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**JURISDICTION STRIPPING:
Litigation, Ideology, and Congressional Control of the Courts**

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This study finds that Congress removes court jurisdiction, and does so with increasing frequency over time. Institution-based models predict that Congress should strategically remove court review to control the judiciary's influence over policy when congressional and court preferences differ. Administrative realities suggest that jurisdiction removals may be aimed at controlling litigation, not judicial ideology. Denying courts' review denies litigants court access, an action with ramifications for litigation driven costs, delays, and caseload pressures. Using a new database of all public laws containing jurisdiction stripping provisions from the 78th through the 108th Congresses, this study tests for relations between jurisdiction stripping and either federal case filings or ideological distances among the courts, Congress, and agencies. The findings indicate that administrative concerns related to litigation in which the government is a defendant influence jurisdiction stripping, but ideology does not.

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 scholarly literature, 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. It likewise affects citizen's ability to challenge government action through the judiciary. In recent years this debate resurfaced in the context of military tribunals at Guantanamo Bay, proposed legislation opposing same-sex marriages, and arguments over federalized rights to school-prayer. While there is no consensus on the scope of Congress's plenary authority over court jurisdiction, one general consensus does emerge: Congress rarely eliminates judicial review (Gunther 1984; Peretti 1999; Resnik 1998).¹ Despite (or, 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."

This study addresses this 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 removed court review.² Two explanations are considered for why Congress might eradicate judicial review. Institutional scholars view jurisdiction stripping as a congressional mechanism to control court influence over policy when court and congressional ideology differs. However, administrative realities suggest that removing court jurisdiction may be a response to litigation and burgeoning court filings. Results from this study

show that Congress regularly, and with increasing frequency, strips jurisdiction from federal courts. However, 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 suggest that jurisdiction stripping may 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.

The Court, Congress, and Agency Dynamic

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). 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. However, court impact on agency policy cannot occur without litigants bringing lawsuits. The result is policy subject to a triad of institutional influences: Congress originates, agencies implement and formulate, and courts and litigants intervene. This suggests that jurisdiction stripping may be a congressional reaction to two possible dynamics: ideological differences among the branches, or the costs and delay imposed by litigation against the federal government.

Ideology

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. The lynchpin of this approach is

the assumption that institutions, acting through their median members, seek to imprint their preferences upon public policy (Epstein, Knight, and Martin 2001; Weingast 2002). Numerous scholars address this issue with respect to agencies, identifying a number of ways in which Congress keeps the bureaucracy in check including oversight and follow-up legislation (Weingast and Moran 1983), third party monitoring known as “fire alarms” (McCubbins and Schwartz 1984), and decisional rules which constrain discretion (Huber, Shipan and Pfahler 2001; McCubbins, Noll, and Weingast 1987, 1989). Because the federal courts, Congress, and the president possess different powers, both in an absolute sense and in relation to one another, this desire to affect policy manifests through strategic behavior either in the form of initial policy positioning or through the manipulation of decision making structures and procedures (Ferejohn and Shipan 1990; Moe 1990; Tiller and Spiller 1999).

Ex ante decisional rules and their attendant costs can be used strategically by Congress to affect court influence on policy. The ideological proximity of Congress, courts, and agencies is the determining factor in this dynamic, with Congress choosing rules which result in greater discretion to either court or agency depending on which entity aligns best with congressional preferences.³ 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.

From this perspective, jurisdictional removal, when it does occur, 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. Jurisdiction stripping may be a structural control used by Congress in the face of divergent court ideology.

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. The political time and resources expended to pass legislation give Congress an interest in not being forced to revisit legislation as a result of litigation. Legal actions brought against the federal government affect courts and agencies by increasing workload, creating policy delay, and diverting resources. These litigation costs give both courts and agencies strong incentives to resist expanded federal court access. Even basic administrative tasks may suffer if agency actions are litigated too often. The ministerial nature of many jurisdiction stripping provisions suggests that this may be a congressional concern. For example, these provisions often address subjects such as social benefit claims, forest insect treatment plans, or law enforcement informational reward programs.

Institutional theories that focus on judicial ideology as expressed through final court decisions 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 agency behavior, in ways unrelated to final case disposition. This is particularly salient given the rise in federal court caseloads over the past several decades. Annual district court case filings in the federal system increased from 73,377 to 352,360 during the 60 years covered by this study. Civil

filings in which the United States was a defendant, the category which includes challenges to agency action, increased sixteenfold during this period from 2,350 to 38,391.⁴

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. 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 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%. Not surprisingly, federal courts have long called for reductions in federal jurisdiction (Judicial Conference 1995; Resnik 1998). 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 reprieve from caseload pressures (Fish 1973).

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, increasing 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 (Posner 1996). Some scholars note a recent increase in self-imposed federal court barriers to litigation as well, including use of the requirements under standing, ripeness, and mootness (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 nonadjudicative measures to reduce case load pressures (Burbank 2004; Hadfield 2004; Miller 2003).

Agencies and Litigation. The mere initiation of a lawsuit against an agency can affect policy by delaying policy implementation and imposing litigation costs in terms of agency time and resources (Levin 1996; Meltzer 1998; Wald 1996). These costs are borne despite the high litigation success rates of government parties (Crowley 1987; Songer, Sheehan, and Haire 1999), suggesting that the litigation process and not the outcome is at issue. 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). 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) or dispense with rulemaking altogether, taking action instead in the form of “guidances” (Mendelson 2007). 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). Nor are litigation costs imposed by suits against the government the agencies' alone. The Department of Justice is responsible, in varying degrees depending on the agency and the issue, for representing agencies in court (Johnston 2002).

By stripping jurisdiction, Congress may be responding to a variety of organizational concerns coming broadly from the courts, the agencies, the legal arm of the executive branch, and congressional self-interest. Jurisdiction stripping may be designed to insulate agency action from the practical interference of litigation instigated against the federal government by outside parties.⁵

Two Hypotheses

If varying institutional ideology matters, 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.

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 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 study 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.⁶ As these are time-series data, Prais-Winsten AR(1) regression analyses are used with the jurisdiction stripping measurement as the dependent variable⁷ and each congressional session's litigation and ideological measurements as the independent variables.

Jurisdiction Stripping. Public laws with provisions that remove jurisdiction from the courts were identified from all public laws passed during the sixty year time span running from the first session of the 78th Congress (1943) through the second session of the 108th Congress (2004). 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.” From this data set, public laws which contained any provision explicitly removing court jurisdiction were included.⁸ 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. The variable, *US Civil Defendant*, measures the annual number of civil cases filed in federal district courts by private parties naming the United States as defendant, a category that captures 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).⁹ 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.¹⁰ Court filings are lagged one year to allow for congressional response time.¹¹

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).¹² 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.¹³ 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 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.¹⁴

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. 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:

$$P|x = |C - J| - |C - A| \tag{1}$$

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. Equation (1) is calculated for both the House and Senate in

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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 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.¹⁵

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.

Results

Contrary to conventional wisdom, Congress explicitly and regularly removes court jurisdiction. Since 1943, Congress passed 248 public laws containing 378 provisions expressly denying the federal courts any power of review. Jurisdictional removals primarily are designed to prevent court review of administrative decision making.¹⁶ Typical legislative language simply states that "no court shall have power or jurisdiction to review" the specified action (U.S. Public Law 93-377 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.

Three categories make up roughly 60% of all jurisdictional removals. 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. 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 of 1969, 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.

While the incidence of jurisdiction stripping 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, 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 legislation stripped jurisdiction, well over twice the 2.27% activity during the first session (Figure 1).

[Insert Figure 1 about here]

Figure 2 compares the incidence of jurisdiction stripping in each congressional session with district court civil case filings in which the United States is a defendant. The results suggest a relationship between Jurisdiction Stripping and the variable US Civil Defendant. The types of cases measured by this variable include actions brought by private citizens against federal agencies under social security, labor, and environmental laws; subject areas that closely align with the most common categories of jurisdiction stripping legislation.

[Insert Figure 2 about here]

Regression Results for Congress, 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 1 shows the regression results with respect to these two courts.

[Insert Table 1 about here]

Jurisdiction Stripping positively correlates with US Civil Defendant across all models at the $p < 0.05$ level, consistent with the graphic description shown in Figure 2. 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. In the Supreme Court model, an increase of 10,000 civil cases against the federal government corresponds to an increase in the jurisdiction stripping measurement of approximately 0.40 or 0.16 percent. None of the ideological variables are significant for either court in either the Senate or House models.

Regression Results for Congress and the Courts of Appeals

Table 2 presents regression results for Congress, agencies, and the First through Tenth Circuit Courts of Appeals. Across all courts and all models US Civil Defendant is significant at the $p < 0.05$ level. The jurisdiction stripping measurement per congressional session increases by about 0.40 (0.16 percent) for every 10,000 new civil cases filed against the federal government. 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.¹⁷

[Insert Table 2 about here]

Discussion

The results uniformly support the Litigation Hypothesis, but do not support the Ideology Hypothesis. 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 agencies, 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.¹⁸

While somewhat over inclusive, citizen suits against the government 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.

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.

Even if court preferences are easily ascertained, Congress may not know which federal court is the relevant actor. Many separation of powers models use the Supreme Court (Eskridge 1991a; Martin 2001; Sheehan 1992). However, the Supreme 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 administrative 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 (28 U.S.C.A. §1291). 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 divergent, although this option is not supported by the ideological variables' lack of significance. 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.¹⁹ Although this study finds removals do not correlate to D.C. Circuit ideology, a correlation with jurisdictional grants might exist.

Finally, 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.

Conclusion

When Congress acts to remove jurisdiction from the courts, it appears to do so in response to increased levels of litigation brought against the federal government. These cases, which include challenges to governmental policy by private citizens, affect agencies and courts from the time they are filed, regardless of the final case disposition. 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. Likewise, litigation over government policies threatens to impose political costs, in both time and resources, on Congress, by potentially forcing Congress to revisit the nature and content of a particular policy. Jurisdiction stripping addresses these costs and interferences by removing litigant access to the courts. Results from this study suggest that jurisdiction stripping may represent congressional protection of governmental institutions, designed to reduce workload and minimize interference with the ongoing operations of government without any particular regard for court or agency ideological preferences.

Endnotes

¹This 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.” 5 U.S.C. §701(a)(1)-(2)(2000).

² Much of the legal literature is limited by examining 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.

³ The terms “ideology” and “preference” are used interchangeably although they represent arguably different concepts. This is because preference measures used here align members of the relevant institutions along a one dimensional, continuous scale which ranges from liberal to conservative, representing a general ideological assessment which purports to predict some kind of systematized behavior across a broad range of issues.

⁴ Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (“U.S. Judicial Conference Reports”) (1942-2004).

⁵ Congressional awareness of litigation involving the federal government comes from multiple sources: committee oversight of agencies, annual appropriations, constituent and interest group lobbying, executive branch contacts, and federal judiciary contacts with Congress, including reports generated by the Chief Justice and Administrative Office.

⁶ 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.

⁷ The dependent variable was converted to a square root to alleviate skew and normality issues with the residuals, determined by “ladder” and “gladder” commands in Stata 8.2.

⁸ 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.

⁹ Civil cases in which the United States was a defendant are reported in U.S. Judicial Conference Reports Table 7 (1942), Table 6 (1943-44), Table C-2 (1945-2004).

¹⁰ Absent a specific legislative directive, district courts have initial appellate jurisdiction over challenges to administrative action. Given the rather arbitrary allocation of this appellate jurisdiction, caseload pressures also were measured by using court of appeals filings. No material difference in the results was found.

¹¹ 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.

¹² The first dimension was selected since it is the primary dimension along which ideological divides are structured in Congress (Poole and Rosenthal 1997).

¹³ 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.

¹⁴ 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.

¹⁵ 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.

¹⁶ 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 2004).

¹⁷ 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.

¹⁸ 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.

¹⁹ Various scholars have found links between *agency* behavior and D.C. Circuit ideology (Revesz 1997; Sheehan 1992).

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TABLES AND FIGURES

TABLE 1 **Jurisdiction Stripping: Ideological Distance and 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 8.2.

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

TABLE 2 **Jurisdiction Stripping: Ideological Distance and Court Filings,
First Through Tenth Circuits, 1943 to 2004**

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

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. First and Tenth Circuit litigation variables squared. Stata 8.2.

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

FIGURE 1 Jurisdiction Stripping Legislation and Trend Line, 78th to 108th Congress

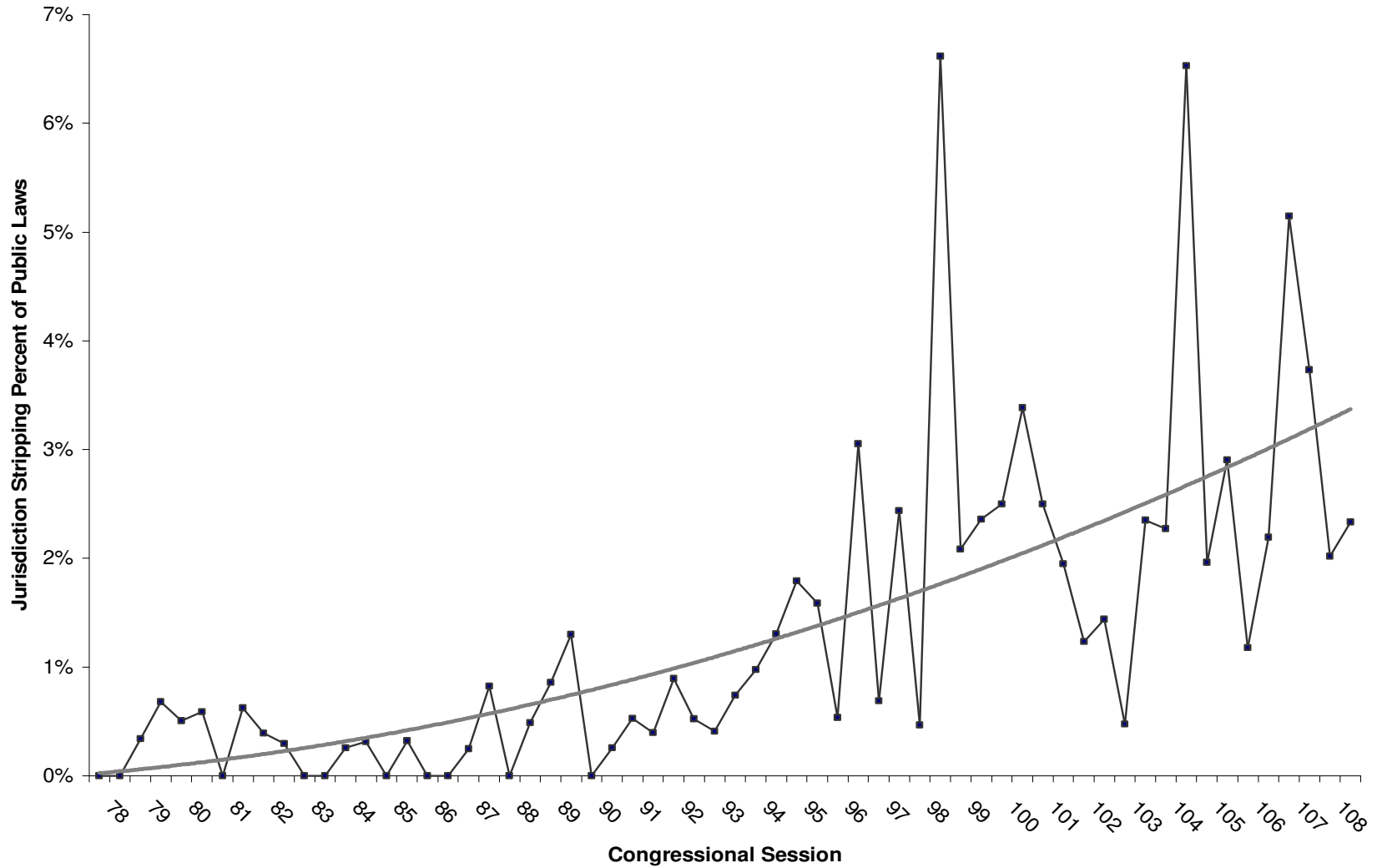


FIGURE 2 Jurisdiction Stripping Legislation and Civil Case Filings With US Defendant, Lagged One Year, 78th to 108th Congress

