expected value of litigation to the plaintiff. Eisenberg and Farber (2003) make the assumption that the indirect effects of C_p and J are not large enough to undermine their direct effects or alter the basic dynamic of the equation. The same assumption is made here.

costs, the plaintiff's assessment of both the chances of a trial and her chances for success, and the value of the potential judgment. A plaintiff's incentives to litigate decrease as a plaintiff's belief in a winning trial outcome decreases, or the judgment value decreases. Jurisdiction stripping operates in a straightforward manner: if legislation removes court jurisdiction, it removes the statutory basis for suit in federal court, leaving, as the only plausible jurisdictional basis, the constitutional claim that the removal itself violates some constitutional right, most likely due process.⁵⁹ As will be discussed in more detail in Chapter Five, the constitutional argument has not been successfully raised with respect to the jurisdiction stripping statutes in the dissertation databases.⁶⁰

If a non-constitutional case is filed, the most likely disposition can be assumed to be a 12(b) dismissal motion for lack of subject matter jurisdiction, or failure to state a claim, an action that is increasingly successful in federal courts for ending non-meritorious suits (Burbank 2004; Cecil, Eyre, and Rindskopf 2007).⁶¹ 12(b) motions take place after the plaintiff's pleading, but before discovery or the government defendant's answer. As a result, they are an exceedingly low cost way to dispose of litigation from a defendant's perspective, particularly when the defendant is an experienced and repeated litigator, as is the government. These motions are also less costly to the court, in terms of time and resources expended, since the standard practice is that pre-trial motions are handled by a magistrate judge.⁶²

⁵⁹ Suits in federal court must be both constitutionally and statutorily authorized. They must also fit within the limited jurisdictional province of federal courts. When the federal government is the defendant this jurisdiction must be based either on the Constitution, or a federal statute or treaty.

⁶⁰ Some of these cases survived to the appellate stage, but the court holdings deny the validity of the constitutional claim. See, *Biodiversity Associates* (1999); *Bowen v. Michigan Academy of Family Physicians* (1986).

⁶¹ Federal Rules of Civil Procedure, Rule 12(b)(1), Rule 12(b)(6).

⁶² While jurisdiction stripping reduces the likelihood of suit in specific policy areas, paradoxically other government actions in response to increased caseload, like adding additional magistrate judges and staff, may increase case filings by streamlining and speeding up the litigation process.

These various factors operate on the plaintiff's expected value of suit by reducing the probability of success at trial (π_p) to near zero, the potential judgment to near zero, the probability of the trial itself (P) to near zero, and at the same time keeping the defendant's costs (C_d) nominal in terms of both resource outlay and delay.⁶³ Applying the foregoing assumptions to the expected value of suit in equation 9 gives the following result:

$$E(V_p) = \pi_p J + (C_d - C_p)/2 - P(C_d + C_p)/2 \quad (9)$$

$$= \sim\emptyset + (\downarrow C_d - C_p)/2 - \sim\emptyset (\downarrow C_d + C_p)/2$$

$$= (\downarrow C_d - C_p)/2 \quad (10)$$

This means that a rational plaintiff will be incited to file suit under these conditions only if the defendant's litigation costs exceeded the plaintiff's litigation costs, a condition where some form of settlement might have a positive value for both the defendant and the plaintiff. This is an unlikely scenario, given the size and scope of the government's resources, its status as an experienced litigator, and the likely rapid disposition of the case through a pre-trial motion. The plaintiff would need to be a resource rich and experienced litigator, a possibility with certain interest group plaintiffs. However, the value of the suit is still comparatively small, most likely taking the form of some kind of settlement, but bounded as it is by the costs of the defendant, as set forth in equation 10. In sum, by stripping court jurisdiction,

⁶³ This presumes that courts will adhere to the jurisdictional removals, a dynamic explored further in the case study presented in Chapter 5. As a general matter, courts do honor jurisdiction stripping legislation. Courts can find jurisdiction over a policy area despite the explicit legislative language, but this occurs in two ways. First, the plaintiff may claim that the jurisdictional removal is a constitutional due process violation. This argument has not been successfully raised with respect to the jurisdiction stripping statutes in the database. Second, the plaintiff must find another statutory provision on which to base jurisdiction. If Congress strategically removes jurisdiction to dampen litigation, it is most likely to do so with respect to government actions that serve as the most common basis for suit, forcing plaintiffs to find other, presumably less advantageous, avenues to anchor litigation. The case study presented in Chapter 5 strongly suggests that Congress is targeting jurisdiction stripping at the statutory provisions most commonly used to support certain types of litigation against the government.

Congress alters the litigation incentives and makes filing a lawsuit against the government an inefficient endeavor.⁶⁴

Case Selection and D.C. Circuit Exclusive Jurisdiction

When Congress assigns jurisdiction solely to the D.C. federal courts, it engages in a hard-wired form of forum shopping. The economic model predicts that Congress does this to provide the government with a distinct litigation advantage. Concentrating jurisdiction in the District of Columbia federal courts reduces a plaintiff's expected value of suit, and accordingly her incentive to sue the government, by increasing plaintiff's litigation costs, and decreasing both a plaintiff's assessed chances of a favorable judgment and the government's defense costs.

Forum shopping is a tactical strategy in which plaintiffs chose to file suit in a court and a location that favors the plaintiff's case, whether due to a sympathetic judge, advantageous legal rules, plaintiff litigation cost savings, or defendant litigation cost increases. With respect to cases that can be heard in federal court, the strategic concerns include an assessment of defendant's rights of removal and venue, concepts that determine whether a case can be moved from a state to a federal forum, and whether a particular court is the appropriate forum within the federal system. Picking the location and court for litigation is an important tactical advantage that can positively impact case outcomes (Algero 1999, Bassett 2006; Clermont 2008, Clermont and Eisenberg 1998). Unlike a private actor, Congress can force litigation into a specific forum by passing legislation that strips jurisdiction from all courts but one. When Congress removes a plaintiff's ability to forum shop, it removes one of the

⁶⁴ It is possible that a plaintiff could file suit against the United States in state court. Depending on the nature of the suit, this runs up against several problems. First, by statute, monetary and tort claims against the United States must be filed in federal court (*Federal Tort Claims Act, Tucker Act*). Second, claims against any agency or federal officer may be removed by the defendant to take the case out of state court and put it into the federal system (*Judiciary and Judicial Procedure, U.S. Code 28 (2004), §1442*). Finally, jurisdiction stripping statutes purport to strip jurisdiction from all courts, presumably both state and federal.

ways that plaintiffs attempt to increase the odds of a favorable result. In doing so, Congress discourages litigation against government actors in the affected policy areas.

Forcing litigation into the D.C. federal courts decreases a plaintiff's expected value of suit in a variety of ways.⁶⁵ First, if forum shopping provides plaintiffs with a tactical litigation advantage, as the literature and practice so strongly assert, then taking away the ability to select a forum should reduce π_p , a plaintiff's assessment of her chances for success at trial.⁶⁶ Second, being forced to try cases in Washington, D.C. increases a plaintiff's litigation costs (C_p). Unless a plaintiff is physically located in the District of Columbia, pursuing a case in the D.C. courts imposes all the costs of conducting litigation from afar, including the costs of local D.C. counsel, and the coordination issues and expense of bringing witnesses and evidence to a distant court. This is particularly true if the government action being challenged is specific to a certain locale, for example cases filed against the Department of Agriculture for crop quarantines, or if the case involves individual-based claims, such as those created by social benefit programs. In such instances, either the evidence is strongly local, or the plaintiff is an individual for whom the impact of long distance litigation may be significant.

Government defense costs (C_d) also are likely to go down when the litigation is consolidated in one location, particularly when that location is Washington, D.C. As an initial matter, if all challenges to a certain government action must take place in one court, this allows both agencies and the Department of Justice to take advantages of efficiencies of scale. As opposed to multiple government actors handling litigation in

⁶⁵ This is considered from a macro level. It is likely true that certain plaintiffs might be advantaged by litigating in the D.C. courts, particularly if they maintain a presence in Washington, D.C. The argument presented here addresses only the broad based impact.

⁶⁶ Unless, of course, plaintiffs always select to litigate against the government in the D.C. courts. This is clearly not so. Any cursory perusal of the federal court filings and reported cases provides ample evidence that suits against the government are brought in multiple courts across the federal system.

courts throughout the country, or a single group of actors commuting to various courts to litigate on the government's behalf, forum assignment to the D.C. federal circuit allows for one court, and potentially one primary, local set of actors, to handle lawsuits. Although various agencies have satellite offices throughout the country, and U.S. Attorneys' offices are also regionally located, the main offices and policy decision-makers for federal actors are in Washington D.C. This means that when litigation occurs in the D.C. courts, costs and inefficiencies associated with conducting and coordinating litigation from a distance likely are reduced.⁶⁷

The selection of a single circuit to hear specified policy challenges also creates expertise and specialization by the forum court. This advantages the government in several ways. First, it reduces uncertainty about both court posture and outcome. The parties will be confronted with a smaller pool of judges (and potential judicial preferences) and the legal precedent at issue will be concentrated in a single circuit. This affects both parties to the litigation, but matters more to the defendant, who is sued because of taking some challenged action. Less uncertainty means that, because the likely outcome of litigation is better known, regardless of what that outcome is, a government defendant can better organize its actions to avoid litigation. Second, there is a greater "repeat player" advantage to the government, who is always the defendant, than there is to the numerous potential plaintiffs. This effect is exponential since multiple exclusive jurisdictional statutes direct litigation into the D.C. circuit. This dovetails, to some extent, with the disadvantage created by not allowing the plaintiff to pick her home forum.

Congress, as a strategic actor, can use any of these factors, individually or in concert, to reduce the likelihood of a suit against the government.

⁶⁷ Although not completely removed, as regional offices where a case arose may also be part of the process.

If plaintiff's assessed chances of winning (π_p) declines, then the expected value of suit in equation 9 also declines.

$$E(V_p) = \downarrow(\pi_p J) + (C_d - C_p)/2 - P(C_d + C_p)/2 \quad (11)$$

As equation 9 demonstrates, the costs of litigation play a significant role in determining a plaintiff's expected value of suit. Removing plaintiff's choice of forum places an even greater emphasis on these costs. And even if plaintiff's assessment of a winning litigation outcome (π_p) is held constant, fixing the forum in the D.C. federal courts still affects litigation costs in a way that discourages suit. This is because as plaintiff's litigation costs (C_p) increase, the incentive to file suit diminishes. An increase in C_p decreases $(C_d - C_p)/2$ and increases $P(C_d + C_p)/2$. In the context of the full formula this operates to lower the suits expected value as follows:

$$E(V_p) = (\pi_p J) + \downarrow[(C_d - C_p)/2] - \uparrow[P(C_d + C_p)/2] \quad (12)$$

By the same token, if defendant's litigation costs decrease, the expected value of plaintiff's suit also decreases, even if none of the other factors have an effect. When C_d is lowered $(C_d - C_p)/2$ lowers. $P(C_d + C_p)/2$ also decreases but by a lesser degree ($P C_d/2$), since P is a value between 0 and 1 that represents the chances a case will go to trial. In the context of the full formula this operates to lower the suit's expected value as follows:

$$\begin{aligned} E(V_p) &= (\pi_p J) + \downarrow[(C_d - C_p)/2] - \downarrow[P(C_d + C_p)/2] \\ &= (\pi_p J) + \downarrow[(C_d - C_p)/2 - P(C_d + C_p)/2] \end{aligned} \quad (13)$$

Fixing the forum in the D.C. federal courts allows Congress to use its powers over court jurisdiction to decrease the incentives for a plaintiff to file suit against the federal government, while at the same time potentially reducing the government defense costs should litigation occur. On a theoretical level, this is a rational, institutional response to litigation costs. What remains unanswered is whether these jurisdictional manipulations occur as predicted, and whether this type of legislation does in fact target causes of action in which the federal government is named as a defendant. These questions are explored in Chapters Three and Four.

CHAPTER THREE

JURISDICTION STRIPPING STATUTES

The economic model clearly points to jurisdiction stripping as a potential strategic congressional response to case filings against the federal government, but do these statutes exist and if so, what do they look like? Most scholars assume that Congress rarely eliminates judicial review (Gunther 1984; Peretti 1999; Resnik 1998). Because of the assumed rarity of these actions, despite a lively theoretical debate over the scope of congressional authority over the courts, little systematic, empirical attention is paid to jurisdiction stripping legislation. This chapter addresses that gap in the scholarship by examining whether jurisdiction stripping occurs and, if so, under what conditions. It considers all instances between 1943 and 2004 in which Congress expressly removes all court review. Two explanations are considered for why Congress might eradicate judicial review. The litigation economics model predicts that removing court jurisdiction is a response to litigation measured by burgeoning court filings against the federal government. Institutional scholars view jurisdiction stripping as a congressional mechanism to control court influence over policy when court and congressional ideology differs. A similar analysis of legislation granting exclusive jurisdiction to the D.C. federal courts is considered in Chapter Four.

The results show that Congress regularly, and with increasing frequency, strips jurisdiction from federal courts. When Congress takes such action, it appears to do so in response to operational concerns, particularly those associated with federal court case filings where the government is a defendant, and not in response to ideological differences between institutions. These findings strongly support the litigation based economic model of institutional response. Jurisdiction stripping appears to be less about Congress trying to control courts and more about mutual congressional, court,

and agency concerns with the delay and interference ongoing litigation brings to governmental business and strained court dockets.

Descriptive Analysis

In order to examine jurisdiction stripping behavior, public laws with provisions that expressly remove all jurisdiction from the courts were identified from all public laws passed during the sixty-two year time span running from the first session of the 78th Congress (1943) through the second session of the 108th Congress (2004).⁶⁸ Much of the theoretical literature is limited by defining jurisdiction stripping solely as a congressional response to conflict with the Supreme Court over the constitutionality of congressional action. This study defines jurisdiction stripping to include any statutory language stating that courts shall have no power of review, without predetermining why Congress chose to act and regardless of subject matter, or whether a statute is new or amended legislation. Relevant legislation was identified from Westlaw and Congressional Universe using keyword searches for all public laws including any of the following terms: “court,” “judicial,” “review,” “jurisdiction,” or “conclusive.”

Contrary to conventional wisdom, Congress explicitly and regularly removes court jurisdiction. As expected, jurisdiction stripping legislation is designed exclusively to insulate government actors from litigation. Since 1943, Congress passed 248 public laws containing 378 provisions expressly denying the federal courts any power of review. The bulk of the legislation identified prevents court review of

⁶⁸ Public laws were selected as the unit of analysis because they represent a final expression of legislative intent, whereas bills passed but not reaching the status of law arguably reflect various stages of strategic, interim position taking and signaling that may or may not be sincere. Less extreme restrictions such as cause of action limitations, relief, statutes of limitation, and procedural requirements for filing a claim are not included. These represent a continuum that culminates with jurisdiction stripping, and while litigation or ideology also may affect their frequency, the effect should manifest most starkly when the strongest form of jurisdictional manipulation (jurisdiction stripping) is examined. It is also possible that lesser court constraints exhibit dynamics independent of jurisdiction stripping which argues for studying them separately.

administrative decision making.⁶⁹ And while this study is concerned with the federal system, the statutes are not directed at the federal judiciary alone. Rather, the legislation purports to strip the power of review from all courts, whether state or federal. Typical legislative language simply states that “no court shall have power or jurisdiction to review” the specified action (*Atomic Energy Act and Atomic Weapons Rewards Act Amendments 1974*). For example, the *2002 Supplemental Appropriations Act* contains a provision that authorizes the Secretary of Agriculture to treat certain forests in Colorado for insect infestation and to begin forest thinning programs in the area. The Secretary’s actions under this legislative section are not subject to judicial review. The *Railroad Revitalization and Regulatory Reform Act of 1976* authorizes the Secretary of Transportation to supply loan guarantees for railroad improvement projects. The asset valuation of these guarantees cannot be challenged in any court. Similarly, no court has jurisdiction to review the Attorney General’s decisions with respect to paying awards for information regarding international terrorism under the *1984 Act to Combat International Terrorism*. Table 3.1 sets forth additional examples of typical jurisdiction stripping provisions.

Three categories make up roughly 60% of all jurisdictional removals (Table 3.2). Of these, legislation dealing with social benefits, such as Medicare/Medicaid reimbursement levels, social security payments, housing and food programs, or individual loss compensation make up the largest proportion, totaling 22% of all jurisdiction stripping provisions.

⁶⁹ It should be noted that none of these provisions address the courts’ right of constitutional review. Presumably courts may still address agency actions should they determine that the issue before them is constitutional in nature. This argument has occasionally been forwarded by litigants, but it appears that courts largely avoid abrogating these provisions on constitutional grounds (see, e.g. *Biodiversity Associates v. Cables*, 357 F.3d 1152 (10th Cir.), *cert. den.*, 125 S.Ct.54 (2004)).

Table 3.1. Sample Jurisdiction Stripping Provisions

Congress	Date	Public Law	Actions Not Reviewable by the Courts
79	1946	548	Price Decontrol Board decisions to remove commodity price caps.
81	1950	569	Determination by Secretaries of the military branches, Coast Guard, Geodesic Survey, or Public Health Service that certain personnel are entitled to payments due to mental incompetence.
85	1958	857	Decisions of the Veterans Administration regarding benefit claims or payments.
87	1962	415	Individual job training eligibility under Labor Department Training Allowance funding.
89	1965	110	Attorney General certifications under <i>Voting Rights Act</i> triggering appointment of examiners.
91	1970	518	Secretary of Transportation designation of a basic service system modernizing intercity railroad transport.
93	1974	377	Attorney General rewards for information on introduction of illegal nuclear material into the U.S.
95	1977	142	HEW determinations leading to suspension of payments to Professional Standards Review Organizations overseeing Medicare-Medicaid reimbursements.
97	1982	384	Agriculture Department's environmental roadless area review and evaluation statement.
99	1985	88	Agriculture Department's resale of timber from the Siuslaw National Forest.
101	1989	73	FDIC decision to keep certain financial information on savings associations from public disclosure.
103	1993	66	FCC adjustment of regulatory fees under amendments to the <i>Communications Act of 1934</i> .
105	1997	33	Certain payment adjustments made to rehabilitation facilities for inpatient rehabilitation services.
107	2001	11	Site choice and special use permit for World War II Memorial next to the Rainbow Pool in Washington, D.C.

Matters dealing with environmental regulation comprise the next largest category with 20% of all jurisdiction stripping provisions, the bulk of which occur after the early 1970s passage of comprehensive environmental laws such as the *National Environmental Policy Act*, the *Clean Air Amendments of 1970*, the *Clean Water Act of 1972*, and the *Occupational Safety and Health Act of 1970*. General law enforcement measures account for roughly 15%, and include matters such as informational awards, protection of undercover agents, implementation of airport explosive detection systems, and determinations by the Attorney General of certain civil penalties.

Table 3.2. Jurisdiction Stripping Law Categories 78th to 108th Congress

Category	Number of Provisions	Percent of Total
Social Benefits (including housing, food, loss compensation, social security, medical)	84	22.22%
Environmental Issues	76	20.12%
Law Enforcement	58	15.34%
Federal Administrative Matters (including federal land and employees)	45	11.90%
Industry Regulation	39	10.32%
Foreign Policy, Defense, and Veteran's Affairs	28	7.41%
Immigrations and Non-nationals	20	5.29%
Industry Benefits	14	3.70%
State Benefits (including transportation, schools, and urban renewal)	14	3.70%
(N)	378	

While jurisdiction stripping activity is low in the early years of this study, the incidence increases over time. Until the mid-1970s, an average congressional session produced 1.5 laws, or 0.4% of its legislation, with provisions removing court jurisdiction. From 1975 to 2004 that average rose to 2.3% of all legislation passed in each session. The most recent ten year average (104th through 108th Congress) is 3% of all public laws per session, the equivalent of roughly seven laws each session which contain provisions stripping the courts' jurisdiction. As well, certain years exhibit peaks of jurisdiction stripping activity. In the 98th Congress, Second Session (1984), 6.62% of enacted public laws contain provisions removing court jurisdiction, as compared to approximately 2% during the entire 97th Congress. Likewise, 6.53% of the 104th Congress's second session (1996) legislation stripped jurisdiction, well over twice the 2.27% activity during the first session (Figure 3.1).

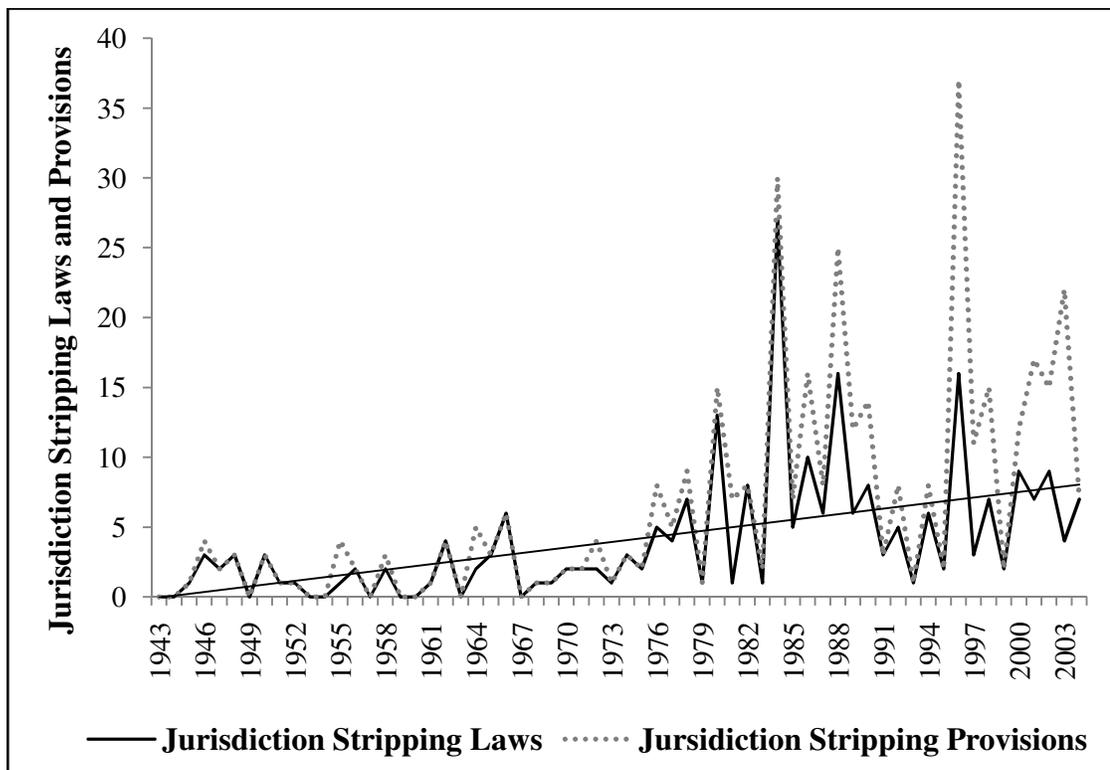


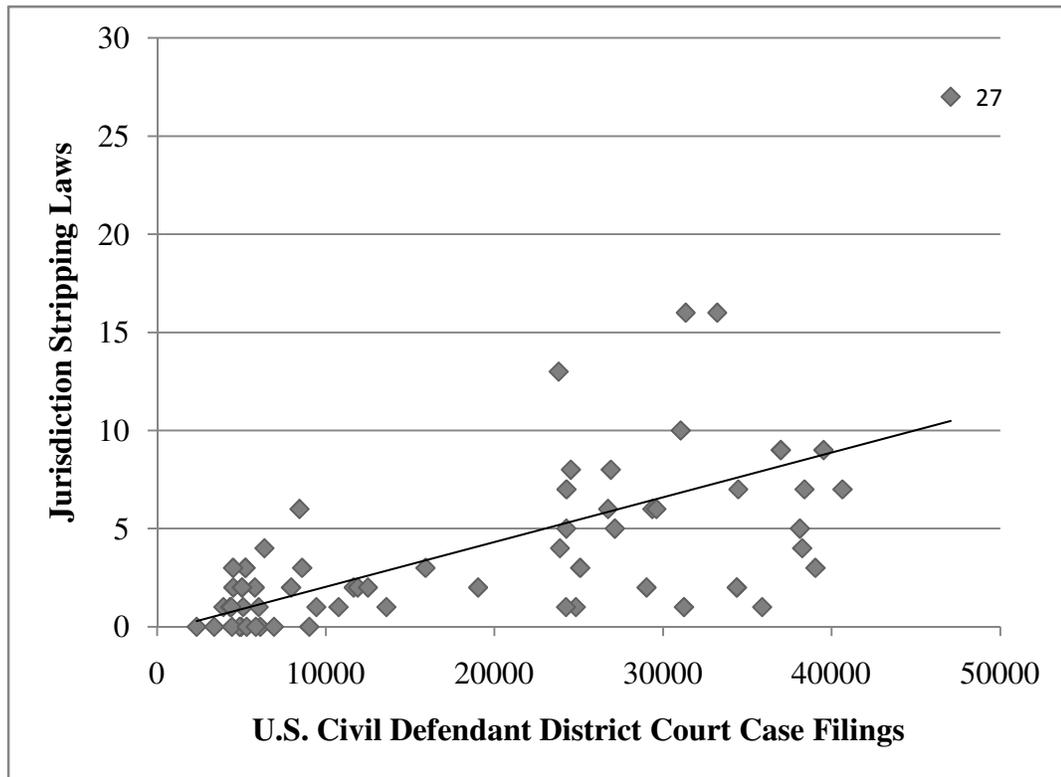
Figure 3.1. Jurisdiction Stripping Legislation and Trend Line, 1943-2004

The impact of omnibus legislation can also be seen. Figure 3.1 displays the number of jurisdiction stripping provisions passed within public laws in any given year. The pattern follows the overall pattern of jurisdiction stripping public laws passed, but with much higher increases in peak years. From 1984 to 1990, an average of 11 laws with 16 separate provisions were passed stripping jurisdiction. In the last eight years of the study, from 1996 to 2004, the annual average measure of legislation removing federal court review was 7 laws and 15 separate provisions per year.

The pattern of jurisdiction stripping activity by Congress appears to correspond to the levels of litigation against the federal government. Figure 3.2 sets out a scatter-plot with each year's incidence of jurisdiction stripping legislation on the Y-axis and the corresponding annual district court civil case filings in which the United States is a defendant ("U.S. Civil Defendant") on the X-axis.⁷⁰ There appears a clear trend, albeit a variable one, in which higher levels of jurisdiction stripping activity correspond to higher U.S. Civil Defendant levels (Figure 3.2). The data point, labeled "27," represents the height of jurisdiction stripping activity, which took place in 1984, with 27 public laws enacted containing jurisdiction stripping provisions. A significant portion of these laws address environmental matters, and form the basis for the case study presented in Chapter Five. This legislative behavior corresponds to a peak in civil case filings against the U.S. government, 47,053, the highest level reported in the sixty-two years covered by this study.⁷¹

⁷⁰ A scatter-plot analysis was also done with both variables transformed into logarithm base 10 to create a standardized unit of measurement. That graph also shows a similar relationship between the two variables, although with a considerably steeper slope. The congressional-years, early on in the study, where there was no jurisdiction stripping were coded as 0.001 for transformation purposes, and in the logarithmic version of the scatter-plot these data points were significantly separate from the rest of the data. These points were removed and the trendlines both with and without the removed data points were compared. There was no significant difference between these trendlines, and, accordingly, only the non-transformed analysis is reported.

⁷¹ For the multiple regression analysis reported later in this chapter, the dependent variable, jurisdiction stripping legislation, was transformed, using the data's square root, to attain a normal distribution. A scatter-plot using the transformed variable does not significantly alter the patterns displayed in Figure 3.2, and accordingly is not reported.



Source. Jurisdiction Stripping Dataset, 1943-2004. Notes. Pearson's correlation coefficient 0.63.

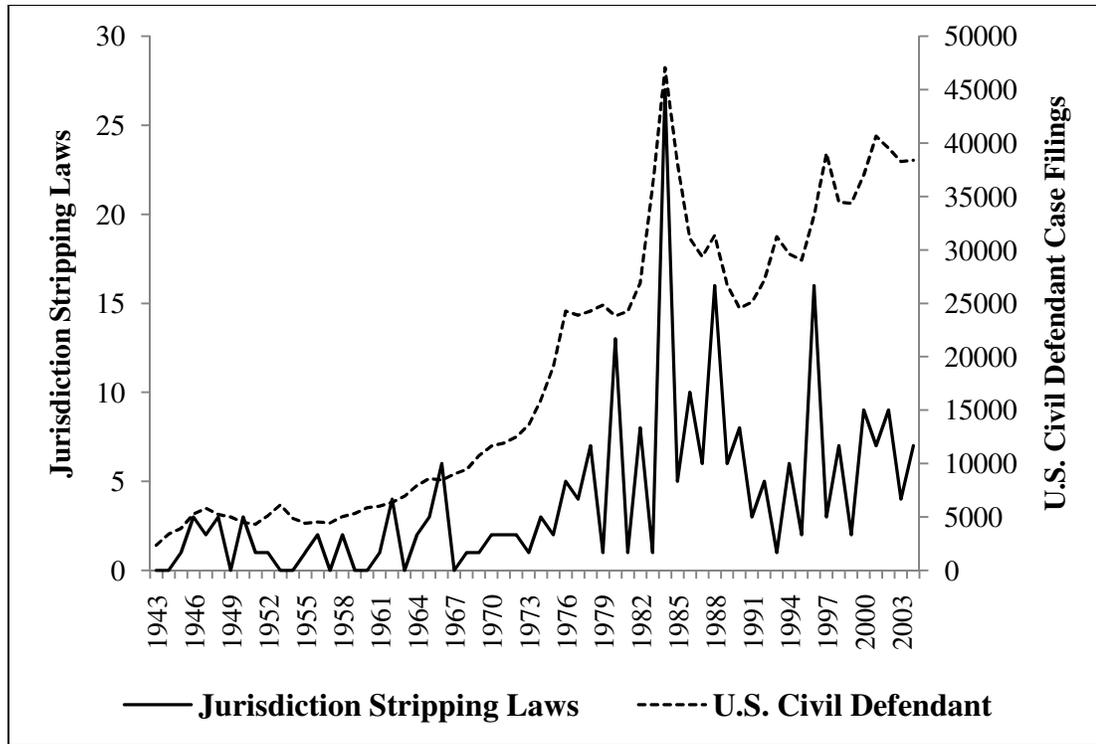
Figure 3.2. Scatter-plot of Jurisdiction Stripping Public Laws and District Court Case Filings with U.S. Civil Defendant, 1943-2004

U.S. Civil Defendant measures the primary area where economic pressure is visited on a broad range of government institutions, and, as argued earlier, it is the area where Congress can most effectively exert control by jurisdictional manipulation. It includes litigation initiated by private parties against agency actions of all kinds, excludes litigation engaged in solely between private parties (actions which do not directly implicate challenges to government policy),⁷² and captures actions under social security, labor, and environmental laws, subject areas that closely align with the most common categories of jurisdiction stripping legislation. District court filings

⁷² Civil cases in which the United States was a defendant are reported in Administrative Office of the United States Courts, *Annual Report of the Director, Judicial Facts and Figures* (Washington 2005), Table 7 (1942), Table 6 (1943-44), Table C-2 (1945-2004).

were chosen rather than case decisions or appeals because filings represent the point at which economic costs, including policy disruption, first attach regardless of final case disposition and without the winnowing process that occurs both as a case progresses and in connection with decisions regarding whether to file an appeal. Absent a specific legislative directive, district courts have initial appellate jurisdiction over challenges to administrative action.

U.S. Civil Defendant may be over inclusive, since it also includes tort and contract claims against the United States. However, given the wide range of jurisdiction stripping statutes and the multiple ways in which the federal government policy can be challenged (giving rise to jurisdiction stripping), the choice was made include all action against the federal government as opposed to predetermining which case types create the relevant litigation pressure. For example, 22% of the jurisdiction stripping laws involve social benefits including Medicare/Medicaid. This could implicate tort litigation associated with standards of care and authorized health providers that fall under the *Federal Tort Claims Act*. This choice is also an artifact of the variable set of case reporting categories used by the Administrative Office and the federal courts over the 62 years covered by this study, and the complicated nature of administrative law, where challenges to agency policy can take multiple forms (including tort and contract based actions) and can appear in agency tribunals, district courts, or appellate courts depending on the authorizing statute and legal nature of the challenge.



Notes. Pearson's correlation coefficient 0.63.

Figure 3.3. Jurisdiction Stripping Legislation and District Court Case Filings With U.S. Civil Defendant, 1943 to 2004

Jurisdiction stripping legislation and U.S. Civil Defendant also appear related in terms of steady growth over time as well as patterns of peak activity. Figure 3.3 compares the incidence of jurisdiction stripping legislation in each congressional session-year with corresponding U.S. Civil Defendant levels. Both variables are increasing, albeit unevenly, over time. In addition, they appear to share variability patterns. The high level of jurisdiction stripping in 1984, reported as data point “27” in Figure 3.2, is part of a larger pattern of increases and decreases in activity that correspond to similar patterns in U.S. Civil Defendant case filings. The number of jurisdiction stripping laws rose from 1 in the prior session (1983) to 27 in 1984 and back down to 5 in 1985. This aligns with a peak in civil case filings against the government during the same time period from 35,881 (1983) to 47,053 (1984) and back down to 38,117 (1985). A similar spike occurred a few years later, in 1988,

when jurisdiction stripping activity went from 6 to 16 and back to 6 public laws between the first sessions of the 100th and 101st Congresses (1987-1989), and the civil case filings against the government correspondingly fluctuated from 29,369 (1987) to 31,348 (1988) and back down to 26,741 (1989).

Empirical Analyses

The descriptive evidence supports the thesis that jurisdiction stripping behavior by Congress is a strategic response to litigation against the government. The texts of these laws speak exclusively about removing court review over decisions made by agencies or other government actors in their policy-implementing roles. The frequency of jurisdiction stripping legislation is increasing over time, and appears to have a strong correlation to the patterns exhibited by increased litigation in which the federal government is a defendant. The following section explores this dynamic further, using multiple regression analysis to test these apparent correlations and the hypotheses underlying them, as well as testing the alternative explanation, based on ideological positioning, offered by strategic institutionalism.

Strategic Institutionalism Model. If varying institutional ideology matters, as strategic institutionalism suggests, jurisdiction stripping should relate to the preferences of Congress, the courts, and agencies in the following ways. As court and congressional preferences move apart, court review no longer acts to keep agency policy in line with congressional goals. Under this scenario court review operates against congressional interests. Therefore, if agency ideology is closer to Congress than court ideology, Congress prefers agency policy to court policy, and court jurisdiction will be removed. Conversely, as agency preferences move away from Congress, court review becomes an important check on agency behavior, provided the court's preferences are closer to Congress than the agency's. Accordingly, jurisdiction stripping should not occur. These observations give rise to the following hypothesis:

Ideology Hypothesis: Jurisdiction stripping occurs when agency ideology is closer to Congress than court ideology.

For each congressional session, if ideology matters, jurisdiction stripping will occur when the court's ideological position is farther from Congress's position than the agency's. Once this condition is satisfied, the likelihood of jurisdiction stripping (x) should increase as the median court ideology (J) moves farther away from median congressional preferences (C) and agency ideology (A) moves closer to Congress.

This can be expressed with the following equation:

$$P|x = |C - J| - |C - A| \tag{14}$$

A positive number indicates that the court is farther away from Congress than the agency and jurisdiction stripping should occur. As the positive numbers increase, they evidence increasing distance between the court and Congress compared to decreasing distance between the agency and Congress. This should mean an increased likelihood of jurisdiction stripping. By the same token, a negative number means the court is closer to the Congress than the agency and, as a result, jurisdiction stripping should not occur. The larger the negative number, the less one would expect to find jurisdiction stripping.

Litigation Economics Model. On the other hand, if the primary motivation for jurisdiction stripping is concern about litigation cost, delay, and interference generated by parties outside of the federal government's control, one would expect to see a rise in jurisdictional removals correlate with a rise in federal case filings. Specifically, one would expect a strong correlation with civil filings where the United States is a defendant, cases that capture challenges to agency actions by private litigants. The alternate hypothesis states:

Litigation Economics Hypothesis: Jurisdiction stripping increases as civil case filings in which the United States is a defendant increase.

Research Design. To analyze these two hypotheses, this research tests for correlations between the incidence of jurisdiction stripping and either federal case filing levels or the ideological distance among Congress, agencies, and the federal courts as represented by the Supreme Court and federal Circuit Courts of Appeals.⁷³ As these are time-series data, Prais-Winsten AR(1) regression analyses are used with the jurisdiction stripping measurement as the dependent variable and each congressional session's litigation and ideological measurements as the independent variables. Prais-Winsten regression is a standard procedure used in time series regression modeling to address possible correlation of residuals with time resulting in autoregressive errors. It is a generalized least-squares linear estimator which adjusts for first-order autocorrelation by transforming the first observation so it is not lost (Yaffe and McGee 2000; StataCorp 2007).

Jurisdiction Stripping Variable. As described earlier, the number of public laws with provisions that fully remove jurisdiction from the courts were identified from all public laws passed during the sixty-two year time span running from the first session of the 78th Congress (1943) through the second session of the 108th Congress (2004).⁷⁴ Each session of Congress is the relevant point of analysis. The dependent variable, *Jurisdiction Stripping*, is the percentage of public laws in each congressional session containing jurisdiction stripping provisions. A percentage measurement was chosen to account for variations in the total number of public laws enacted across different congressional sessions.

Litigation Variable. As set forth in the prior section, the variable, *U.S. Civil Defendant*, measures the annual number of civil cases filed in federal district courts by

⁷³ The Eleventh Circuit, established in 1981, and U.S. Court of Appeals for the Federal Circuit, formed in 1982, are not included due to insufficient data.

⁷⁴ As stated previously, relevant legislation was identified from Westlaw and Congressional Universe using keyword searches for all public laws including any of the following terms: "court," "judicial," "review," "jurisdiction," or "conclusive."

private parties naming the United States as a defendant.⁷⁵ District court filings were chosen rather than case decisions or appeals because filings represent the point at which litigation disruption and court influence over policy first attach regardless of final case disposition and without the winnowing process that occurs both as a case progresses and in connection with decisions regarding whether to file an appeal.⁷⁶ Court filings are lagged one year to allow for congressional response time.⁷⁷

Ideological Measurements. The ideological variables measure distance among the Congress, courts, and agencies in each congressional session using each institutions' median member as the relevant actor. For all actors, preferences were measured using derivations of Poole and Rosenthal's common space scores (Poole 1998, 2005; Poole and Rosenthal 1997).⁷⁸ Using one measurement system for all institutions, including the courts, overcomes significant validity problems which arise when varying measurement strategies and metrics are used to identify different institutional preferences.

Congressional measures were derived for the floor median Nominate Common Space score in each congressional session.⁷⁹ Presidential Nominate Common Space scores were used as a proxy for overall agency ideology (Moe 1987; Tiller and Spiller

⁷⁵ Administrative Office of the United States Courts, *Annual Report of the Director, Judicial Facts and Figures* (Washington 2005), Table 7 (1942), Table 6 (1943-44), and Table C-2 (1945-2004).

⁷⁶ Given the rather arbitrary allocation of appellate jurisdiction, caseload pressures also were measured by using court of appeals filings and using district court civil filings with a U.S. defendant plus administrative appeals in appellate courts which represent challenges to agency adjudication filed directly in the courts of appeals. No material difference in the results was found.

⁷⁷ Litigation variables for the 1st, 10th, and D.C. Circuit analyses are squared to address normality issues with the residuals. The results are materially the same as analyses in which these variables are not transformed.

⁷⁸ The first dimension was selected since it is the primary dimension along which ideological divides are structured in Congress (Poole and Rosenthal 1997).

⁷⁹ Because the literature disagrees whether the relevant measure for Congress should be the floor median or the majority party median, both were obtained and analyzed (Aldrich and Rohde 2001; Cox and McCubbins 1993). In addition, the filibuster pivot identified with each congressional session's Senate majority party was also obtained and analyzed. As there was no significant difference in any of these results, only the results from the floor median analyses are reported.

1999; Wood and Anderson 1993). The score for Truman was taken from his Nominate Common Space score as a U.S. Senator (Binder and Maltzman 2002).

Appellate court Nominate Common Space scores were assigned according to the method developed by Giles et al. (2001, 2002), which uses norms of senatorial courtesy to assign appellate judges a score derived from the scores of their home state senators. Judicial Nominate Common Space scores for Supreme Court Justices are derived from the method developed by Martin and Quinn (2002, 2005) and Epstein et al. (2007) in which preference points for each Justice premised on changing voting patterns are transformed in to Nominate Common Space scores.⁸⁰

As an alternative to Nominate Common Space score measurements, the majority political party for each court sitting during the relevant congressional session was identified by assigning each judge a political party based upon the appointing president's party. This method is a remarkably reliable measure of preference across a wide range of studies (Pinello 1999; Sisk and Heise 2005). Majority party control of both the House and Senate as well as the president's party were identified for each congressional session.

Ideology Variables. Equation (14) is calculated for both the House and Senate in each congressional session, resulting in the following variables: *House Distance* and *Senate Distance*.

If ideology matters, Congress will remove jurisdiction when the court's majority party is different from the majority party of both the Congress and the

⁸⁰ Databases and documentation for court median Judicial Common Space scores are available at <http://epstein.law.northwestern.edu/research/JCS.html> (2005). Nominate Common Space scores begin with the 75th Congress, and some circuit judge appointments were prior to that time, leaving these judges without scores. No panel median member was derived without a full set of Nominate Common Space scores, resulting in a variation from Circuit to Circuit in the number of congressional sessions analyzed. This is indicated in each table by the variation in N. Judicial Nominate Common Space scores for the full panel of Supreme Court Justices can be derived from the second session of the 81st Congress through the second session of the 108th Congress.

agencies in a particular congressional session. *Court Diff Party* is coded “1” if the court’s majority party is different from the party controlling the unified agency and House or unified agency and Senate, respectively.⁸¹

Two models were run for each congressional session. The *House Model* uses only the House floor median and majority party to calculate congressional preferences. The *Senate Model* uses only the Senate floor median and majority party to calculate preferences. Although the House and Senate should react similarly to court divergence, each is analyzed separately to allow for differences that may be masked by a unified approach and to avoid variable multicollinearity.

Regression Results for the D.C. Circuit and the Supreme Court

Jurisdictional removals are analyzed first with respect to case filings and ideological differences among Congress, agencies and either the Supreme Court or the D.C. Circuit. Separation of powers modeling often focuses on the Supreme Court because it is assumed to be the court most likely to provoke congressional and executive action (Epstein, Segal, and Victor 2002; Eskridge 1991a, 1991b). The D. C. Circuit, because of its physical location in Washington, D.C., the geographic nature of most district court jurisdiction, and express statutory provisions has a docket which contains a disproportionate number of cases involving the federal government and governmental agencies (Cross and Tiller 1998; Revesz 2001).

Table 3.3 shows the regression results with respect to these two courts using U.S. Civil Defendant. Jurisdiction Stripping positively correlates with U.S. Civil Defendant across all models at the $p < 0.05$ level, consistent with the graphic

⁸¹ Additional analyses coded these variables as “1” if the majority court party differed from a unified House, Senate, and agency. The results were consistent with those using separate House and Senate measurements.

Table 3.3. Jurisdiction Stripping: Ideological Distance and U.S. Civil Defendant Court Filings, Supreme Court and DC Circuit, 1943 to 2004

	Supreme Court		D.C. Circuit	
	House	Senate	House	Senate
House Distance	-0.34 (0.36)	--- ---	-0.41 (0.35)	--- ---
Senate Distance	--- ---	-0.26 (0.51)	--- ---	-0.11 (0.33)
Court Diff Party	-0.14 (0.13)	-0.14 (0.15)	-0.23 (0.24)	-0.20 (0.16)
US Civil Defendant	3.74e-05* (0.42e-05)	3.77e-05* (0.57e-05)	8.02e-10* (0.95e-10)	8.77e-10* (0.97e-10)
Constant	0.20* (0.09)	0.22 (0.11)	0.56* (0.07)	0.56* (0.07)
Adj R ²	0.75	0.74	0.65	0.61
N	55	55	59	59

Notes. *p < 0.05. Jurisdiction Stripping is the square root of the percent of legislation per congressional session. Separate analyses using the House floor median and the Senate floor median. Prais-Winsten regression. D.C Circuit litigation variable squared. Stata 10.0.

Source. Jurisdiction Stripping Dataset, 78th to 108th Congress.

description shown in Figure 3.3. As the number of case filings with the United States as named defendant rise, Jurisdiction Stripping rises. These are the cases in which

private parties sue the government and include challenges to agency policy. None of the ideological variables are significant for either court in either the Senate or House models.

Regression Results for the Courts of Appeals. Table 3.4 presents regression results for Congress, agencies, and the First through Tenth Circuit Courts of Appeals. Across all courts and all models U.S. Civil Defendant is significant at the $p < 0.05$ level. None of the ideological variables with respect to Congress, the agencies, and the remaining federal courts of appeals achieve significance. The results confirm the Supreme Court and D.C. Circuit findings: as case filings in which the United States is named a defendant increase jurisdiction stripping increases.⁸²

Discussion. The results from both these analyses uniformly support the Litigation Economics Hypothesis, and the litigation based model of congressional behavior. There is no support for the Ideology Hypothesis generated by strategic institutionalism assumptions of ideological and preference based positioning between the branches. Jurisdiction Stripping appears related to litigation pressures, but not ideological differences among government institutions. The findings show a robust link between Jurisdiction Stripping and civil cases filed against the federal government. These are precisely the cases one would expect to exert the greatest unwanted cost and pressure on the government as a whole, as they represent litigation brought by private parties contesting government action, suggesting Congress does not remove jurisdiction to curtail government actors, but rather to curtail private parties' capacity to bring the government in to court.⁸³

⁸² Secondary analyses regarding the affect of public support for the federal courts on jurisdiction stripping also were conducted from 1973-1993 using the method described in Durr, Martin, and Wolbrecht (2000). Public support variables neither achieved significance nor materially changed the findings in any model.

⁸³ Secondary analyses, not reported here, included variables measuring federal criminal case filings and civil cases in which the United States was a plaintiff. Neither variable rose to significance, nor did their inclusion materially affect the reported results.

Table 3.4. Jurisdiction Stripping: Ideological Distance and Court Filings, First Through Tenth Circuits, 1943 to 2004

Circuit	House Distance	Senate Distance	CtDiff Party	U.S. Civil Defendant	Cons	Adj R ²	N
First	-0.47	---	-0.04	6.54e-10*	0.61*	0.62	44
	(0.34)	---	(0.28)	(1.08e-10)	(0.10)		
	---	-0.32	-0.06	7.17e-10*	0.63*	0.59	44
Second	---	(0.42)	(0.17)	(1.15e-10)	(0.12)		
	-0.23	---	0.01	3.95e-05*	0.18	0.73	50
	(0.23)	---	(0.10)	(0.34e-05)	(0.12)		
Third	---	-0.44	-0.02	3.81e-05*	0.15	0.74	50
	---	(0.31)	(0.10)	(0.35e-05)	(0.13)		
	-0.21	---	-0.19	3.48e-05*	0.34*	0.75	60
Fourth	(0.16)	---	(0.12)	(0.45e-05)	(0.08)		
	---	-0.23	-0.18	3.44e-05*	0.34*	0.75	60
	---	(0.19)	(0.12)	(0.49e-05)	(0.08)		
Fifth	-0.15	---	0.02	3.82e-05*	0.24	0.70	47
	(0.30)	---	(0.13)	(0.42e-05)	(0.12)		
	---	0.02	0.02	3.92e-05*	0.26*	0.69	47
Sixth	---	(0.30)	(0.11)	(0.48e-05)	(0.11)		
	0.02	---	-0.33	3.63e-05*	0.37*	0.63	40
	(0.30)	---	(0.29)	(0.46e-05)	(0.15)		
Seventh	---	-0.07	-0.08	3.59e-05*	0.35*	0.61	40
	---	(0.25)	(0.14)	(0.47e-05)	(0.13)		
	-0.40	---	-0.25	3.92e-05*	0.17	0.79	53
Eighth	(0.22)	---	(0.16)	(0.30e-05)	(0.09)		
	---	-0.19	-0.25	3.98e-05*	0.22*	0.76	53
	---	(0.27)	(0.14)	(0.34e-05)	(0.10)		
Ninth	-0.38	---	-0.04	3.25e-05*	0.31*	0.75	55
	(0.22)	---	(0.10)	(0.51e-05)	(0.09)		
	---	-0.19	-0.03	3.63e-05*	0.28*	0.73	55
Tenth	---	(0.26)	(0.12)	(0.55e-05)	(0.09)		
	-0.18	---	-0.15	3.38e-05*	0.36*	0.68	44
	(0.36)	---	(0.14)	(0.44e-05)	(0.14)		
Tenth	---	0.01	-0.10	3.65e-05*	0.38*	0.67	44
	---	(0.35)	(0.14)	(0.45e-05)	(0.13)		
	-0.19	---	0.04	3.84e-05*	0.21	0.70	47
Tenth	(0.27)	---	(0.12)	(0.39e-05)	(0.13)		
	---	-0.22	-0.05	3.69e-05*	0.28*	0.70	47
	---	(0.36)	(0.11)	(0.50e-05)	(0.11)		
Tenth	-0.62	---	0.28	6.29e-10*	0.56*	0.62	44
	(0.39)	---	(0.23)	(1.09e-10)	(0.12)		
	---	-0.07	-0.04	7.27e-10*	0.69*	0.57	44
	---	(0.48)	(0.15)	(1.16e-10)	(0.13)		

Notes. *p < 0.05. Jurisdiction Stripping is legislation percent square root. House and Senate floor median separate. Prais-Winsten regression. First and Tenth Circuit litigation variables squared. Stata 8.2. Source. Jurisdiction Stripping Dataset, 78th to 108th Congress.

Citizen suits against the government, while somewhat over inclusive, cover litigation over social security entitlements, labor matters, and environmental laws, all areas corresponding to the most common legislative categories of jurisdiction stripping. Many of these jurisdictional removals are ministerial in nature, for example, preventing review of various social aid benefit formulas, or Forest Service insect infestation treatment plans, or asset valuations for railroad improvement loan guarantees. To the extent Congress has any interest in seeing agencies able to carry out basic tasks without being sued, these are the types of agency action that warrant protection.

Removal of jurisdiction in relation to specific subject areas suggests avenues for future study which focus on jurisdiction stripping as it relates to discrete agencies and their specific policy making regimes. Jurisdictional removals may play a greater role with respect to some agencies as opposed to others, both in terms of the nature of agency policy making as well as the incidence of litigation in that policy area. Environmental regulation is one example. It comprises 20% of all the jurisdiction stripping legislative provisions identified, and is also a source of considerable federal litigation. In such issue areas, whether ideological considerations are a factor with respect to Congress and the litigants, as opposed to Congress and the judiciary, is worth consideration. The specific ideology of these agencies, their oversight committees, their particular longitudinal litigation history, and the ideology of the most active litigant interest groups may shed light on the motivation behind congressional removals of court jurisdiction. These issues are explored further in the environmental litigation case study presented in Chapter Five.

Several factors may account for the ideological variables' failure to explain jurisdiction stripping. Structural control models often assume perfect information between the actors. This is problematic, as administrative review can, and often does,

involve a myriad of mundane details ranging from cost of living calculations for social benefits, to award provisions for law enforcement information. It strains credulity to assert that Congress confidently predicts court response to such a wide range of issues. In addition, global measurement of agency preferences using the president as a proxy may miss some of the subtle variation between different agency ideologies. Although using the sitting executive to represent agency preferences is the current best practice (Epstein and O'Halloran 1994; Eskridge and Ferejohn 1992; Spence 1997), the significance of ideological differences among Congress, courts, and any one agency may be lost by such a uniform approach.

As argued in Chapter One, however, the most likely explanation is that even if court preferences are easily ascertained, litigation pressures do not depend on court disposition of a case, and in any event Congress cannot know, *ex ante*, which federal court is the relevant actor. Although many separation of powers models use the Supreme Court (Eskridge 1991a; Martin 2001; Sheehan 1992), the Court's annual docket, ranging from 75 to 150 cases in the past 50 years (Cordray and Cordray 2001), makes it a sporadic participant in policy implementation at best. From this perspective, it is not surprising that ideological differences between Congress and the Supreme Court are not significantly related to jurisdictional removal. The courts of appeals might be considered the relevant actors, as their appellate jurisdiction is largely mandatory.⁸⁴ However, each of the thirteen courts of appeals operates independently of the others. Absent statutes which assign jurisdiction to specific courts, Congress cannot tell which circuit court will be mostly likely to hear a particular challenge. This uncertainty argues against congressional response to any one appellate court. Congress could remove jurisdiction from all appellate courts if any one of them is ideologically

⁸⁴ *Judiciary and Judicial Procedure, U.S. Code 28 (2007): §1291.*

divergent, although this option is not supported by the ideological variables' lack of significance.

On the other hand, Congress could selectively grant jurisdiction to ideologically proximate courts. Some statutes do assign jurisdiction over specific issues to specific courts, most often to the D.C. Circuit. Various scholars have found links between agency behavior and D.C. Circuit ideology (Revesz 1997; Sheehan 1992). Although this study finds removals do not correlate to D.C. Circuit ideology, a correlation with jurisdictional grants might exist. This is considered in the following chapter, where jurisdiction stripping is examined from the perspective of exclusive grants of jurisdiction to the federal courts in the District of Columbia.

CHAPTER FOUR

JURISDICTION GRANTS TO THE D.C. FEDERAL COURTS

One way that Congress can manipulate jurisdiction, that is less extreme than complete jurisdiction stripping, is to direct litigation to specific courts. Grants of exclusive jurisdiction operate on two levels. They concentrate litigation over the policy provisions in question into one forum, and they effectively strip the other federal courts of jurisdiction over these provisions. No empirical study has looked systematically at if and when these exclusive jurisdictional grants occur and under what circumstances. Because the jurisdiction stripping database discussed in Chapter Three is populated almost entirely by administrative matters, and because the federal courts of the District of Columbia hear a disproportional number of cases involving federal agencies as opposed to the other circuits, it makes considerable sense to first explore exclusive jurisdictional grants to the federal D.C. Courts.

The benefit to Congress from this arrangement is that the assignment of jurisdiction solely to the D.C. courts acts as forum selection by the federal government. This is designed to provide relief to institutional actors (including Congress, agencies, the courts, and the Department of Justice) affected by the costs and delays created when the government is sued by reducing the potential value of such suits. Plaintiffs lose the advantage of forum shopping along with the increased likelihood of success implicated by strategic forum selection. Plaintiff litigation costs likely rise, due to the necessity of litigating in a court that may not be proximate to either the cause of action or the plaintiff's location. And government defendant's litigation costs are reduced, since all actions must be brought in Washington, D.C., the central location for most government actors. The economic model for these effects is presented in detail in Chapter Two.

In keeping with the two potential explanations for why Congress might manipulate court jurisdiction, this chapter considers whether, as litigation effects and economic modeling suggest, exclusive grants are designed to address operational concerns, in particular costs from policy disruption and resource diversion connected with litigation against the government, without regard to ideological considerations. In the alternative, the predictions generated by strategic institutionalism are also considered: whether this congressional behavior is a response to varying ideology among the courts, Congress, and agencies.

Descriptive Analysis

Public laws that allocate exclusive jurisdiction to the D.C. federal courts were identified from all public laws enacted between 1943 and 2004. As in the full jurisdiction stripping analyses, public laws were selected as the unit of interest because they represent a final expression of legislative intent, whereas bills passed but not reaching the status of law arguably reflect various stages of strategic, interim position taking and signaling that may or may not be sincere. Relevant legislation was identified from Westlaw and Congressional Universe using keyword searches for all public laws that included the term “Columbia.” From these, only legislation that specified the D.C. federal courts as the sole judicial forum was included in the database.⁸⁵ For the purposes of the empirical analysis, this variable is labeled “D.C. Jurisdiction Grants.”

Congress regularly assigns exclusive jurisdiction over certain policy areas to the federal courts situated in Washington, D.C. From 1943 to 2004, 91 public laws contained such jurisdictional grants. These covered a wide variety of policy matters including environmental regulation, royalty and license fee challenges, federal

⁸⁵ Numerous public laws add the D.C. federal courts as an additional or alternate forum for litigation, but these do not constitute action that locks in a single forum and, as such, are not within the dynamics modeled.

Table 4.1. District of Columbia Federal Court Jurisdiction Grants, 1943-2004

Congress	Date	Public Law	Court	Reviewable Actions
81	1950	831	Appeals	Determination that individual or organization is part of a Communist organization.
82	1952	554	Appeals	Denial by the FCC of construction permit, station license, transfer request.
93	1975	629	District	Act to quarantine, seize, or destroy plants deemed a noxious weed and related property.
94	1976	283	District	Federal Election Commission failure to act or dismissal of filed complaints.
94	1976	553	District	License revocation for phonorecord player establishment.
94	1976	586	Appeals	Challenges to validity or constitutionality of arrangements for construction of Alaska natural gas pipeline.
96	1980	425	Appeals	Challenges to Secretary of Transportation denial or approval of 5 year exemptions to fuel efficiency standards.
96	1980	187	District	Challenges to FEC decision not to pursue a complaint alleging violation of federal campaign election laws.
99	1986	499	District	Citizen suits against EPA, and other federal actors alleging failure to perform nondiscretionary duties under Superfund.
100	1988	418	Appeals	Appeals from civil penalties, sanctions, or denial orders imposed with respect to oil exports.
100	1988	667	Appeals	Appeals from royalty fee determinations under the <i>Satellite Home Viewer Act</i> with respect to satellite carrier transmissions.
102	1992	563	Appeals	Copyright issues in connection with the sale, import, distribution of digital audio recording units.
104	1996	127	District	Attorney general equitable action against the National Natural Resources Conservation Foundation.
106	1999	102	Appeals	Challenge by Board to final SEC regulation regarding new hybrid financial instruments.
107	2002	171	Appeals	Denial of petition to label irradiated pending final rules.
108	2004	419	Appeals	Challenge to Copyright Royalty Judges determinations.

Source. D.C. Jurisdiction Grant Dataset, 78th to 108th Congress.

administrative matters, and agricultural regulation. The federal allocation of rights to market and import sugar could only be challenged in U.S. Court of Appeals for the District of Columbia Circuit under the *Sugar Act*. This court is also the only forum that can hear challenges to rulemaking of general and national applicability under the *Federal Energy Administration Act*. Any person wishing for judicial review of national rules for the designation for surface coal mining land suitability under the *Surface Mining Control and Reclamation Act of 1977* must file that suit in the U.S. District Court of the District of Columbia. The D.C. district court also has sole jurisdiction over certain actions against the Assistance Board in regard to programs for credit to farmers and ranchers under the *Farm Credit Act*. And, in an example that received considerable recent attention, the *U.S. Patriot Act of 2001* limited final appellate review of terrorist detentions in connection with habeas petitions to the D.C. Circuit. The allocation between district court and appellate court jurisdiction is fairly even. Of the 91 exclusive jurisdictional laws identified, 55% (50) placed jurisdiction in the district court and 45% (41) placed jurisdiction in the appellate court. Table 4.1 sets out additional examples of typical exclusive jurisdictional grants.

These legislative provisions fall in to six general categories: environmental issues, federal administrative matters, industry regulation, foreign policy and defense, state benefits, and individualized government action that impacts a specific person or entity (Table 4.2).

Table 4.2. D.C. Jurisdiction Grant Law Categories, 1943-2004

Category	Number of Provisions	Percent of Total
Environmental Issues	12	13%
Federal Administrative Matters (including federal land and employees)	23	25%
Industry Regulation	6	7%
Foreign Policy, Defense, and Veteran's Affairs	2	2%
State Benefits (including transportation, schools, and urban renewal)	2	2%
Individualized Government Action (affecting individuals or specific entities)	46	51%
Individual	28 (61%)	
Corporate Entity	18 (39%)	
(N)	91	100%

Source. D.C. Jurisdiction Grant Dataset, 78th to 108th Congress.

With 46 laws, the category, Individualized Government Action, represents the largest number of public laws in the database, making up 51% of all exclusive jurisdictional grants to the D.C. federal courts. This makes considerable sense from the litigation economics perspective. Individualized Government Action identifies those laws that allow challenges to government decisions, primarily regulatory decisions, affecting specific individuals or corporate entities. The individuals affected by these provisions are, as a general matter, not primarily situated in Washington, D.C. The jurisdictional assignments cover subjects such as claims for property taken, destroyed, or diminished by the federal government,⁸⁶ and denial, revocation, or alteration of licenses and permits to engage in government regulated activities.⁸⁷ Challenges by a

⁸⁶ *Kermit Roosevelt Fund*, Public Law 79-671, *U.S. Statutes at Large* 59 (1945): 316; *International Claims Settlement Act of 1949 Amendments*, Public Law 84-285, *U.S. Statutes at Large* 69 (1945): 562; *Federal Plant Pest Act*, Public Law 85-36, *U.S. Statutes at Large* 71 (1957): 1442.

⁸⁷ *Ocean Thermal Energy Conversion Act of 1980*, Public Law 96- 320, *U.S. Statutes at Large* 94 (1980): 974; *Omnibus Trade and Competitiveness Act of 1988*, Public Law 100-418, *U.S. Statutes at*

farmer or importer to the Secretary of Agriculture's decision to quarantine, seize, or destroy plants deemed by the government to be noxious weeds can only be brought in the U.S. District Court of the District of Columbia.⁸⁸ This court is also the designated judicial forum for suits based on the Secretary of the Interior's leasing decisions regarding government land and Outer Continental Shelf locations subject to oil, gas, and sulfur drilling.⁸⁹ If an automobile manufacturer wishes to challenge fuel economy exemption decisions, the suit must be brought in the U.S. Court of Appeals for the D.C. Circuit.⁹⁰ Whether the plaintiff is an individually run farm, or a large manufacturing or oil production corporation, these laws remove the advantage of a local forum and require the plaintiff to bring suit in Washington, D.C. when challenging the designated regulatory actions. As discussed in Chapter Two, this decreases a plaintiff's expected value of suit by increasing plaintiff litigation costs, decreasing defendant litigation costs, and decreasing the likelihood a plaintiff will prevail at trial. This combination of factors makes litigation against the government less attractive.

The laws in the second largest category, Federal Administrative Matters, make up roughly 25% of the database. These laws address actions that impact the internal operations of the federal government, and include, for example, oversight of national foundations,⁹¹ information and communication requirements between agencies,⁹²

Large 102 (1988): 1107; *Goals 2000: Educate America Act*, Public Law 103-272, *U.S. Statutes at Large* 108 (1994): 125.

⁸⁸ *Federal Noxious Weed Act of 1974*, Public Law 93-629, *U.S. Statutes at Large* 88 (1975): 11273.

⁸⁹ *Submerged Lands of the Outer Continental Shelf*, Public Law 83-212, *U.S. Statutes at Large* 67 (1953): 462.

⁹⁰ *Educate America Act*, Public Law 103-272, *U.S. Statutes at Large* 108 (1994): 125.

⁹¹ *National Fish and Wildlife Foundation Establishment Act*, Public Law 98-244, *U.S. Statutes at Large* 98 (1984): 107; *Federal Agriculture and Improvement and Reform Act of 1996*, Public Law 104-127, *U.S. Statutes at Large* 110 (1996): 888.

⁹² *Government in the Sunshine Act*, Public Law 94-409, *U.S. Statutes at Large* 90 (1976):1241; *Money and Finance Codification*, Public Law 97-258, *U.S. Statutes at Large* 96 (1982): 877.

congressional investigatory committee activities,⁹³ and federal employment matters.⁹⁴ These cases involve internal disputes among multiple government actors, whose decision-makers are located in the nation's capital, making the D.C. federal courts the most cost efficient judicial forum from the government's perspective.

Another sizeable category, Environmental Issues, with 12 laws, representing 13% of the database, also contains numerous provisions that involve suits based on localized conditions. Among these are citizen and interest group prompted review of regulations promulgated under the *Comprehensive Environmental Response, Compensation, and Liability Act*, and challenges to national rules with respect to the *Clean Air Act*, certain coal mining activity,⁹⁵ or primary drinking water regulations.⁹⁶

Jurisdictional assignment to the D.C. courts is increasing over time. Omnibus legislation and multiple provisions within a single bill exhibit only a slight effect on the overall pattern of this increase. Figure 4.1 displays these trends. From 1943 until 1970, forum assignments to Washington, D.C. were relatively sporadic, averaging one public law every two congressional sessions. In the 1970s the frequency increased. In the final 25 years of the study, from 1970 through 2004, Congress passed, on average, two laws containing exclusive grants to the D.C. federal courts every year. As with full jurisdiction stripping, jurisdictional assignments exhibit certain peak periods. In the seven years between 1974 and 1980, Congress passed 30 exclusive D.C. jurisdiction laws, an average of four per session. Again, from 1992 to 1996, the average passage rate rose to three laws per session.

⁹³ *Ethics in Government Act*, Public Law 95-521, *U.S. Statutes at Large* 92 (1978): 1824; *Act to Confer Jurisdiction*, Public Law 93-190, *U.S. Statutes at Large* 87 (1973): 736.

⁹⁴ *Civil Service Reform Act*, Public Law 95-454, *U.S. Statutes at Large* 92 (1978): 1111; *Department of Veterans Affairs Health Care Personnel Act of 1991*, Public Law 102-40, *U.S. Statutes at Large* 105(1991): 187.

⁹⁵ *Surface Mining Control and Reclamation Act of 1977*, Public Law 95-87, *U.S. Statutes at Large* 91 (1977): 445.

⁹⁶ *Safe Drinking Water Act Amendments of 1986*, Public Law 99-339, *U.S. Statutes at Large* 100 (1986): 642.

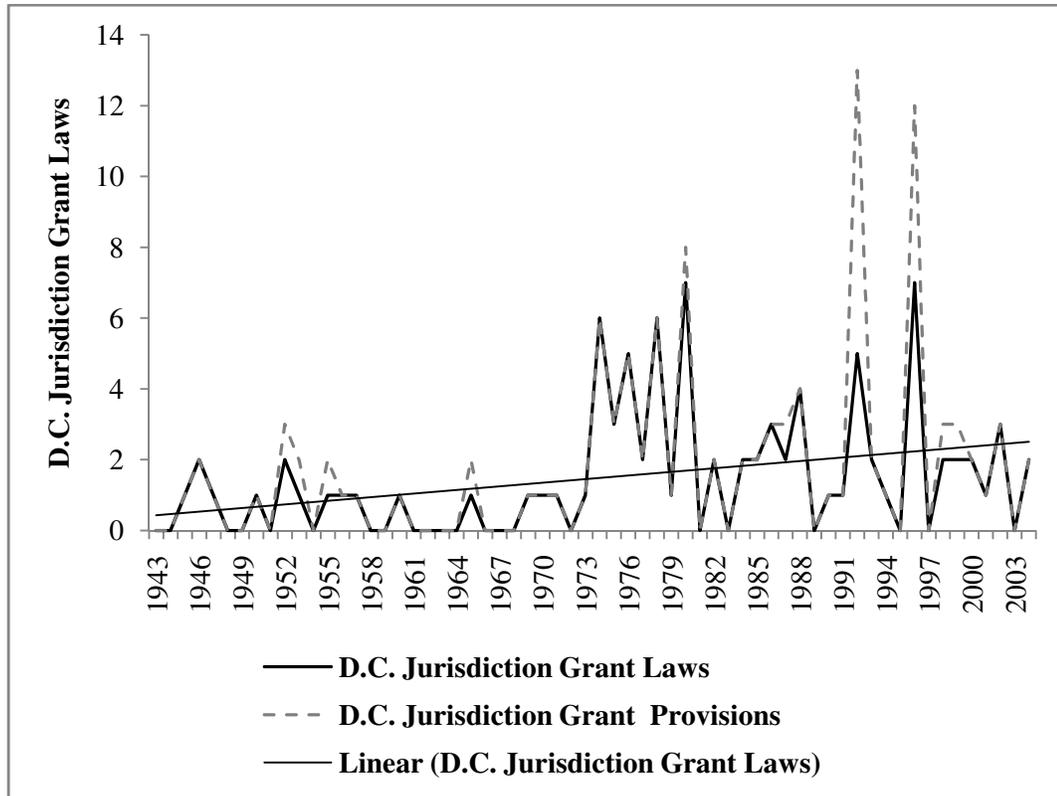
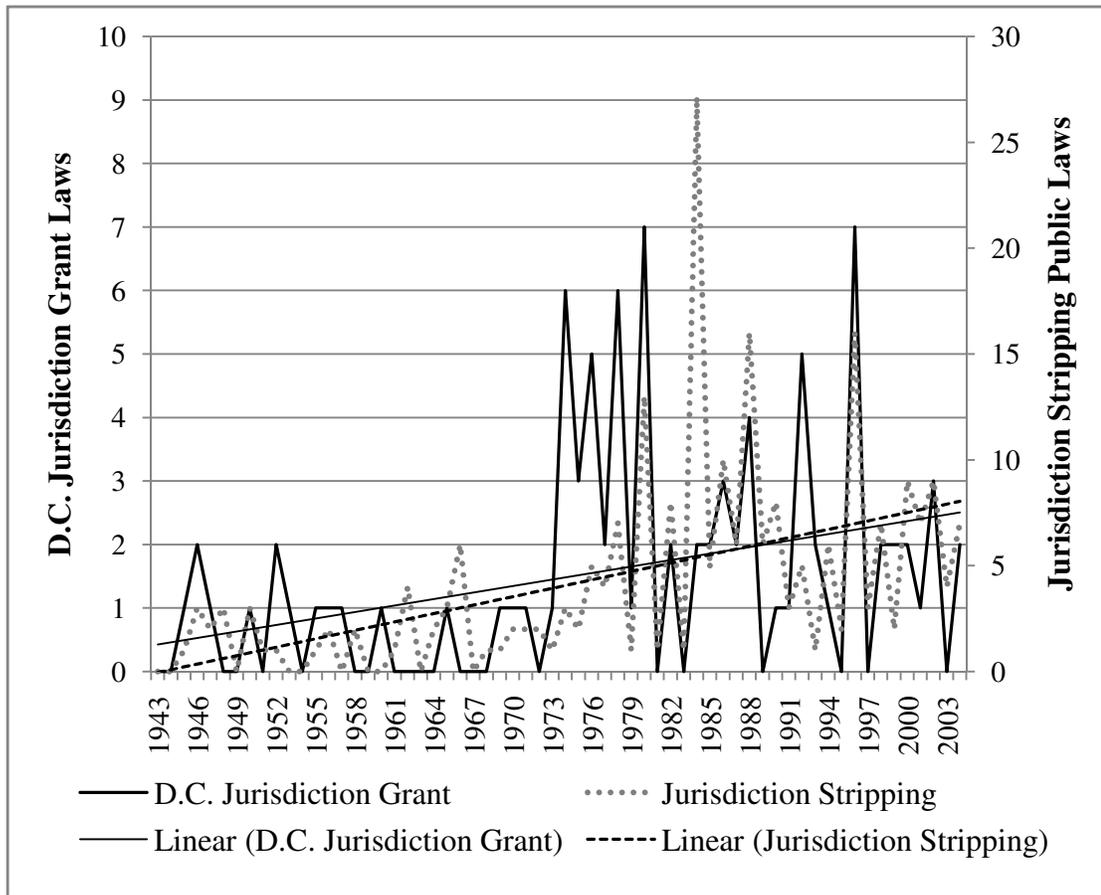


Figure 4.1. District of Columbia Federal Court Jurisdiction Grants and Trendline, 1943-2004

The pattern of exclusive jurisdiction grant activity over time bears some similarities to full jurisdiction stripping. While the peak activity is not identical, both types of legislation exhibit sharp increases in the late 1970s and late 1990s. In particular, exclusive jurisdiction grants peaked in 1980, with seven grants that year. Jurisdiction stripping also exhibited a peak in 1980, rising to a new high of 13 jurisdiction stripping public laws passed. A similar pattern occurred in 1996, when Congress passed seven laws assigning jurisdiction to the D.C. courts and also passed sixteen public laws containing full jurisdiction stripping provisions. Figure 4.2 shows the general pattern and similar trend of these two forms of jurisdictional removal.



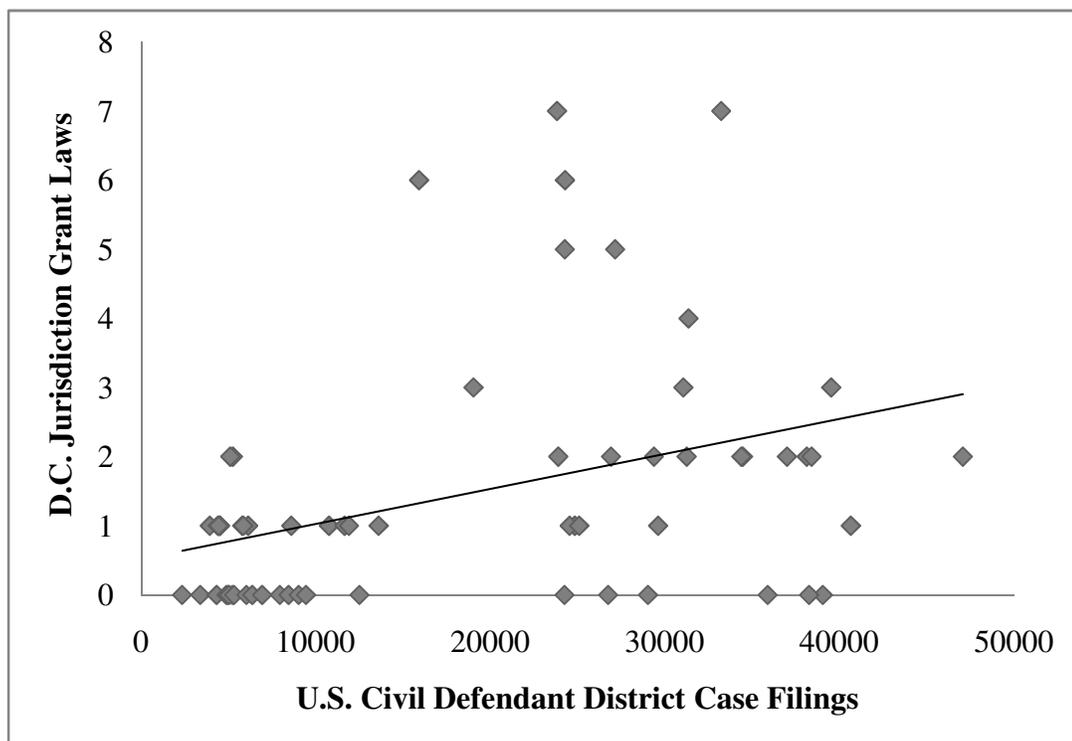
Sources. Jurisdiction Stripping Dataset, 1943-2004; D.C. Jurisdiction Grant Dataset, 1943-2004.
 Notes. Pearson's correlation coefficient 0.54.

Figure 4.2. District of Columbia Federal Court Jurisdiction Grants and Jurisdiction Stripping Trends, 1943-2004

Congress's pattern of assigning jurisdiction to the D.C. courts appears to correspond to the levels of litigation against the federal government. Figure 4.3 sets out a scatter-plot with each year's incidence of jurisdiction assigning legislation on the Y-axis and the corresponding annual district court civil case filings in which the United States is a defendant ("U.S. Civil Defendant") on the X-axis.⁹⁷ Although there

⁹⁷ A scatter-plot analysis was also created with both variables transformed into logarithm base 10 to create a standardized unit of measurement. That graph also shows a similar relationship between the two variables, although with a considerably steeper slope. The congressional-years in which there were no jurisdictional assignments were coded as 0.001 for transformation purposes, and in the logarithmic version of the scatter-plot these data points were significantly separate from the rest of the data. These points were removed and the trendlines both with and without the removed data points were compared.

is a fair amount of variation, a general trend can be seen in which higher levels of jurisdictional assignment activity correspond to higher U.S. Civil Defendant levels.



Sources. D.C. Jurisdiction Grant Dataset, 1943-2004.

Notes. Pearson's correlation coefficient 0.37.

Figure 4.3. Scatter-plot of District of Columbia Federal Court Jurisdiction Grants and District Court Case Filings with U.S. Civil Defendant, 1943-2004

Figure 4.4 compares the incidence of legislation that grants exclusive jurisdiction to the federal D.C. courts in each congressional session-year with the variable, U.S. Civil Defendant.⁹⁸ Both variables show a generally similar pattern of

There was no significant difference between these trendlines, and, accordingly, only the non-transformed analysis is reported.

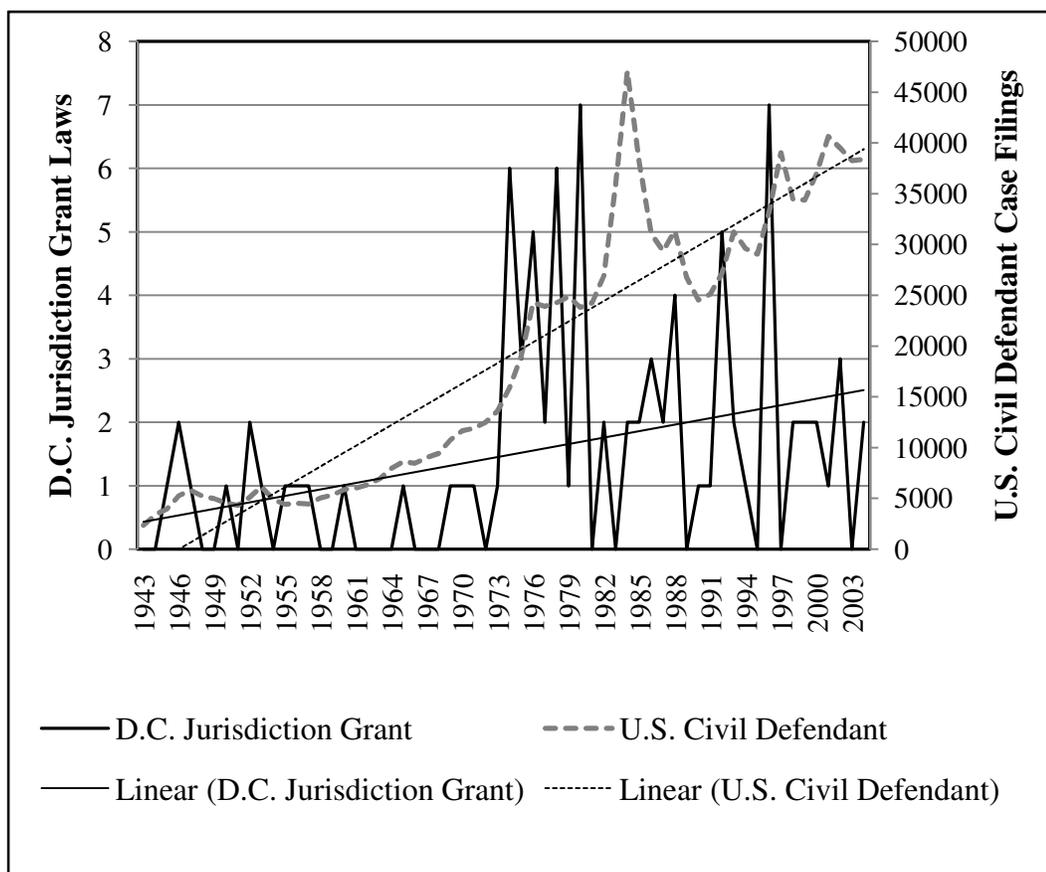
⁹⁸ As described in Chapter 3, this measurement represents the annual number of civil cases filed in federal district courts by private parties naming the United States as defendant, a category that includes litigation initiated by private parties against agency actions of all kinds and excludes litigation engaged in solely between private parties (actions which do not directly implicate challenges to government policy). Civil cases in which the United States was a defendant are reported in Administrative Office of the United States Courts, *Annual Report of the Director, Judicial Facts and Figures* (Washington 2005), Table 7 (1942), Table 6 (1943-44), Table C-2 (1945-2004). This category is, by necessity, over

growth over time. As with the full jurisdiction stripping analyses, civil filings against the federal government were chosen because they represent the primary area where economic pressure is visited on a broad range of government institutions, and, as argued earlier, is an area in which Congress can most effectively exert control by jurisdictional manipulation.⁹⁹

The patterns of peak D.C. court jurisdictional assignment activity by Congress, shown in Figure 4.4, also exhibit a moderate, although not fully consistent, alignment with U.S. Civil Defendant case filings. The growth in jurisdictional assignments to the D.C. courts between 1974 and 1980, with peaks in 1974 (six laws), 1976 (five laws), and 1978 (six laws), aligns with a jump in civil case filings against the government during the same time period from 13,603 in 1973 to 15,918 in 1974, and increasing again to 24,260 in 1976, and 24,277 in 1978. A similar rise occurred a few years later, between 1992 and 1996, when jurisdictional assignment activity peaked at five and seven laws respectively in each of the associated congressional sessions, and the civil case filings against the government correspondingly rose from roughly 25,000 before the start of the period to an average of approximately 30,000 cases filed each year between 1992 and 1996.

inclusive, since it also includes tort and contract claims against the United States. This is an unavoidable artifact of the somewhat variable set of case reporting categories used by the Administrative Office and the federal courts over the 62 years covered by this study, and the complicated nature of administrative law, where challenges to agency policy can appear in agency tribunals, district courts, or appellate courts depending on the authorizing statute and legal nature of the challenge.

⁹⁹ As discussed in the previous chapter, district court filings were chosen rather than case decisions or appeals because filings represent the point at which economic costs, including policy disruption, first attach regardless of final case disposition and without the winnowing process that occurs both as a case progresses and in connection with decisions regarding whether to file an appeal. Absent a specific legislative directive, district courts have initial appellate jurisdiction over challenges to administrative action.



Source. D.C. Jurisdiction Grant Dataset, 1943-2004. Notes. Pearson's correlation coefficient 0.37.

Figure 4.4. District of Columbia Federal Court Jurisdiction Grants and District Court Case Filings With U.S. Civil Defendant, 1943 to 2004

U.S. Civil Defendant captures government action in a wide array of regulatory contexts, including environmental regulation, royalty and license fee challenges, federal administrative matters, and agricultural regulation, as well as actions among multiple government entities. These subject areas align with the most common categories of exclusive jurisdiction granting legislation, and represent categories of litigation that impose costs across multiple government actors.

The incidence of jurisdictional assignments to the D.C. courts does not appear to correspond to the ideological proximity between Congress and the U.S. Court of

Appeals for the D.C. Circuit, contrary to what the strategic institutionalist approach predicts. This ideologically based perspective assumes that Congress will favor jurisdiction in the D.C. courts when the preferences of those courts are similar to congressional preferences. Under these conditions, Congress is assured that the courts will oversee and review government actions, in this case policy implementation by agencies, in a way that keeps policy closest to the congressional ideal point. One would then expect that Congress chooses the D.C. federal courts over all other possible federal courts because the D.C. courts are most ideologically proximate to Congress. This is not the case, however, since in no congressional session studied was the U.S. Court of Appeals for the D.C. Circuit the ideologically closest circuit to the either the House floor or the Senate floor.¹⁰⁰ This was analyzed by calculating the distance between the median Judicial Common Space score for all the federal appellate courts, and either the median House Common Space score or median Senate Common Space score in a given congressional session.¹⁰¹ A comparison between these measurements in the years 1980 and 1996 (Figure 4.5), two years in which jurisdictional assignments peaked, shows that, contrary to what an ideological explanation would suggest, the assignments to the D.C. courts increased when the D.C. Court of Appeals was the *least* proximate court to congressional ideology.¹⁰²

¹⁰⁰ Throughout this study, the median Judicial Common Space scores for the appellate courts in each circuit are used rather than district court scores. This is because the appellate court is the functional court of last resort for all federal courts within each circuit. This calculation uses the median member Judicial Common Space score for each circuit in each congressional session considered. Not all congressional sessions could produce comparisons across all circuits, as the Judicial Common Space scores cannot be reliably calculated for all circuits due to judicial appointments during presidential terms prior to Truman (the first president for whom a Common Space Score can be calculated).

¹⁰¹ The 11th Circuit is not included as it was formed in 1980, and the first judges were appointed to serve in October of 1981. In all analyses presented, because the literature disagrees whether the relevant measure for Congress should be the floor median or the majority party median, both were obtained and analyzed (Aldrich and Rohde 2001; Cox and McCubbins 1993). As there was no significant difference in any of these results, only the results from the floor median analyses are reported.

¹⁰² Distance between the median Judicial Common Space score of each circuit court and the median Common Space Score of the House floor was used. A similar graphic using the median Common Space Score for the Senate produced similar results, so only the House version is shown.

This pattern was tested for all congressional sessions in the database, using the regression analyses discussed in the following section to determine whether some kind of reverse ideological selection process was in effect. When the full dataset is considered, no effect of House or Senate ideological distance from the D.C. Circuit Court was found (see the “Results” section under the “Empirical Analyses” portion of this chapter).

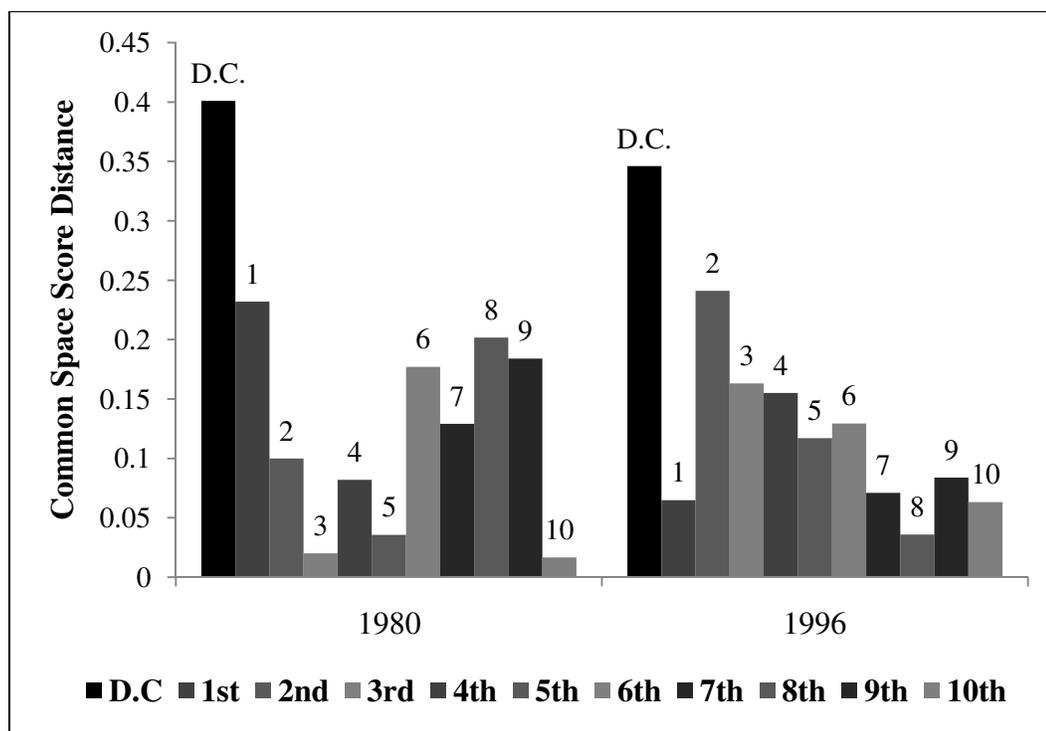
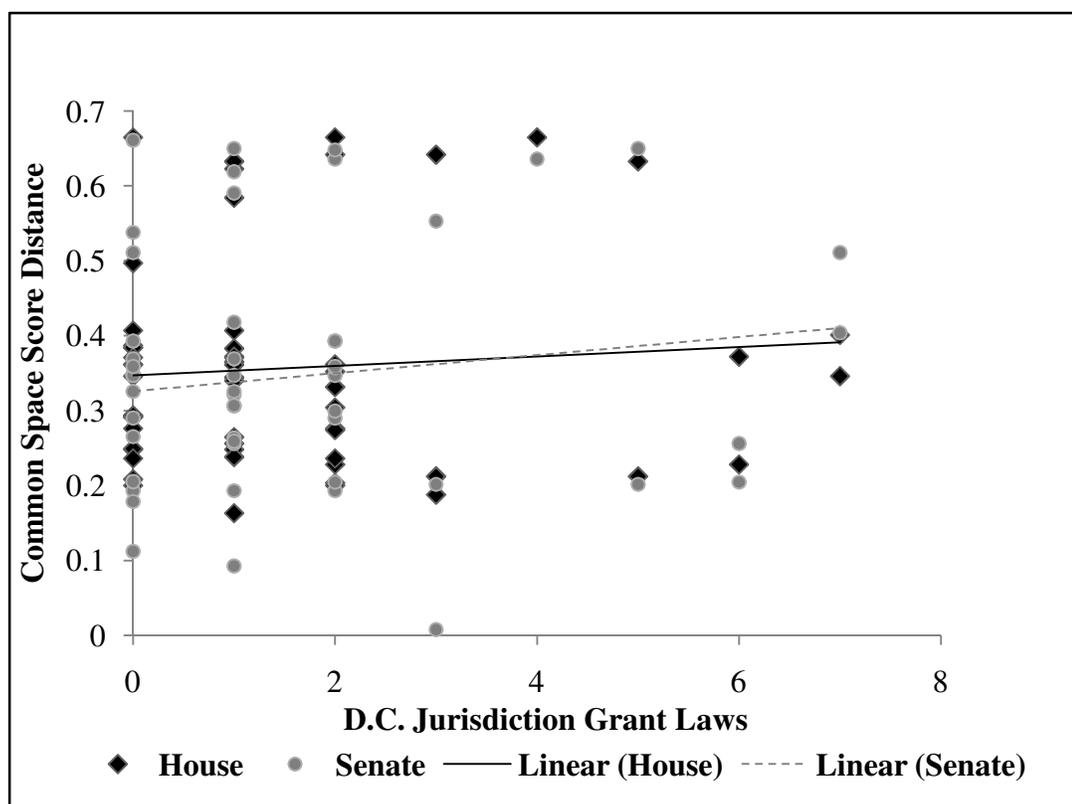


Figure 4.5. Ideological Distance Between House Floor Median and Circuit Courts of Appeal Medians, 1980 and 1996

Even considering the D.C. federal courts in isolation, jurisdictional assignments to these courts do not appear to rise as the congressional chambers grow ideologically more proximate to the court, nor do these legislative assignments appear to diminish as the ideological positions of the court and Congress diverge. Figure 4.6 compares the incidence of exclusive jurisdictional grants to the D.C. courts (X-axis)

with the distance, using median Common Space and Judicial Common Space scores, between the D.C. Circuit and the House and Senate, respectively (Y-axis). If ideological proximity matters, one would expect to see an inverse relationship between the incidence of grants and the ideological differences. A smaller preference distance should correspond to a greater number of laws granting jurisdiction to the D.C. federal courts. As Figure 4.6 shows, the scatter-plot graph does not consistently exhibit the expected patterns.



Source. D.C. Jurisdiction Grant Dataset, 1943-2004. Notes. Pearson's correlation coefficients, House 0.08, Senate 0.14.

Figure 4.6. Congress – Court Ideological Distance and District of Columbia Federal Court Jurisdiction Grants, 1945-2004

Empirical Analyses

The descriptive evidence suggests that Congress assigns jurisdiction to the federal courts in Washington, D.C., as the economic model predicts, in response to litigation against the government. The frequency of this jurisdiction granting legislation is increasing over time, and the trajectory and patterns of this increase appear to correspond to patterns exhibited by civil case filings in which the government is brought into court as a defendant. Ideological differences between the branches appear unrelated to jurisdiction granting activity. This dynamic is explored further, using multiple regression analysis to test these apparent correlations and the economic hypotheses underlying them, as well as testing the alternative explanation, based on ideological positioning, offered by strategic institutionalism.

Strategic Institutionalism Model. If exclusive grants of jurisdiction are a strategic response to institutional ideology, then one would expect these congressional actions to relate to the preferences of Congress, the courts, and agencies in the following ways. As court and congressional preferences move closer, court review operates to reinforce congressional interests. As agency preferences move away from Congress and court preferences move closer to Congress, court review becomes an important check on agency behavior, provided the court's preferences are closer to Congress than the agency's. Therefore, if court ideology is closer to Congress than agency ideology, Congress prefers court policy to agency policy, and exclusive jurisdictional grants will occur in order to provide court oversight of agency actions. These observations give rise to the following hypothesis:

Ideological Hypothesis: Exclusive jurisdictional grants to the D.C. courts occur when D.C. court ideology is closer to Congress than agency ideology.

For each congressional session, if ideology matters, exclusive jurisdictional grants will occur when the court's ideological position is closer to Congress's position than the

agency's. Once this condition is satisfied, the likelihood of exclusive jurisdictional grants (x) should increase as the median court ideology (J) moves closer to the median congressional preferences (C) and agency ideology (A) moves farther away from Congress. This can be expressed with the following equation:

$$P|x = |C - A| - |C - J| \quad (15)$$

A positive number indicates that the court is closer to Congress than the agency and jurisdictional grants to the D.C. federal courts should occur. As the positive numbers increase, they evidence increasing distance between the agency and Congress compared to decreasing distance between the court and Congress. This should mean an increased likelihood of congressional assignment of jurisdiction to the court. By the same token, a negative number means the agency is closer to the Congress than the court and, as a result, jurisdictional assignments should not occur. The larger the negative number, the less one would expect to find jurisdiction assignment legislation.

It could also be the case that as both the agency and court approach congressional ideology, Congress may wish to lock in the D.C. federal courts as the courts of review to protect agency policy-making from actions of other, less proximate courts. However, when the relative positions for all other circuit courts were calculated in each congressional session, it was never the case that the D.C. court was the ideologically closest to either the House or Senate.¹⁰³ At best, this suggests that something other than ideology is operating in the jurisdictional selection of the D.C. federal courts. At worst, it militates strongly against the position that Congress is protecting agencies by assigning jurisdiction to the ideologically best possible court. Regardless, it results in a series of observations that, due to their lack of variation, cannot be included as variables in the analysis.

¹⁰³ As described earlier in this section, these calculations were made using the median Judicial Common Space and Common Space scores for the relevant Circuit Courts of Appeal, and the respective congressional chamber floors.

Litigation Economics Model. On the other hand, the primary motivation for jurisdictional assignment may be congressional concern with litigation cost, delay, and interference generated by parties outside of the federal government's control.

Exclusive grants of jurisdiction may be a strategic congressional manipulation of the classic cost-benefit calculations that arise in connection with government's role as a defendant. If so, one would expect to see a rise in jurisdictional grants to the D.C. courts correlate with a rise in federal case filings. Specifically, one would expect a strong correlation with civil filings where the United States is a defendant, cases that capture challenges to government actions by private litigants. The alternate hypothesis states:

Litigation Economics Hypothesis: Exclusive jurisdictional grants to the D.C. federal courts increase as civil case filings in which the United States is a defendant increase.

Research Design. To analyze these two hypotheses, this research tests for correlations between the incidence of jurisdictional grants and either federal case filing levels or the ideological distance among Congress, agencies, and the Court of Appeals for the D.C. Circuit. As these are time-series data, Prais-Winsten AR(1) regression analyses are used with the jurisdictional grant measurement as the dependent variable and each congressional session's litigation and ideological measurements as the independent variables.¹⁰⁴

D.C. Courts Exclusive Jurisdiction Variable. The number of public laws with provisions that assign jurisdiction exclusively to the federal courts in the D.C. circuit were identified from all public laws passed during the sixty year time span running from the first session of the 79th Congress (1945) through the second session of the

¹⁰⁴ A more detailed description of Prais-Winsten regression is set out in the "Research Design" section of Chapter Three.

108th Congress (2004).¹⁰⁵ Each session of Congress is the relevant point of analysis. The dependent variable, *D.C. Jurisdiction Grant*, is the number of public laws in each congressional session containing provisions that grant jurisdiction to the federal courts, either district or appeals, of the D.C. circuit. Data from the 78th Congress (1943-1944) were not included, because full ideological measurements for the appellate court were unavailable due to the appointment of some judges during presidential terms prior to Truman, the first president for whom a standardized ideological measurement is available. The dependent variable is not normally distributed, however, this can be corrected by measuring the variable as the percent of exclusive jurisdictional grants per congressional session and then transforming the variable into its square root, a standard transformation for this issue. All analyses were run using this transformed dependent variable as well as the untransformed measure. There was no material difference in the results. For ease of interpretation, the untransformed regression analyses are reported.

Litigation Variable. The variable, *U.S. Civil Defendant*, measures the annual number of civil cases filed in federal district courts by private parties naming the United States as a defendant.¹⁰⁶ District court filings were chosen rather than case decisions or appeals because filings represent the point at which litigation disruption and court influence over policy first attach regardless of final case disposition and without the winnowing process that occurs both as a case progresses and in connection with decisions regarding whether to file an appeal.¹⁰⁷ Court filings are lagged one year to allow for congressional response time.

¹⁰⁵ As stated previously, relevant legislation was identified from Westlaw and Congressional Universe using keyword searches for all public laws including the term “Columbia.”

¹⁰⁶ Administrative Office of the United States Courts, *Annual Report of the Director, Judicial Facts and Figures* (Washington 2005), Table 7 (1942), Table 6 (1943-44), Table C-2 (1945-2004).

¹⁰⁷ Given the rather arbitrary allocation of appellate jurisdiction, caseload pressures also were measured by using court of appeals filings. No material difference in the results was found. Administrative appeals reported by the Administrative Office of the U.S. Courts were not used as a variable for two

Ideological Measurements. The ideological variables measure distance among the Congress, courts, and agencies in each congressional session using each institutions' median member as the relevant actor. For all actors, preferences were measured using derivations of Poole and Rosenthal's common space scores (Poole 1998, 2005; Poole and Rosenthal 1997).¹⁰⁸ Using one measurement system for all institutions, including the courts, overcomes significant validity problems which arise when varying measurement strategies and metrics are used to identify different institutional preferences.

Congressional measures were derived for the floor median Nominate Common Space score in each congressional session.¹⁰⁹ Presidential Nominate Common Space scores were used as a proxy for overall agency ideology (Moe 1987; Tiller and Spiller 1999; Wood and Anderson 1993). The score for Truman was taken from his Nominate Common Space score as a U.S. Senator (Binder and Maltzman 2002).

Appellate court Nominate Common Space scores are usually assigned according to the method developed by Giles et al. (2001, 2002), which uses norms of senatorial courtesy to assign appellate judges a score derived from the scores of their home state senators. As the courts of the D.C. Circuit are not located within a state, the appointing president's common space score was used unless there was a long term and clear affiliation between the judge in question and a particular state political apparatus, in which case the Giles method was used.¹¹⁰

reasons. First, reliable data are unavailable for the full time span of the study, and second, administrative appeals fail to capture challenges that do not require exhaustion of administrative review or appear first in district court.

¹⁰⁸ The first dimension was selected since it is the primary dimension along which ideological divides are structured in Congress (Poole and Rosenthal 1997).

¹⁰⁹ Because the literature disagrees whether the relevant measure for Congress should be the floor median or the majority party median, both were obtained and analyzed (Aldrich and Rohde 2001; Cox and McCubbins 1993). As there was no significant difference in any of these results, only the results from the floor median analyses are reported.

¹¹⁰ Databases and documentation for court median Judicial Common Space scores are available at <http://epstein.law.northwestern.edu/research/JCS.html> (2005). Nominate Common Space scores begin with the 75th Congress, and some circuit judge appointments were prior to that time, leaving these

As an alternative to Nominate Common Space score measurements, the majority political party for each court sitting during the relevant congressional session was identified by assigning each judge a political party based upon the appointing president's party. This method is a remarkably reliable measure of preference across a wide range of studies (Pinello 1999; Sisk and Heise 2005). Majority party control of both the House and Senate as well as the president's party were identified for each congressional session.

Ideology Variables. Equation (15) is calculated for both the House and Senate in each congressional session, resulting in the following variables: *House Distance* and *Senate Distance*.¹¹¹ In addition, if ideology matters, Congress will grant jurisdiction when the agency's majority party is different from both the majority party of the Congress and the court in a particular congressional session. The variable, *Agency Diff Party*, is coded "1" if the agency's majority party is different from the party controlling the unified court and House or unified court and Senate, respectively.¹¹²

Two models were run for each congressional session. The *House Model* uses only the House floor median and majority party to calculate congressional preferences. The *Senate Model* uses only the Senate floor median and majority party to calculate preferences. Although the House and Senate should react similarly to court divergence, each is analyzed separately to allow for differences that may be masked by a unified approach and to avoid variable multicollinearity.

judges without scores. No panel median member was derived without a full set of Nominate Common Space scores, as a result the analysis begins in 1945.

¹¹¹ A separate analysis was run using the median Common Space distances between the U.S. Court of Appeals for the D.C. Circuit and both the House and Senate floor as separate variables within the same regression. Neither of these variables rose to a level of significance.

¹¹² Additional analyses coded these variables as "1" if the majority agency party differed from a unified House, Senate, and court. The results were consistent with those using separate House and Senate measurements.

Control Variables. It may be the case that the increase in exclusive jurisdictional grants is simply a function of the number of public laws passed in a particular congressional session. This was controlled for in the jurisdiction stripping analysis by using a dependent variable that was a percent of the overall public laws enacted in any year. Since the incidence of exclusive jurisdictional grants is much lower in each congressional session, the changes in public law passage in the current analyses was controlled for by including the control variable, *Total Public Laws*, which measures all public laws enacted in each congressional session-year.

Results. Table 4.3 displays the multiple regression results for both the House and Senate models using D.C. Jurisdiction Grant as the dependant variable and U.S. Civil Defendant, House Distance, Senate Distance, Agency Diff Party, and Total Public Laws as the independent variables. Both models strongly support the Litigation Economics Hypothesis. U.S. Civil Defendant is positive and significant at the 0.01 level. This means that as case filings in which the government is named a defendant increase, jurisdiction grants to the D.C. federal courts increase. As expected, the control variable, Total Public Laws, is also significant, indicating that the overall level of legislative activity in a particular congressional session positively correlates to the number of D.C. Jurisdiction Grants enacted. None of the ideological variables tested achieve significance, providing no support for the Ideological Hypothesis.

As noted in the dependent variable description, the residuals were somewhat skewed thereby exhibiting problems with normal distribution. This was corrected by changing the dependent variable to a percentage of public laws passed in each session, transforming the dependent variable by taking its square root, and removing the control variable “Total Public Laws” from the analysis. A new regression analysis was run using the transformed dependent variable. The resulting regression residuals were normally distributed. The regression results from the new analysis were not different

in any material respect from the original results (no ideological variables rose to significance and the case filing variables in both models were highly significant). Accordingly the untransformed results are reported below, as they are easier to interpret.

Table 4.3. D.C. Jurisdiction Grants: Ideological Distance and Court Filings, 1945 to 2004

	House Model	Senate Model
House Distance	0.89 (1.27)	---
Senate Distance	---	1.52 (1.36)
Agency Diff Party	-0.27 (0.44)	0.08 (0.45)
U.S. Civil Defendant	6.22 e-05** (1.61e-05)	6.37e-05** (1.58e-05)
Total Public Laws	5.04e-03** (1.80e-03)	5.04e-03** (1.84e-03)
Constant	-1.26 (0.67)	-1.48* (0.68)
R ²	0.19	0.20
N	60	60

Notes. *p < 0.05, ** p < 0.01. Separate analyses using the House floor median and the Senate floor median. Prais-Winsten regression. Stata 10.0.
Source. D.C. Jurisdiction Grant Dataset, 1943-2004.

Discussion. Both the descriptive and empirical analyses support a litigation based explanation for Congress's selective jurisdictional assignment to the D.C. federal courts, an action that effectively removes jurisdiction from all other courts in the federal system. Ideological differences among the branches do not appear to influence this type of congressional behavior. As civil cases in which the government is named as a defendant increase, so does the incidence of legislation naming the D.C. courts as the required forum. As the costs and interference of litigation rise, driven by the rising number of cases against the government, Congress appears to take strategic action to make such lawsuits less palatable to plaintiffs. The economic model predicts that costs of litigation play an important role in the expected value of suit, and accordingly in the likelihood that a plaintiff will have adequate incentive to litigate against the government. Congress can manipulate litigation costs in the government's favor by requiring certain challenges be brought in courts, such as those in the District of Columbia, most proximate to government litigators and decision makers. This has the benefit of reducing government costs of suit and, for those litigants not situated in Washington, D.C., of increasing plaintiff costs by selecting a non-local forum. The presence of a single, specialized, and expert court reduces outcome uncertainty and, among other benefits, allows the government to adjust its behavior to avoid litigation.

These dynamics are borne out by the textual nature of the jurisdictional assignments identified in this study. Decisions affecting individuals and individual corporations make up the largest category of actions that must be brought in D.C. federal courts. These include property claims, status determinations, and licensing and permitting decisions. The majority of plaintiff's affected by these decisions, such as entities deemed foreign terrorist organizations,¹¹³ farmers challenging plant

¹¹³ *Antiterrorism and Effective Death Penalty Act of 1996*, Public Law 104-132, *Statutes at Large* 110 (1996): 1214.

quarantines,¹¹⁴ or radio and television stations denied construction permits,¹¹⁵ are not located in Washington, D.C. Another sizeable category, that containing environmental matters, also involves numerous provisions that, by the very nature of regulating the environment, implicate local and regional air, land, and water conditions.

It may be the case, however, that the individualized regulatory scheme and litigation history of particular policy categories either deviate from this larger pattern or contain specialized or competing incentive structures when it comes to court review. The potential plaintiffs affected by the D.C. jurisdictional grants, while concentrated in some categories, taken as a whole cover a wide spectrum of individuals and entities, both regional and national in their contacts. Examining smaller, more discrete policy-areas within the database is not suited to the broad based empirical analyses conducted here, because the number of public laws assigning D.C. court jurisdiction in a particular policy area are not numerous enough, even over time, to provide a sufficient number of data points. This argues for additional, qualitative, case-based examination of these public laws.

The fact that jurisdictional assignment occurs primarily in regulatory laws suggests strongly that the selection of certain areas for jurisdictional grants might be a function of industry group or interest group activity. Interest groups, not part of the original enacting coalition often attempt to use litigation as an alternate way to achieve their policy goals. The jurisdictional manipulations by Congress may be driven by the enacting coalition's reaction to, or anticipation of, subsequent litigation and policy interference. This manifests in two ways. First, for interest or industry groups with influence over the legislative process and either sufficient litigation resources, or an

¹¹⁴ *Federal Noxious Weed Act*, Public Law 93-629, *Statutes at Large* 88 (1974): 2148.

¹¹⁵ *Civil Aeronautics Act of 1938 Amendments*, Public Law 82-554, *Statutes at Large*, 65 (1951): 65.

established business presence in Washington D.C., setting the forum for certain regulatory challenges in the D.C. federal courts operates as a tactical advantage over smaller, more regional competitors. The resource rich groups are less likely to be dissuaded from challenging individualized regulatory decisions in the D.C. courts, whereas their smaller competitors may acquiesce to unfavorable regulatory decisions because of the added cost of filing a challenge in a non-local forum. Second, regulated industries often cooperate and help craft the regulatory process in order to create barriers to entry and mold inevitable regulations to a form as favorable as possible to industry. Litigation can damage this policy balance. Creating jurisdictional barriers in reaction to such litigation can serve regulated industry interests, by maintaining the policy status quo.

Peak increases in the 1970s and 1990s of both jurisdiction stripping measures studied suggest that jurisdictional assignments may operate in conjunction with other court control mechanisms, including complete jurisdictional removal. A broader investigation of court jurisdiction generally, including removal of entire areas to specialized courts (such as money claims against the federal government), and other cost manipulations, including requirements that administrative remedies be exhausted first, all might benefit from an analyses using the economic models presented here.

The specifics of what motivates jurisdiction stripping in various policy areas is best approached from a more case-based, contextual analysis that focuses on the interested actors and their interactions with each other and the legal system. Chapter Five addresses this need for additional qualitative analysis, taking up the task with respect to full jurisdiction stripping and environmental regulation in National Forests.

CHAPTER FIVE

JURISDICTION STRIPPING AND NATIONAL FOREST MANAGEMENT

The jurisdiction stripping laws identified in Chapter Three cover a wide array of administrative policies, ranging from Medicare Benefits to federal loan guarantees. Both theory and initial empirical testing strongly suggest that Congress enacted these provisions to foreclose litigant access to the courts in response to the policy disruption and resource displacement created by litigation against the federal government. The empirical analyses presented in Chapters Three and Four use case filings as a general measure of the degree of litigation pressure exerted on government actors and find that increased litigation pressure corresponds to an increased incidence of jurisdiction stripping. This chapter narrows the inquiry to examine specific jurisdiction stripping legislation in a single policy area. In doing so, the examination moves beyond the rough proxy of case filings, to identify how litigant access to the court system generates pressure on government actors, and how litigation incentives, legal rules, and strategic behavior result in costs and delay with respect to agency policy which prompt Congress to remove court review.

This chapter considers a series of public laws (“State Wilderness Acts”), passed predominantly in the mid-1980s, that removed federal court review of certain *National Environmental Policy Act* (“NEPA”) claims against the United States Forest Service (“Forest Service”). When the underlying litigation incentives, political dynamics, policy issues, and congressional record are considered, it is clear that, in keeping with both the theory and the generalized empirical results, Congress included jurisdiction stripping provisions in the State Wilderness Acts to insulate itself, the Forest Service, and the Department of Agriculture from the policy disruption and related costs created by interest group litigation aimed at halting commercial timber

activities and public access in national forests. This is not to say that specific court decisions, or judicial preferences regarding case outcomes, were irrelevant. Instead, the history and context of the jurisdiction stripping legislation examined reinforce the main assertion presented in this dissertation: congressional manipulation of the structure and procedure of court jurisdiction cannot be understood without accounting for the incentives and strategies inherent in litigation against the federal government.

This chapter first presents the general characteristics of the State Wilderness Acts, and then considers the political and interest group dynamics affecting these Acts, along with the relevant legislation that helped shape forest management decisions by the Forest Service. The litigation strategy engaged in by opponents to timber harvesting and any other non-preservationist activity in the national forests is then examined, along with the costs that this litigation imposed on the Forest Service and Congress. Finally, the congressional decision to strip jurisdiction is discussed as a strategic response to the policy disruption created by *NEPA*-based litigation against the Forest Service.

State Wilderness Acts

Matters dealing with environmental regulation make up nearly 20% of all jurisdiction stripping provisions identified in Chapter Three.¹¹⁶ Of these 76 environmentally related laws, nearly half (33) address the wilderness designation of certain lands in the National Forest System. These State Wilderness Acts were passed during a thirteen year period from 1980 to 1993, with the majority of the legislative activity taking place in 1984.¹¹⁷ Each piece of legislation is designed to cover the national forest lands of a specific state, although one of the initial provisions passed in

¹¹⁶ (Table 3.2).

¹¹⁷ Because these acts contain similar language and were passed primarily in 1984, the analyses in Chapter 3 were re-run with the Wilderness Act legislation eliminated. There was no substantial change to the empirical results.

1980 covers federal forest lands in a multi-state region.¹¹⁸ The Acts include 36 of the 50 states, and cover the full span of the continental United States from Florida¹¹⁹ to Oregon.¹²⁰

State Wilderness Acts explicitly identify certain land in a state that qualifies as “wilderness,” where access is very limited and commercial activity, such as logging, is prohibited. Land in the national forest system not expressly set aside for protection by the Acts is subject to ongoing management and assessment by the Forest Service, and, depending on forest management plans created by the agency for each affected area, may be subject to commercial and recreational use. The Acts are a state by state replacement for an earlier nationwide attempt to make these wilderness designations, based on a Forest Service survey of all national forest land (RARE II), and supported by an environmental impact statement, issued in 1979, explaining the methods used to identify the protected acreage and detailing the potential environmental effects of agency designation decisions. Key to this process, and important to the later political and legal contentions, is that in naming some land as protected, both the Forest Service roadless area survey, and the State Wilderness Acts that reference that survey, leave a significant portion of national forest land open to possible public and commercial use, depending on subsequent determinations by the Forest Service.

¹¹⁸ The *Colorado Wilderness Act of 1980*, Public Law 98-560, *Statutes at Large* 94 (1980): 3256, addresses national forests located in Colorado, South Dakota, Missouri, South Carolina, and Louisiana.

¹¹⁹ *Florida Wilderness Act of 1984*, Public Law 98-430, *Statutes at Large* 98 (1984): 1665.

¹²⁰ *Oregon Wilderness Act of 1984*, Public Law 98-328, *Statutes at Large* 98 (1984): 272.

Table 5.1. State Wilderness Acts, 1980 to 1993

Public Law	Year Passed	State Covered	Sponsor
96-487	1980	AK	Rep. Udall (D-AZ)
96-560	1980	CO, SD, MO, SC and LA	Rep. Johnson (R-CO)
96-550	1980	NM	Rep. Lujan (R-NM)
97-384	1982	IN	Sen. Lugar (R-IN)
97-407	1983	MO	Sen. Eagleton (D-MO)
97-466	1983	WVA	Rep. Benedict (R-WVA)
98-321	1984	WI	Rep. Obey (D-WI)
98-322	1984	VT	Rep. Jeffords (R-VT)
98-323	1984	NH	Rep. Gregg (R-NH)
98-324	1984	NC	Rep. Clarke (D-NC)
98-328	1984	OR	Rep. Weaver (D-OR)
98-339	1984	WA	Sen. Gorton (R-WA)
98-406	1984	AZ	Rep. Udall (D-AZ)
98-425	1984	CA	Rep. Burton (D-CA)
98-428	1984	UT	Sen. Garn (R-UT)
98-430	1984	FL	Rep. Fuqua (D-FL)
98-508	1984	AR	Sen. Bumpers (D-AR)
98-514	1984	GA	Sen. Nunn (D-GA)
98-515	1984	MS	Sen. Cochran (R-MS)
98-550	1984	WY	Sen. Wallop (R-WY)
98-574	1984	TX	Rep. Bryant (D-TX)
98-578	1984	TN	Rep. Duncan (R-TN)
98-585	1984	PA	Rep. Clinger (R-PA)
98-586	1984	VA	Rep. Boucher (D-VA)
99-197	1985	KY	Rep. Perkins (D-KY)
99-490	1986	TN	Rep. Quillen (R-TN)
99-504	1986	NE	Sen. Exon (D-NE)
100-184	1987	MI	Rep. Kildee (D-MI)
100-499	1988	OK	Rep. Watkins (D-OK)
100-547	1988	AL	Rep. Flippo (D-AL)
101-195	1989	NV	Sen. Reid (D-NV)
101-401	1990	ME	Sen. Mitchell (D-ME)
103-77	1993	CO	Rep. Skaggs (D-CO)

Source. Chutkow Environmental Jurisdiction Stripping Database, 2009.

The structure and language of the State Wilderness Acts are largely uniform. Specific federal lands within a state are identified and designated as wilderness under the National Wilderness Preservation System. The Acts then declare that: (1) the Department of Agriculture has completed a national roadless area review evaluation of all federal lands in the National Forest System (“RARE”); (2) Congress has conducted its own review of these roadless areas in the respective state and of the related environmental impacts; and (3) for federal forest lands located in the state in question, the final environmental impact statement generated by the Forest Service and Department of Agriculture in connection with RARE is not subject to judicial review. General information about each Act, including the state covered and the primary congressional sponsor appears in Table 5.1.

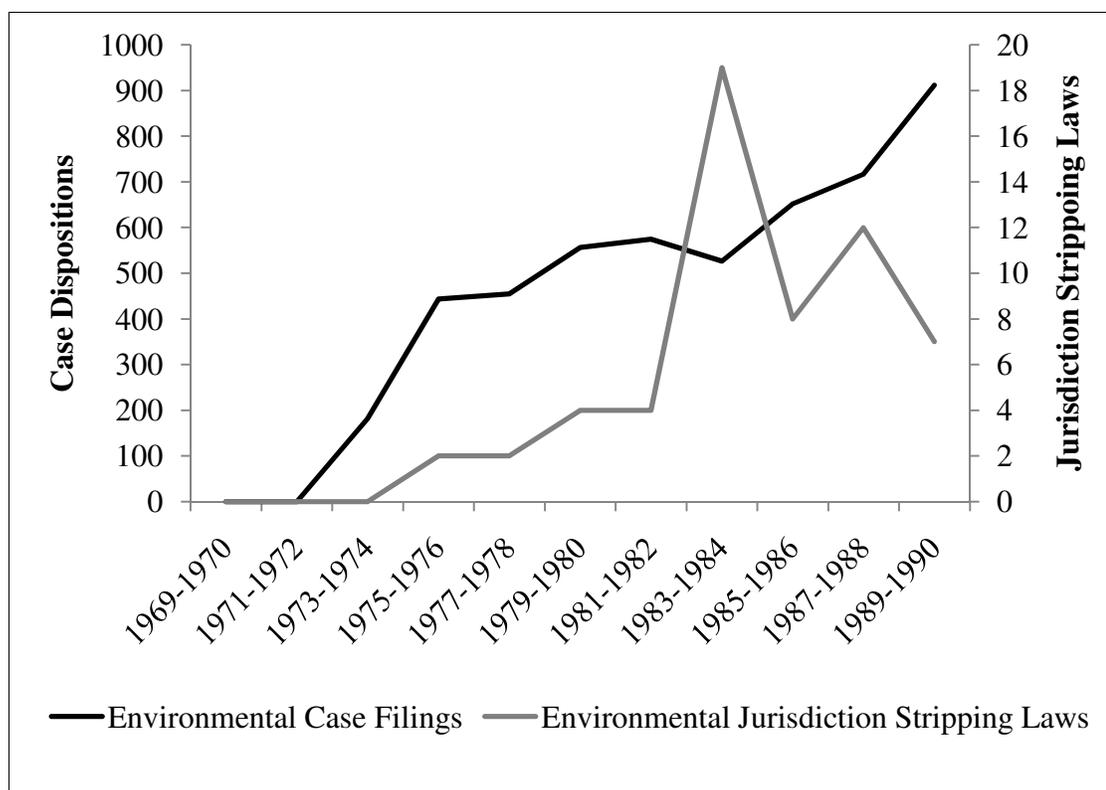
Litigation Pressure and Case Filings

The empirical inquiries in Chapters Three and Four capture litigation related pressure on federal actors through the rough proxy of case filings. Environmental claims are the subject matter of the State Wilderness Acts’ jurisdiction stripping provisions. As an initial matter, the dynamic found in the empirical analyses, where increased case filings correspond to increased jurisdiction stripping, appears to hold true in the context of environmental litigation against the federal government. Figure 5.1 below shows the annual trends in jurisdiction stripping public laws related to environmental policy and cases filed (as represented by annual case dispositions)¹²¹ against the federal government based on environmental laws.¹²² Both measures exhibit an upward trend over the period examined, with the onset of litigation preceding the

¹²¹ While case dispositions lag case filings, on average 88% of the cases in this category were disposed of pre-trial. As a result, the assumption is made that disposition dates and case filing dates probably differ on average by about six months.

¹²² Federal Judicial Center. 2005. *Federal Court Cases: Integrated Data Base, 1970-2000*, Ann Arbor, MI: Inter-university Consortium for Political and Social Research, ICPSR No., <http://www.icpsr.umich.edu>.

onset of legislative activity. The spike in jurisdiction stripping public laws during the 1983-1984 time period is attributable to the State Wilderness Acts. It corresponds to a slight dip in the environmental litigation activity during that same time period which may represent a litigation reduction in response to the high concentration of laws removing court review. The correspondence between State Wilderness Act passage and cases filed against the Forest Service challenging environmental impact statements (the specific focus of State Wilderness Act jurisdiction stripping provisions) exhibits an even stronger relationship, as shown in Figure 5.2, and is examined in detail below in the section discussing *NEPA* claims against the Forest Service.



Source. Chutkow Environmental Jurisdiction Stripping Dataset, 2009; Federal Court Cases: Integrated Data Base, 1970-2000, Federal Judicial Center, Civil Terminations.

Figure 5.1. Annual U.S. Civil Environmental Defendant Case Dispositions and Environmental Jurisdiction Stripping Public Laws, 1970-1990

Litigation and State Wilderness Acts

The State Wilderness Acts' passage, and the included jurisdiction stripping provisions, occurred during a period in which environmental interest groups strategically used the court system to disrupt Forest Service timber harvesting arrangements in national forests.¹²³ The following factors affected litigation incentives in this issue area, and in doing so made the use of the judicial process, along with the attendant costs it imposed on government defendants, an attractive way for interest groups to achieve their policy goals. The issue area in question, forest management and timber harvesting, was a contentious one, with well defined interests on both sides. One interest group, environmentalists, was unsuccessful in achieving its policy goals through the legislative process. Delay in policy implementation and/or settlement with the government were both "wins" for environmental interests. These goals were accessible through the courts due to the open-ended language of *NEPA* which created compliance uncertainty for government actors and afforded litigants a legal basis for delaying forest management plans and their attendant timber harvest authorizations. In addition, the favorable legal rules governing preliminary injunctions in cases involving alleged environmental harm gave plaintiffs an effective way to disrupt Forest Service actions well in advance of final case disposition.

Interest Groups and the National Forest System

The National Forest System consists of federally owned forest lands overseen by the United States Forest Service, an agency within the Department of Agriculture.

¹²³ Suits against timber harvesting were part of a larger strategy to prevent any use of national forests, including recreational use and its related commercial development. Timber harvesting was often the forerunner for other commercial ventures, due to the roads, staging areas, and other development that accompanied logging. For this reason, environmental groups were keenly interested in preventing timber companies from either gaining a foothold or continuing activities in national forests. A second concern, was that logging would establish the roads and access that would disqualify land from being categorized as pristine, a requirement, as discussed later, for placing it within the protection of certain wilderness preservation statutes.

The creation of the National Forest System dates back to 1876 when the federal government began withdrawing public lands from general homesteading access out of concerns that the natural forest resources of the United States, as well as their related economic value, required some form of protection and preservation (Steen 1976; Wilkinson and Anderson 1987). Currently, the Forest Service manages approximately 193 million acres of forests and grasslands in 43 states.¹²⁴ States with the highest number of national forest acres are: Alaska, California, Idaho, Montana, Oregon, Colorado, and Arizona, although 17 other states also have a national forest presence that exceeds one million acres (Table 5.2).¹²⁵

In the course of this management, the Forest Service must make decisions about forest access and use, including use for sport, recreation, and commercial activity, such as timber harvesting. Commercial timber activity in particular often leads the way for other forest uses, by creating roads and access to otherwise inaccessible land. In this regard timber harvesting is not only the forerunner of greater public use, but is also the lightning rod for objections to national forest access. Because use and preservation of forest land are often mutually exclusive, the degree to which national forests are available for human activity of any kind is the source of tension between two distinct interest groups: the timber industry coalition and environmentalists.

¹²⁴ United States Forest Service. "Table 6, NFS Acreage by State, Congressional District and County," United States Forest Service, http://www.fs.fed.us/land/staff/lar/2008/TABLE_6.htm, (accessed March 30, 2009).

¹²⁵ Ibid.

Table 5.2. Largest National Forest Acreage States

State	Acreage
1. Alaska	21,969,228
2. California	20,812,121
3. Idaho	20,463,385
4. Montana	16,966,146
5. Oregon	15,668,052
6. Colorado	14,519,108
7. Arizona	11,264,579
8. New Mexico	9,413,655
9. Washington	9,284,302
10. Wyoming	9,241,184
11. Utah	8,203,168
12. Nevada	5,763,868
13. Michigan	2,874,842
14. Minnesota	2,840,753
15. Arkansas	2,598,672
16. South Dakota	2,017,367
17. Virginia	1,664,305
18. Wisconsin	1,532,044
19. Missouri	1,492,073
20. North Carolina	1,255,163
21. Florida	1,175,926
22. Mississippi	1,173,901
23. North Dakota	1,106,034
24. West Virginia	1,043,028

Source. United States Forest Service. Table 6, NFS Acreage by State, Congressional District and County. Notes. Figures also include nominal amounts of national grassland.

Timber Industry Coalition. National forests contain a significant amount of the undeveloped forest land in the United States, according to some estimates as much as one third of the total undisturbed forest stock (Coggins, Wilkinison, and Leshy 1993). These forest stocks are of considerable interest to the timber industry, which contracts with the government for harvesting rights on federal land. In the mid-1980s, when most State Wilderness Acts were passed, 136 million acres, roughly 28% of all the available timber-producing land was publicly owned, with the vast majority of that

land situated in national forests (U.S. Department of Agriculture 1989). During the 1970s and 1980s, approximately half of the softwood timber, essential to the construction industry, was on federal land (Waddell, Oswald, and Powell 1987). In some states, particularly in the northwest, this percentage was even higher. In 1983, the federal government owned 57% of commercial timber in Oregon.¹²⁶ Timber harvested on public land was worth \$307,609,817 in 1970, \$729,829,429 in 1980, and \$1,187,384,520 in 1990.¹²⁷ The timber industry itself generates jobs, both directly and indirectly, broadly across the U.S. economy, including not only logging and mill employment, but also wood product preparation for the commercial and residential construction industry. Table 5.3 shows the nationwide value of timber harvested and the number of timber related jobs from 1972 to 1993. The direct category includes timber logging and mills. The indirect category represents millwork, building, lumber, and construction products, residential wood products, and construction industry employment.

¹²⁶ Victor Atiyeh, Governor of Oregon, speaking before the Senate Subcommittee on Public Lands and Reserved Water of the Committee of Energy and Natural Resources on August 16, 17, *Hearing on S.2805 and S.2818, Adjustments to Timber Sales Contracts on National Forest System Lands and Public Lands*, 97th Cong., 2nd sess., 1983, 14.

¹²⁷ United States Forest Service, "National Forest Service Management Reports," United States Forest Service, [http://gis.fs.fed.us/forestmanagement/reports/sold-harvest/documents/1905 - 2008_Natl_Sold_Harvest_Summary.pdf](http://gis.fs.fed.us/forestmanagement/reports/sold-harvest/documents/1905-2008_Natl_Sold_Harvest_Summary.pdf), (February 25, 2009).

Table 5.3. Timber Related Jobs (1000s) and Value of National Forest Timber Harvested, 1972-1993

Year	Direct Employment	Indirect Employment	Total Employment	Timber Harvest Value
1972	251.00	3249.3	3500.30	\$381,956,590
1973	261.80	3447.6	3709.40	\$479,233,003
1974	272.00	3316.8	3588.80	\$508,615,356
1975	243.10	2874.1	3117.20	\$365,951,687
1976	265.90	2979.4	3245.30	\$492,029,190
1977	273.50	3274.4	3547.90	\$732,556,790
1978	277.10	3575.8	3852.90	\$854,682,200
1979	284.90	3700.1	3985.00	\$967,923,445
1980	265.70	3545.2	3810.90	\$729,829,429
1981	250.50	3428.7	3679.20	\$714,922,395
1982	223.50	3278.4	3501.90	\$339,214,989
1983	243.20	3443.4	3686.60	\$649,622,237
1984	254.00	3884.4	4138.40	\$759,577,198
1985	244.60	4145.2	4389.80	\$720,636,166
1986	242.40	4334.2	4576.60	\$786,881,222
1987	249.10	4544.6	4793.70	\$1,015,995,028
1988	253.80	4701.2	4955.00	\$1,235,734,207
1989	250.10	4734.9	4985.00	\$1,316,841,207
1990	244.70	4650.7	4895.40	\$1,187,384,520
1991	226.70	4235.3	4462.00	\$845,694,147
1992	223.30	4145.6	4368.90	\$934,504,178
1993	226.30	4353.3	4579.60	\$914,646,052

Source. Employment, Bureau of Labor Statistics, 60,63; Timber value, National Forest Service Management Reports, 1905-2008.

The economic impact of timber production on communities and states, particularly those with significant national forest presence, created a coalition of business and community interests united by the desire to see timber harvesting continue in national forests at levels that supported their economic interests (Culhane 1981, Hirt 1994, Hoberg 2004). This group included businesses directly supporting the extraction of timber such as road clearing and construction companies, engineers, sawmill operators, lumber brokers, pulp processors, tool suppliers, transport companies, and construction material suppliers. Middle and end product users such as

floor and pallet makers and residential and commercial construction companies also were affected.

In addition, the timber industry's interests dovetailed with other commercial and non-commercial enterprises that valued access to national forests. Grazing rights were important for farmers and livestock rangers located on the periphery of national forestland. Wilderness designations and other restrictions threatened to foreclose mineral exploration, a situation which particularly concerned the mining industry because of companionate restrictions being considered by the Department of the Interior and the Bureau of Land Management for lands under their control. Recreational use in national forests was an individual concern for citizens of proximate communities who used the lakes, streams, and clearings for vacations and weekend entertainment. Recreational use was also a major concern for businesses engaged in tourism or related enterprises. The Forest Service did not begin collecting systemized data on recreational use until 2000, with the launch of the National Forest Visitor Use Monitoring Project. However, in that year, the Forest Service estimates 257 million site visits nationally with 14.3 million visits to limited wilderness areas.¹²⁸ Real estate developers, food and entertainment enterprises, consumer goods stores, and camping, hunting, fishing, hiking, and skiing related groups and business all opposed restricting national forest access.

State, county, and municipal actors whose tax base depended on the revenue generated by logging and related commercial activity in and around national forests also had a strong interest in keeping the land available for multiple use (Atiyeh 1983; Helmick 1982). If forestland cannot be accessed for commercial activity, business

¹²⁸United States Department of Agriculture, "National Visitor Use Monitoring Results, August 2001, USDA Forest Service Region 5, Modoc National Forest," United States Forest Service, http://www.fs.fed.us/recreation/programs/nvum/reports/year1/R5_Modoc_final_082001.doc, (May 27, 2009).

revenues drop and regional governments are affected. In addition, national forestland does not provide a direct tax base for the communities in which it is located (being federal land). Timber harvesting revenues collected by the Forest Service not only supplement the agency's budget, but also are shared with local governments. These revenues are vital in supporting government infrastructure and public services such as schools, roads, and fire and safety personnel in the affected communities.

Environmental Groups. On the other side of the access and use issue were environmental organizations. Groups interested in protecting forest land in the United States have long been part of the political landscape. The environmental movement grew in strength and scope during the 1960s and 1970s, with organizational numbers and membership increasing exponentially, and the passage of multiple environmental laws in the early 1970s as a testament to the movements' increased political power (Berry 1997). These organizations, which included both nationally based not-for-profits, such as the Sierra Club and the Wilderness Society, and loosely organized groups of local residents, primarily were interested in preserving national forests in their pristine, natural state (Hays 1998). Environmental advocates acted at various times both independently and in concert. A typical list of plaintiffs, for example, taken from a single lawsuit against the Forest Service, includes Siskiyou Regional Education Project, Klamath-Siskiyou Wildlands Center, Oregon Natural Resources Council Fund, Sierra Club, American Lands Alliance, The Wilderness Society, Pacific Rivers Council, and Defenders of Wildlife (*Siskiyou Regional Education Project v. Goodman* 2007).

With respect to Forest Service management of these national assets, the environmentalist position was to stop all timber harvests and leave the land undisturbed (Jones and Taylor 1995; Mortimer 2002). Some scholars also note that environmental groups with a national presence were structurally incented to continue

challenging Forest Service oversight of the national forests to justify fundraising and generate the revenues needed to support their organizational overhead (Mortimer 2002). For purposes of this analysis, global references to environmental interests groups, environmentalists, or preservationists means that varying group of actors that engaged in lobbying and litigation aimed at the Forest Service and designed to stop or slow timber harvesting and any other commercial or public activity in national forests.

Legislative Winners and Commercial Timber Activity

The history of conflict between the timber coalition and environmental groups over national forest management is well documented (Clary 1986; Hirt 1994, Hays 1996). Preservationists, however, were unsuccessful by the mid-1970s in getting Congress to pass legislation that expressly limited commercial activity on public lands, despite the resounding success of environmental organizations on a national level in passing broad-based environmental laws such *NEPA*, *Clean Air Amendments*, *Endangered Species Act*, and *Clean Water Act*. By one estimate, nearly 49 environmental laws were passed during this period that affected national forests (Thomas 2005). While some of this legislation can be quite explicit regarding expected levels of environmental protection,¹²⁹ the statutes that set the stage for the State Wilderness Acts, directed specifically at forest management, spoke in vague generalities that left considerable discretion with the Forest Service.

This was due to the fact that, between 1967 and 1990, the years of interest regarding the State Wilderness Acts,¹³⁰ representatives from states with the greatest stake in ongoing commercial timber activity and other multiple uses in national forests

¹²⁹ The *Endangered Species Act* of 1973 affects commercial activity in national forests through its definition of endangered species and critical habitats under the direction of the Fish and Wildlife Service. This can also be a source of litigation challenging commercial or timber activity.

¹³⁰ Throughout these analyses, where data availability permits, 1970 to 1990 are treated as the years of interest with respect to the State Wilderness Acts. This is because *NEPA* was signed into law in January of 1970. The year 1990 is used as a cut date, because the *Colorado Wilderness Act of 1993* was, in substance, a continuation of the *Colorado Wilderness Act of 1980*.

controlled the committees with jurisdiction over the Forest Service and most wilderness related legislation. In the House, this was the Committee on Insular and Interior Affairs¹³¹ and in the Senate this jurisdiction was split between the Committee for Agriculture, Nutrition, and Forestry¹³² and the Committee for Energy and Natural Resources.¹³³ In the House, of the ten states that placed the largest number of representatives on the committee from 1967 to 1990, six had 59% or more of their timberland stocks on federal land and four ranked in the top ten timber employment states. When states with the highest percentage of their representatives serving on the committee are considered, to control for the differing number of representatives per state, eight of the top ten had 59% or more of their timberland stocks on federal land. The situation in the Senate oversight committees was largely the same.¹³⁴

During this same time period, the United States Forest Service was seen by environmental activists, with ample justification, as hostile to the concerns of the environmental movement (Dana and Fairfax 1980; Jones and Taylor 1995; Twight 1983). Numerous studies support this perception, with scholars noting that the Forest Service, with its widespread regional offices and professionalized staff, developed close ties to timber companies (Nienaber and McCool 1996) and favored timber production over environmental and preservationist concerns (Biber 2009; Hirt 1994; Wilkinson 1992).

These concerns were exacerbated by the considerable discretion the Forest Service, and its parent agency, the Department of Agriculture, enjoyed over the management of national forests. This level of control was ceded to the agency in the

¹³¹ Renamed the Committee on Natural Resources in 1993, and then the Resources Committee in 1995.

¹³² Called the Committee on Agriculture and Forestry prior to 1977.

¹³³ Also called the Committee on Interior and Insular Affairs.

¹³⁴ Chutkow Environmental Jurisdiction Stripping Database, 2009; timber data from United States Forest Service. "Table 6, NFS Acreage by State, Congressional District and County," United States Forest Service, http://www.fs.fed.us/land/staff/lar/2008/TABLE_6.htm, (accessed March 30, 2009).

late 1800s and confirmed by the Supreme Court in *United States v. Grimaud* (1911). The *Forest Reserve Act of 1891* directed the president to identify and set aside land for the public domain. The *Forest Management Act of 1897* authorized the Department of Agriculture, and its forestry division which later became the United States Forest Service, to develop rules and regulations detailing how national forest land was to be used and preserved. In combination, these two Acts set the legislative stage for the Forest Service. The agency not only was integral in helping identify land placed within the national forest system, but it also commanded wide latitude in determining how, and by whom, those lands were used. This discretion was challenged as an unconstitutional delegation of legislative power in the *Grimaud* in connection with penalties levied for violation of Department of Agriculture rules. The Supreme Court upheld the agency's broad powers over national forests, noting "In the nature of things, it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation had its peculiar and special features, and, in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power."¹³⁵

The result of all these factors was a pattern of legislation that spoke in general terms about preservation, but as a practical matter, left the definition and implementation of forest conservation (and by the same token forest commercialization) to the Forest Service. The *Multiple Use Sustained Yield Act of 1960* ("MUSYA") instructs the Forest Service to maintain public lands for a wide range of uses including commercial timber and mining operations, public recreation, and wildlife and ecosystem protection. The *National Forest Management Act of 1976* ("NFMA"), designed to provide additional management guidance to the Forest

¹³⁵ *United States v. Grimaud*, 220 U.S. 506 (1911), 516.

Service, requires the formation of a management plan for each national forest. These management plans must take into account a list of general criteria aimed at balancing both use and conservation goals defined with the help of public participation. In combination, while these Acts prescribe a process for the Forest Service to follow, their reliance on vague definitions of conservation and multiple-use offer little guidance as to how national lands should be managed (Daniels 1987; Murphey 1996; Mortimer 2002).

Congress also passed a national *Wilderness Act* in 1964 in an effort to appease growing preservationist concerns that the multi-use dictates of the *MUSYA* implemented by the Forest Service were depleting the wilderness ecosystems in public lands (Hoberg 2004; Jones and Taylor 1995; Twight 1983). The national *Wilderness Act* created a National Wilderness Preservation System (“Wilderness Preservation System”). Once land was deemed a wilderness area and placed within the Wilderness Preservation System, multiple uses, in particular logging and timber harvesting activity were significantly restricted in order to maintain the area’s “wilderness character.”¹³⁶ The Act specified approximately 9.1 million acres of federal land as wilderness and instructed the Secretary of Agriculture to survey the remaining federal forest lands within ten years and recommend to the President and Congress which additional national lands should be added to the Wilderness Preservation System. The Act defines “wilderness” as undeveloped federal land, “retaining its primeval character,” devoid of man-made improvements, and which has the following, four characteristics: it “(1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation;” (3) is at least 5000 acres; and (4) may also have other features that make it

¹³⁶ *Wilderness Act of 1964, U.S. Code 16 (1964), §1131(a).*

worthy of preservation.¹³⁷ In these vague terms, the Act sets up a categorical system in which some land (wilderness) is left fallow and other land (not found to be wilderness) is available for commercial and recreational use. The task of applying these general directives to the millions of acres of national forest land fell to the Forest Service.

Strategic Litigation and RARE

The catalyzing events that ultimately led to the State Wilderness Acts' jurisdiction stripping provisions began in 1967, when the Forest Service undertook an inventory of the public lands under its management to determine which qualified for inclusion in the Wilderness Preservation System. These evaluations, called remote area roadless evaluations or RARE, dovetailed with the Forest Service's management obligations later codified in *NFMA*. Under *NFMA*, the inventory of public lands and identification of wilderness areas requiring heightened protection were necessary first steps in the development of forest management plans for the national forests. A portion of each management plan (subsequently required by *NFMA* for each national forest) was to detail the nature and extent of timber harvesting activity allowed within a particular national forest, both in the wilderness areas shielded by the Wilderness Preservation System as well as those lands not designated as wilderness. The Forest Service approached this analysis by first identifying forest land as either roaded or roadless. If land already contained roaded access, it generally failed to satisfy the Wilderness Preservation System requirement that included land be primeval and undeveloped. Next, if the land was roadless, the Forest Service determined whether, despite the absence of roads, the land fell within the general statutory definition of "wilderness." If the land was wilderness, it was identified for inclusion in the Wilderness Preservation System. The Forest Service used these categories as part of its management plan for the national forest in question, allocating, among other things,

¹³⁷ *Wilderness Act of 1964*, U.S. Code 16 (1964), §1131(a)-(c).

overall acceptable commercial timber activity among the various parcels depending on the level of protection required.¹³⁸

The RARE process was conducted with at least some input and oversight from both interested members of the public and Congress. The Forest Service, in its Final Environmental Impact Statement released in 1979,¹³⁹ detailed its process for surveying and categorizing forest land under RARE. Among the criteria considered were renewable resource use (including timber harvesting), non-renewable resources (including commercial mining products such as natural gas and minerals), wilderness quality (using the *Wilderness Act's* generalized standards, with ratings conducted by forest service professionals, including industry and environmental group representatives), and public input (signatures received by the Regional Forester for or against certain designations). Some scholars suggest that the public input portion of this process (signature collection and wilderness ratings) was used to identify areas of high preservation interest which could be designated as wilderness thus diverting attention from other areas (Mohai 1987).

Congressional representatives were fully aware of the land allocation process, and the specific RARE allocations, as evidenced, for example, by the Forest Service's handling of the related environmental assessment. The draft environmental impact statement supporting RARE was issued to the public on June 15, 1978, and public comment was invited until October 1978. Some 264,093 comments were received. A short two months later the final impact statement was issued, but only circulated to Congress and certain agencies. The President (Carter) approved the wilderness allocations with minor changes and forwarded them to Congress for final action.

¹³⁸ For a general discussion of this process, see Hoberg 2004 and Mortimer 2002.

¹³⁹ United States Forest Service, "RAREII: Final Environmental Statement – Roadless Areas Review and Evaluation (Jan. 1979)," United States Forest Service, <http://roadless.fs.fed.us/data/pdfdocs/rare2.pdf>. (November 14, 2008).

Congressional approval was delayed primarily because of lawsuits challenging the process.¹⁴⁰ Some scholars suggest that the Forest Service had its own independent preference for commercial use percentages that differed slightly from congressional preferences (Booth 1991). This evidence shows that when congressional delegations were monitoring the process, but not as actively involved (RARE II), the Forest Service allocated less land to wilderness without any obvious congressional objection. The wilderness acreage allocations increased slightly, but only after the RARE II process was challenged in court, and, as described in the next section, Congress addressed the issue on a state by state basis.

This situation was untenable for environmental groups, who saw the Forest Service's actions as the first step in wider access for commercial use of national forest land. As legislative options appeared unproductive, these interest groups opted instead for the strategic use of the court system. The goal was to prevent timber harvesting activity in national forests, and, by forcing new environmental assessments, forestall any commercial or recreational use of the land. Since the completion of RARE was a necessary step to free up non-wilderness land for commercial activity, environmental interests could achieve their goal through any court action that delayed the RARE process, timber sales, or the promulgation of forest management plans. Although a final court decision on the merits could achieve this end, the litigation goal could also be met by creating pre-trial delays, and imposing litigation costs on the agency sufficient to create a self-imposed agency halt to RARE and any intermediate timber harvesting. This strategic approach relied on three factors. First, the passage of *NEPA* gave litigants a legal way to impose process-based costs and delays on an agency. Second, favorable rules governing preliminary injunctions in environmental cases

¹⁴⁰ See *California v. Bergland*, 483 F. Supp. 465 (E.D. CA 1980) for a description of the challenged RARE process.

allowed litigants to stop timber harvesting before and during trial. Finally, court decisions in two key cases created uncertainty over outcomes with respect to RARE and the development of forest management plans.

The role of uncertainty is important in this type of policy-based litigation. This is because the defendant is a government entity with continuous and ongoing policy interactions with the public. This provides numerous ways in which the agency is vulnerable to suit. The plaintiff's strategy is to file multiple suits challenging the contested policy, and to continue to do so even if the particular strain of litigation is not decided definitively either for or against the plaintiff. In this way, a plaintiff can diversify her chances across the court system. Multiple suits increase uncertainty, in no small part because they often result in multiple different case dispositions.¹⁴¹

It is also in the plaintiff's interests to take legal risks and continuously refine case form and content depending on judicial and agency reactions. The more suits, the wider the variation in claims, the more costs plaintiff can impose on the defendant, and the more likely it is that the plaintiff might obtain some kind of positive court action. This need not be a decision on the merits, although it can be. The disruption of a single positive case outcome, including an intermediary injunction, settlement, or decision on the merits compounds this dynamic, not only because it may affect ongoing cases, but also because it helps the plaintiff refine her arguments and target her litigation in future cases.

This strategy is particularly effective when, as was the case here, there is wide discretion afforded to an agency and insufficient statutory guidelines as to how this discretion should be exercised. This leaves the agency vulnerable to legal challenges claiming the agency is not following its statutorily proscribed duties, since the statutory directions leave so much room for alternative interpretation. In the case of

¹⁴¹ Posner (2001) describes this in the antitrust context as the "cluster bomb" effect.

the Forest Service, these directions were both vague and sometimes conflicting: manage public land for multiple uses and preserve wilderness (unhelpfully defined as land “affected primarily by the forces of nature”).¹⁴² The presence of open-ended legislation, such as *NEPA*, added to this dynamic by providing the plaintiffs with a legal basis for challenging agency action and imposing significant process-based delays premised on rules and parameters that also appeared to change on a case by case basis.

There are, as a result, strong incentives for the defendant to be risk adverse and attempt to dampen litigation when faced with multiple suits in such an ill-defined statutory context. Litigation successes, even sporadic ones, reinforce the risk for the defendant that out of the many cases filed some may result in a legal strategy or court ruling that permanently changes policy. Any indication in the litigation process that the plaintiff might have a viable litigation strategy, whether or not that strategy appears likely to prevail in the end, can make avoiding litigation more and more attractive for the defendant.¹⁴³ On the other hand, less litigation means less diversification and fewer cases in the system that might pay off for the plaintiff.

NEPA and Environmental Impact Statements. Environmental interest groups were handed a litigation gift with the passage of *NEPA* which was signed into law in January 1970. *NEPA*, which is at the heart of much litigation involving national forest management, applies to all federal agencies, and requires the preparation of either an environmental assessment or an environmental impact statement (“EIS”) for all “major federal actions significantly affecting the quality of the human environment...”¹⁴⁴ An EIS is not a substantive requirement, but rather one designed to

¹⁴² *Wilderness Act of 1964, U.S. Code* 16 (1964), §1131(a)-(c).

¹⁴³ In some ways this is a bit of a paradox, because injunctions or other pre-trial motion outcomes may reduce uncertainty by increasing both parties’ assessment of the plaintiff’s chances at trial – although this need not always be the case.

¹⁴⁴ *National Environmental Policy Act, U.S. Code* 42 (1970), § 4332(2)(C).

inform agencies and the public about the environmental impacts and potential alternative actions related to important agency policy implementation.

The generality of the Act's language quickly became the basis for litigation against the government, often aimed at delaying implementation of agency policy by claiming that an EIS either was not prepared, or was inadequately prepared, thereby forcing multiple impact reviews of an agency's action (Mandelker 2008). In concept, these procedural requirements were not intended to be an onerous or time consuming process for the involved agencies, however, the litigation generated by the Act created agency behavior designed to avoid the costly and time consuming process of defending an EIS in court. In response, agencies produced EIS that grew in length and complexity over time in an attempt to anticipate and avoid litigation (Karkkainen 2002; Mandelker 2008). Current regulations issued by the Council on Environmental Quality, charged with implementing *NEPA* procedures, state that an EIS should usually be about 150 pages, with an expected 300 page maximum for very complex government actions.¹⁴⁵ However, by 2000 the Council on Environmental Quality reports that the average EIS was 742 pages, with many commentators attributing this growth to overcautious agencies seeking to avoid EIS legal challenges.¹⁴⁶ This means that as a litigation tool, *NEPA* allows litigants to inject delay in the policy process, although the outcome may not be altered, as any revisitation of an EIS results in multiple agency hours and resources expended generating the necessary documents and studies to support agency action.

¹⁴⁵ *Code of Federal Regulations*, Council on Environmental Quality, title 40, sec. 1502.7.

¹⁴⁶ United States House of Representatives Committee on Resources, "Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act. Initial Findings and Draft Recommendations, December 21, 2005," House Resources Committee, http://www.law.georgetown.edu/gelpi/research_archive/nepa/NEPATaskForce_FinalDraft.pdf, p. 11-13 (Accessed May 17, 2990) ("2005 *NEPA* Task Force").

The Forest Service was a particular target for this type of litigation (Ackerman 1990; Jones and Taylor 1995; Mason 2008; Thomas 2005). The first *NEPA*-based case aimed at stopping an approved timber harvest was filed in 1970, within months of the Act's passage.¹⁴⁷ Between 1970 and 2008, 282 cases were filed against the Forest Service challenging timber sales, based on *NEPA* claims, and generating some kind of reported decision by a federal judge (Environmental Jurisdiction Stripping Database, 2009, hereinafter "Environmental Database").¹⁴⁸ Between 1970 and 1990, the dates of primary interest here, 57 such cases were reported. Of these, the government ultimately prevailed in 36 cases (63%), in keeping with other studies finding that the government has a high likelihood of litigation success in federal court (Crowley 1987; Songer, Sheehan, and Haire 1999). 14 actions in the database (25%) specifically mentioned roadless areas, of which the government won 60% (8).

The number of *NEPA* cases identified in the Environmental Database is, no doubt, a vast underestimation of the actual number of cases that appeared in federal court, since, by some estimates, roughly 98% of federal civil cases filed either settle¹⁴⁹ or are dismissed prior to trial (Clermont 2008, Shavell 2003). While this percentage includes civil litigation between private parties, whose interest in monetary settlement may create an upward skew that undermines a direct application to litigation against the government as well as substantive pre-trial dispositions which are reported, nonetheless it is clear that the vast majority of filed cases fail to go to trial, and correspondingly fail to generate a reported judicial decision. Reports by the Federal Judicial Center ("FJC") strongly suggest that this dynamic applies to environmental

¹⁴⁷ *Sierra Club v. Hardin*, 325 F. Supp. 99 (Alaska 1970).

¹⁴⁸ Cases were collected based upon a Westlaw search in the category "allfeds" using the search terms *NEPA* or national environmental policy act, timber or log, and national forest or forest service. Cases were then screened for appropriate content and to account for appeals and remands.

¹⁴⁹ Settlements rates are high, but do vary by district and case type (Clermont and Schwab 2008; Eisenberg and Lanvers October 1, 2008; Galanter and Cahill 1994)

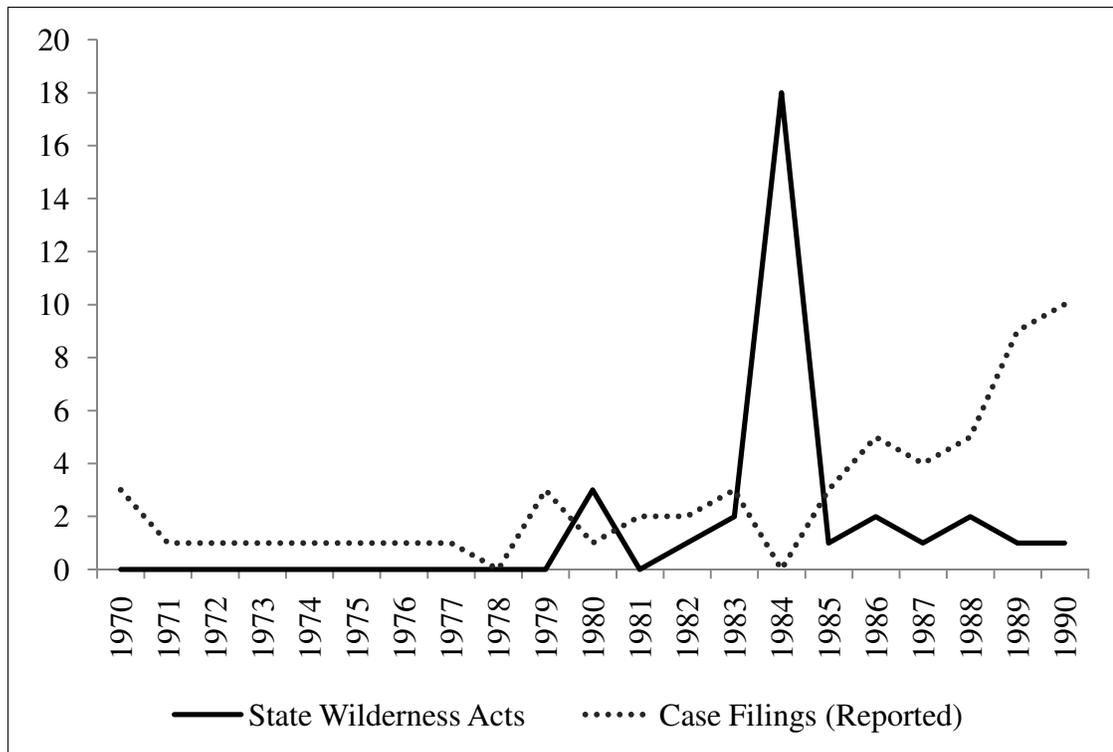
cases against government defendants as well. The FJC reports that between 1970 and 1990, federal courts disposed of 5,021 cases based on environmental challenges against the government.¹⁵⁰ The FJC database includes all case dispositions, whether or not they resulted in a written action by a judge. Of these, roughly 88% were disposed of before trial.¹⁵¹ This percentage is in keeping with the overall proposition that reported cases underestimate actual litigation activity and suggests strongly that the actual number of *NEPA* cases against the Forest Service between 1970 and 1990 was far higher than the 57 cases appearing in the Environmental Database. If the 88% pretrial disposition applies, the actual number of cases could be closer to 475.

Reported *NEPA*-based claims against the Forest Service and State Wilderness Act passage exhibit remarkably related trends over time (Figure 5.2). Until 1978, reported case filings were one a year. The increase in reported cases between 1978 and 1979, to three cases, precedes the enactment of three State Wilderness Acts a year later. Between 1979 and 1983, the year prior to the peak in State Wilderness Act enactments, reported case activity rose to between two and three cases per annum as compared to only one case a year in the preceding nine years. In 1984, the majority of State Wilderness Acts are passed, along with statutory language that precluded court challenges to the Forest Service EIS underlying the RARE inventory process. No reported cases were filed in 1984, and this is likely a response to the State Wilderness Acts. The rise in *NEPA*-based challenges after 1984 captures challenges to the State Wilderness Acts and litigation crafted to circumvent the prohibition on judicial

¹⁵⁰ Data from Federal Judicial Center. 2005. *Federal Court Cases: Integrated Data Base, 1970-2000*, Ann Arbor, MI: Inter-university Consortium for Political and Social Research, ICPSR No., <http://www.icpsr.umich.edu>, nature of suit code 893, "environmental matters."

¹⁵¹ Some of these cases may generate written decisions by the judge that are reported, such as summary judgment rulings.

review.¹⁵² The lack of legislative response after 1990¹⁵³ is a function of the fact that most states (36) were already covered by State Wilderness Act protections.



Source: Environmental Jurisdiction Stripping Database, 2009.

Figure 5.2. State Wilderness Acts and NEPA-Based Timber Litigation Case Filings, U.S. Forest Service Defendant, 1970 to 1990

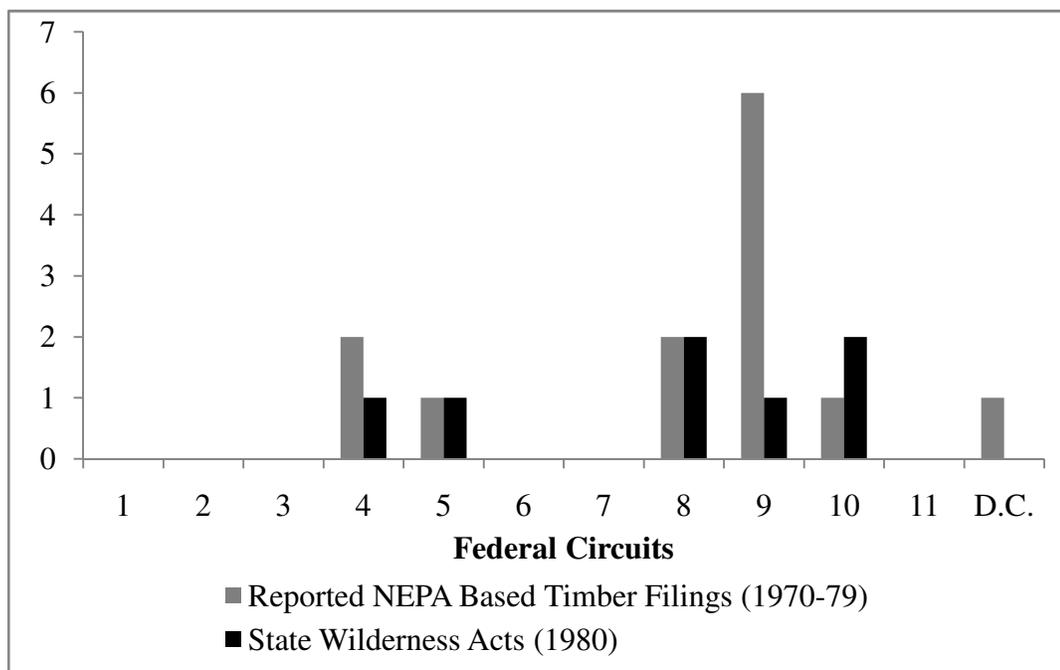
When the data are examined at the federal circuit level, the trends become even clearer. Congress passed the initial State Wilderness Acts first in circuits with NEPA based timber litigation. Once these prototype Acts were through the legislative process, and as lawsuits continued, Acts were passed not only in litigation heavy

¹⁵² See, for example *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), filed in 1985, and *City of Tenakee Springs v. Franzel*, 960 F.2d 776 (9th Cir. 1992), filed in 1986.

¹⁵³ With the exception of the 1993 *Colorado Wilderness Act* which is treated as an extension of the *Colorado Wilderness Act of 1980*.

circuits, but prophylactically across the country in response to concerns that the environmental, multiple suit litigation strategy might appear in other circuits as well. The circuit level analysis reveals these patterns because federal circuits are regional, usually encompassing several states, each of which may contain one or more federal district courts. The appellate court sets precedent for all courts, in all states, within a jurisdictional circuit. This means that cases filed in one district court potentially can affect other trial courts in the same circuit, either by providing a decisional example to follow, or because a case moves to the appellate level and creates precedent for the entire circuit. In the State Wilderness Act context, litigation activity within a circuit had potential ramifications for all states within the circuit's jurisdictional reach.

From 1970 to 1979, *NEPA* based cases challenging Forest Service timber policies were filed in six different federal circuits. In 1980, when the first State Wilderness Acts were passed, every state was from a circuit that experienced this *NEPA*-based litigation. Conversely, where no such litigation was identified in a state's federal circuit, no State Wilderness Act was enacted (Figure 5.3). The only exception is the D.C. Circuit, which was the forum for some litigation, but contains no national forests. At the state level, two of the seven State Wilderness Act states, Alaska and South Dakota, experienced litigation directly, both within five years of the Acts passed with respect to their respective in-state national forests. The difference in the state level and circuit level relationships suggests, as is argued in more detail later, that Congress's primary concern was not necessarily particular judges, but rather a larger pattern of litigation, the costs it created, and the underlying threat, that lawsuits in one area presaged case filings elsewhere.



Source. Environmental Jurisdiction Stripping Database, 2009.

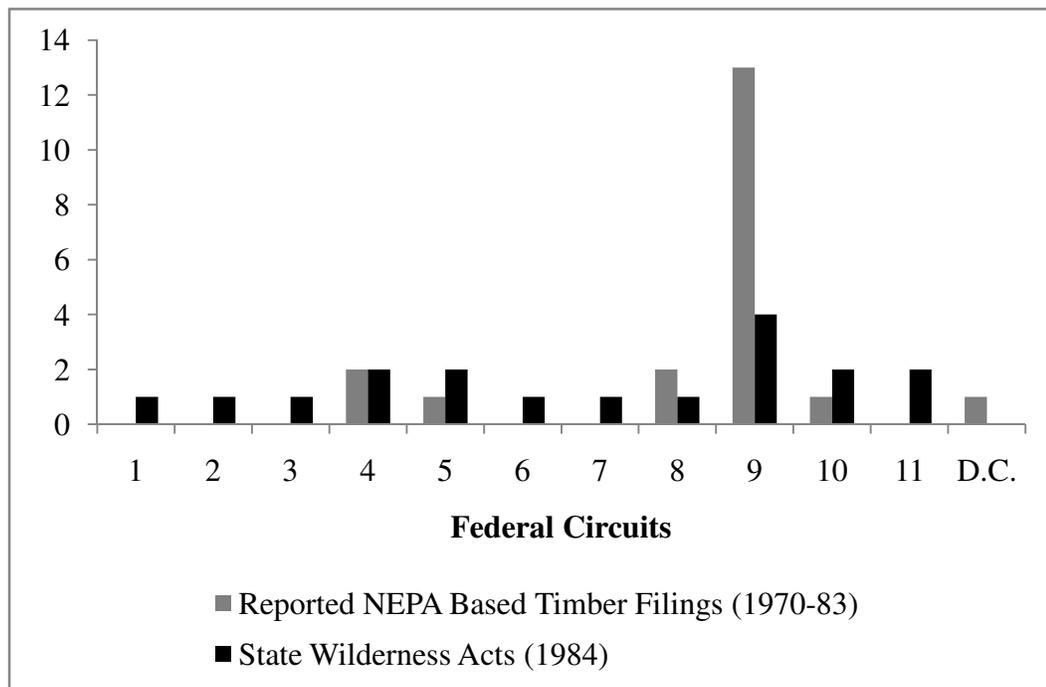
Figure 5.3. State Wilderness Act Enactments, 1980, and Reported *NEPA* Based Timber Case Filings, U.S. Forest Service Defendant, 1970 to 1979

The pattern generally holds for the Acts passed in 1982 and 1983, with two of the three State Wilderness Acts enacted in circuits experiencing litigation: Missouri (8th) and West Virginia (4th). From 1981 to 1982, additional reported cases all were filed in the 9th Circuit, with the exception of a contract claim filed in the U.S. Court of Federal Claims,¹⁵⁴ leaving the reported case filing pattern shown in Figure 5.3 largely unchanged. The *Indiana Wilderness Act* passed in 1982, is the exception, located in the 6th Circuit where no reported cases were identified.

The Indiana case signals the coming flurry of enactments in 1984, when Acts are passed in states from every federal circuit except D.C. (Figure 5.4). This broad legislative response anticipated additional lawsuits and responded to overall litigation on an aggregate level, but also protected the states directly experiencing litigation. By

¹⁵⁴ *Louisiana-Pacific Corp. v. United States*, 228 Ct.Cl. 363 (1981).

the end of 1984, the majority of states located in circuits with reported case filing activity were covered by State Wilderness Acts. This included four of the five states in the 4th Circuit, all states in the 5th Circuit, and four of six states in the 10th Circuit. The 8th and 9th Circuit states showed substantial legislative activity, although slightly lower than the other regions. In the 9th Circuit, where the highest number of reported case filings were identified from 1970 to 1983, State Wilderness Acts were passed for five of the nine states by 1984, with six of nine covered by 1989.¹⁵⁵ In the 8th Circuit, three of seven states had Wilderness Acts by 1984, which rose to four of seven by 1986.



Source: Environmental Jurisdiction Stripping Database, 2009

Figure 5.4. State Wilderness Act Enactments, 1984, and Reported NEPA Based Timber Case Filings, U.S. Forest Service Defendant, 1970 to 1983

Preliminary Injunction Rules. Judicially created standards for preliminary injunctions in environmental cases made litigation against the Forest Service attractive to environmental plaintiffs regardless of whether the case ever went to trial. Injunctive

¹⁵⁵ Only Hawaii, Idaho, and Montana did not have State Wilderness Acts.

relief is an equitable action where the court orders the defendant to halt her contested behavior. Injunctions can occur at several points during litigation. Temporary restraining orders and preliminary injunctions take effect pre-trial, with a preliminary injunction, if granted, often operating to stay the defendant's actions throughout the litigation process until the trial court's judgment.¹⁵⁶ The trial court can also issue an order that keeps an injunction in place as an appeal progresses.¹⁵⁷ Standards for granting a preliminary injunction (and other injunctive relief) are a matter of case law and vary by circuit. As a general matter, however, in order for a judge to halt a defendant's actions, the plaintiff must show the following: irreparable harm should the defendant continue her actions, inadequacy of other legal remedies, lack of excessive harm to the defendant if she is restricted from acting, any affect on third parties, and a likelihood that when the case is decided the plaintiff will prevail on the merits.¹⁵⁸ If the environmental plaintiff can satisfy these requirements, she can halt timber sales on the forest land at issue throughout the pendency of the trial. This was of no small consequence, since, for example, the average time between filing a case and final disposition in the Environmental Database is roughly two years. This delay could easily disrupt a timber harvest for much longer than the court related time, since the Forest Service engages private companies to conduct forest harvesting and sales, and a contract in limbo for 24 months poses significant planning and revenue problems for a private entity.

The practical application of these standards by many courts in environmental cases advantaged plaintiffs seeking preliminary injunctions in environmental disputes

¹⁵⁶ Rule 65, Federal Rules of Civil Procedure.

¹⁵⁷ Rule 62(c), Federal Rules of Civil Procedure. There are also appellate rules that allow the an appeals court to issue an injunction or stay a lower court judgment pending appeal.

¹⁵⁸ See, generally, *Rodriguez v. De Buono*, 175 F.3d 227 (2d Cir. 1999); *United States v. Power Engineering Co.*, 191 F. 3d 1224 (10th Cir. 1999), *cert. denied* 529 U.S. 1086 (2000).

with the government. The purpose of a preliminary injunction is to freeze the status quo in order to prevent harm pending a legal decision on the dispute's merits. Logging in a forest by definition changes the status quo. If the final decision in a case is the determination that certain land is pristine wilderness worthy of protection, allowing forest harvesting to continue during a trial functionally eviscerates the case outcome. This analysis was employed by a wide range of courts in districts all over the country. Trial courts issued preliminary injunctions, for example, in *Minnesota Public Interest Group v. Butz* (1975) (enjoining logging in the Boundary Waters Canoe Area of Minnesota); *West Virginia Highlands Conservancy v. Island Creek Coal Co.* (1971) (enjoining timber cutting in West Virginia); and *Earth First v. Block* (1983) (enjoining Forest Service activity in areas adjoining wilderness land in Oregon).

The Supreme Court recognized what had become common practice by federal courts in *Amoco Production v. Village of Gambell* (1987), a case involving the federal government's grant of oil and gas leases on protected land in Alaska. Despite ruling against the right to a preliminary injunction in the case at hand, in dicta regarding the standards for issuing preliminary injunctions in cases where environmental harm is alleged, the Court said, "Environmental injury, by its nature, can seldom be adequately remedied by money damages, and is often permanent, or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment" (*Amoco Production v. Village of Gambell*, p.480).

Preliminary injunctions and temporary restraining orders issued on timber sales were a cause of substantial disruption and substantial cost to the Forest Service.¹⁵⁹ The costs were independent of final case disposition. A preliminary injunction issued by a

¹⁵⁹ See testimony of U.S. Forest Chief F. Dale Robertson, speaking before the Senate Subcommittee of the Committee on Appropriations, *Hearing on Department of the Interior and Related Agencies Appropriations for 1990*, 101st Cong., 1st sess., March 7, 1989, Part A, 560-562.

district court in Texas, for example, was later overturned by the 5th Circuit, but nonetheless resulted in the cessation of timber sales in the disputed regions for seven years.¹⁶⁰ Preliminary injunctions stopping timber harvests in Oregon and Washington were such an ongoing problem that Congress included language overriding injunctions and authorizing the Department of Agriculture to conduct specified timber sales in 1985 and 1989.¹⁶¹

In *NEPA* cases against the Forest Service, the grant of intermediary injunctive relief to plaintiffs appears to be more a function of the legal standards applied than a function of judicial ideology. Of the 282 cases identified in the Environmental Database, slightly over 40% (116) involved injunctive relief either during the lower court handling of the case or upon pendency of an appeal.¹⁶² The judges in these 116 cases were split fairly evenly between Democrat and Republican appointees. 62 judges (53%) were appointed by Democrat presidents, 54 (47%) by Republican presidents.

It may be, however, that the judicial preferences of the appellate judges in a circuit affected trial court grants of intermediate injunctive relief in the identified cases. A disproportionate number of the 116 cases, 78 (70%), were decided by courts in the 9th Circuit. However, if only judges in the 9th circuit are considered, the ideological mix remains neutral, both in terms of appointing party and in terms of the median ideological scores for the court of appeals. Exactly half (39) of the 9th Circuit district court judges in these cases were Democrat appointees. As not all cases were appealed, the overall ideological tenure of the 9th Circuit Court of Appeals was

¹⁶⁰ Senate Subcommittee on Forests, Family Farms, and Energy of the Committee on Agriculture, *Hearing on Sipsey Wild and Scenic River and Alabama Wilderness Addition Act of 1988; and Proposed Revisions in the U.S. Forest Service Administrative Appeals Process*, 99th Cong., 2nd sess., S. Hearing No. 99-1000, (Sept. 28, 1988), 29-30.

¹⁶¹ *Additional Appropriations for Fiscal Year 1986*, Public Law 99-190, *U.S. Statutes at Large* 99 (1985): 1185; *Department of Interior and Related Agencies Appropriations Act of 1990*, Public Law 101-121, *U.S. Statutes at Large* 103 (1989): 701.

¹⁶² This includes temporary restraining orders, preliminary injunctions, junctions pending appeal, or stays of judgment pending appeal.

considered using the Judicial Common Space scores described in Chapter Three. The average common space score for the 9th Circuit between 1970 and 2006 (the last year Judicial Common Spaces scores are available) was -0.06. For the years 1970 to 1990, during which the State Wilderness Acts were passed, the 9th Circuit average score was -0.008. Both these measurements, although weakly liberal, as a practical matter show very little inclination toward either a conservative or liberal perspective in the circuit.

Parker v. United States and California v. Bergland. Two court decisions were the final legal factors that contributed to the efficacy of the *NEPA*-based litigation strategy against the Forest Service's attempts to complete the RARE process and finalize forest management plans. The Forest Service lost both cases. Although the judicial scope in each case was limited to a single circuit, these decisions created heightened uncertainty for the Forest Service as to the outcome of legal challenges to RARE on a nationwide scale. That uncertainty increased litigation avoidance behavior by the Forest Service, which provided the delays in implementing forest management policy that satisfied environmentalists' primary goal.¹⁶³

The Forest Service finished its first roadless areas review and evaluation ("RARE I") in October 1973. The review covered 12.3 million acres and identified 274 wilderness areas to be included in the Wilderness Preservation System as dictated by the national *Wilderness Act*. RARE I was abandoned before any recommendations were made to Congress or the president, due to a lawsuit filed in the 10th Circuit. The dispute in *Parker v. United States* (1971) was over a timber contract granted by the Department of Agriculture covering land in the White River National Forest which had not been surveyed for its wilderness status by the Forest Service and was

¹⁶³ Litigation avoidance behavior denotes actions taken by the Forest Service, under the threat, or perceived threat, of litigation which are designed to forestall a potential lawsuit. These include the withdrawal of forest management plans, extensive studies and documentation prior to agency action, the reduction, and in many cases cessation of timber harvesting contracts and approval, and pre-action negotiations with environmental interests.

contiguous to other land acknowledged as worthy of wilderness protection. The court determined that the Forest Service should have considered the wilderness character of the land under contract and enjoined the timber harvest. The Forest Service decided to conduct a new, nation-wide, RARE survey (“RARE II”), rather than take the chance that other courts in the 10th Circuit, where Colorado is located, or in other circuits around the country, might also add new land to the wilderness survey inventory. The litigation economics of this is discussed further in the next section, but as an introductory matter, the adverse decision in a single case was sufficient to increase the Forest Services’ uncertainty as to potential outcomes in other cases, and given the costs involved in addressing the issue through litigation, the agency decided to start over.

The RARE II survey, along with the EIS required by *NEPA*, was finished in 1979, nearly seven years after RARE I. Almost immediately, the Forest Service was sued by the State of California and various environmental groups claiming the EIS underlying the new roadless survey failed to take into consideration adequate alternatives to the various wilderness determinations. What unified both the state and the environmental plaintiffs was not necessarily the need to preserve as much wilderness as possible, but rather a deep dissatisfaction with the Forest Service’s determinations and process. As evidenced by the later *California Wilderness Act of 1984*,¹⁶⁴ which was crafted with the input of much of the state’s congressional delegation, California wanted to be an active participant in determining the wilderness allocations of national forests within its boundaries. The 9th Circuit in *California v. Bergland* (1982)¹⁶⁵ agreed with the plaintiffs, ultimately holding that the Forest Service needed to redo its EIS with respect to a contested list of 47 areas comprising

¹⁶⁴ *California Wilderness Act of 1984*, Public Law 98-425, *U.S. Statutes as Large* 98 (1984): 1619.

¹⁶⁵ Also referred to as *California v. Block*.

almost 1 million acres of land. As with the prior case, although the decision directly affected only 5% of the national forest land in California, the uncertainty created by the court ruling with respect to the remaining California national forests, the other states in the 9th Circuit, and potentially with respect to the rest of the country, led the Forest Service to begin talking about a RARE III.¹⁶⁶

Forest Service Litigation Avoidance

The combination of all these factors left the Forest Service with the following economic choice: it could continue with its RARE process, approve timber sales in the interim, draft forest management plans, and face the ongoing threat of litigation, or it could take actions designed to avoid litigation. The Forest Service made the rational choice to minimize its litigation exposure. In doing so, it also strategically elevated costs to key congressional constituencies in national forest reliant states, thereby elevating the institutional costs of the environmental litigation, and setting in motion the passage of the State Wilderness Acts and the related jurisdiction stripping provisions.

For the purpose of this analysis, the extent of the Forest Service's litigation avoidance is a function of the agency's expected loss at trial. And, as noted, this calculation is affected by the unique characteristics surrounding the State Wilderness Acts, including the significant outcome uncertainty created when an agency is granted a considerable degree of discretion in its authorizing statutes, is subject to vague and sometimes conflicting legislative directives, must comply with mutable rules governing environmental assessments, and finds itself the target of a multi-suit litigation strategy aimed at disrupting policy. As discussed in Chapter Two,¹⁶⁷ the defendant's expected trial loss can be expressed as $\pi_d J + C_d$, where π_d is the

¹⁶⁶ *Code of Federal Regulations*, Proposed Rules, Department of Agriculture, Forest Service, National Forest System Land and Resource Management Planning, title 36, sec. 219.17 48 (April 18, 1983).

¹⁶⁷ Page 52.

defendant's assessment of the likelihood that the plaintiff will win at trial, (J) is the value of the potential judgment for the plaintiff (and loss to the defendant), and (C_d) is the defendant's litigation costs.¹⁶⁸ The defendant will engage in litigation avoidance (Y_L) provided it is less costly than the expected trial loss. This can be expressed as follows:

$$Y_L < \pi_d J + C_d \tag{16}$$

An increase in the value of Y_L corresponds to the increasing levels of self-imposed costs the defendant, in this case the Forest Service, is willing to bear in order to avoid trial.

The litigation factors discussed affect this equation in the following ways. The Forest Service was facing very expensive potential judgments, both in real economic terms and in terms of policy control.¹⁶⁹ A full halt to timber harvesting in national forests essentially would remove the agency's mandate to manage for multiple uses, and, as discussed earlier, the Forest Service supported controlled timber harvesting in national forests, provided such activity was under the agency's direction (Clary 1986; Hirt 1994; Kaufman 1960). Timber harvest reductions also impact the Forest Service budget, as the agency relies on its share of revenues from timber sales to fund the agency (GAO Report 07-764). A decision mandating that the RARE process must start anew meant surveying millions of acres of forestland, involving both extensive diversion of forest service labor and considerable economic expense. Preparation of a

¹⁶⁸ This analysis is from the government's point of view. If it were the case that J was a dollar amount then that number could be assumed a constant regardless of party perspective. The equation modifies when the value is also policy based. For the government, J represents the cost of changing the policy (in both economic terms and less tangible policy disruption terms). As the calculation is concerned with increasing likelihood of government litigation avoidance, for these purposes, the government's assessment is the one that matters.

¹⁶⁹ The Department of Justice ("DOJ") represents the Forest Service and Department of Agriculture in court. This means direct litigation costs to the DOJ, however the Forest Service, and to a lesser extent the Department of Agriculture, is actively involved in trial preparation because they have both the expertise and the direct experience with the issues under challenge. See Chapter Two for additional discussion.

new EIS for the RARE process could also involve potentially millions of dollars and months if not years of policy implementation delay.¹⁷⁰ As a result, the potential judgment cost (J) increased. The relaxed rules for preliminary judgments in environmental cases meant that all costs attendant to halting forest management and timber harvesting, discounted by the probability of injunctive relief, became part of the costs of trial for the government. If the discount number is close to the 40% intermediate injunction rate found in the Environmental Database, this is a sizeable increase in C_d .

Uncertainty regarding litigation outcomes plays an important role. The Forest Service's policy discretion, and the generality of authorizing statutes, meant the agency could not comfortably rely on legislative language to protect its actions from suit. In addition, key victories by environmental interests in *Parker* and *California v. Bergland*, with regard to *NEPA* compliance in connection wilderness designations, increased the Forest Service's uncertainty about what constituted a legally defensible environmental impact statement. This uncertainty increased the Forest Service's (and the environmental plaintiff's) assessment of the plaintiff's chances for winning at trial especially given a multiple suit strategy. As a result, π_d increased. Accordingly, Y_L increased as follows:

$$\uparrow Y_L < \uparrow \pi_d \uparrow J + \uparrow C_d \tag{17}$$

In other words, the litigation strategy employed by the environmental plaintiffs in combination with the delegatory and general nature of the statutes affecting the agency created significant incentives for the Forest Service to engage in increasingly expensive behavior in order to avoid litigation.

¹⁷⁰ *NEPA* 2005 Task Force, p.20.

The Forest Service did this primarily by reducing timber sales and threatening to begin RARE III.¹⁷¹ Not only did the Forest Service engage in a rational response to litigation by these actions, but it also engaged in strategic behavior of its own. It was in the agency's best interest to be protected from environmental litigation, at the very least in the context of finishing RARE and getting forest management plans in place. Relying on courts to do this was an uncertain, expensive, and time consuming process. However, if Congress was sufficiently motivated it might intervene. Through curtailed timber production and unresolved commercial access parameters, which promised to continue for a prolonged time if a nationwide RARE III came to fruition, the Forest Service contributed to significant economic distress in the national forest rich states, conditions which created pressure on congressional delegations.

Reduction in Timber Sales. Timber harvests in the national forests decreased steadily after the passage of *NEPA*. In 1970, the volume of timber harvested in national forests was 11,538,725 million board feet (mbf). The volume dropped to 9,178,209 mbf in 1980, and reached a ten year low of 6,747,260 in 1982, just prior to the enactment of most State Wilderness Acts.¹⁷² These drops occurred in both Democrat and Republican administrations. From 1977-1979, during the Carter administration, timber harvesting was fairly even (10,481,536 mbf to 10,376,955 mbf). The decreases started in 1980, Carter's last year in office, (10,376,955 in 1979

¹⁷¹ Greater public consultation and input in the administrative process with the intent of creating less contentious policy might be another obvious response. To some extent this did happen, with the Forest Service negotiating the extent and content of timber harvesting and sales with environmental groups and timber interests prior to allowing any timber sale. This still meant reduced harvests, because the structural problem with this approach was twofold. First, no one environmental group spoke for all the interests. This meant, in the context of a multiple suit strategy with multiple plaintiffs, satisfying one group did not necessarily satisfy all. Second, for environmental groups the end game was to stop commercial activity (or any activity) on national forest land and this goal could not live in harmony with interests that wanted some kind of timber access.

¹⁷²U.S. Forest Service, "National Forest Service Management Reports, 1905-2008," [http://gis.fs.fed.us/forestmanagement/reports/sold-harvest/documents/1905 - 2008_Natl_Sold_Harvest_Summary.pdf](http://gis.fs.fed.us/forestmanagement/reports/sold-harvest/documents/1905-2008_Natl_Sold_Harvest_Summary.pdf) (accessed February 25, 2009).

to 9,178,209 in 1980) and continued through the Reagan administration, hitting a low point in 1982 (6,747,260).

These reductions were primarily the result of self-imposed restrictions by the Forest Service in reaction to the threat of litigation, or settlement agreements between the agency and environmental plaintiffs (Jones and Taylor 1995 Hassler and O'Connor 1986). These actions are consistent with agency avoidance behavior in the face of litigation cited in the broader literature (Levin 1996; Meltzer 1998; Wald 1996). Forest industry representatives testified before Congress that due to the uncertainty created by appeals and litigation threats surrounding the RARE process, the Forest Service was in “chaos” and was “gun-shy” about approving management programs that allowed development on potential roadless areas.¹⁷³ In Utah, for example as soon as litigation was filed challenging timber sale activities in roadless areas, the Forest Service brought all timber related planning and action to a complete halt.¹⁷⁴ Congressmembers grew increasingly frustrated with the policy stagnation. One group of senators asked, “must the State of Alaska constantly petition for relief because the Forest Service is afraid of litigation and would rather deny any roads as the easier course . . . ?”¹⁷⁵

Forest Service policy implementation also stagnated because the agency began testing the waters for possible litigation response when timber sales or forest management plans were finalized. The Forest Service authorized an action and if a suit

¹⁷³ Larry B. Blasing, Director, Forestry Programs, Inland Forest Resource Council, speaking before the Senate Subcommittee on Public Lands and Reserved Water of the Committee of Energy and Natural Resources on May 28, 1981, *Hearing on the Montana Wilderness Study Act*, 97th Cong., 1st sess., S. Hearing No. 97-33, 1981.

¹⁷⁴ James S. Riley, Executive director of Intermountain Forestry Services, speaking before the Senate Subcommittee on Public Lands and Reserved Water of the Committee on Energy and Natural Resources on February 9, 1984, *Hearing on Designating Certain National Forest System Lands and Public Lands in Utah and Arizona as Wilderness*, 98th Cong., 2nd sess., S. Hearing No. 98-779, 158.

¹⁷⁵ Additional Views of Senators McClure, Burns, Nickles, Murkowski, McConnell, Wallop, and Garn, Senate Committee on Energy and Natural Resources, *Report to accompany H.R. 97*, 101st Cong., 2d sess., S. Rpt. 101-126, (March 30, 1990), 36.

was filed, the Forest Service withdrew the proposed plan. This behavior was so prevalent that one court noted “the Forest Service has developed a practice of making, withdrawing, and reinstating timber sales and forest policy decisions in a way that might forestall judicial review indefinitely if left unchecked.”¹⁷⁶

The Forest Service also settled numerous suits, most commonly agreeing to stop or reduce timber harvesting, or revisit the extent and degree of wilderness protections, with respect to certain contested areas (Thomas 2005). The Forest Service, for example, agreed to cancel a timber sale in the Olympic National Forest, despite the plaintiff’s failure to obtain a lower court injunction.¹⁷⁷ In another case, the Forest Service stopped timber sales in California pursuant to a settlement after being sued under *NEPA*.¹⁷⁸ Environmental groups were well aware of the Forest Service’s willingness to settle and made this an explicit part of their litigation strategy. As the Wilderness Society noted in one of its publications, “the Forest Service may well initiate settlement negotiations. The agency is usually anxious to avoid having the planning process tied up in appeals, especially those that might result in adverse rulings in federal courts” (The Wilderness Society 1985, 456). In the alternative, the Forest Service negotiated the parameters of timber harvests with environmental groups before the fact. It was noted, in a House committee report on *NEPA*, that “because of an excellent collaborative dialogue in the southern U.S. between the Forest Service and interested parties, there is no active litigation involving National Forests in Alabama, Louisiana or Mississippi.”¹⁷⁹

Threatened RARE III. After the court decision in *California v. Bergland*, in February of 1983, John Crowell, Assistant Secretary of Agriculture, announced the

¹⁷⁶ *Sierra Club v. Robertson*, 764 F.Supp.546, (W.D. Ark.1991), 548-50.

¹⁷⁷ *Washington Department of Wildlife v. Stubblefield*, 739 F.Supp. 1428 (W.D. WA 1989).

¹⁷⁸ Senate Committee on Interior and Insular Affairs, *Senate Report*, 93d Cong., 2d sess. S. Report No. 93-1272 (Oct. 10, 1974), 4-5.

¹⁷⁹ *NEPA* 2005 Task Force, p.12.

agency's intent to reevaluate all roadless areas previously studied for wilderness potential nationwide. In other words, the agency signaled an intention to embark upon RARE III. This proposal was expressly designed "to minimize future risk of court challenge," as opposed to being a court ordered mandate.¹⁸⁰ In practical terms, this meant that the disruption to timber policy could continue for some time. The *Wilderness Act* was passed in 1967. Sixteen years and two RARE iterations later a fully realized assessment of national forest land was still unfinished. This possibility resonated in Congress. Representative John Seiberling of Ohio bemoaned that if Congress did not address the situation, RARE III would come out and "you are going to find the same lands tied up in court and possibly a lot more under RARE III, and we will be off for another 10 years of lawsuits and timberlands that ought to be released tied up."¹⁸¹ In urging Congress to take some action to prevent more wilderness studies, Senator Jesse Helms declared a third RARE study "a tremendous waste of taxpayers' money."¹⁸² Congressman Jim Weaver described a potential RARE III as a "costly and time consuming,"¹⁸³ and Senators Wallop and Simpson urged legislative action to prevent additional RARE-related expenses estimated at between \$15 and \$30 million.¹⁸⁴

Congressional and Agency Litigation Costs

The actual dollar cost of RARE III, was not the only, or even the primary, cost that concerned congressional representatives. Failure to resolve the litigation-inspired

¹⁸⁰ *Code of Federal Regulations*, Proposed Rules, Department of Agriculture, Forest Service, National Forest System Land and Resource Management Planning, title 36, sec. 219.17 48 (April 18, 1983).

¹⁸¹ House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearings on Additions to the National Wilderness Preservation System*, 98th Cong. 2nd sess., H. Hearing No. 98-3, Part IX, (March 29, 1984, April 6, 1984), 71.

¹⁸² Remarks of Senator Jesse Helms on Wilderness Release Language in the *New Hampshire Wilderness Act*, H.R. 3921, 98th Cong. 1st sess., *Congressional Record* 129 (Nov. 18, 1983): S17171.

¹⁸³ House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearing on Additions to the National Wilderness Preservation System*, 98th Cong. 1st sess. (May 17, 26 1983), 3.

¹⁸⁴ Remarks of Senator Wallop and Senator Simpson on *Wyoming Wilderness Act*, 98th Cong. 1st sess., *Congressional Record* 129 (Feb. 22, 1983): S1432.

timber management paralysis and failure to clarify wilderness designations in the national forests imposed costs across a wide range of private commercial interests¹⁸⁵ and institutional actors, starting with political costs and pressures on congressional representatives from states with a meaningful national forest presence. The congressional reactions reported in the following sections were culled from a full review of the legislative history generated in connection with the passage of the State Wilderness Acts, including the Congressional Record, Senate and House hearings and committee reports, and related exhibits. These documents cover roughly 14 years of congressional debate.¹⁸⁶

In keeping with the theoretical predictions of Chapter Two, Congress is primarily concerned with the following litigation costs: economic effects in constituent states, policy disruption and delay, the spread of copycat litigation (not necessarily related to court ideology), and administrative costs. As with the Forest Service analysis, each of these factors increased the cost Congress was willing to bear in order to avoid litigation. Unlike the Forest Service, Congress could change the equation by stripping jurisdiction and removing litigant access to the courts.

Economic Effects in Constituent States. Timber production on national forest land sank to a 10-year low in 1982, in the midst of a severe nation-wide recession (Congressional Budget Office 1982). As Table 5.3 shows, direct employment from logging and mill processing, the employment affected first by restrictions in forest harvesting, dropped from 251,000 in 1972 to its own ten-year low of 223,500 in 1982. This was compounded by a drop in the price per million board feet of timber from steady increases from 1970 to 1981, to a six year low in 1982 of

¹⁸⁵ Including a variable mix depending on the state in question, of timber, recreation, mining, farming and related business interests.

¹⁸⁶ The legislative review was based on documents generated in Westlaw, database “fed-lh,” using the relevant public law number and “litigation” as the search terms.

\$50.27.¹⁸⁷ This meant that at a time when the Forest Service was reducing timber harvests in response to litigation, the timber industry, despite labor related cost cutting, faced fixed expenses (including capital assets and a minimal workforce) that could not be met without increased harvest production.

This profoundly affected the local economies of states with the greatest share of timberland in national forests, such as Utah (91%), Colorado (72%), and Oregon (63%). The combination of a stagnant national economy and the litigation induced slow-down in national forest harvesting caused the governor of Oregon to declare a state of emergency in the timber industry in late 1982. In a plea for some kind of congressional intervention, the governor testified that, since 1979, 25% of the plywood mill workers were laid off, lumber production was down 30%, and the state was experiencing increasing bankruptcies in lumber related industries.¹⁸⁸ The economic pain, however, was not narrowly limited. Congressional representatives from Arkansas, West Virginia, Utah, Colorado, and New Hampshire, to name a few, expressed concern in committee hearings about job losses and the overall negative economic impact connected with the failure to resolve wilderness uses in national forests.¹⁸⁹

¹⁸⁷ United States Forest Service, "National Forest Service Management Reports," United States Forest Service, [http://gis.fs.fed.us/forestmanagement/reports/sold-harvest/documents/1905 - 2008_Nat_Sold_Harvest_Summary.pdf](http://gis.fs.fed.us/forestmanagement/reports/sold-harvest/documents/1905-2008_Nat_Sold_Harvest_Summary.pdf), (February 25, 2009).

¹⁸⁸ Victor Atiyeh, Governor of Oregon, speaking before the Senate Subcommittee on Public Lands and Reserved Water of the Committee of Energy and Natural Resources on August 16, 17, *Hearing on S.2805 and S.2818, Adjustments to Timber Sales Contracts on National Forest System Lands and Public Lands*, 97th Cong., 2nd sess., 1983, 15.

¹⁸⁹ Senate Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearing on S.2805 and S2818 Adjustments to Timber Sales Contracts on National Forest System Lands and Public Lands*, 97th Cong. 2nd sess., S. Hearing No. 97-117 (August 16,17, 1983), 46; House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearings on Additions to the National Wilderness Preservation System*, 98th Cong. 2nd sess., H. Hearing No. 98-3, Part IX, (March 29, 1984, April 6, 1984); Statement of Senator William L. Armstrong speaking before the Senate Subcommittee on Parks, Reaction, and Renewable Resources, Committee on Energy and National Resources on June 3, 1980, *Hearings on S.2741*, 96th Cong. 2nd sess., S. Hearing No. 96-117, .545; Senate Committee on Agriculture, Nutrition, and Forestry, 98th Congress 2nd Session, S. Report No. 98-414 (April 26, 1984), 7-9

The litigation effects, market conditions, and opportunity to use national forest access to alleviate constituent economic woes were not lost on the state delegations and the oversight committees, whose composition, as discussed earlier, was heavily tilted toward representatives from states with the largest percentage of commercial timber in national forests and the highest overall acreage of federal forest land. Congress and the Forest Service were both uniquely positioned to provide more timber and more wilderness access to commercial interests because of their mutual control over national forests, but first the Forest Service needed to be extricated from the RARE related litigation. Once the Forest Service was free to assign public land use to commercial interests, without interference from environmental groups, the economic pressures to the timber industry and other commercial actors might be reduced. This is, of course, a classic case of allocating public goods to satisfy special interests, and the specific wilderness designation and Forest Service litigation protections in the State Wilderness Acts were designed to make these public goods available. The first State Wilderness Acts passed in 1980. Of the initial states covered, all were in the top ten largest national forest states in the country: Alaska ranked first, with over 21 million acres; Colorado ranked sixth with roughly 14 million acres; and New Mexico eighth with over nine million acres.

Policy Disruption and Delay. Congressmembers, in the various hearings related to the State Wilderness Acts, repeatedly expressed their apprehensions about the inherent policy disruption, delay, and uncertainty created by ongoing *NEPA*-based litigation against the Forest Service. This was not a policy neutral concern. Congress was concerned about environmental litigation demands that were getting in the way of the Forest Service approving commercial and non-preservationist uses for national forests. When speaking about the agency's participation as a defendant in the litigation process, the comments reflect a generalized concern with the multiple suit strategy

against the agency and that strategy's impact on Forest Service multi-use management regardless of outcome. Accordingly, much of the record largely is devoid of references to any specific case, court, or judge (with the exception of *California v. Bergland* discussed below). Senator Robert Packwood argued for congressional intervention in the French Pete Wilderness to end six years of public litigation and lobbying.¹⁹⁰ The Forest Service expressly argued that diversion of resources and procedural delays created by the need to respond to lawsuits made management of the forests nearly impossible (Forest Service 2002). A House Report in 1983 from the Committee on Interior and Insular Affairs supported the need for a legislative response to the ongoing delay in the forest planning process created by potential lawsuits.¹⁹¹ Concerns that the RARE process would never end were expressed in House hearings on the *Vermont Wilderness Act*.¹⁹² General litigation-created delay and interference were cited as a reason for the majority of the State Wilderness Acts, including those proposed for Oregon,¹⁹³ Texas,¹⁹⁴ and Utah.¹⁹⁵

Alleviating uncertainty in connection with forest management issues was also a frequently expressed concern. What was meant by this term, even though it was often used elliptically in the congressional record, was the need to stop suits

¹⁹⁰ Statement Senator Robert Packwood, speaking before the Senate Subcommittee on Park and Recreation, Committee on Energy and Natural Resources, *Hearing on H.R. 3454, An Act to Designated Certain Endangered Public Lands for Preservation as Wilderness*, 95th Cong., 2nd sess., S. Hearing No. 95-42, Part 2 (April 21, 1977), 5.

¹⁹¹ House Committee on Interior and Insular Affairs, 98th Cong. 1st sess., H. Report No. 98-545, Part 1, (November 14, 1983), 3.

¹⁹² Statement of Representative Seiberling, speaking before the House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearings on Additions to National Wilderness Preservation System*, 98th Cong. sess. 1 (July 9, 14, 1983), 54. The Green Mountain National Forest in Vermont is about 400,000 acres.

¹⁹³ Senate Committee on Energy and Natural Resources, *Oregon Wilderness Act of 1984*, 98th Cong. 2nd sess., 98th Cong. 2nd sess., S. Report No. 98-465 (May 18, 1984).

¹⁹⁴ House Committee on Interior and Insular Affairs, 98th Cong., 2d sess., H.Rep.No. 98-730, Part 1, (May 2, 1984), 4.

¹⁹⁵ Scott Matheson, Governor of Utah, speaking before the House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearing on Additions to the National Wilderness Preservation System*, H. Hearing No. 98-3, Part X, (March 26 and 27, 1984), 116.

challenging wilderness designations and timber sales so that the Forest Service could make some definitive judgments about wilderness status thereby releasing nonwilderness land for commercial and recreational uses. A Senate committee report in connection with the *Vermont Wilderness Act* argued legislation was needed to address the uncertainty over forest management created by environmental lawsuits against the Forest Service aimed at stopping multi-use management practices.¹⁹⁶ Resolving uncertainty was likewise cited in debates over *the Oregon Wilderness Act*,¹⁹⁷ *Colorado Wilderness Act*,¹⁹⁸ and *Montana Wilderness Act*.¹⁹⁹ In addition to the number of suits, and the vague statutory terrain, several other factors contributed to this uncertainty. First, although government actors in general, and the Forest Service in particular, were likely to win federal cases, winning was not a given. The flip side of overall litigation success rates is the percent of cases lost. From this perspective, what matters is not that the Forest Service won 63% of the cases filed between 1970 and 1990. Instead, what matters is that the agency lost 37% of the time.²⁰⁰ When the Forest Service lost a case this generally meant two things, both of which benefitted the environmental plaintiffs' forest preservation goals. First, the court halted the contested timber harvest or sale. Second, the court ordered the agency to redo its environmental studies regarding the impact to the forestland at issue. Congressional and agency concerns were heightened by the decision in *California v. Bergland*.

¹⁹⁶ Senate Committee on Agriculture, Nutrition, and Forestry, *Report to Accompany H.R. 4198, Vermont Wilderness Act of 1984*, 98th Cong. 2nd sess., S. Report No. 98-416 (April 26, 1984), 11.

¹⁹⁷ Senate Subcommittee on Public Lands and Reserved Water of the Committee on Energy and Natural Resources, *Hearing on Oregon Wilderness Act of 1983*, 98th Cong. 1st sess., S. Hearing No. 98-635, Part 2 (Oct. 20, 1983), 3.

¹⁹⁸ *Colorado Wilderness Act Senate Conference Report*, 96th Cong. 2nd sess., *Congressional Record* 126 (December 4, 1980): S15572.

¹⁹⁹ House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearing on the Additions to the National Wilderness Preservation System*, 98th Cong. 1st sess., (May 17, 26 1983, May 26, 1983), 30-31.

²⁰⁰ It should be noted that the government's win-rate is lower when all cases from 1970 to 2008 are considered (59%). This is likely an artifact of the database which codes unresolved cases in which the plaintiffs won any form of intermediate injunctive relief as a plaintiff "win."

Copycat Litigation. While the overall disruption created by the litigation process clearly mattered to Congress, another court decision, along the lines of *California v. Bergland*, was also a concern. *California v. Bergland* is mentioned in the legislative history of most State Wilderness Acts, including the State Wilderness Acts of Colorado, Vermont, New Hampshire, Florida, Arkansas, Texas, and Tennessee.²⁰¹ The issue, however, is not that a future court *will* hold the same way, but that a future court *might* do so. This is an important distinction, since what is at issue is not that the ideology of a known court will create policy problems, but rather that the assessed risk that any court might create policy problems increases with each positive example. This affects Congress's calculus as to the costs and benefits of legislative intervention, just as it affected the Forest Service's calculus with respect to litigation avoidance. Representative Robert Smith (Oregon), in the course of objecting to the *Oregon Wilderness Act* as premature, heatedly told the Senate, "the fact is that we are here in this room today simply because of the hollow threats of a handful of environmental enthusiasts, shaking the stick of a 'potential' lawsuit over our heads."²⁰² Senator Orrin Hatch put the issue more evenly, "Unless it is clear that the Forest Service shall not manage the released acres as wilderness, they will operate under the constant threat

²⁰¹ Senate Committee on Agriculture, Nutrition, and Forestry, *Report on the Wisconsin Wilderness Act of 1984 to Accompany H.R. 3578*, 98th Cong., 2nd sess., S. Rep. No. 98-413 (April 26, 1984); Senate Committee on Agriculture, Nutrition, and Forestry, *Report to Accompany H.R. 4198, Vermont Wilderness Act of 1984*, 98th Cong., 2nd sess., S. Report No. 98-416 (April 26, 1984); Senate Committee on Energy and Natural Resources, *Report on the Florida Wilderness Act*, 98th Cong., 2nd sess., S. Report No. 98-580 (August 6, 1984); Senate Committee on Energy and Natural Resources, *Hearing on the Arkansas Wilderness Act of 1984*, 98th Cong., 2d sess., S. Report No. 98-462 (May 18, 1984); Senate Subcommittee on Soil and Water Conservation, Forestry, and Environment of the Committee on Agriculture, Nutrition, and Forestry, *Senate Hearing on Designation of Lands as Part of the National Wilderness Preservation System*, 98th Cong., 2d sess., S. Hearing No. 98-1099 (July 25, 1984); Senate Committee on Agriculture, Nutrition, and Forestry, *Hearing on the New Hampshire Wilderness Act*, 98th Cong., 2nd sess., S. Report No. 98-414 (April 26, 1984), 9; Senate Committee on Agriculture, Nutrition, and Forestry, *Hearing on the Texas Wilderness Act*, 98th Cong., 2nd sess., S. Report No. 98-614 (Sept. 18, 1984); Senate Committee on Agriculture, Nutrition, and Forestry, *Hearing on the Tennessee Wilderness Act*, 98th Cong., 2nd sess., S. Report No. 98-615 (Sept. 18, 1984).

²⁰² Senate Subcommittee on Public Lands and Reserved Water of the Committee on Energy and Natural Resources, *Hearings on the Oregon Wilderness Act of 1983*, 98th Cong., 1st sess., S. Hearing No. 98-635, (October 20, 1983), 35.

that if they fail to do so, they will be challenged in court.”²⁰³ While the specific antagonists in these quotes are not expressly identified, it is clear both “environmental enthusiasts” and “they” refers to the environmental public interest groups actively using courts to challenge policy. With respect to the *Utah Wilderness Act*, for example, the topic of Senator Hatch’s remarks, both the Sierra Club and the Wilderness Society testified in opposition to the wilderness allotments in the Senate hearings.²⁰⁴ As of 1984, the two organizations, combined, were parties in four reported 10th Circuit environmental lawsuits, where Oregon is located. These groups’ presence in the policy debate also carried a credible threat of future litigation. Through 1984, the Sierra Club was plaintiff in 206 reported environmental suits nationwide, and the Wilderness Society was a party in 30 such suits.²⁰⁵

A strong desire to address case precedent in states where a court decision already existed, such as California and Oregon, prompted State Wilderness Acts in those jurisdictions. The impetus for State Wilderness Act legislation for much of the rest of the country, however, was the desire to prevent litigation from spreading. In fact, many states had no history of Forest Service litigation pending, but still wanted pre-emptive congressional relief from a potential copycat lawsuit challenging wilderness and nonwilderness designations. For example, no *NEPA*-based timber cases appear in the Environmental Database at either the district court or circuit court level, prior to the passage of State Wilderness Acts for Florida, Georgia, Indiana,

²⁰³ Statement of Orrin Hatch, Senator from Utah, Before the Senate Subcommittee on Public Lands and Reserved Water of the Comm. on Energy and Natural Resources, *Hearing Utah Wilderness Act Designating Certain National Forest System Lands and Public Lands in Utah and Arizona as Wilderness*, 98th Cong. 2nd sess., S. Hearing No. 98-779 (February 9, 1984), 67.

²⁰⁴ Senate Subcommittee on Public Lands and Reserved Water of the Committee on Energy and Natural Resources, *Senate Hearings on the Utah Wilderness Act Designating Certain National Forest System Lands and Public Lands in Utah and Arizona as Wilderness*, 98th Cong. 2nd sess., S. Hearing No. 98-779, (February 9, 1984).

²⁰⁵ Westlaw search results for the 10th Circuit and “allfeds,” using the respective party name.

Kentucky, Mississippi, New Hampshire, Pennsylvania, Tennessee, Vermont or Michigan.

Nor does the desire for such legislation appear to be based on any particular concern with the respective ideology of the federal judiciary, as Table 5.4 shows. At the time of most State Wilderness Acts' passage, the median Judicial Common Space Scores of the various appellate courts evidence no particular party or ideological disparity between the enacting Congress and the federal courts with jurisdiction in the relevant state.²⁰⁶ The Judicial Common Space scores are the median score in the relevant circuit and range from -1 (most liberal) to 1 (most conservative). The median range across all courts is fairly narrow with the most liberal score at -0.30 (9th Circuit in 1980) and the most conservative scores of 0.26 attributable to the 4th Circuit (1983-1984) and 6th Circuit (1985-1987). This range is consistent with the average Judicial Common Space score medians for all circuits in the federal system between 1980 and 1993, which range from -0.22 (1980) to 0.27 (1993).²⁰⁷ With respect to circuit court composition related to the enactment of the State Wilderness Acts, 9 circuits are categorized as liberal, 11 as conservative, and 13 as neutral.

²⁰⁶ Appellate courts were chosen, because they are functionally the courts of last resort in most circuits given the paucity of the Supreme Court's docket, and while cases against the Forest Service are first filed in district court, the assumption is that district court behavior is constrained by the review of the appellate courts in each respective circuit.

²⁰⁷ If anything, the national trend shows a movement over time towards a more conservative federal judiciary, in keeping with the appointment power exercised by Reagan during primary years of the study, which suggests less need to protect Forest Service multi-use policy from court preferences.

Table 5.4. State Wilderness Acts, Legislative Majorities, Presidential Party, and Federal Appellate Court Median Judicial Common Space Scores

State	Year	Cir	Median CS	Court Liberality	House Majority	Senate Majority	President Party
Alaska	1980	9	-0.30	Liberal	D	D	D
Colorado	1980	10	-0.14	Liberal	D	D	D
New Mexico	1980	10	-0.14	Liberal	D	D	D
Indiana	1982	7	0.01	Neutral	D	R	R
Missouri	1983	8	-0.29	Liberal	D	R	R
West Virginia	1983	4	0.26	Conserv	D	R	R
Wisconsin	1984	7	0.01	Neutral	D	R	R
Vermont	1984	2	-0.05	Neutral	D	R	R
New Hampshire	1984	2	-0.05	Neutral	D	R	R
North Carolina	1984	4	0.26	Conserv	D	R	R
Oregon	1984	9	-0.16	Liberal	D	R	R
Washington	1984	9	-0.16	Liberal	D	R	R
Arizona	1984	9	-0.16	Liberal	D	R	R
California	1984	9	-0.16	Liberal	D	R	R
Utah	1984	10	0.08	Neutral	D	R	R
Florida	1984	11	-0.03	Neutral	D	R	R
Arkansas	1984	8	-0.07	Neutral	D	R	R
Georgia	1984	11	-0.03	Neutral	D	R	R
Mississippi	1984	5	0.08	Neutral	D	R	R
Wyoming	1984	10	0.08	Neutral	D	R	R
Texas	1984	5	0.08	Neutral	D	R	R
Tennessee	1984	6	0.23	Conserv	D	R	R
Pennsylvania	1984	3	-0.14	Liberal	D	R	R
Virginia	1984	4	0.26	Conserv	D	R	R
Kentucky	1985	6	0.26	Conserv	D	R	R
Tennessee	1986	6	0.26	Conserv	D	R	R
Nebraska	1986	8	0.15	Conserv	D	R	R
Michigan	1987	6	0.26	Conserv	D	D	R
Oklahoma	1988	10	0.25	Conserv	D	D	R
Alabama	1988	11	0.18	Conserv	D	D	R
Nevada	1989	9	0.01	Neutral	D	D	R
Maine	1990	1	0.01	Neutral	D	D	R
Colorado	1993	10	0.25	Conserv	D	D	D

Source. Environmental Jurisdiction Stripping Database, 2009.

Notes. D =Democrat; R = Republican.

Administrative Costs. Lawsuits against the agency also imposed direct budgetary costs on both the Forest Service and the Department of Agriculture. The inability to meet financial and budgetary goals, due in large part to the inability to complete timber sales under the cloud of litigation, was a reoccurring theme in the Forest Service’s appropriations and budgetary review testimony.²⁰⁸ Adding to the policy gridlock, according to the agency, was the diversion of staff out of the field and away from management related activities in order to comply with litigation and *NEPA* requirements either in response to or in anticipation of litigation.²⁰⁹ The Department of Agriculture’s General Counsel was responsible for overseeing litigation involving the agency. In multiple budget requests and related testimony before Congress, the general counsel attributed the need for additional attorney’s and staff to Forest Service timber harvest and land management litigation under *NEPA*. Such was the case, for example, in 1971 (“the demand for legal assistance has recently increased greatly as a result of the number lawsuits disputing Forest Service land management decisions”);²¹⁰ 1979 (citing to ongoing litigation over land management among “conservation, recreation, timber, and industrial development interests”);²¹¹ as well as staffing increases petitioned for in 1985, 1990, and 1991.²¹²

²⁰⁸ Testimony of F. Dale Robertson, Chief of the Forest Service Robertson Speaking Before the Senate Committee on Appropriations, Subcommittee on Agriculture, *Hearing on H.R. 2686 Department of the Interior and Related Agencies Appropriations for 1992*, 101st Cong., 1st sess., S. Hearing No. 102-360 (May 15, 1991).

²⁰⁹ Testimony of F. Dale Robertson, Chief of the Forest Service Robertson Speaking Before the Senate Committee on Appropriations, Subcommittee on Agriculture, *Hearings on the Department of the Interior and Related Agencies Appropriations for 1990 Part A*, 101st Cong. 1st sess., (March 7, 1989), 560-562.

²¹⁰ Statement of Edward M. Shulman, General Counsel Department of Agriculture Shulman, Speaking Before the Senate Committee on Appropriations, Subcommittee on Agriculture, *Hearing on the Agriculture-Environmental and Consumer Protection Appropriations for Fiscal Year 1972 Part C*, 92nd Cong. 2nd sess. (June 30, 1972), 1246-1248.

²¹¹ Prepared Statement of Norman L. Plotka, Acting General Counsel, Office of the General Counsel, Department of Agriculture, Before the Senate Committee on Appropriations, Subcommittee on Agriculture, *Hearing on Agriculture, Rural Development, and Related Agencies Appropriations for Fiscal Year 1980*, 96th Cong. 1st sess. (March 17, 1979), 1105.

²¹² Statement of Daniel Oliver, General Counsel, Office of the General Department of Agriculture, Speaking Before the Senate Committee on Appropriations, Subcommittee on Agriculture, *Hearing on*

Congressional Jurisdiction Stripping Response.

The costs to timber and other commercial interests, recreational groups, state and local governments, and agency resources created by litigation against the Forest Service resonated in Congress, and the Forest Service oversight committees with their timber industry and national forest multi-use slant. These costs included the virtual cessation of active forest management, the resource diversion attributable to litigation, and the attendant economic stress felt by state governments, regional constituencies, and the timber industry and other commercial industries reliant on nonwilderness designations for national forest access. This dynamic was exacerbated by heightened uncertainty over the Forest Services' litigation chances based on the level of litigation and the environmental lobby's success in *California v. Bergland*.²¹³ However, for Congress, the solution did not turn upon a rational level of action designed to avoid litigation. The agreed upon legislative response crystallized around the need *stop* the *NEPA*-based litigation that was creating such havoc. In other words, Congress wished to prevent environmental litigants from suing the Forest Service. And, unlike the Forest Service, Congress had the power to accomplish this goal by stripping court jurisdiction. As noted in this first chapter of this dissertation, if Congress removes federal court jurisdiction, litigants lose their basis for suit, and those that try to sue are subject to a quick case dismissal.

the Rural Development, and Related Agencies Appropriations for Fiscal Year 1986, 99th Cong., 1st sess., S. Hearing No. 99-262 (April 4-5, 1985), 489-490; Statement of Alan C. Raul, General Counsel, Department of Agriculture, Before the Senate Committee on Appropriations, Subcommittee on Agriculture, *Hearings on the Department of Agriculture, Rural Development, Agriculture, and Related Agencies Appropriations for 1991, Part 6*, 101st Cong. 2nd sess. (March 21, 1990), 37; Senate Subcommittee of the Committee on Appropriations, *Hearings on the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1992*, 102nd Cong. 1st sess., U.S. Government Printing Office No. 42-372 (March 7, 1991).

²¹³ The Forest Service lost in other court decisions based on differing environmental claims that did not challenge the RARE process. For the purposes of this analysis, given *California v. Bergland*'s prevalence in the legislative record, it is the focus of the analysis.

This is what Congress chose to do in the State Wilderness Acts. It sought to free up the RARE process, and, in doing so, the management of national forests, by foreclosing *NEPA* challenges to the Forest Service's 1979 RARE II environmental impact statement. The statutory language, which also is referred to as "sufficiency and release language," in all the State Wilderness Acts is, for the most part, identical and very straightforward. Congress declares that the EIS prepared in January 1979 in connection with RARE II is not subject to judicial review with respect to national forests in the subject state. The Acts then go on to provide that the Department of Agriculture (and therefore the Forest Service) have adequately categorized the federal forestland within the state as wilderness or nonwilderness. The Wisconsin Wilderness of 1984 is a typical example, and in pertinent part, reads as follows:

"SEC. 5. (a) The Congress finds that --

(1) the Department of Agriculture has completed the second roadless area review and evaluation program (RARE II); and

(2) the Congress has made its own review and examination of National Forest System roadless areas in the State of Wisconsin and of the environmental impacts associated with alternative allocations of such areas.

(b) On the basis of such review, the Congress hereby determines and directs that --

(1) without passing on the question of the legal and factual sufficiency of the RARE II final environmental statement (dated January 1979) with respect to National Forest System lands in States other than Wisconsin, such statement shall not be subject to judicial review with respect to National Forest System lands in the State of Wisconsin;

(2) with respect to the National Forest System lands in the State of Wisconsin which were reviewed by the Department of Agriculture in the second roadless area review and evaluation (RARE II) and those lands referred to in subsection (d), that review and evaluation or reference shall be deemed for the purposes of the initial land management plans required for such lands by the Forest and Rangeland Renewable Resources Planning Act of 1974, "16 USC 1600 note" as amended by the National Forest Management Act of 1976, "16 USC 1600 note" to be an adequate consideration of the suitability of such lands for inclusion in the National Wilderness Preservation System and the Department of Agriculture shall not be required to review the wilderness option prior to the revisions of the plans, but shall review the wilderness option when the plans are revised, which revisions will ordinarily occur on a ten-year cycle, or

at least every fifteen years, unless, prior to such time, the Secretary of Agriculture finds that conditions in a unit have significantly changed;”²¹⁴

State Wilderness Acts were handled on a state by state basis, after a few failed attempts in the 96th and 97th Congresses to pass a nationwide act. As a practical matter, this meant that each state’s delegation acted as the arbiter between the timber industry and environmental interests,²¹⁵ in what appears to be part of a political quid pro quo, or logroll, in no small part because the conflict over forest management affected more than one state’s national forests and regional economy. The *Utah Wilderness Act*, for example, sponsored by Republican Senator Jake Garn, was the product of close work with Utah’s Democrat Governor, Scott Matheson, Utah Senator Orrin Hatch, and Utah Congressmembers Hanson, Nielson, and Marriott. Each testified in Senate hearings that the legislation was a negotiated compromise, the result of extensive private and public meetings, between interest groups competing over national forest management, including preservationists, the timber industry, farmers, and the mining industry. The Forest Service also participated in crafting the Acts’ language. The legislative histories of the remaining Acts are similar. The state congressional delegations stepped in and supplanted the judicial process (or threatened judicial process) by crafting a political settlement between the parties, and with the addition of the jurisdiction stripping language, attempted to keep that political settlement out of court.

Additional facts suggest that, by the time of the Act’s passage, the litigation interference with Forest Service activities was of sufficient magnitude to unify a wide range of political actors’ interests behind the proposition that the lawsuits needed to stop. A majority of the Acts were either sponsored or supported by the entirety of a states’ congressional delegation, both House and Senate, regardless of party. This was the case, for example, with the State Wilderness Acts covering New Mexico,

²¹⁴ *Wisconsin Wilderness Act of 1984*, Public Law 98-321, *U.S. Statutes at Large* 98 (1984): 250.

²¹⁵ *Paddy Creek Wilderness Act of 1982*, 97th Cong. 2nd sess., *Congressional Record* 128 (December 16, 1982): H9945-6.

Colorado, Oregon, Wyoming, and Indiana.²¹⁶ Of the 33 Acts, 11 of the primary sponsors were from the Senate, 22 came from the House. 60% (20) of the primary sponsors were Democrats, not surprising given House control during the relevant time periods, but of note since the jurisdiction stripping provisions worked to the detriment of environmental interests. Over 70% (24) of the State Wilderness Acts had sponsors and co-sponsors from both political parties. The Acts generally passed the full House or Senate floor with little opposition, as one would expect from a legislative quid pro quo designed to benefit various states. The *Tennessee Wilderness Act*²¹⁷ and the *California Wilderness Act*²¹⁸ are typical, both passing the Senate on a voice vote and the House by substantial margins (Tennessee by 404 to 12, California by 368 to 41).

Accurate accounts of the state by state financial exposure to continued timber harvesting reductions and other access restrictions on national forests are not readily available. However, some of the congressional testimony provides an indication of the vulnerability of many national forest reliant state economies. One lumber company official estimated that the industry and its related businesses contributed \$6 billion per annum to Oregon's economy.²¹⁹ The Association of Oregon Counties, in support of multiple use, noted that 31 of the 36 Oregon counties shared in national forest revenue, a vital source of income for roads and schools. The Forest Service contribution dropped from \$100 million on average to \$45 million in 1982²²⁰ and \$60

²¹⁶ Senate Subcommittee on Parks, Reaction, and Renewable Resources, Committee on Energy and national Resources, *Hearings on S.2741*, 96th Cong. 2nd sess., S. Hearing No. 96-117 (June 3, 1980), 545.

²¹⁷ *Tennessee Wilderness Act of 1984*, Public Law 98-578, *U.S. Statutes at Large* 98(1984): 3088.

²¹⁸ *California Wilderness Act of 1984*, Public Law 98-425, *U.S. Statutes at Large* 98(1984): 1619.

²¹⁹ Testimony of John Hampton, President Hampton Affiliates, Before the Senate Subcommittee on Public Lands and Reserved Water of the Committee on Energy and Natural Resources, *Hearing on the Oregon Wilderness Act of 1983*, 98th Cong. 1st sess., S. Hearing No. 98-635 Pt. 1 (July 21, 1983, August 25, 1983), 673.

²²⁰ Testimony of this nature was common from commercial interests. It should be noted, however, that environmental groups and groups favoring preservation presented alternative economic scenarios, including those that blamed the economic hardship on the national recession, not Forest Service litigation avoidance. Regardless, the interpretation that the litigation caused economic harm, on the whole, received a favorable reception by the congressional committees.

million in 1983.²²¹ Opponents to wilderness set asides in the *Texas Wilderness Act* estimated that denying access even to the designated sections of national forest would cost the taxpayers \$1.6 million.²²² Timber industry supporters of the *Pennsylvania Wilderness Act* argued that the timber industry in that state employed 82,300 people, garnering wages valued at over \$1 billion a year and generating sales revenues of \$2.5 billion a year.²²³ Recreational and related tourism interests, also a part of the timber coalition in favor of multi-use, were estimated by supporters of *Colorado's Wilderness Act* to generate \$3.9 billion in 1983.²²⁴

Trends in passage of the Acts and timber harvests volume on national forest land strongly suggest that the economic hardships created by the litigation were a unifying force. State Wilderness Act passage occurs after timber harvest declines, with the first incidence in 1980 and then the bulk of State Wilderness Acts passed after the prolonged drop in timber harvests from 1979 to 1982, which correspond to the litigation challenges launched against the 1979 RARE II survey. Timber harvests did begin to increase in 1983 (from 6,747,260 mbf to 9,244,037 mbf) just prior to the 1984 spike in State Wilderness Act passage, however a one year increase likely did

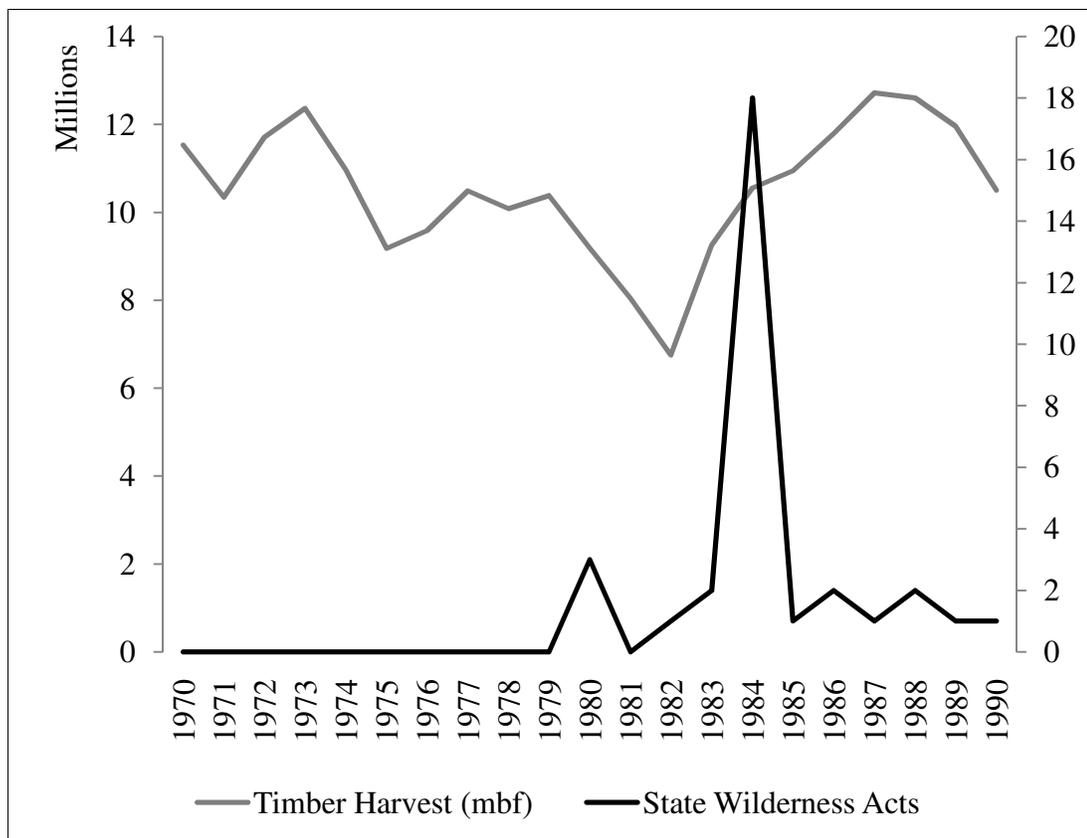
²²¹ Statement of Kess Cannon, Executive Assistant, Association of Oregon Counties, Before the Senate Subcommittee on Public Lands and Reserved Water of the Comm. on Energy and Natural Resources, *Hearing on the Oregon Wilderness Act of 1983*, 98th Cong. 1st sess., S. Hearing No. 98-635, (July 21, 1983, August 25, 1983), 686.

²²² Senate Subcommittee on Soil and Water Conservation, Forestry, and Environment of the Committee on Agriculture, Nutrition, and Forestry, *Hearing on Additions to the National Wilderness Preservation System and the Sabine National Forest Land Conveyance*, 98th Cong. 2nd sess., S. Hearing No. 98-1035 (May 24, 1984), 11.

²²³ Statement of Robert J. LeBar, Forest Resources Administrator, Hammermill Paper Company, Before the Senate Subcommittee on Soil and Water Conservation, Forestry, and Environment of the Committee on Agriculture, Nutrition, and Forestry, *Hearing on the Additions to the National Wilderness Preservation System and the Sabine National Forest Land Conveyance*, 98th Cong. 2nd sess., S. Hearing No. 98-1035 (May 24, 1984), 74.

²²⁴ Testimony of Congressman Timothy Wirth Before the House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearing on Additions to the National Wilderness Preservation System*, 98th Cong., 2nd sess., H. Hearing No. 98-3 Part A (May 10, 1984), 275.

not dispel the economic concerns created by a four year slide in production (Figure 5.5).



Source. Environmental Jurisdiction Stripping Database, 2009. Notes. Timber harvest on left axis.

Figure 5.5 National Forest Timber Harvest Volume (mbf) and State Wilderness Act Passage, 1970 to 1990

The Acts’ legislative history shows unequivocally that the jurisdiction stripping language was intended to put an end to the lawsuits’ interference with Forest Service policy implementation. It is hard to misinterpret articulated congressional intent when the Senate oversight committee, in this case reporting on the *Oregon Wilderness Act*, asserts that the jurisdictional removal is designed to “resolve the RARE II issue in Oregon.”²²⁵ The House oversight committee report on the *Wisconsin*

²²⁵ Senate Committee on Energy and Natural Resources, *Report on the Oregon Wilderness Act of 1984*, 98th Cong. 2nd sess., S. Report No. 98-465 (May 18).

Wilderness Act was equally direct. “Enactment of the legislation will resolve the RARE II issue in Wisconsin, eliminating the possibility of lawsuits related to wilderness review requirements in the current generation of forest plans and thereby ending uncertainties plaguing the national forest planning efforts. It will also terminate the ongoing RARE III re-study of roadless lands in the planning process and in so doing will avoid significant additional delays and costs in the implementation of national forest land use plans in Wisconsin.”²²⁶ None of the Acts leave any doubt that they are designed to resolve the litigation issues surrounding the RARE process. Legislative reports, for example, regarding State Wilderness Acts in Vermont, New Mexico, Alaska, Missouri, West Virginia, Indiana, North Carolina, New Hampshire, and Texas all echo the jurisdiction stripping rationales cited in connection with the Wisconsin and Oregon Acts.²²⁷

The examination of jurisdiction stripping in the context of litigation against the Forest Service provides additional support for the broader theoretical and empirical claims made in this dissertation. The State Wilderness Act case study reinforces the

²²⁶House Committee on Interior and Insular Affairs, *House Report 3578, Establishing the Wilderness Areas in Wisconsin*, 98th Cong. 1st sess., H. Report No. 98-531, Part 1 (Nov. 10, 1983), 1-2.

²²⁷ Senate Committee on Agriculture, Nutrition, and Forestry, *Senate Report to Accompany S.R. 4198, Vermont Wilderness Act of 1984*, 98th Cong. 1st sess., S. Report No. 98-416 (April 26, 1984), 10-11; Senate Committee on Agriculture, Nutrition, and Forestry, *Hearing on the New Hampshire Wilderness Act*, 98th Cong., 2nd sess. S. Report No. 98-414 (April 26, 1984); . Senate Subcommittee on Parks, Reaction, and Renewable Resources, Committee on Energy and national Resources, *Hearings on S.2741*, 96th Cong. 2nd sess., S. Hearing No. 96-117 (June 3, 1980); Senate Committee on Agriculture, Nutrition, and Forestry, *Hearing on the Texas Wilderness Act*, 98th Cong., 2nd sess., S. Report No. 98-614 (Sept. 18, 1984); Senate Committee on Agriculture, Nutrition, and Forestry, *Hearing on the North Carolina Wilderness Act*, 98th Cong., 2nd sess. S. Report No. 98-415 (April 26, 1984); House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearing on Additions to the National Wilderness Preservation System*, 98th Cong. 1st sess. (May 17, 26, 1983); House Subcommittee on Public Lands and National Parks of the Committee on Interior and Insular Affairs, *Hearings to Establish the Charles C. Deam Wilderness in the Hoosier National Forest, Indiana*, 97th Cong. 2nd sess., S. Hearing No. 97-9 (December 2,6, 1983); Senate Subcommittee on Parks, Recreation, and Renewable Resources of the Committee on Energy and Natural Resources, *Hearing on a Bill to Designate Certain Lands in the State of Missouri, in the Black Hills National Forest, South Dakota, and National Forest System Lands in the State of New Mexico for Inclusion in the National Wilderness Preservation System*, 96th Cong. 2nd sess., S. Hearing No. 96-140, (May 29, 1980).

assertion that congressional reaction to the courts cannot be separated from either the underlying dynamics of the litigation process or the litigants that make strategic use of that process. As expected, jurisdiction stripping in the State Wilderness Acts was aimed at litigants and their access to the court system, and designed to protect government institutions from the costs imposed by litigation against the government. Also, as conjectured, in this instance jurisdictional removal implicates interest group politics and legislative access. Stripping jurisdiction over RARE II determinations benefitted the timber industry and commercial interests, all of which had legislative pull with the committees that oversaw the Forest Service.

These two larger observations highlight some key points about jurisdiction stripping behavior in the State Wilderness Act context that likely apply to jurisdiction stripping in general. First, the political economy dynamics of these actions are of central importance, including the degree to which economic costs and policy disruption costs are intertwined. In the State Wilderness Acts study, it mattered that policy disruption translated so directly into economic pressure on key congressional constituencies, who in turn affected and motivated congressional actors to intervene. The study also reveals that litigation against the government provides strategic opportunities for the defendant agency as well. The Forest Service wanted Congress to pass protective legislation. The agency used the existing litigation activity and the threat of additional legal action as justification for RARE III, an extreme and costly endeavor, whose specter finally catalyzed Congress into action. In addition, it may be the case that jurisdiction stripping occurs, as it did in the State Wilderness Act context, when litigation costs and disruptions hit a tipping point, which creates a unification of interests across a wide range of political actors.

With respect to court behavior, clearly legal rules, such as the standards for obtaining injunctive relief, play an import role in shaping litigation incentives,

responses, and costs. And in this context, the preferences of courts also matter. The holding in *California v. Bergland*, by increasing the assessed chances that plaintiffs would win, increased the likelihood that environmental interest groups would challenge RARE II in court, and increased the likelihood that the Forest Service would take costly actions to avoid litigation.

In addition, the congressional role in jurisdiction stripping extends beyond the immediate act of removing court review. In the State Wilderness Act study, vague and delegatory congressional statutes set the stage for environmental litigation against the Forest Service. Congress failed to provide the agency with detailed guidance about the appropriate balance between conservation and commercial activity in national forests. *NEPA*, and its requirements for environmental impact statements in connection with major federal actions, also contained generalized and open-ended statutory language, which provided insufficient direction as to what constituted an adequate environmental impact statement, or what constituted a major federal action. In conjunction, the generality of these statutes left considerable discretion with the Forest Service and gave dissatisfied interests adequate grounds to sue the agency. Broad delegation to agencies in the absence of specific congressional directives likely plays an important role in jurisdiction stripping.

Congress could fix this dynamic by either being more specific in its statutory language or, in the State Wilderness Acts case, exempting all Forest Service decisions regarding management of national forest land from judicial review. Congress did neither of these things. Instead, it responded to one active area of litigation and contention while leaving remaining forest land designations and management plans both subject to review and to the varying statutory dictates and uncertainties created by the interplay between environmental statutes and statutes addressing forest

management, including *NEPA*, the *Endangered Species Act*, *NFMA*, and the national Wilderness Act.

This is, however, a case study whose facts fit easily in to the litigation effects analysis. The concentration of interests on either side of policies affecting the management of National Forests, and the available statutory basis to challenge these policies in court may not generalize across all statutes in the jurisdiction stripping database. Additional case studies are needed to determine whether statutes that remove review, for example, over social service benefits, or railroad corridor improvements, exhibit the same dynamics identified here.

CHAPTER SIX

CONCLUSION: JURISDICTION STRIPPING AND LITIGATION

Jurisdiction stripping protects government actors from public interference. Congress removes federal court review in response to lawsuits against the federal government. These cases, which include challenges to governmental policy by private citizens, impose costs on all three branches starting at the point of case filing. This is true because, for all the parties involved, litigation demands resources in time and money, and with agencies in particular it can result in delayed policy implementation. Increased litigation also places pressure on a federal judiciary whose institutional structure makes responding to a rising workload difficult. Litigation against the government threatens to impose political costs on Congress by potentially forcing Congress to revisit the nature and content of a particular policy and by creating policy interference for key constituencies. The resultant policy disruption, resource diversion, and caseload pressure caused by litigation against the government create strong incentives for Congress to alleviate litigation pressure by removing public access to the judiciary. Jurisdiction stripping is the result.

The study of jurisdictional removals is the study of court-Congress interaction. Jurisdiction stripping is simply an extreme form of this interaction, or so it might appear, depending on how one views institutional relationships. If one assumes that Congress removes court review as a systemized response to judges and the decisions they make, then jurisdiction stripping becomes a procedural tool in a strategic game between two powerful institutions jockeying over the content and nature of public policy. A different, more cooperative picture of institutional relations emerges if jurisdiction stripping is understood as a reaction, not to the judiciary alone, but rather to the entire litigation process overseen by the judiciary. The federal courts are not

solely comprised of judges and judicial decisions. In fact, properly understood, the federal courts are not an entity, but rather of an intricate process that resolves public and private disputes. Congressional control over the structure and procedure of case disposition in the federal courts provides the government with a unique ability, not available to private defendants, to react to litigation by manipulating public access to the court system. Jurisdiction stripping is a limitation on litigant access to the courts with jurisdictional removals insulating government actors from litigation disruption and costs. From this perspective, Congress's strategic behavior is directed at the public, not at other government actors.

Institutional views that posit an adversarial relationship between Congress and the courts fail to capture the full range of institutional incentives attendant to interactions with the federal judiciary. This is, to some extent, an artifact of scholarly attention directed at the Supreme Court, an entity whose purpose and place in judicial and governmental hierarchies mean that it engages in first order, policy based decision making. But the overwhelming majority of federal litigation is resolved far away from the Supreme Court, in the trial and appellate courts of the federal system. Most litigation is resolved by the lower courts, but not necessarily decided by a judge; a vital distinction. Judicial decisions are only a small, albeit significant, part of what the court system produces. The vast majority of federal court cases terminate without a judge's final opinion on the case merits. Instead, disputes are resolved in response to the incentives generated by the judicial process. In other words, litigation economics affects much case resolution.

Litigation Effects and Jurisdiction Stripping Solutions

This dissertation argues that jurisdiction stripping is a congressional response to litigation against the federal government and can best be explained by litigation economics and the strategic behavior it creates, not by ideological measures.

Jurisdiction stripping is considered in three contexts. The two empirical studies examine aggregate trends with respect to two different jurisdictional removal strategies; complete jurisdiction stripping, and partial jurisdiction stripping through exclusive jurisdictional grants to federal courts in the District of Columbia. The third study considers removal of court review in a single policy area: *NEPA* challenges to Forest Service management in national forests.

Lawsuits create policy disruption, costs, and delay for government actors including agencies, courts, and Congress. Jurisdiction stripping alleviates these costs by reducing a plaintiff's expected value of suit, making suits against the government less attractive. The basic structure of this argument differs slightly for full jurisdiction stripping and exclusive jurisdictional grants. With respect to full jurisdiction stripping, removing court review means one of two things: either a lawsuit regarding the protected agency action will never be filed, or if it is filed it will be subject to early and rapid dismissal. Federal courts may operate under "notice pleading" rules that allow for easy access, but one of the foundational requirements of a federal suit is jurisdiction.²²⁸ In either case, lawsuits become less appealing to plaintiffs, because of the reduced chances for staying in court long enough to achieve plaintiff's goals, including general policy disruption, satisfactory settlement, intermediary injunction, or disposition on the merits.

For exclusive jurisdictional grants, funneling litigation into one jurisdiction, particularly one proximate to the center of national government, reduces the plaintiff's value of suit by taking away her choice of forum (and attendant choice of judge and regional legal precedent) and forcing her to absorb the costs of litigating in a distant court. Creating a single specialized forum also reduces outcome uncertainty which

²²⁸ Rule 8, Federal Rules of Civil Procedure.

allows potential government defendants to adjust their behavior in ways that comport with the court's rulings thereby reducing the chances the government will be sued.

This dissertation's empirical analyses and related case study all provide evidence that supports the litigation effects explanation for jurisdiction stripping in the following ways. Ideological proximity between courts and Congress do not explain jurisdiction stripping. Litigation against the federal government, however, is strongly related to the removal of court review. The language of jurisdiction stripping statutes is consistent with predictions generated by litigation economics models: jurisdiction stripping protects agency decision making, and most often designates a D.C. forum when the plaintiff is likely to have her ties elsewhere. The State Wilderness Act study shows that policy disruption, delay, and resource diversion created by litigation against the Forest Service were core considerations for removing judicial review.

Ideology. The ideological explanation for jurisdiction stripping, in which Congress reacts to the policy preferences of a hostile judiciary, finds no support as a primary explanatory factor in the studies presented here. The two empirical studies measure institutional ideological preferences in a variety of ways, both through Common Space scores and political party identification. The Supreme Court and each federal circuit were considered separately in the event that Congress might react to the ideology of a single, influential court. The House and Senate also were considered separately to account for each chamber's preferences (although ancillary analyses were performed using an aggregate congressional measure of ideology as well). None of the ideological variables rise to significance in any of the empirical analyses. With respect to exclusive jurisdictional grants, not only did the U.S. Court of Appeals for the D.C. Circuit fail to be the ideologically closest circuit to either the House floor or the Senate floor, but during two peak years (1980 and 1996), the D.C. Court of Appeals was the least proximate federal court to congressional ideology.

Nor does the State Wilderness Act study provide evidence that jurisdiction stripping is primarily a congressional response to hostile courts. The House and Senate were controlled by different parties during the passage of most of the State Wilderness Acts, and the judiciary was often either ideologically neutral or, given the congressional split in control, aligned with one of the two chambers. Certainly, some court cases are mentioned in the congressional debate and hearings, particularly the suit in California that declared the Forest Service's environmental impact statement inadequately prepared with respect to certain forest land. The articulated congressional concern, however, expressed repeatedly throughout the legislative histories, was not about the perceived hostility of the courts, but rather was about the policy disruption caused by the litigation process itself, and the threat of future disruption should a multiple suit strategy continue to be employed by environmental interests bent on stopping commercial activity in national forests.

This is not to say that court preference is irrelevant to jurisdictional removals. Legal doctrine and specific judges' predilections likely do contribute to the overall litigation effects, as discussed in more detail below. These individuated preferences, however, are different from a systemic and identified set of court preferences that sway congressional action.

Litigation Pressure. In all three studies, jurisdiction stripping is related to the pressures created by litigation against the federal government, whether broadly represented by case filings in the federal system, or captured in more detail in the political dynamics of environmental litigation against the Forest Service. These are the very cases one would expect to exert the greatest unwanted cost and pressure on the government as a whole, as they represent litigation brought by private parties contesting government action, suggesting Congress does not remove jurisdiction to

curtail government actors, but rather to curtail private parties' capacity to bring the government in to court.

As litigation pressure increases, jurisdiction stripping increases. This is true in every analysis, in every model, and for every kind of jurisdiction stripping studied. The regression analyses for full jurisdiction stripping show a robust positive correlation between civil case filings against the federal government and the number of jurisdiction stripping laws enacted in a particular congressional session. The studies show not only corresponding increases in both measures over time, but also strikingly similar patterns of variation, with activity peaks and valleys occurring during roughly the same time periods for both measures.

Exclusive jurisdictional grants to the D.C. federal courts demonstrate the same strong correlation between case filings and jurisdiction removal in the regression analyses, even though the manner of eliminating court review differs from full jurisdiction stripping. This was true in both the House and Senate models. As litigation pressure against the federal government increases, Congress increasingly makes the D.C. Circuit an exclusive litigation forum, an act that makes litigation against the government less attractive to plaintiffs.

The State Wilderness Act study reaffirms this relationship in the specific context of 33 jurisdiction stripping statutes. Numerous congressman statements, and related agency and public testimony in the legislative histories, make it clear that the jurisdiction stripping provisions in the Acts were a response to litigation and threats of litigation against the Forest Service. The legislative history is supported by corresponding trends between State Wilderness Act passage and *NEPA* based lawsuits identified in the litigation databases.

Statutory Language. The statutes identified in the jurisdiction stripping databases protect administrative action, in keeping with the litigation effects analysis

which predicts that removal of court review is meant to insulate government actors from suit. All jurisdiction stripping provisions, in both the full jurisdiction stripping database and the exclusive jurisdictional grant database, remove court review of agency decision making, an act that is protective of both agencies and their policy implementing duties. The *Safe Drinking Water Act Amendments of 1996* contains typical statutory language. The Act provides that in the course of listing maximum allowable contaminant levels, “The Administrator's decision whether or not to select an unregulated contaminant for a list under this clause shall not be subject to judicial review.”²²⁹ Exclusive grants of jurisdiction to the federal courts in the District of Columbia follow a similar pattern. Challengers to the Secretary of Transportation’s decisions regarding automobile fuel economy exemptions, for example, may file “a petition for review in the United States Court of Appeals for the District of Columbia Circuit. That court has exclusive jurisdiction to review the decision and to affirm, remand, or set aside the decision under [the *Administrative Procedure Act*].”²³⁰ Court review of the Forest Service’s 1979 environmental impact statement is removed in the State Wilderness Acts’ to protect Forest Service management plans based on the EIS from continuous litigation.

Additional characteristics of exclusive jurisdictional grants also comport with the expectations generated by a litigation centered analysis. These Acts are designed to raise plaintiff’s costs of suit and lower her expectations of winning, conditions more likely to occur if the plaintiff or cause of action is located away from the District of Columbia. 51% of the identified laws were categorized as Individualized Government Action, laws affecting specific individuals or corporate entities who, as a general

²²⁹ *Safe Drinking Water Act Amendments of 1996*, Public Law 194-182, *U.S. Statutes at Large* 110 (1996): 1613.

²³⁰ *Revision of Title 49, United States Code Annotated, Transportation*, §32904(b)(5)(a), Calculation of Average Fuel Economy, Public Law 103-272, *U.S. Statutes at Large* 108 (1994): 745.

matter, are not primarily situated in Washington, D.C. An additional 13% of the exclusive jurisdictional grants deal with environmental matters which implicate localized conditions.

Policy Disruption and Costs. This dissertation argues that litigation costs, both in terms of policy disruption and resource diversion, are the engine that drives jurisdiction stripping. The empirical analyses capture these costs inferentially, by measuring overall litigation pressure, and find strong correlations between increased litigation against the government and increased jurisdiction stripping. The State Wilderness Act case study allows a more direct examination of litigation costs.

Like the empirical analyses, the State Wilderness Act case study also supports the litigation effects model. It finds that Congress removed review of the Forest Service EIS in response to environmental litigation against the agency. The litigation created three kinds of costs that deeply concerned Congress. It disrupted agency forest management decisions, thereby imposing economic hardship on key constituencies, including the timber industry. It diverted Forest Service personnel and resources away from their management duties and into litigation related tasks. It produced agency behavior designed to avoid litigation, including formation and withdrawal of various forest management plans, additional environmental assessments, and a threatened third remote area roadless evaluation.

Commercial interests, located in the national forest rich states, including the timber industry, tourism related businesses, and mining and farming interests stood to lose significant revenues and future revenues without access to national forests. State and regional economies, and the governments reliant on these businesses and the tax revenues they generated, also were vulnerable. Forest Service timber sales ground to a halt, and timber harvests plummeted, largely in response to agency concerns about being sued. State Wilderness Acts were passed in large numbers soon after timber

harvests in national forests reached a 13 year low.²³¹ The economic pressures faced by the agency included its reliance on timber sales to meet budgetary goals. Both the Forest Service and the Department of Agriculture repeatedly requested additional resources from Congress to address increasing litigation related costs. The legislative history is filled with congressman statements evidencing frustration and increasing anger over the costs and policy gridlock generated by the environmental litigation.

Generalizability

Jurisdiction stripping is a largely unstudied area. While this dissertation starts the inquiry by establishing the importance of litigation and the lack of ideological effects, as well as framing the analysis in terms of litigation economics, additional questions remain. The State Wilderness Act study makes a compelling case for the effect of litigation costs, and it comports with inferential evidence presented in the empirical analyses. It is a fair question, however, to ask whether these particular statutes fully capture the underlying dynamics of jurisdiction stripping legislation. It may be that other legislative histories and other litigation profiles do not evidence the same clear congressional intent to insulate government actors from the costly and disruptive effects generated by policy challenges filed in federal court. The Wilderness Act Studies do seem to be an easy case, particular because they involve environmental litigation against the government. These cases are often part of a multiple suit, public interest litigation strategy specifically aimed at disrupting policy implementation by imposing costs on the government, as was the case with the *NEPA* suits against the Forest Service.

A full answer to this question requires in depth case studies for the remaining jurisdiction stripping statutes in the databases, a project well worth pursuing, but

²³¹ Although harvest showed an increase in 1983, the year prior to the bulk of State Wilderness Acts' passage.

beyond the foundational inquiries presented here. There are, however, other characteristics of the jurisdiction stripping statutes identified that suggest the State Wilderness Act study is not an anomaly. A substantial number of jurisdiction stripping statutes implicate agency action related to environmental issues. Provisions addressing environmental matters make up 20% (76 of 378) of the full jurisdiction stripping database. 13% (12 statutes) of the D.C. jurisdictional grants contain environmentally related jurisdiction stripping provisions. These numbers suggest that the specific litigation dynamics identified in State Wilderness Act study, at the very least, may be found in multiple other congressional decisions to remove court review.

Other statutory categories, while not environmental in nature, also suggest the suitability of a litigation economics approach. A large number of jurisdiction stripping provisions, particularly in the full jurisdiction stripping database, deal with benefit payments made by the federal government. Removal of court review in this context protects agency decisions regarding how government money is spent from challenge in federal court. 30% of the full jurisdiction stripping database involves government benefits. Social benefits, including housing, food, loss compensation, social security, and Medicare/Medicaid account for 84 provisions (22%). Industry benefits and benefits to states, including transportation, schools and urban renewal comprise another 8% (28 provisions). At the very least, one component of any related litigation very likely involves government expenditures, a factor that fits easily in to the cost benefit analyses presented here in connection with litigation economics.

Another large statutory segment of the database is regulatory in nature. 51% of the full jurisdiction stripping data base and 45% of the exclusive jurisdictional grants fall into this category. As discussed in more detail below, this type of legislation is likely to arise in the context of interest group dynamics similar to those examined in the State Wilderness Act study. Taken in conjunction with environmental statutes and

benefit conferring legislation, a significant portion of the jurisdiction stripping legislation is likely either to echo directly the dynamics presented in the State Wilderness Act study or expressly implicate policies that involve financial considerations.

Additional Factors and Areas of Study

The nature of the jurisdiction stripping statutes and the details provided by the State Wilderness Act study suggest several additional dynamics that may affect jurisdictional removals and should be considered when conducting further studies of jurisdiction stripping. Interest group behavior, including rent seeking, may play a key role. Legal doctrine governing the availability of injunctive relief may matter. Individual court preferences and the influence of a particular judicial circuit may impact the underlying litigation economics. Agency ideology is worth consideration. Broader questions about jurisdiction stripping also remain which suggest additional avenues for study addressing why Congress strips jurisdiction only in selective policy areas and varies between full and partial jurisdiction stripping. Finally, it is worth asking whether the economic effects identified here apply to other jurisdictional manipulations.

Interest Group Politics. Litigation against the federal government, because it challenges agency decisions and therefore policy implementation, does not affect government actors alone. Policy disruption, interference, or change has ramifications for segments of the public affected by the policy regime under contestation. Certain issue areas, commonly found in jurisdiction stripping statutes, suggest that removal of court review may be linked to interest group politics. Regulatory laws make up the largest statutory category identified in the databases. This means that many of the jurisdiction stripping public laws deal with agencies that promulgate and implement rules governing private activity. In the full jurisdiction stripping database, categories

identified as environmental regulation, law enforcement, industry regulation, and immigration policy make up 193 of 378 total provisions or 51% of the identified public laws. In the D.C. jurisdictional grant database, 41 of the 91 public laws, or 45%, fall into one of these categories. These are the type of laws whose passage and enforcement generates interest group politics since they are legislatively designed to delineate between affected individuals based on group level classifications (Lowi 1972). In the case of the State Wilderness Acts, although the environmental regulation in question was directed at the agency requiring *NEPA* compliance with respect to forest management plans, the legislation in essence regulated commercial activity in national forests, limiting such activity to nonwilderness areas.

Social benefits statutes comprise another large portion of the jurisdiction stripping databases, as noted above. This type of legislation also can involve interest group activity, particularly statutes addressing Medicare and Medicaid. Health care matters implicate insurance companies, hospitals, and related trade associations, as well as medical professionals and their related policy organizations, such as the American Medical Association. This does not mean interests must be part of a formally organized group, although this usually is the case. Interest group action can include disparate litigants with no formal connection, all of whom, for example, choose to challenge Medicare payment schedules. These separate individuals may act as if they were a group, at least with respect to litigation. This is because there are often fee shifting statutes, rights of action, and legal strategies that are common to some policy litigation.²³² Through the mediating force of attorneys, these legal rules create a group of individuals who act in consort without a formal organization.

²³² See, for example, the *Equal Access to Justice Act of 1996*, Public Law 96-481, *U.S. Statutes at Large* 94 (1996): 2325, *U.S. Code* 5 (2007), §504, *U.S. Code* 28 (2007), §2412.

In the interest group context, in addition to shielding the government from litigation costs, congressional removal of court review could involve classic rent seeking behavior in which one interest group tries to use legislation to disadvantage competing interests. Accordingly, some jurisdiction stripping could be designed to achieve interest group goals by protecting favorable policy and removing litigation as a lever for policy change or disruption, thereby forcing opposing interest groups into the legislative arena where their success rate is lower. Certainly in the State Wilderness Act study, one of the intended purposes behind the jurisdiction stripping provisions was to advantage timber industry and other commercial interests who wanted environmental interest group litigation to stop so that the Forest Service could resume management policies that allowed multiple-use in national forests. Other regulatory provisions (and some of the benefit conferring statutes) in the jurisdiction stripping database may also exhibit this kind of rent seeking behavior.

Legal Doctrine and Intermediary Relief. Procedural rules for intermediary injunctive relief that favor plaintiffs may be common in litigation that leads to jurisdiction stripping.²³³ The standards for granting injunctions affected the levels of policy delay created by lawsuits in the State Wilderness Act study. When the harm alleged cannot be rectified with monetary damages, and is irreparable, courts tend to err on the side of plaintiffs, granting a halt to agency action until the case merits are decided. In effect, this makes some of the costs of a favorable plaintiff judgment (a halt to agency policy) part of the defendant's ongoing litigation costs by creating policy disruption as the case proceeds. This, in turn, increases both plaintiff's expected value of suit, as well as defendant's maximum level of litigation avoidance.

²³³ This includes temporary restraining orders, preliminary injunctions, injunctions pending appeal, or stays of judgment pending appeal.

This is particularly true in suits alleging potential environmental harm, as there is a strong presumption that harm to the environment is irreparable (*Amoco v. Gambell* 1987). In the State Wilderness Act study, of the 282 *NEPA* based timber cases identified against the Forest Service, slightly over 40% (116) involved injunctive relief either during the lower court handling of the case or upon pendency of an appeal. This dynamic may also be found in connection with the other jurisdiction stripping statutes in the databases that involve environmental matters.

Specific legal doctrine governing injunctive relief in other issue areas may also play a similar role. This dynamic is less salient in nonequity cases, where the relief sought is primarily monetary, since injunctions usually are not appropriate in cases where money damages can make the plaintiff whole, a circumstance which militates against characterizing the potential harm as irreparable (*Nelson v. National Aeronautics and Space Administration* 2008). The dissertation databases do include jurisdiction stripping laws with statutory language that suggests nonequity claims, including the large number of laws dealing with social benefits (roughly 22%) in the full jurisdiction stripping database, and the economic nature of many Individualized Government Action statutes (51%) in the D.C. jurisdictional grant database. The statutory language alone, however, can be misleading. Whether equitable or nonequitable claims are at issue turns on the underlying litigation history of the particular provision and the interest groups involved. For example, court review is removed regarding certain payment adjustments made to rehabilitation facilities for inpatient rehabilitation service under Medicare/Medicaid.²³⁴ Intermediary injunctive relief is an integral part of litigation against Medicaid agencies (Lever and Eastman 1991).

²³⁴ *Balanced Budget Act of 1997*, Public Law 105-33, *U.S. Statutes at Law* 111 (1997): 251.

Court Preferences. Judicial preferences may impact jurisdiction stripping in ways different from the broad ideological struggles depicted by many institutional accounts. Evidence from the State Wilderness Act study, and the basic economic dynamics of litigation incentives described in Chapter Two, both suggest that individualized judicial preferences can exert tangible and interactive influences on the congressional decision to remove court jurisdiction on an issue by issue basis.

Litigation economics shows that a plaintiff's overall value of suit is directly affected by the parties' assessments of plaintiff's chances to prevail in court. These assessed chances rise if the known judge is disposed toward the plaintiff. A plaintiff may be able to increase her chances of getting a favorable judge if her litigation is part of multiple suit strategy located in a circuit with influence over the contested policy issue.

This was the dynamic in the State Wilderness Act study. Environmental plaintiffs challenged timber harvesting, with many of the suits filed in the district courts of the 9th Circuit. The evidence in the study shows that, overall, the 9th Circuit ideology varied from liberal, to moderately liberal, to neutral during the time in which the State Wilderness Acts were passed, but numerous suits allow litigants access to numerous different judicial profiles, particularly in the larger judicial circuits. The 9th Circuit Court of Appeals, for example, covers nine states, and 13 federal trial districts. This impact was compounded by the concentration of national forest land in the northwest.

The trial court in one of the filed cases, *California v. Bergland* (1982), ruled in favor of the environmental interests holding that the Forest Service's environmental impact statement was inadequate. The ruling was later upheld by the appellate court. These rulings changed Forest Service and congressional behavior by changing the government defendants' assessments of plaintiff's overall court chances. This was the

case, despite the fact that the ruling only applied to specific forests in California, did not necessarily apply to EIS for other states in the 9th Circuit, and did not have precedential value in other appellate circuits. The legislative history shows that Congress and the agency were concerned that the success in *California v. Bergland* would incite copy cat lawsuits, not only in the 9th Circuit, but all over the country.

The concern with copy cat lawsuits was not with the perceived ideology of courts in the federal system. Neither the congressional record nor the ideological characteristic of the federal bench support this interpretation. Instead, the concern was that multiple suits in numerous districts would increase litigation costs against government actors, creating more policy disruption, while at the same time increasing plaintiff's chances of finding another court willing to hold in the plaintiff's favor. To stop current, threatened, and potential litigation, Congress removed judicial review over the immediate point of policy contention, the 1979 environmental impact statement supporting RARE II.

This suggests several things for the broader study of jurisdiction stripping. Judicial preference may matter on an issue by issue basis. Court preference is not significant with respect to aggregate measures of jurisdiction stripping, as evidenced by the broader empirical studies, but it may play a role depending on the nature of the litigation and its geographic location. As the State Wilderness Act study shows, this may not be a systemized reaction by Congress to perceived court hostility, but rather a pragmatic response to judicial profiles in certain circuits and the potential spread of multiple suit strategies. This does suggest, as discussed earlier, interest group activity, which further limits the applicability to all the statutes in the database. It does mean, however, that when further case studies are conducted, particular attention should be paid to litigation patterns, including concentrations of litigation in certain forums, the size and policy influence of involved circuits, and the presence of pivotal cases.

Agency Preferences. It may also be the case that agency preferences matter, even if the congressional choice between court and agency preferences does not. In other words, Congress may act to protect agencies from policy disruption only under circumstances in which agencies and Congress are aligned, regardless of the ideological composition of the federal courts. While this was not tested directly, the broader empirical analysis tend to cut against this argument, given the strong correlation between jurisdiction stripping and litigation pressure across the full term of the study (1943 to 2004), during which time the government was both unified and divided, and the executive branch at varying times was unified with one or both chambers or in opposition to one or both chambers. The State Wilderness Act study also raises doubts, since, as noted above, jurisdiction stripping provisions were passed under a wide variety of congressional-executive policy configurations.

The State Wilderness Act study raises another complicating issue in considering agency preferences: how to measure agency ideology. The empirical analyses use party of the executive, the standard approach in the literature; however, this may be too simple an heuristic. The Forest Service, for example, has many characteristics that argue it operates as its own principal (Carpenter 2001; Kaufman 1960). Other agencies may follow suit, or may be subject to control by either the president or congressional oversight committees, and this may vary depending on the type of agency and the nature of its activities. Despite these initial reservations, additional analyses using agency ideology are worth consideration.

Questions Concerning Jurisdiction Stripping Variations. It is also worth asking why Congress might choose one form of jurisdictional removal over another. In most of the examples discussed below, the first step towards an answer requires additional, specific case studies of the identified statutes, including their legislative and litigation history. Certain jurisdiction stripping characteristics, established by the

initial studies presented here, provide both a frame work and some directional guidance for these wider inquiries.

Selective Jurisdiction Stripping. Why does Congress revoke judicial review only over those specific agency actions identified in the jurisdiction stripping database, while leaving judicial review over other administrative behavior? Most administrative action may be challenged in federal court. The *Administrative Procedure Act* (“APA”) expressly provides that administrative agencies may be sued.²³⁵ The Act overrides general principles of sovereign immunity which hold that the government is not subject to suit for carrying out governmental business. Jurisdiction stripping provisions in administrative laws are an exception to the APA’s default rule which allows judicial review. The federal courts generally uphold these provisions, provided there is explicit evidence of congressional intent to remove review in the statutory language or legislative history (*Block v. Community Nutrition Institute* 1984; *Heckler v. Ringer* 1984; *Weinberger v. Salfi* 1975). Congress, therefore, must add specific language into a statute expressly stating that judicial review is removed. The overall incidence of this legislation, which is rising over time, still remains a small percentage of legislative enactments. When combined, the various jurisdiction databases identified 339 jurisdiction stripping laws passed from 1943-2004, most of which occurred after 1960. This represents 2% of all the legislation passed during that time period. This suggests that very specific conditions prompt Congress to strip jurisdiction.

The primary way to explore this dynamic is through additional case studies of the identified jurisdiction stripping statutes, examining the specific congressional record and litigation history that gave rise to each, and looking for overlapping characteristics. Some possible criteria are discussed above, including the presence of

²³⁵ *Administrative Procedure Act of 1946, U.S. Code 5 (2007), §701.*

interest group activity, the case history and applicable legal doctrine, the overall levels of litigation activity, and the measurable indices of economic cost to both the agency and to the public actors affected by the policy.

Another possible approach is to examine these factors as they apply to provisions within the same statute. A number of the Acts in the jurisdiction stripping databases contain complex and lengthy legislation. Jurisdiction stripping language in these statutes, however, is often quite narrow in scope. As a result, one statutory provision removes judicial review over a specific agency action while leaving court review with respect to other, related provisions. For example, Health, Education, and Welfare determinations leading to suspension of payments to Professional Standards Review Organizations overseeing Medicare-Medicaid reimbursements are not reviewable, but the Secretary's approval of the associated monitoring plan is subject to suit.²³⁶ Rulemaking by the Secretary of Transportation is still actionable in the *Intermodal Surface Transportation Efficiency Act of 1991*, but notices that rulemaking will be delayed cannot be reviewed in court.²³⁷ The same circumstances apply to the laws in the D.C. jurisdictional grant database. Challenges to the Secretary of Agriculture's decisions on plant variety protection applications may only be brought in the federal courts sitting in Washington, D.C., but challenges to the broader regulatory scheme are not limited to that forum.²³⁸

Full Jurisdiction Stripping or Exclusive Jurisdictional Grants. Congress takes an affirmative act not only when it removes judicial review, but also when it designates the form that removal will take. The jurisdiction stripping data bases contain both complete jurisdictional removals and exclusive jurisdictional grants

²³⁶ *Medicare – Medicaid Anti-Fraud and Abuse Amendments of 1977*, Public Law 95-142, *U.S. Statutes at Large* 91(1977): 1175.

²³⁷ *Intermodal Surface Transportation Efficiency Act of 1991*, Public Law 102-240, *U.S. Statutes at Large* 105(1991): 1914.

²³⁸ *Plant Variety Protection Act of 1963*. Public Law 91-577, *U.S. Statutes at Large* 83 (1969): 742.

which have the effect of removing jurisdiction from all courts other than the District of Columbia federal circuit. What influences Congress to take one action instead of the other? Initial characteristics of the statutes contained in each database suggest that there are significant overlaps in the kinds of action protected, but also significant variation between the two jurisdiction stripping actions. Both databases address environmental matters, but exclusive jurisdictional grants contain a smaller percentage of these statutes (13%) than the full jurisdiction stripping database (20%). Conversely benefits statutes appear more frequently in the full jurisdiction stripping database (30%) than in the exclusive jurisdictional grant statutes, where these kinds of laws are almost non-existent. Finally, exclusive jurisdictional grants are heavily regulatory with close to 71% of the statutes falling into one of three categories (environmental, industry regulation, and individualized government action).

It may be the case that, depending on the specific kinds of regulatory statutes involved, Congress chooses a single forum more often in areas that benefit from judicial expertise, either because of wide variation in approaches between circuits or due to the technical nature of the regulatory scheme. So, for example, the federal courts in the District of Columbia are the exclusive forum to challenge rulemaking under the *Federal Energy Administration Act of 1974*,²³⁹ or to challenge exemptions from fuel efficiency standards.²⁴⁰ This allows some review, which may be a more politically palatable than full jurisdiction stripping, while at the same keeping that review in a more predictable setting than if the issues are considered in multiple circuits. Once case studies are completed on the statutes in the individual databases, a comparative perspective between the two groups is needed, with a particular focus on the technical complexity of the statutes involved.

²³⁹ *Federal Energy Administration Act of 1974*. Public Law 93-275, *U.S. Statutes at Large* 99(1974):96.

²⁴⁰ *Automobile Fuel Efficiency Act of 1980*, Public Law 96-425, *U.S. Statutes at Large* 94(1980): 1821.

Other Jurisdictional Manipulation. The salience of litigation effects across two different methods for controlling court jurisdiction (full jurisdiction stripping and exclusive jurisdictional grants) suggests that the litigation effects analysis presented here may shed light on other congressional actions that affect court access. Statutes of limitation, federal amount in controversy minimums, and rules regarding prior exhaustion of administrative remedies all place limitations on federal litigation and may also be designed to insulate government actors from public suit.

Court and Congressional Studies

This dissertation presents one of the first systematic studies of jurisdiction stripping in the federal system. In doing so, it argues for a modest, but important change in approach toward institutional studies when the federal courts are involved. The judicial system is a process, not an entity. In most cases, its dynamics and effects cannot be captured through the heuristic of judicial ideology. This is because the federal courts take in, process, and resolve disputes through litigation. Courts cannot be separated from litigation effects, incentives, and economics. These factors determine not only when the judiciary is engaged, but also the nature, form, and duration of that engagement. These factors must be taken into consideration when modeling the interactions between Congress and the courts. To do otherwise risks misunderstanding the nature of those interactions. Jurisdiction stripping, for example, is not a predatory congressional response to federal courts and their ideological preferences over policy. It is a response to the access courts provide to the public. It is a response to public litigation against the federal government and the pervasive resource diversion, costs, and policy disruption such litigation often brings.

This dissertation also argues for a second, but related shift in analytic approach. Much institutional scholarship is couched in terms of strategic adversarialism between the government branches. This is often the foundational

assumption made when approaching court-congressional studies. But as this dissertation demonstrates, government actors can be motivated by common concerns, and they can react in ways that are cooperative rather than obstructive. What triggers this in the jurisdiction stripping context is public interference with government business. Government institutions often are not jockeying among each other, they are jockeying instead against external pressures. In many institutional interactions, the strategic adversary may not be the other governmental branches, it may be the public.

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