THE KING'S WRONGS AND THE FEDERAL DISTRICT COURTS: UNDERSTANDING THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

by

Stephen Lowe Nelson

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ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

The University of Utah Graduate School

STATEMENT OF DISSERTATION APPROVAL

The dissertation of **Stephen Lowe Nelson**

has been approved by the following supervisory committee members:

Richard Green	, Chair	**April 22, 2009** Date Approved
Susan Olson	, Member	**April 22, 2009** Date Approved
Lauren Holland	, Member	**April 22, 2009** Date Approved
Peri Schwartz-Shea	, Member	**April 22, 2009** Date Approved
James Holbrook	, Member	**April 22, 2009** Date Approved

and by **Matthew Burbank**, Chair of the Department of **Political Science**

and by Charles A. Wight, Dean of The Graduate School.

ABSTRACT

This dissertation examines the Discretionary Function Exception (DFE) to the Federal Tort Claims Act (FTCA). Enacted by Congress in 1946, the FTCA is a partial waiver of sovereign immunity, or the common law tradition that "the King can do no wrong," and establishes that the United States government can be held liable for its torts to the same extent as private individuals are liable under similar circumstances. The DFE is a controversial, and not well-understood, limitation to the government's waiver of sovereign immunity.

Despite their 60-year existence, the public administration community knows surprisingly little about how the FTCA and DFE operate in federal courts, and the United States Supreme Court has only addressed the DFE on four occasions, creating a confusing test or set of standards to be applied by federal district courts, the judicial institution that hears the vast majority of DFE-related litigation. This dissertation, which focuses on a common aspect of DFE litigation, government's pretrial motions to dismiss a private litigant's DFE case, presents descriptive, quantitative data collected from DFE cases decided in federal district courts and reported to LexisNexis, an Internet legal search engine. These data provide both pragmatic and theoretical insight about the historical development of the DFE in the federal district courts.

From these data, it is clear the FTCA and DFE are significantly more complex and theoretically nuanced than previously discovered. First, although the FTCA

"judicialized" public administration, and while FTCA litigation in the federal district courts has not led to increased accountability and transparency for agencies, the FTCA remains a "legislative-centered" statute because it is only a partial waiver of sovereign immunity and leaves to Congress the ultimate authority to compensate victims of government's torts. Second, DFE jurisprudence reveals a preference at both the United States Supreme Court and federal district courts for "traditionalist" public administration values, something which previously had only been observed at the Supreme Court level. And, third, the DFE's history in the federal district courts reveals a previously unidentified partnership between the public administration and the judiciary: the federal district courts as agencies' risk managers.

Dedicated to my wife, Natalee Ann Nelson, for her unwavering support of this project from start to finish;

and

to my late mother, Karen Lowe Nelson, who endured much on my behalf over the course of her life and contributed greatly to my ability to complete this project.

EPIGRAPH

"If Henry III had been capable of being sued, he would have passed his life as a defendant."

Frederick Pollock and Frederic Maitland, 1895.

(From: Pollack and Maitland, 1968. The History of English Law. 2nd ed. Cambridge: Cambridge University Press.)

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CHAPTER 1

INTRODUCTION

The year 1946 was significant for both public administration and public law. Several pieces of legislation passed that year that substantially redefined the relationship between Congress and bureaucracy. For David H. Rosenbloom (2000), Distinguished Professor of Public Administration in the School of Public Affairs at American University, these acts, such as the Administrative Procedures Act (APA) and the Legislative Reorganization Act (LRA), helped bring about a "legislative-centered" public administration in which administrative agencies serve as extensions of Congress, exercise legislative functions, and are subject to legislative procedural requirements and Congressional oversight. Despite the new "legislative-centered" appearance of bureaucracy, one of these 1946, the Federal Tort Claims Act of 1946 (FTCA), transferred the function of determining liability for torts[1] committed by agencies and public

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[1] The word "tort" originates from the French phrase *avoir tort*, which means: "to be wrong." Generally speaking, the law of torts is a common law development concerned with assigning liability for economic losses, damages, or injuries arising out of human activities (Prosser, 1971; Shapo, 2000). When a tort claim is brought against a defendant, liability can be assigned based upon one of three theories: strict liability, negligence liability, or liability for intentional harms (Epstein, 2000). Because the United States Supreme Court has held that the federal government cannot be held strictly liable for its actions (the term "strict liability" refers to liability that "arises irrespective of how the tortfeasor conducts himself," in other words "the degree of care used in performing the activity is irrelevant to the application of [strict liability] doctrine"), FTCA plaintiffs may

administrators out of the hands of Congress to the courtrooms of the judiciary. The FTCA, in short, partially waives sovereign immunity, or the common law tradition that "the King can do no wrong," by allowing the federal courts to oversee and enforce administrative accountability over significant matters affecting agency actions.

The FTCA establishes that the United States can be held liable for its torts to the same extent as private individuals are liable under similar circumstances (28 U.S.C. § 2674). Using the FTCA as a "cause of action,"[2] or a legal vehicle for bringing a case to federal court, plaintiffs like Ronald Green can sue the government when injured by government activities. Ronald Green filed his lawsuit shortly after he was released from the United States Penitentiary in Atlanta Georgia (USP-Atlanta), where he was incarcerated from January 1992 until August 1993.[3] Green's suit alleged that after mandatory lockdown on the night of October 20, 1992, Green's cellmate, Larry Kerr, violently assaulted Green by punching him in the face and head, and grabbing him around the neck, choking him nearly to the point of unconsciousness. After this initial attack, Kerr brandished a razor blade and sexually assaulted Green while threatening to

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only pursue their claims based upon negligence liability or liability for some kind of intentional harms (*Dalehite v. United States*, 1953, pp. 44-45; *Laird v. Nelms*, 1972, p. 799).

[2] Black's Law Dictionary defines "cause of action" as: "[t]he right which a party has to institute a judicial proceeding" ("Cause of action," 1991, p. 152). The United States Supreme Court also refers to the FTCA as a "cause of action" (*Carlson v. Green*, 1980, pp. 19-20; *Wilkie v. Robbins*, 2007, p. 2599).

[3] Although not enumerated in the FTCA, the United States Supreme Court has specifically held that federal inmates may sue the United States, under the FTCA, for injuries sustained while incarcerated in federal prisons (*United States v. Muniz*, 1963).

slash him unless Green complied with Kerr's sexual demands (*Green v. United States*, 1995).[4]

Green reported the incident the next morning to prison officials and received emergency treatment from an ophthalmologist for the injuries to his eyes. During an official investigation into the incident, Kerr admitted to prison administrators that he choked Green and punched him in the eye, but Kerr denied any sexual misconduct. Prison officials punished Kerr with 60 days of disciplinary segregation after an internal, administrative disciplinary hearing,[5] which concluded that Kerr had committed the

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[4] The facts described in this paragraph come from Green's pleading to the United States District Court for the Eastern District of Pennsylvania, and are not verified through any independent investigation. The *Green* Court, thus, accepted Green's representations as fact for the purposes of its opinion.

[5] The Code of Federal Regulations requires federal prisons to establish specific disciplinary procedures to address inmate misconduct, "… [s]o that inmates may live in a safe and orderly environment, [and therefore] it is necessary for institution authorities to impose discipline on those inmates whose behavior is not in compliance with Bureau of Prison rules" (28 C.F.R. § 541.10(a)). These same regulations establish a multistage procedure for handling complaints against inmates. The first step in these procedures is the filing of an "incident report," which must be issued:

> When staff witnesses or has a reasonable belief that a violation of Bureau regulations has been committed by an inmate, and when staff considers informal resolution of the incident inappropriate or unsuccessful, staff shall prepare in Incident Report and promptly forward it to the appropriate Lieutenant. (28 C.F.R. § 541.14(a))

Incidents that fall within one of the two highest categories of severity, such as sexual assaults, must be investigated by prison staff (28 C.F.R. § 541.14(a)). After the investigation, an initial hearing is held before the Unit Disciplinary Committee, followed by a hearing before the Discipline Hearing Officer, who is authorized to impose penalties against inmates found to have violated prison rules of conduct.

physical attack but found insufficient evidence of any sexual assault (*Green v. United States*, 1995).

Kerr's aggressive nature and penchant for sexual violence was well-known to USP-Atlanta prior to his transfer to Green's cell. When Kerr entered USP-Atlanta in June 1991, his criminal history included convictions for armed robbery, sexual assault, aggravated sodomy, battery, aggravated assault, kidnapping, and rape. Despite this history, prison officials chose to place Kerr in the general prison population following an initial intake screening[6] upon Kerr's arrival at the prison (*Green v. United States,* 1995).

Prison administrators also knew that Kerr attacked at least two other inmates in the year prior to being transferred to Green's cell. During the first incident, which occurred on February 2, 1992, Kerr physically assaulted another inmate in one of the prison's television rooms. After investigating this first incident, prison officials concluded that they lacked sufficient evidence to write an incident report against Kerr, which would have led to an administrative hearing. The prison did, however, decide to separate Kerr from his first victim, and eventually transferred the victim to another federal prison. During the second incident, which occurred on September 11, 1992,

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[6] The intake screening process at federal prisons is governed by the Code of Federal Regulations. These regulations state that the screening serves the following purposes: "Bureau of Prisons staff screen newly arrived inmates to ensure that Bureau health, safety, and security standards are met" (28 C.F.R. § 522.20). The screening procedure is as follows:

> Immediately upon an inmate's arrival, staff shall interview the inmate to determine if there are nonmedical reasons for housing the inmate away from the general population. Staff shall evaluate both the general physical appearance and emotional condition of the inmate. (28 C.F.R. § 522.21(a)(1))

Kerr's then-cellmate reported to prison officials that Kerr sexually assaulted him and threatened to rape him. When interviewed by prison officials about the allegation, Kerr said: "I have been drinking that little girl [referring to the inmate victim] told on me … she got mad because I wanted some tonight that is my wife and now she's mad" (*Green v. United States*, 1995, p.3).[7]

Unlike the first attack, prison officials wrote a formal incident report about the second assault. However, this written report only referenced Kerr's intoxication and said nothing of the alleged sexual assault. During the accompanying disciplinary hearing, Kerr admitted to being intoxicated on the date of the incident and was sentenced to a suspended term of seven days of disciplinary segregation. Once again, prison officials transferred Kerr's victim to a different federal prison, and released Kerr to the general prison population on October 7, 1992. That same day, USP-Atlanta officials assigned Kerr to Ronald Green's cell, where he remained until the day of the alleged assault on Green himself (*Green v. United States*, 1995).

In his FTCA lawsuit, filed after his release from USP-Atlanta, Green claimed that the Bureau of Prisons violated its duty of care owed to Green by negligently placing him in the same cell as Larry Kerr, who, in Green's opinion, was too violent to be housed in the general prison population (*Green v. United States,* 1995). The duty of care the Bureau of Prisons owes its inmates is specifically mandated by Congress. The United States Code requires the Bureau of Prisons to:

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[7] When including this language in its written opinion, the *Green* Court quotes from a September 16, 1992, memorandum prepared by prison staff investigating this incident.

(1) have charge of the management and regulation of all Federal penal and correctional institutions;
(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise; and
(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States … (18 U.S.C. § 4042).

Congress's mandate to the Bureau of Prisons and the regulations accompanying this duty of care (described above in footnotes 5 and 6) vest a considerable amount of discretion in the hands of Bureau officials charged with administering this duty of care to federal inmates.[8] For example, regulations regarding the screening process for new federal inmates (as described in detail in footnote 6) do not specify particular factors that administrators must consider before placing inmates in the general prison population and does not dictate results in particular cases, but rather allows administrators to make decisions on a case-by-case basis based on judgment or choice. These placement decisions necessarily involve policy considerations because administrators must weigh the goals of ensuring that "health, safety, and security standards are met" against the physical and fiscal (or budgetary) constraints under which the prison operates.

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[8] Although the cases described below do not arise under the FTCA (but rather other causes of action), it is important to note that the United States Supreme Court gives prison officials considerable discretion in determining matters of prison security. In *Bell v. Wolfish* (1979) the Court stated: "[P]rison administrators … would be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security" (p. 547; see also *Rhodes v. Chapman*, 1981, p. 349 fn. 14). This judicial deference to administrative discretion "requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice" (*Whitley v. Albers*, 1986, p. 321).

Regulatory procedures addressing allegations of inmate misconduct (described in detail in footnote 5) are a further example of administrative discretion. These regulations explicitly grant prison administrators discretion in deciding when to initiate and issue an official incident report by requiring an incident report only if (1) officials have a "reasonable belief" that a violation of prison rules has occurred; and (2) if they consider informal resolution inappropriate (28 C.F.R. § 541.14(a)). The decision whether the "reasonable belief" standard has been satisfied, and whether further action is warranted, is not only inherently discretionary, it is also grounded in policy considerations such as the prison's financial resources, the prison's concerns for inmate safety (in the context of the particular allegation of misconduct), as well as the rights of both the victim and the alleged offender.

The discretionary acts described above eventually doomed Green's lawsuit, and precluded him from recovering monetary damages against the government for his injuries. Specifically, although the FTCA provided Green the opportunity to initiate his lawsuit against the government in federal court (an action that would have been precluded by the doctrine of sovereign immunity prior to 1946), the federal district court judge assigned to Green's case dismissed his lawsuit under a controversial limitation to the FTCA's waiver of sovereign immunity before Green's case could proceed to a trial and before Green could be awarded damages for his injuries.[9] This exception, the

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[9] In his written opinion dismissing Green's case, Judge Pollack of the Eastern District of Pennsylvania acknowledged Green's frustration that the very discretion that led to his injuries also formed the basis of the law that precluded Green's lawsuit by noting: "[H]ad

discretionary function exception (DFE), which shields the federal government from tort liability for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government" (28 U.S.C. § 2680(a)), is the subject of this dissertation.

Despite its 60-year existence, the public administration community knows surprisingly little about how the FTCA and DFE operate in federal courts. The DFE is the most criticized and litigated exception to the FTCA, and, as one commentator notes, "has given rise to more confusion than any other aspect of the [FTCA], and its meaning continues to divide scholars and jurists" (Cole, 1990, n.p.). Because the DFE acts as a jurisdictional bar to suing the government, its meaning and interpretation are of critical importance to public administrators. Unfortunately for those seeking to understand the DFE, the exception is only vaguely defined by Congress in the FTCA. Moreover, the United States Supreme Court has addressed the DFE only four times in the law's 60-year history. The four cases that have addressed the DFE have created an evolving and confusing test or set of standards to be applied where the vast majority of FTCA litigation begins and ends: the courtrooms of the federal district courts.

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prison officials fully investigated this allegation, they might have decided to place Kerr in disciplinary segregation. Had Kerr been in segregation, Green might not have suffered the injury he allegedly suffered. Nonetheless, the decision as to how to handle the allegation of sexual assault fell within the discretion Congress has given, for better or worse, to prison officials. Under the Supreme Court's interpretation of the discretionary function exception, an FTCA suit cannot be based on this decision" (*Green v. United States*, 1995, p. 22-23).

Most empirical research by public law scholars who seek to understand the DFE focuses on the development of the Supreme Court's four opinions on the exception. The single study of the DFE in political science involves the application of the exception by the federal circuit courts of appeal (Weaver & Longoria, 2002). Little is known, thus, about how the DFE operates in the federal district courts, who many consider to be the "workhorses" of the federal judiciary because they hear significantly more cases than the federal appellate courts (Carp & Stidham, 1998; Johnson & Songer, 2002).

While few scholars study the FTCA and DFE, even fewer utilize theory to describe and explain the statute's significance. The only author to relate empirical observations of the FTCA to public administration theory is Rosenbloom, who employs a three-part theoretical framework, based upon the three branches of government outlined in the United States Constitution, to understand public administration-related observations (1983; 2005). Rosenbloom's (2000) investigation of the FTCA, which is based almost entirely on legislative history, suggests that the FTCA is most reflective of a political (legislative) approach to public administration, as opposed to a managerial (executive) or legal (judicial) approach to public administration. Rosenbloom's conclusions, however, are limited to a single political institution, the United States Congress. We, therefore, do not know to what extent Rosenbloom's Congress-related findings translate to other political institutions, such as the federal district courts.

The fact that Rosenbloom only describes the FTCA in a legislative context is puzzling given the significant role that the federal district courts play in determining how the FTCA and DFE affect litigants in government tort cases, as described in Ronald

Green's case, above. In the context of the FTCA and DFE, in other words, the federal district courts are tasked by Congress with the difficult responsibility of balancing individual claims and government discretion. This dissertation, thus, is centrally concerned with how the DFE is implemented in the federal district courts; what this implementation says about the relationship between Congress, the federal courts, and federal administrative agencies; and how public administration theory can help explain decisions in DFE cases by federal district court judges.

Relating the DFE's 60-year judicial history to public administration theory is difficult because no empirical data exist on the operation of the DFE in the federal district courts over time. Moreover, the unique institutional nature of the judiciary creates challenges for researchers seeking to understand the DFE in the context of the federal district courts. Because he was studying Congress, Rosenbloom (2000) had myriad public statements by legislative officials upon which to base his findings. Unlike members of Congress, federal district judges do not typically speak openly or publicly about their opinions on issues which may become the subject of litigation in their court rooms. To understand the development of a particular issue in the federal district courts, thus, we must devote significant attention to the published written opinions of federal district court judges.

This dissertation seeks to provide both pragmatic and theoretical insight about the historical development of the DFE in the federal district courts. Because FTCA bench trials are so rare, this dissertation focuses on a more common aspect of DFE litigation: government's pretrial motions to dismiss a private litigant's DFE case, such as the motion

that ended Ronald Green's hope of recovering monetary damages from the federal government through his tort lawsuit. These motions are typically labeled and referred to as a "motion to dismiss for lack of subject matter jurisdiction," and require a federal district judge to dismiss a private litigant's DFE case if the judge is convinced that relief cannot be legally granted for that case under the DFE. Preliminary investigation reveals approximately 985 motions to dismiss have been heard (and reported for publication) by federal district courts in the United States between 1946 and 2007.

Using these 985 cases as a data source and Rosenbloom's (1983; 2005) three-part theory of public administration as a theoretical reference point, this dissertation asks the following questions:

1. How often are government's motions to dismiss FTCA cases pursuant to the DFE granted by district court judges?
2. Has the government's rate of success in their motions to dismiss FTCA cases pursuant to the DFE changed over time?
3. Whether the motion is granted or denied, how often do federal district court judges include dicta[10] in their written opinions issued on government motions to dismiss FTCA cases pursuant to the DFE; and

[10] Black's Law Dictionary defines "dicta" as: "[o]pinions of a judge which do not embody the resolution or determination of the court. Expressions in court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases" ("Dicta," 1991, p. 313).

4. How does Rosenbloom's three-part theoretical framework help us understand these cases?; and
5. How do these data advance our understanding of Rosenbloom's three-part theoretical framework and develop our understanding of other theoretical contributions to public administration scholarship?

The purpose of this dissertation, thus, is not to attempt to explain judicial behavior in DFE cases or attempt to predict future outcomes in these cases, nor is it simply a narrow empirical study of outcomes at the federal district court level. Rather, this dissertation: (1) provides readers with previously unavailable information about what happens to DFE cases in federal district courts at the motion-to-dismiss-stage, after a plaintiff's case has been filed but prior to trial; (2) utilizes Rosenbloom's three-part framework to explain the theoretical significance of these outcomes; and (3) extends Rosenbloom's theoretical discussion of the DFE using the works of other public administration theorists, such as Stover (1995), who charts the development of a "managerialist" jurisprudence within the United States Supreme Court, and Melnick (1985), and Cooper (1985), who describe a "partnership" between public administration and the courts. This dissertation, in short, demonstrates to the public law and public administration communities that the FTCA and DFE are significantly more theoretically complex and nuanced than previously discovered.

Chapter 2 of this dissertation details the DFE's historical development within both Congress and the United States Supreme Court. Chapter 3 reviews the academic literature relevant to the DFE within public law, political science, and public

administration communities. Chapter 4 discuses the research design and data collection methods for this dissertation. Chapter 5 presents and discusses the data collected for this dissertation. Finally, Chapter 6 describes the theoretical implications and conclusions of this dissertation.

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CHAPTER 2

HISTORY OF THE FTCA AND DFE

Introduction

This chapter details the history of the Federal Tort Claims Act (FTCA) and the Discretionary Function Exception (DFE) to the FTCA, and is divided into two general categories: (1) pre-1946 and; (2) post-1946. The legislative history of these statutes has been appropriately described as "massive," and this dissertation does not seek to describe this history in minute detail (Zillman, 1989, p. 690). Rather, the pre-1946 section introduces the reader to the concept of sovereign immunity and highlights important aspects of the legislative history of the FTCA and DFE. The second section of this chapter, which describes the history of the FTCA and DFE after 1946, describes the DFE as interpreted by the United States Supreme Court over time. This section is more limited than the first section because the DFE has only been addressed by the Supreme Court four times since it became law. This chapter also discusses how the FTCA differs from 42 U.S.C § 1982 and includes a small sample of scholarly and judicial criticism of the DFE.

Pre-1946 History

Sovereign Immunity and the "Private Bill" System

Under common law, the doctrine of sovereign immunity protected the United States government from tort liability, or liability for injuries committed by its agencies and employees, in federal court. Sovereign immunity, or the principle that the government "cannot be lawfully sued without its consent" (*United States v. Lee*, 1882, p. 204), is taken from the common law tradition that "the King can do no wrong" (*Feather v. The Queen*, 1865, p. 1205). According to the United States Supreme Court, the reasons for upholding this immunity "… partake somewhat of dignity and decorum, somewhat of practical administration, [and] somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants" (*United States v. Shaw*, 1941, p. 501).

Because of sovereign immunity, private citizens injured by government action prior to 1946 could only seek relief from the government by directly petitioning Congress through a "private bill." Such an "appeal to Congress" was the only avenue available for recovery since the federal courts had no legal jurisdictions to hear tort claims against the federal government (*German Bank v. United States*, 1893). The first "private bill" was enacted by Congress on April 13, 1792. It compensated individuals for damages caused to a Wilmington, Delaware, school by occupying United States soldiers (Act of Apr. 13, 1792).

The "private bill" system was never a universally popular method for disposing of tort claims against the federal government. As early as February 23, 1832, shortly after his election to the House of Representatives, John Quincy Adams[11] declared:

> There ought to be no private business before Congress. There is a great defect in our institutions by the want of a court of Exchequer or Chamber of Accounts. It is judicial business, and legislative assemblies ought to have nothing to do with it. One half of the time of Congress is consumed by it, and there is no common rule of justice for any two of the cases decided. A deliberative assembly is the worst of all tribunals for the administration of justice. (Hearings on HR 5373 et al. as cited in Jayson & Longstreth, 2002, p. 49)

Later, in 1850, President Millard Fillmore urged Congress to create a separate court for adjudicating "private bills." According to President Fillmore, the fact that an overworked Congress made decisions on "private bills" without the time to closely examining the merits of every claim amounted to "a denial of justice … to either the claimant or the government…"[12] (Richardson, 1902, pp. 2627-2628).

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[11] John Quincy Adams was the President of the United States for one term, from 1825-1829. In 1831, Adams was elected to the House of Representatives where he served until his death in 1848.

[12] The exact text of Fillmore's statement is as follows:

> The difficulties and delays incident to the settlement of private claims by Congress amount in many cases to a denial of justice. There is reason to apprehend that many unfortunate creditors of the Government have thereby been unavoidably ruined. Congress has so much business of a public character that it is impossible it should give much attention to mere private claims, and their accumulation is now so great that many claimants must despair of ever being able to obtain a hearing. It may well be doubted whether Congress, from the nature of its organization, is properly constituted to decide such cases. It is impossible that each member should examine the merits of every claim on which he is compelled to vote, and it is preposterous to ask a judge to decide a case which he has never heard. Such decisions may, and frequently must do injustice either to the claimant or the government, and I perceive no better remedy for this growing evil

Over time, members of Congress began to worry that problems with the "private bill" system were becoming "injurious to the character of Congress" (Broadhead as cited in Jayson & Longstreth, p. 49).[13] According to Judge William A. Richardson, one of the early appointees to the Court of Claims:

> Committees could not constitute themselves courts for the trial of facts. They had not the time to devote to that kind of investigation, to the interruption or exclusion of their duties to the country on the great national questions which were always pending in Congress. They could not effectively examine the claimants' witnesses to any great extent before themselves, and they were not sufficiently familiar with the matters in controversy to be able to procure witnesses for the Government. Claimants, in fact, presented only ex parte cases, supported by affidavits and the influence of such friends as they could induce to appear before the committees in open session, or to see the members in private. No counsel appeared to watch and defend the interests of the Government. Committees were, therefore, perplexed beyond measure with this class of business, and most frequently found it more convenient and more safe not to act at all upon those claims which called for much investigation, especially when the amounts

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> than the establishment of some tribunal upon such claims.. (Richardson, 1902, pp. 2627-2628)

[13] Senator Broadhead of Pennsylvania, speaking on December 18, 1854, noted:

> Two days of every week – one third of the time spent by committees – is set apart for the consideration of private bills and reports, and yet not much more than half are acted upon.
>
> Want of time leads to improper legislation, and often to great injustice. Those who have honest claims are postponed for years. Justice is cheated by long delay… The pressure of business of a private character prevents us from considering great questions in a way becoming statesman representing this great people, and this extended empire. Our time is too valuable to be occupied in discussing the merits or demerits of a private bill. Frequently we dispute about the facts of a case presented in an ex parte way, the truth of which could be better ascertained by a tribunal differently constituted. Besides, we are run down by private claimants, and their agents or attorneys; and private claims are either passed or pressed into the appropriation bills the last nights of our sessions, contrary to the rules of the Senate, and injurious to the character of Congress. (Richardson 1882, p. 3, as cited in Jayson & Longstreth, 2002)

> involved seemed large. Moreover, when bills for relief in meritorious cases were reported, few of them were acted upon by either house, or, if passed by one, were not brought to a vote in the other house, and so fell at the final adjournment, and if ever revived had to be begun again before a new Congress and a new committee, and so on year after year and Congress after Congress. (Richardson 1882, p. 3, as cited in Jayson & Longstreth, 2002)

These types of concerns led Congress to create the Court of Claims in 1855, which turned out to be an imperfect yet important first step towards abandoning the "private bill" system.

The Court of Claims

On February 24, 1855, Congress established the Court of Claims (Act of February, 1855). Although the court's three-part purpose was to: "reliev[e] Congress, … protect[] the Government by regular investigation, and … benefit[] the claimants by affording them a certain mode of examining and adjudicating upon their claims," the court's decisions were subject to approval or disapproval of Congress (*United States v. Klein*, 1872, p. 144). In other words, the Court of Claims could not issue legally-enforceable "judgments," like an Article III court (such as the federal district courts or the circuit courts of appeal) but rather submitted bills for consideration to Congress (*Nourse's Case,* 1866; *United States v. Klein*, 1872; *Williams v. United States*, 1933).

Because decisions by the Court of Claims had no effect without Congressional approval, many of the efficiency and equity-related problems which existed prior to the court's creation remained. For example, many Congressional committees would review the entire record submitted before the Court of Claims before making a decision on the

court's judgment (Jayson & Longstreth, 1999). Speaking to this, Judge Richardson (1885) noted:

> [i]f the work which the Court had done was thus to be all gone over again in committee, little was gained by reference to the Court at all. In fact it was a positive loss and injury to the claimants, because they were forced to try their cases twice, while neither Congress nor claimants obtained relief. Favorable reports were often not concurred in or not acted upon at all, and were finally lost altogether. (p. 8)

Given these concerns, as well as the large number of new claims generated during the outbreak of the Civil War,[14] Congress eventually granted the Court of Claims the power to enter final judgments[15] (Conscription Act, 1863).

The jurisdiction conferred by Congress on the Court of Claims made no explicit mention of tort claims. Rather, it included all claims founded upon any law of Congress, or regulation of an executive department, "or upon any contract, express or implied with the government of the United States," and all claims referred to the court by either house

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[14] During his first annual message to Congress, delivered on December 3, 1861, President Abraham Lincoln encouraged Congress to grant the Court of Claims the power to issue final judgments, stating:

> It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature, belong to the judicial department.
> While the Court [of Claims] has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgment final.
> I commend to your careful consideration whether this power of making judgments final may not properly be given to the Court. (Cong. Globe, 37th Cong. 2d Sess, Pt. IV, Appendix, 2)

[15] This power, however, was subject to an appeal to the United States Supreme Court.

of Congress (Act of February, 1885, n.p.). While private litigants began pursuing tort claims in the Court of Claims shortly after the court's inception, both the Court of Claims itself[16] and the United States Supreme Court quickly eliminated the Court of Claims as a jurisdictional option for addressing the government's torts. Specifically, while hearing an 1868 case involving the tort of false arrest, the Court declared,

> [t]he language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the government founded on torts… In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims.[17] (*Gibbons v. United States*, 1868, pp. 274-276)

The Court's opinion in *Gibbons* is grounded in the assumption that concerns over the government's ability to operate efficiently trump any legal right a private litigant has in just compensation for the government's wrongs.[18] Notwithstanding the creation of the

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[16] In fact, in the first volume of the Court of Claims Reports, which reported decisions made by the court, two cases were dismissed on the grounds that as a tort claim, it could not be adjudicated by the Court of Claims (*Pitcher v. United States,* 1863; *Spicer v. United States*, 1865).

[17] The Federal Courts Improvement Act of 1982 abolished the Court of Claims. In its place, Congress established the United States Claims Court, which assumed the jurisdiction of the trial division of the former Court of Claims, and the Court of Appeals for the Federal Circuit, which assumed appellate jurisdiction over the new Claims Court. Under The Court of Federal Claims Technical and Procedural Improvements Act of 1992, the name of the United States Claims Court was changed to the United States Court of Federal Claims.

[18] In Justice Story's majority opinion, he writes:

> [I]t does not undertake to guarantee to any person in the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests…

Court of Claims and the Supreme Court's declaration that Congress be the final arbiter of tort claims against the government, the "private bill" system became increasingly cumbersome for Congress as the scope of government activity expanded and increased in complexity. For example, during the 1880s, members of the House Committee on Claims estimated that between 1,000 and 2,000 claim bills per session were referred to their committee for a hearing.[19] This saturation only worsened over time. Several

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> The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizens, through occurring while engaged in the discharge of official duties… These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the Court of Claims, of all wrongs done individuals by the officers of the General Government, though they may have been committed while serving that government, and in the belief that it was for its interests. (*Gibbons v. United States*, 1868, p. 276)

[19] During a January 1886 speech to Congress, a frustrated Representative Springer of Illinois noted:

> During the last session of Congress there were referred to the Committee on Claims for their consideration more than a thousand bills; and under the new rules, basing our estimate on the number already referred, there will be perhaps twelve hundred or fifteen hundred referred to that committee during this Congress. It is absolutely impossible for any committee of this House, with so large an amount of business imposed upon it, to do justice to the claimants and to the government. (*Cong. Rec.*, 1886a, n.p.)

Two months later, in March 1886, Representative Warner of Missouri declared, with only thinly veiled sarcasm, that:

> We are confronted in that committee and are now confronted with over fifteen hundred claims, running in amounts from a few dollars up to millions of dollars. These claims are presented on ex parte evidence. Many of the claims are entitled to consideration at the hands of the Government, while many are simply thrown into the Congressional lottery to take their chances, to see whether they will draw a prize in the manner in which these matters are being disposed of by Congressional action on ex parte evidence. The just and the unjust stand an equal chance… the Committee on Reform in the Civil Service of the Forty-fifth Congress used this language: "It is hardly too much to say that a person with a

decades later, during the Seventy-Fourth and Seventy-Fifth Congresses, private individuals brought over 4,600 private bills with claims for approximately $200,000,000 (Street, 1953).

In addition to the fact that Congress felt it was spending an inordinate amount of time considering private bills, political officials became more sensitive to public complaints that the private bill system was unjust and fraught with political favoritism. (Jayson & Longstreth, 1999). By the late 1800's, private bills were commonly handled by lobbyists, called "parliamentary agents" or "claims brokers." According to one commentator, these "agents" or "brokers" would "slip[] [their private bills] through" Congress in a manner which "would shock the sense of justice if the facts against them were made known by an open trial"[20] (Davie, 1884, n.p.).

> just claim upon Congress might almost as well abandon it as pursue it, and that no one with an unjust claim, if only plausible, persistent, and needy, need be without some hope of success. (*Cong. Rec.,* 1886b, n.p.)

According to Representative Springer of West Virginia, some 2,000 claims were pending before the Committee on Claims in March 1887. (*Cong. Rec*. 1887)

[20] G.M. Davie, in an 1884 law review article entitled "Suing the States" wrote:

> If one happens to be in Washington during a session of Congress, he cannot but be surprised at the great number of "claim brokers" and "parliamentary agents" there congregated. He will see lobbyists of all colors and degrees, and who are bent on all manner of designs against the Government. Claims, some of them just, no doubt, but others of a character so extravagant and far fetched, that they could not stand judicial investigation for an instant, are "put through," often by their titles, in a manner which seems inconsistent with accurate justice…
> No member, be he ever so faithful and diligent to the public interests, can seriously pretend to investigate, understand, watch over and keep up with the thousands of claims which are introduced at each session, and each of which is sought to be successfully "engineered" by its "friends." In the rush of business, there is neither time nor opportunity to adequately consider them; and it is

The Tucker Act

Responding to these pressures, members of Congress began to discuss alternatives to current methods for adjudicating government torts. During the Forty-ninth Congress, for example, legislation which would later become known as the Tucker Act (1887) (named for its sponsor, Congressman Tucker of Virginia, the chair of the House Judiciary Committee during the Forty-ninth Congress), proposed amendments to the Court of Claims Act (1855). The report accompanying the committee bill declared that the jurisdiction of the Court of Claims excluded "a large class of cases in equity, in admiralty, and in tortious acts of the Government through its agents which are left to Congress, for which a court of justice is better fitted to attain the right between the litigants" (H. Rep. No. 1077, 1886, pp. 3-4). The Tucker Act proposed to extend the court's jurisdiction "to [government] obligations of all kinds … so that it will take the whole mass of these claims away from Congress"[21] (*Cong. Rec.*, 1887a, n.p.).

> constant rumor that heavy claims are "slipped through" that would shock the sense of justice if the facts against them were made known by an open trial. (Davie, 1884, n.p.)

[21] The Tucker Act (1887), as originally proposed, provided in part that the Court of Claims shall have jurisdiction:

> to hear and determine the following matters: First, All claims founded upon the Constitution of the United States, or any law of Congress, or any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable, and all other claims which may be referred to it by either House of Congress. (H.R 6974, 1887, n.p.)

The Tucker Act, as originally proposed, eventually passed the House of Representatives (*Cong. Rec*., 1887a). However, the Senate Committee on Claims modified the bill to remove the court's tort jurisdiction, a change which was later approved in the Senate (*Cong. Rec*., 1887b). Because the House initially refused to approve the Senate version of the bill, the issue was referred to a conference committee where the Senate's views eventually prevailed. According to Congressman Tucker, "[t]he Senate doubted whether there should be full power given in case of tort against the United States and so they [decided that] action of tort against the United States should not be within the provision of the bill. The conferees on the part of the House, after full discussion, agreed" (Cong. Rec., 1887c, n.p.).

The Tucker Act, with a provision excluding tort claims, became law on March 3, 1887. Despite changes to the jurisdiction of the Court of Claims, however, the "private bill" process continued to plague Congress, especially as the government began to more frequently utilize motor vehicles and aircraft.[22] To the dismay of members of the Committee on Claims, claims as much as 15 years old began to be passed from Congress to Congress without action. According to Congressman Box,

> [t]here are just claims pending before the Committee on Claims – small claims, some of them 10, 12, 15 years old – on which the Congress has never acted. They are usually claims of humble, small people, people who

[22] Almost one-third of claims brought before the Sixty-seventh Congress involved damages by government trucks (H. Rep. No 342, 1921). Other tort claims heard during the Sixty-seventh Congress involved damages arising out of collisions on water, as well as personal injuries and deaths involving government aircraft (*Cong. Rec.*, 1922a).

> are not able to send agent here to lobby their claims through. (*Cong. Rec.*, 1922b, n.p.)[23]

The FTCA

Despite the malaise in the "private bill" system, and the fact that "[m]embership on the Committee of Claims ha[d] become a nearly intolerable burden" (H. Rep. No. 667, 1926, pp. 1-2), Congress spent at least 30 years considering how to most appropriately handle civil tort claims against the United States before passing the FTCA (*United States v. Spelar*, 1949). One early legislative effort to deal with this problem, the Small Tort Claims Act (1922), authorized executive department heads to administratively adjust any claim that did not exceed $1,000 (H.R. 7912, 1921).[24] The Small Tort Claims Act, however, only encompassed property damage claims arising from the negligence of federal employees. Any claim involving personal injury or death, or property damage that did not involve negligence, was not covered by the Small Tort Claims Act (1922).

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[23] Echoing this sentiment, Congressman Edwards noted:

> [d]uring the 10 years that I have been a member of the Committee on Claims it has always been a subject of controversy upon the floor of the House as to the method to be pursued in paying claims. It was claimed that certain parties, either through favoritism or because of knowing members of the committee, were able to get bills passed through the House, and that a great many other parties who were damaged just as much by the actions of the Government were not able to obtain redress. (*Cong. Rec.*, 1922a, n.p.).

[24] Another early effort by Congress to relieve itself of the burden of "private bills" was the 1925 Public Vessels Act which allowed private litigants to sue (pursuant to the Suits in Admiralty Act) for damages caused by a public vessel of the United States. For a brief legislative history of the Suits in Admiralty Act and the Public Vessels Act, see *United States v. United Continental Tuna*, 1976.

Because of the limitations of the Small Tort Claims Act, Congress was forced to consider subsequent legislation to address claims which would otherwise have to be brought back to Congress in the form of a "private bill." For example, in 1930, Congress passed the Act of May 27, 1930, which authorized the Secretary of Agriculture to reimburse (up to $500) private property owners for damage or destruction of their property[25] "caused by employees of the United States in connection with the protection, administration, or improvement of the national forests."[26] Later, in 1935, the River and Harbor Improvement Act conferred jurisdiction on the Court of Claims to adjudicate claims for damage to oyster growers arising from the dredging operations in Congressionally-authorized river and harbor improvements. In 1936, Congress

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[25] In a March 21, 1930, letter to Senator McNary, Chairman of the Senate Committee on Agriculture and Forestry, Acting Secretary of Agriculture Dunlap listed a "summary of several typical cases of recent occurrence" which were not covered by the Small Claims Act because they did not involve negligence on the part of a federal employee. This letter, which helped justify the passage of the Act of May 27, 1930, noted the following three instances:

1. An airplane engaged in forest-fire patrol was forced to make an emergency landing in a clover field, resulting in destruction of the crop to the extent of $25.
2. While a ranger was burning debris on forest land, the fire escaped from him as a result of an unusually high wind arising causing damage to a rancher's fence in the amount of $113.05.
3. In repairing a Government telephone line crossing private land a hole was blasted for setting a pole, resulting in damage to a portion of a privately owned pipe line, the existence of which the ranger had no means of ascertaining, the repair cost being $41.34 (S. Rep. No 364, 1930, p. 3).

[26] Interestingly, this authorization still exists. Instead of only $500, however, the Secretary of Agriculture is now able to reimburse property owners up to $2,500 (16 U.S.C. § 574).

authorized the Secretary of State, in the Act of February 13, 1936, to adjust claims for personal injury or death caused by federal employees in a foreign country.[27] With the Act of March 20, 1936, Congress even voted to authorize payment for claims arising from the activities of the FBI.[28] Other acts in subsequent years addressed other limited areas of damages caused by federal employees,[29] but none of these pieces of legislation amounted to a "general" tort claims act.

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[27] This authorization was limited to settlements of $1,500 or less, excluded property damage claims, and had to be certified by the Secretary to Congress before payment was remitted (31 U.S.C. § 224a).

[28] The motivation behind this act were injuries to third parties suffered as a result of the attempted apprehension of the Dillinger gang at Little Bohemia, Wisconsin, and the eventual capture of Dillinger in Chicago (H. Rep. No 2034, 1935). Referencing an April 13, 1935, letter of Attorney General Cummings to Senator Ashurst, Chairman of the Committee on Claims, noted that:

> [The Act of March 20, 1936] does not include the question of negligence as a condition precedent to payment. The reason is manifest when a study of the methods that are necessary for the effective fight against the criminal has been made. Every precaution possible may be taken, and yet, innocent third persons become involved in many instances. Often they sustain personal injury or property damage when a capture is made by the agents of the Bureau, but the agents have not been guilty of wanton or negligent acts. They must be free to act on the spur of the moment and in the most reasonable manner which the particular circumstances may afford, and they have been trained to this end. It is for payment of claims arising out of such activities, then, that this legislation becomes necessary. (H. Rep. No 2034, 1935 p. 2, n. 1).

[29] When the Civilian Conservation Corps was established in 1937, the Director of the Corps was authorized to settle and pay claims (of $500 or less)

> . . arising out of operations authorized by [the Act of June 18, 1937] on account of damage to or loss of property or on account of personal injury … caused by the negligence of any enrollee or employee of the Corps while acting within the scope of his employment. (50 Stat 321, n.p.)

Between the passage of the Small Tort Claims Act in 1921 and the enactment of the Federal Tort Claims Act in 1946, over 30 bills were introduced in Congress proposing alternatives to the "private bill" system for dealing with tort claims.[30] A major obstacle to passing a general tort claims act was controversy over which branch of government (or an agency within a branch of government) would be responsible for handling tort claims. Describing his aversion to allowing civil juries to handle tort claims, Congressman Edmonds, a member of the Committee on Claims, noted:

> I took up the question with a number of Philadelphia lawyers in regard to whether it would not be a good thing for the Government to take care of personal injury claims by allowing suits to be brought in court. The gentlemen were all high-class lawyers, and after they got through considering the matter they decided that it would be very inadvisable to allow personal injury claims to be presented

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The Military Claims Act, enacted in 1943, authorized the Secretary of War "to consider, ascertain, adjust, determine, settle and pay [up to $500, or up to $1,000 in time of war]" any claim

> . . for damage to or loss or destruction of property, real or personal, or for personal injury or death [caused by military or civilian personnel of the War Department or Army] while acting within the scope of employment, or otherwise incident to noncombat activities of the War Department or of the Army (57 Stat 372, n.p.).

[30] These bills, organized by the Congress in which they were proposed, are as follows: 68th Cong, 2d Sess: H.R. 12178 (1925); H.R. 12179 (1925); 69th Cong, 1st Sess: S 1912 (1925), S. Rep. No. 14 (1925), H. Rep .No 667 (1926), H.R. 6716 (1926), H.R. 8914 (1926); 70th Cong, 1st Sess: H.R. 9285 (1928), H. Rep. No. 286 (1928), S. Rep. No. 1699 (1928); 70th Cong, 2d Sess: H. Rep. No. 2812 (1929); 71st Cong, 2d Sess: S. 4377 (1930), S. Rep. No. 766 (1930); 71st Cong, 3d Sess: H.R. 15428 (1930), H.R. 16429 (1931), H.R. 17168 (1931); 72nd Cong, 1st Sess: S. 211 (1931), H.R. 5065 (1932); 73rd Cong, 1st Sess: H.R. 129 (1933), S. 1833 (1933); 73rd Cong, 2nd Sess: H.R. 8561 (1934); 74th Cong. 1st Sess: H.R. 2028 (1935), S. 1043 (1935); 76th Cong, 1st Sess: S. 2690 (1939), H.R. 7236 (1939); 76th Cong, 3rd Sess: H.R. 7236 (1940); 77th Cong, 1st Sess: H.R. 5185 (1941), H.R. 5299 (1941), H.R. 5373 (1941); 77th Cong, 2d Sess: S 2207 (1942), S. 2221 (1942), H.R. 6463 (1942); 78th Cong, 1st Sess: S. 1114 (1943), H.R. 817 (1943), H.R. 1356 (1943); 79th Cong, 1st Sess: H.R. 181 (1945); 79th Cong, 2nd Sess: S. 2177 (1945).

> to a jury, owing to the fact that judgments would be rendered against the Government by juries which they would not render against individuals. I think we had better handle these cases in the way we are handling them… (*Cong. Rec., 1922b, n.p.)*

Perhaps reflecting a fear of expensive judgments being handed down by civil juries, a common provision of general tort claims bills during this time period would have conferred jurisdiction on the United States Employees' Compensation Commission to administratively adjudicate tort claims (without a jury, of course) involving personal injury and death, and certify judgments on these claims to Congress for their consideration (H.R. 12178, 1925; H.R. 12179, 1925; S. 1912, 1925, H.R. 6716, 1926; H.R. 9285,1928; H.R. 129, 1933). Claims for property damages, under these bills, were left for other agencies to adjust or to the Court of Claims to adjudicate. One of these bills, in fact, was passed by both houses of Congress but pocket-vetoed by President Coolidge in 1929.[31]

Another common concern, prior to the enactment of the FTCA, was whether Congress should impose a ceiling on the amount of money a claimant could recover through a tort action against the United States. Some, including Attorney General Mitchel, were concerned that if Congress did not set a limit or cap on the amount of damages that could be recovered, individuals would be willing to engage in all manner

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[31] According to McGuire, President Coolidge vetoed the bill on advice of Attorney General Sargent who was concerned that the bill's provisions authorizing the Comptroller General to defend the federal government against tort suits in the Court of Claims was contrary to the established tradition that the Attorney General appear in courts on behalf of the United States (McGuire, 1931).

fraud and unethical behavior in order to obtain a favorable judgment against the government. Speaking in December 1929, Mitchel noted:

> [T]he proposal [for unlimited damages] is so revolutionary and so many abuses are likely to arise that I think the subject requires very careful study, and the provisions should be very carefully guarded to protect the rights of the United States. Any lawyer who has had wise experience in the prosecution or defense of so-called damage suits, that is actions for damage to persons or property resulting from negligence, knows the evils that are likely to arise: perjury, subornation of witnesses, framing of false claims, ambulance chasing, solicitation of claims, and conditions of that kind, and how difficult it sometimes is to obtain the proper evidence to resist unfounded or false claims. (McGuire, 1931, p. 136)

Proposals during this time period did not provide for unlimited damages, but capped recovery for property damage between $5,000 and $50,000, [32] and limited claims for personal injury or death between $5,000 and $10,000.[33]

The final version of the FTCA began to take shape during the course of the Seventy-Seventh Congress (*United States v. Spelar*, 1949). On January 14, 1942,

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[32] S. 1912 (1925) proposed a cap of $5,000 on property damage claims. S. 2690 (1939) and H.R. 817 (1943) proposed caps of $7,500 on property damage claims. H.R. 9285, (1928), as amended in committee, S. Rep No 1699 (1929), S. 4377 (1930), S 211 (1931), S. 4567 (1932), H.R. 129 (1933), and S. 1043 (1935) all proposed a $50,000 cap on property damage claims.

[33] H.R. 12178 (1925) and S. 1912 (1925) proposed a $5,000 cap on personal injury or death claims. H.R. 9285 (1928), S. 4377 (1930), S. 211 (1931), S. 4567 (1932), S. 1043 (1935), S. 2690 (1939), S. 1114 (1943), and H.R. 817 (1943) all recommended a $7,500 cap on personal injury or death claims. H.R. 8914 (1926) and H.R. 129 (1933) proposed a $10,000 cap on personal injury or death claims.

The fact that some of these bills allowed an individual to recover more for a property damage claim than for a personal injury or death claim generated significant controversy. For example, Congressman Cellar criticized S 1912 (which would have capped personal injury and death claims at $5,000) in the Sixty Ninth Congress by noting: "[i]t seems quite illogical to place a greater value upon chattels or contracts than upon life and limb" (H. Rep. No. 667, 1926, p. 8).

President Franklin D. Roosevelt criticized the "private bill" process as "… slow, expensive, and unfair both to the Congress and to the claimant" (HR. Doc. 562, 1942). In his message to Congress, Roosevelt complained that while nearly 6,300 "private bills" had been brought to the previous three Congresses, fewer than 20% of those claims had been acted upon (*Cong. Rec.,* 1963).

With this condemnation of the "private bill" process, the House Judiciary Committee began making revisions to previous bills which had failed to become law, and crafted a proposal which was incorporated in several subsequent bills of the Seventy-seventh Congress (HR 6463, 1942; S. 2207, 1942; S. 2221, 1942), was the subject of further hearings, and was eventually favorably reported (S. Rep. No. 1196, 1942 (to accompany S 2221); H. Rep. No. 2245,1942 (same)). The revised proposal allowed department heads to settle property damage and personal injury claims not exceeding $1,000 (awards over $500 had to be reviewed by the Attorney General) and conferred concurrent jurisdiction on the Court of Claims and the federal district courts to hear claims against the United States (S. 2690, 1939; H.R. 7326, 1939). Although it was introduced in both the Seventy-Eighth and Seventy-Ninth Congresses, final action was not taken on this proposal until it was incorporated as Title IV of the Legislative Reorganization Act of 1946 (S. 2177, 1946; S. Rep. No. 1400, 1946).

The FTCA, as enacted in 1946, is slightly different from the proposal from the Seventy-Seventh Congress. Specifically, the FTCA permits private litigants to sue the United States only in the United States District Courts, and the FTCA provides no limitations on damages. The Attorney General of the United States is authorized to settle

FTCA claims, but only after a claimant has initiated an FTCA lawsuit (28 U.S.C. § 2677). FTCA judgments are paid out of a permanent appropriation by Congress, generally known as the "judgment fund" (31 U.S.C. 1304; *Lozada v. United States*, 1992). Under the FTCA, in other words, the United States is liable for its torts in the same manner and to the same extent (subject to certain exceptions, including the DFE) as a private individual under similar circumstances (28 U.S.C. § 2674).

The FTCA can be considered only a limited waiver of sovereign immunity in civil tort actions brought against the United States government because the FTCA contains fifteen specific exceptions.[34] Each of these exceptions acts as a jurisdictional bar to recovery by would-be claimants. In other words, when an exception to the FTCA applies, federal district courts can dismiss a claimant's action against the government for lack of subject matter jurisdiction.

The FTCA and 42 U.S.C. § 1983

The FTCA is not the only federal statute that allows members of the general public to sue in district court when they have been harmed by public administration. For

[34] In addition to the DFE, these exceptions include the following: claims arising from lost or miscarried letters by postal workers; claims arising from the assessment or collection of taxes; claims in admiralty; claims arising from wars or matters of national defense; claims arising when the government imposes or establishes quarantine; claims arising out of certain intentional torts; claims arising from Treasury Department activities or activities involving the monetary system; claims arising out of combat activities by one of the armed forces; claims arising in a foreign country; claims arising from the Tennessee Valley Authority; claims arising from the Panama Canal Company; and claims arising from federal banks (28 U.S.C. § 2680(a)-(n)).

instance, when a public administrator violates the constitutional rights of an individual or a group of individuals, and reasonably should have known that their actions would be in violation of others' clearly established constitutional rights, they can be sued under 42 U.S.C. § 1983 (Section 1983) for compensatory and punitive damages. Excessive force lawsuits against police officers are common examples of § 1983 litigation. For example, in *Vondrak v. City of Las Cruces* (2008), John Vondrak sued police officers for excessive force, illegal arrest, and inadequate medical attention after being detained in handcuffs during the course of a drunk driving investigation. Vondrak, an orthodontist, claimed that officers secured his handcuffs so tightly that he suffered "right radial and bilateral median nerve injuries" in his hands and wrists, which permanently interfered with his ability to perform his job. In upholding the trial court's denial of qualified immunity for the police officers who detained Vondrak, the Tenth Circuit Court of Appeals noted that Vondrak had a "clearly established" right to be free from "unduly tight handcuffing" while being investigated by police (*Vondrak v. City of Las Cruces*, 2008, p. 1208).

Since liability under Section 1983 involves the infringement of a right established or guaranteed under the United States Constitution, some commentators refer to these violations of constitutional rights as "constitutional torts" (Rosenbloom & Kravchuk, 2005, p. 79). As both statutes impose civil liability for inappropriate conduct on behalf of public administrators, and because both types of conduct are referred to as "torts," differentiating between FTCA litigation and Section 1983 litigation can be confusing. For the purposes of this dissertation, there are at least two important differences between litigation under these statutes which are important to explain.

First, while Section 1983 litigation involves "constitutional torts," FTCA litigation involves only civil torts, or torts established under common law. The second difference between the two statutes involves the scope of liability for damages. While public administrators can be held personally liable under Section 1983, government itself is not liable for these violations. Conversely, while public administrators bear no personal liability under the FTCA, government itself bears all liability for the actions of its agencies and employees. In other words, while Section 1983 affects the pocketbooks of individual public administrators, FTCA liability impacts government's budgets directly.

The DFE

The DFE protects the federal government from tort liability for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government" (28 U.S.C. § 2680(a)).[35] The DFE is generally considered to be the most controversial and litigated exception to the FTCA. When the DFE is invoked, the monetary stakes are high for both the plaintiff and the United States government. If the DFE applies, the government escapes liability

[35] The DFE provides, in full, that the FTCA does not apply to:
> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (28 U.S.C. § 2680(a)).

for its conduct; if the DFE does not apply, the government's liability remains, and the FTCA case proceeds to the next step in the litigation process.

Legislative history of the DFE. While the exact term "discretionary function exception" only begins to appear towards the latter part of the FTCA's legislative history, it is clear that Congress considered for some time whether to restrict government's tort liability beyond traditional common law limitations. For example, Congressional discussion of exceptions to general government tort liability began in 1926, appeared again in 1928 and 1931, and included such exceptions as claims compensated under other statutes, claims arising from flood control efforts, and claims made by prisoners incarcerated in federal correctional facilities (Cong. Rec., 1926; Cong. Rec. 1928; H.R. Rep. No. 2800, 1931). One especially far-reaching proposal, set forth in 1933, would have excepted from coverage "[a]ny claim on account of the effect or alleged effect of an Act of Congress, Executive Order of the President, or of any department or independent establishment" (S. 4567, 1932; S. 1833, 1934).

In 1942, both the Senate and the House introduced pre-FTCA tort recovery bills containing an exception for "discretionary functions" (Cong. Rec., 1942; S. 2221, 1942; H.R. 6463, 1942). According to Zillman (1989), the "scraps of legislative history [from the 77th Congress in 1942] were destined to become the most significant legislative history of the [DFE]" (p. 705). These "scraps" from the Seventy-Seventh Congress include a paragraph of legislative explanation of the DFE, which appeared in the committee reports accompanying the 1942 proposals, and testimony from an assistant attorney general before House Judiciary Committee proceedings regarding the proposals.

The legislative explanation for the DFE describes the DFE's purposes. First, the DFE protects the government from suit when the government is engaging in authorized activities, such as flood-control and irrigation projects. Second, the DFE precludes individuals from challenging the legal validity or constitutionality of government activities (whether legislative or regulatory) through the medium of a tort suit.[36] The

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[36] The exact text of this paragraph, as it appears in three different committee reports, is as follows:

> Section 402 specifies the claims which would not be covered by the bill. The first subsection of section 402 exempts from the bill claims based upon the performance or nonperformance of discretionary functions or duties on the part of a Federal agency or Government employee, whether or not the discretion involved be abused, and claims based upon the act or omission of a Government employee exercising due care in the execution of a statute or regulation, whether or not valid. This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved. To take another example, claims based upon an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted. The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation or the legality of a rule or regulation should be tested through the medium of a damage suit for tort. However, the common law torts of employees of regulatory agencies would be included within the scope of the bill to the same extent as torts of nonregulatory agencies. Thus, section 402(5) and (10), exempting claims arising from the administration of the Trading With the Enemy Act or the fiscal operations of the Treasury, are not intended to exclude such common law torts as an automobile collision caused by the negligence of an

DFE, for example, would prevent lawsuits challenging the fiscal operations of the Treasury Department, but would allow an individual to recover if they are injured in an automobile accident (caused by the negligence of a Treasury Department employee) during the administration of those functions.

The phrase "discretionary functions" was drafted to protect the government "against tort liability for errors in administration" (*Dalehite v. United States*, 1953, p. 27). As noted 1942 by Assistant Attorney General Francis Shea while testifying before the House Judiciary Committee in favor of the DFE, the proposed language avoids:

> … any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity [just because] the same conduct by a private individual would be tortious… [It was not] intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for tort. The same holds true of other administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project and the like. (Hearings on H.R. 5373 and H.R. 6463, 1942, pp. 25-33)

Federal courts view Shea's testimony as one of the more important aspects of the DFE's legislative history: Two separate United States Supreme Court opinions interpreting the term "discretionary functions" quote Shea when describing the legislative intent behind the DFE (*Dalehite v. United States*, 1953; *United States v. Varig Airlines*, 1984).

Criticism of the DFE. From its inception, scholars have criticized the DFE for the extent to which it shields the federal government from liability. Hugh C. Stromswold (1955) called the DFE a "monstrous joker" which will "engulf the entire [FTCA] in a

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> employee of the Treasury Department or other Federal agency administering those functions.

twilight zone" (p. 42). Donald Zillman (1995) notes that the FTCA "has not opened the United States to any claim of responsibility … both lawyers and plaintiffs should know they are playing in a game where the rules favor the house" (p. 388). Others criticize the DFE for allowing the government to avoid financial accountability when people are injured as a result of its conduct (Krent, 1991; Schuck, 1983).

Jurists have expressed similar frustrations over the significant protections the DFE provides the federal government. Justice McKay, in a concurring opinion in the Tenth Circuit Court of Appeals case overturning the *Allen* opinion, calls the FTCA "a false promise," noting that "the rule that 'the king can do no wrong' still prevails at the federal level in all but the most trivial of matters" (*Allen v. United States*, 1987, p. 1424-1425). One of the most scathing judicial commentaries on the DFE comes from Justice Merritt of the Sixth Circuit Court of Appeals, who writes that the DFE has "swallowed, digested, and excreted the liability-creating sections of the [FTCA]" (*Rosebush v. United States*, 1997, p. 444).

Judicial History of the DFE

The *Dalehite* Era

The purpose of this subsection is to provide an overview of the DFE as interpreted by the United States Supreme Court. As noted above, the Supreme Court's evolving standards regarding the DFE have led to considerable confusion on the part of judges and scholars attempting to understand the DFE. This subsection, thus, does not purport to

clarify all misunderstanding with regard to the DFE. Rather, the discussion below serves to introduce readers to the confusing state of the DFE's judicial history.

The first DFE case to make its way to the Supreme Court, *Dalehite v. United States* (1953), involved 8500 plaintiffs seeking $200 million in damages after two ships carrying fertilizer-grade ammonium nitrate (FGAN) exploded in the harbor off Texas City, Texas. The FGAN had been produced and distributed based on government specifications. Private firms operating under these specifications packaged and distributed FGAN in six-ply paper bags at a relatively high temperature after mixing it with clay, and a combination of petrolatum, rosin, and paraffin to prevent caking. Prior to the explosion at Texas City, the government had a relatively trouble-free experience with its FGAN specifications. It had produced and distributed FGAN for over 3 years without an accident. The plaintiffs claimed the government was negligent in the manufacture, bagging, shipment, and storage of the ammonium nitrate, should have warned the public of the possibility of an explosion.

The *Dalehite* Court rejected the plaintiffs' arguments, and found that the government was not liable for damages resulting from the explosion. The Court focused not only on the probability of harm, but on the burden of preventing harm, describing the government's FGAN specifications as "… all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program" (*Dalehite v. United States*, 1953, p. 42). In other words, given the fact that the government had manufactured and distributed FGAN safely for over 3 years prior to the accident, further experimentation of the government's part to

devise a safer way of producing and shipping FGAN was a matter of discretion. Furthermore, the Court noted that the decision not to bag FGAN at a relatively high temperature would have greatly increased production costs, and therefore drastically decreased production.

While the *Dalehite* Court described a distinction between planning level decisions and operational level decisions, it did not make the distinction conclusive. Two years later, in *Indian Towing Co. v. United States* (1955), the Supreme Court refused to hold the government immune for negligence arising from an operational level activity. A tugboat owner claimed its boat ran ashore and was damaged because the United States Coast Guard failed to maintain the light in a light house. Utilizing the *Dalehite* language differentiating between "operational" and "planning" activities, the *Indian Towing* Court held that governmental activities at an operational or implementation level could be subject to suit.

For the next 30 years, lower federal courts applied a "planning v. operational" test, based on the *Dalehite* and *Indian Towing* decisions, to determine which suits should be dismissed because of the discretionary function exception, and which suits should proceed to trial. Under this test, courts generally labeled government decisionmaking involving broader issues of social or political policy as "planning" decisions, and deemed them discretionary, or protected for purposes of the DFE (Dobbs, 2001, p. 699). The Coast Guard's decision, in *Indian Towing*, to operate a lighthouse in order to guide and protect ships entering a harbor, is an example of a planning-level decision in this context, and was protected in the *Dalehite* Era. On the other hand, government's implementation-

related decisions, such as allowing a lighthouse light to burn out or become inoperable after making the planning-level decision to build and staff the lighthouse, were deemed "operational" decisions for purposes of the *Dalehite* standard, and were not protected under the DFE.

The *Varig Airlines/Berkowitz/Gaubert* Era

After nearly 3 decades of silence on the issue, the Supreme Court, motivated by a perception that lower courts were expanding *Dalehite*'s planning/operational test to exercise greater oversight over bureaucracy, issued three opinions on DFE cases in 7 years (Weaver & Longoria, 2002). The first of these cases, *United States v. Varig Airlines* (1984), involved injuries (and deaths) arising aboard an airplane certified by the government for use in commercial aviation. An administrative regulation promulgated by the Civil Aeronautics Agency prior to the accident required waste receptacles to be made of fire-resistant materials. One-hundred-twenty-four victims were killed or injured from smoke and toxic gases released during a fire in a restroom on the plane because a towel disposal area did not contain the fire.[37]

In its opinion, the *Varig* Court identified two relevant factors when considering DFE cases. First, the Court declared that Congress, in enacting the DFE, intended to immunize certain types of conduct from suit, rather than a particular status of actors

[37] *Varig* was actually a consolidation of two cases. In the other case, four people were killed in an airplane crash where a defectively installed gasoline line for a cabin heater caused a fire.

(*United States v. Varig Airlines*, 1984). Second, the Court found that, by enacting the DFE, Congress intended "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political [factors] through the medium of an action in tort" (*United States v. Varig Airlines*, 1984, p. 814). Given these two factors, the *Varig* Court concluded that *Dalehite* "no longer represent[ed] a valid interpretation of the [DFE]." (*United States v. Varig Airlines*, 1984, p. 811-812). While the *Varig* Court did not expressly state or apply a "test" to the government's actions in the case, the Court held that the DFE shielded the government from liability.[38]

While *Varig* marked the beginning of the shift away from *Dalehite's* planning/operational test, 4 years later, in *Berkovitz v. United States* (1988), the Court further eroded the *Dalehite* standard. The plaintiffs in *Berkovitz* sued the government

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[38] The *Varig* Court's reasoning as to why the DFE shielded the government from liability in this case is as follows:

> When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding . . . . Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function . . . .
> . . . The acts of FAA employees in executing the "spot-check" program in accordance with agency directives are protected by the discretionary function exception as well. The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources. (*United States v. Varig Airlines*, 1984, pp. 819-820)

because a 2-month-old infant, whose parents had given him a dose of an oral polio vaccine called Orimune, became paralyzed after contracting polio. The plaintiffs based their claim against the government on the fact that the Department of Biologic Standards (a department of the National Institutes of Health) had licensed Lederle Laboratories to produce Orimune, and the Bureau of Biologics (of the Food and Drug Administration) had approved the release of a particular batch of Orimune.

In its analysis, the *Berkovitz* Court considered the licensing processes and procedures the government follows before manufacturers may produce a particular drug, and determined that the involved agencies did not have discretion to deviate from these processes and procedures. According to the Court's analysis, if the Orimune batch was negligently released because an agency did not follow its established procedures, the DFE would not apply. Conversely, if the Orimune batch was negligently released for another reason, such as an incorrect belief that the Orimune batch met applicable safety standards, the DFE would bar the suit if "… the agency officials making that determination permissibly exercise[d] policy choice" (*Berkovitz v. United States*, 1988, p. 545). The *Berkovitz* Court remanded the case to a federal district court so that the court could take evidence and make findings consistent with the decision.

Berkovitz established a two-step test or model for lower courts to use in determining whether the DFE applies to government action. Under *Berkovitz*, lower courts determine: (1) whether a government employee (or agency) has discretion to make any choice at all (if there is no discretion to make a choice, then the DFE does not apply to the employee or agency's actions); and (2) if the employee or agency has discretion to

make a choice, district courts must determine whether Congress intended to immunize that type of discretion from liability. Under *Berkovitz*, the DFE applies only when government policies allow "room for implementing officials to exercise independent policy judgment" (*Berkovitz v. United States*, 1988, p. 547).

The Supreme Court's final DFE decision, *United States v. Gaubert* (1991), solidified the new two-step test for determining the applicability of the DFE. In *Gaubert*, a former chairman of the board and largest shareholder of a federally insured savings and loan sued the government after the Federal Home Loan Bank Board ("FHLBB") pressured Gaubert to step down as majority stockholder and post a $25,000,000 security interest to guarantee the solvency of the savings and loan. The FHLBB had wanted Gaubert's savings and loan to merge with a weaker bank, but after Gaubert stepped down, his savings and loan failed and Gaubert lost not only his security interest but the value of his remaining shares in the savings and loan.

In its opinion, the *Gaubert* Court noted that in order for a plaintiff's "complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime" (*United States v. Gaubert*, 1991, pp. 324-325). The Court further clarified that "the focus of [its] inquiry is not on the agent's subjective intent in exercising the discretion conferred ... , but on the nature of the actions taken and on whether they are susceptible to policy analysis" (*United States v. Gaubert*, 1991, p. 325). The Court rejected Gaubert's claim, holding that the DFE did not apply to the "decisions made at the operational or management level of the bank involved in this case" (*United*

States v. Gaubert, 1991, p. 325). The *Gaubert* Court strengthened *Varig* and the *Berkovitz* two-step test by noting that "[a] discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions" (*United States v. Gaubert*, 1991, p. 325).

It is difficult to summarize the DFE's history in the Supreme Court without confusion. In fact, many commentators have noted that the Court's treatment of the DFE is difficult to understand for both lower courts and FTCA litigants (Bagby & Gittings, 1992; Peck, 1956). While the Supreme Court has decided four DFE cases since 1946, the first and last stop for the vast majority of DFE cases in the judiciary is the federal district courthouse. Although the Supreme Court has broadened the scope of the DFE over time, the Court has left considerable discretion in the hands of lower court judges in determining the DFE's application in their courtrooms.

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CHAPTER 3

LITERATURE REVIEW

Introduction

The academic literature discussing the FTCA and DFE can be divided into three general categories: (1) public law literature; (2) political science literature; and (3) public administration literature. Most of the FTCA and DFE literature comes from the public law community and is published by law schools in law review journals. Very few studies within either political science or public administration directly address the FTCA or the DFE. This chapter discusses the three categories of FTCA and DFE literature described above, and concludes with a discussion of the gaps in the existing FTCA and DFE literature.

The FTCA and DFE Within Public Law Literature

Public law scholars have been writing about the DFE since shortly after the FTCA was passed by Congress in 1946. Most of these early efforts to address the DFE simply describe the scope of the exception and its legislative history, and explain how the DFE and FTCA affect sovereign immunity (Clark 1974; Harris & Shnepper, 1976; Jaffe, 1963; Peck, 1956; Reynolds, 1968). As time passed and the DFE began to make its way through the federal court system, the public law community began to address federal circuit court treatment of DFE cases ("Comment: Discretionary," 1971; "Comment:

Federal," 1983; "Recent developments," 1980; Zillman, 1977). The purpose of these earlier articles is not necessarily to test any propositions about the DFE or make predictions about the DFE, but rather to describe the DFE and provide general information about the DFE to the public law community.

Not all public law literature on the DFE is general or informational in nature. Other commentators in the field of public law relate the DFE to specific policy areas and speculate as to how the DFE would apply in certain instances. Commentators, for example, have examined how the DFE applies in the areas of federal parole board decisionmaking, radiation exposure, environmental hazards, nuclear testing, MSHA-performed mine inspections, and even the decision to establish and maintain weight rooms in federal prisons (Crooks, 1995; Hankins, 1995; Hills, 1983; Jarvis, 1993; Lapat & Notter, 2006; Marisseau, 1992; Schuck & Park, 2000). One ambitious author, Professor William P. Kratzke (1986), examined parallels between the development of the DFE and the liability of private individuals in the following substantive areas of tort law all in a single article: freedom to contract, interference with prospective advantage, law enforcement activities, duty to provide police protection to individuals, medical malpractice, right of privacy, negligent performance of services or activities undertaken, water and flood control, approval of design of construction projects, release of prison inmates and mental patients, independent contractors and nondelegable duties, products liability, private nuisance, misrepresentation, landowner obligations, absence of negligence of defendant, and inspections for benefit of third persons.

Most public law literature is highly critical of the DFE. For example, some commentators believe that the exception needs clarification from Congress (Matthews, 1957). Another common theme in public law literature critical of the DFE is that the DFE is confusing for courts and litigants (Bagby & Gittings, 1992; Peck, 1956). Specifically, one commentator complains that the DFE, as enacted, leaves courts with insufficient direction to weigh the policy goals of tort law that support governmental liability (such as compensation for victims, risk-spreading, deterrence, and the rule of law) versus policies that support immunity (such as the government's ability to make decisions and exercise discretion without fear of financial or budgetary consequences) ("Note: Government," 1998). Still another commentator has advocated that Congress amend the FTCA to allow petitioners the right to a jury trial in FTCA cases (Kirst, 1980).

A significant portion of public law literature critical of the DFE was published after the Supreme Court's *Varig/Berkovitz/Gaubert* decisions. *Varig*, according to one scholar, "shift[ed] the policy balance [away from petitioners] toward the government" (Zillman, 1995, p. 386). For example, scholars have termed the DFE a thinly-veiled extension of sovereign immunity, and an excuse for dangerous governmental policies to remain unchanged and unexposed to public view that does not sufficiently deter the government's tortious behavior (Hyer, 2007; Krent, 1991; Levine, 2000; Peterson & Van Der Wide, 1997).

The Court's *Gaubert* opinion is a specific target of much of this negative commentary, because most public law scholars view *Gaubert* as an expansion of sovereign immunity beyond prior Supreme Court interpretations of the DFE like *Dalehite*

and *Varig*. In addition to describing the *Gaubert* opinion as "troubling," scholars have charged that *Gaubert's* provisions are unfair for plaintiffs who deserve redress for their injuries, and enlarge the DFE to the point that the exception exceeds Congressional intent (Goldman, 1992; Hackman, 1997; Hyer, 2007, p. 1108; Zillman, 1995). Peterson and Van Der Weide (1997) go as far to call the *Gaubert* "far-reaching" and "harsh" and refer to *Gaubert* as the "resurrection" of sovereign immunity.

Although quick to criticize the DFE, no scholars put forth any systematic or scientific evidence to substantiate their criticism. Most public law scholarship on the DFE, in other words, utilizes the "case method model" popularized by professors at Harvard Law School around the turn of the twentieth century (Heise, 2002, p. 822). These articles, like the ones cited in this subsection, appear in American law reviews and consist of critical or interpretive evaluations of case law and do not ask research questions or utilize any sort of empirical methods (Epstein & King, 2002; McAdams & Ulen, 2002).

Interestingly, one public law article published in 1993, just after the Supreme Court issued its *Gaubert* opinion, makes a hypothesis-style proposition about the DFE, but offers no empirical evidence to confirm or deny his hypothesis. In his article, Kratzke (1993) describes in detail the Court's shift from its *Dalehite* analysis to the *Varig/Berkovitz/Gaubert* standard. This portion of Kratzke's article is similar to other public law scholarship in that it follows the "case method model" by generally describing changes in Supreme Court precedent from one opinion to another. Kratzke then deviates from other public law scholarship by theorizing that the government's DFE success rate

will not necessarily change under the new *Gaubert* standard, given the fact that lower courts have been deciding DFE cases for 30 years and have developed an idea of when the exception should apply and when it should not apply. Kratzke's position, in other words, is at odds with most other public law scholarship which views *Gaubert* as significantly strengthening the government's position in DFE cases.

Unfortunately for readers intrigued by Kratzke's assertion, Kratzke does not offer any data to confirm or deny his position. To Kratzke's credit, of course, the stated purpose of his article is not to systematically answer questions about the DFE, but rather to describe the judicial history of the DFE. Kratzke's article, however, should whet the appetite of those wanting to know more about the DFE than what they can learn through a traditional "case method-style" law review article. The data for this dissertation can be used to test Kratzke's thesis about the government's success in DFE cases over time, and these data and their relationship to Kratzke's thesis are discussed in Chapter 6: Theoretical Implications and Conclusions.

The FTCA and DFE Within Political Science Literature

Scholars in political science have "unaccountably ignored" the DFE (Weaver & Longoria, 2002, p. 338). Most references in political science to the DFE arise in the area of international law and the Foreign Sovereign Immunities Act (1976), the statute which governs how foreign sovereigns are subject to suit in federal courts (Evans 1980; Falk, 1965; Leigh, 1987; Semmelman, 1993). Weaver and Longoria (2002) note how strange this is given the fact that the DFE implicates a number of issues central to the study of

political science, such as the judicial oversight of public administration, the separation of powers, and administrative accountability.

Weaver and Longoria's article, in fact, represents the only empirical, quantitative data about the DFE available for those interested in learning about the DFE in the courtroom. Weaver and Longoria (2002) take their data from 377 cases in the federal circuit courts of appeal, which represent every case heard at that level from 1950 to 2001, and code their data using three categories: (1) the number of actual and potential plaintiffs; (2) whether a bureaucratic decision involving administrative discretion was minimal or substantial; and (3) whether the broader policy implications are minimal, moderate, or substantial.

From their data, Weaver and Longoria conclude first that there is no relationship between the number of people affected by the underlying incident and the successful use of the DFE, and second that there is no association between the level of bureaucratic involvement and the DFE. They did, however, find a statistically significant connection between policy implications and the successful use of the DFE (Weaver & Longoria, 2002). Using logistic regression to analyze their entire set of data, Weaver and Longoria predict that the most likely case for government success in a DFE argument would involve multiple plaintiffs, substantial bureaucratic involvement, and significant policy implications.

Weaver and Longoria (2002) are critical of the way federal appellate courts interpret the DFE. Given their prediction for the most successful use of the DFE, Weaver and Longoria raise the concern that the government will use the DFE to avoid

accountability by shielding itself from liability in cases where it causes the most damage to society. Moreover, Weaver and Longoria conclude that the judiciary has given "too much deference to the separation of powers and the doctrine of sovereign immunity … creat[ing] an environment that sometimes does not encourage administrators to use care or to abandon unnecessarily injurious policies" (p. 348).

The FTCA and DFE Within Public Administration Literature

Like the field of political science (with Weaver and Longoria's article), the public administration community is informed about the FTCA and DFE largely through the work of a single scholar, David Rosenbloom. The scholarly work of David Rosenbloom emphasizes the importance of the United States Constitution to public administration. The Constitution is what makes public administration different from administration in the private sector. Beginning with his 1983 article in Public Administration Review through six editions of his textbook, Rosenbloom (2005) develops a "comprehensive intellectual framework" based on the separation of powers doctrine as contained in the Constitution for understanding subjects relevant to public administration (p. xvii). Because this dissertation utilizes Rosenbloom's framework as a device for examining the FTCA and DFE, this section of the literature review begins with a thorough description of Rosenbloom's three-part theory of public administration. This literature review concludes with an examination of the portion of Rosenbloom's work which specifically addresses the FTCA.

Rosenbloom's Managerial Approach

Rosenbloom's (1983) first approach, the managerial approach, finds its origins in values such as efficiency and economy and manifests itself in the executive branch's interest in the effectively executing and implementing of the law. Many who view public administration from a managerial approach tend to minimize the differences between public and private administration, preferring instead to view government as analogous to a large, private corporation, and favor administering government with the managerial principles and values practiced in the business world. Rosenbloom separates adherents to the managerial approach into two categories: "the traditionalists" and "the reformers" (Rosenbloom, 2006, p. 15).

The "traditionalists." The "traditionalists" trace their roots back to the civil service reform efforts of the 19th century. During this time period, the practice of patronage appointments to so-called "spoilsmen"[39] led to corruption and widespread inefficiency within American government. Traditionalist reformers advocated a more business-like (or nonpolitical) approach to government. For example, these reformers believed that selection for government jobs should be based on fitness and merit rather than political partisanship.

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[39] The terms "spoilsmen" and "spoils system" originate from a statement made in 1832 by New York Senator William L. Marcy, when he proclaimed "to the victor go the spoils" while speaking in favor of the federal government's system of patronage appointments after an election. James Parton, a well-known historian of the 1850s referred to "spoilsmen" as the nation's "refuse" (Parton, 1887, p. 220).

Traditionalist theorists in the late 19th century argued that the majority of public administrators had no political (or policymaking) functions in their day-to-day duties and functions. One such theorist, Woodrow Wilson (1887), who would later serve as President of the United States from 1913 to 1921, wrote that "[A]dministration lies outside the proper sphere of politics. Administrative questions are not political questions" (p. 18). According to traditionalists, a dichotomy existed between politics and administration. Rather than seeing public administration as a field of political science, in other words, traditionalists view public administration as "a field of business" (Wilson, 1887, p. 209).

As adherents to a business-like approach to public administration, "traditionalists" adhere to values such as efficiency and economy. Specifically, public administration should be geared towards running government in a manner which maximizes effectiveness. Woodrow Wilson (1887) articulated this business-like focus on the "bottom line" as follows: "[I]t is the object of administrative study to discovery, first, what government can properly and successfully do, and, second, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or energy" (p. 197). Efficiency, as noted by later "traditionalist" theorists, is the ultimate "axiom number one in the value scale of administration" (Gulick & Urwick, 1937, p. 10).

The Political Approach, however, is not the only approach rejected by the "traditionalists." The "traditionalist" perspective of public administration also deemphasizes the role of law in running government. According to Leonard White

(1926), author of the first public administration textbook, "the study of administration should start from the base of management rather than the foundation of law, and is therefore more absorbed in the affairs of the American Management Association than in the decisions of the courts" (pp. vii-viii).

The concept of a business-like public administration eventually became the "orthodox or classical view of how the public service should be run" (Rosenbloom, 2005, p. 16), and theorists during this time period emphasized a scientific method for developing knowledge about public administration. Wilson (1887), for example, declared that "the science of administration is the latest fruit of that study of politics," and noted that "the eminently practical science of administration is finding its way into college courses…" (p. 197). Leonard White (1926) also declared that public administration was transforming from an art to a science. A significant portion of contemporary public administration scholarship shares the "traditionalists'" desire to develop a science of public administration (Rosenbloom, 2005, p. 19).

The "reformers." Beginning in the early 1990s, the new public management movement rose to popularity within the public administration community. Like the "traditionalist" approach, new public management espouses improved performance on the part of government. However, the new public management movement views the "traditionalist" approach to public administration as "broken" to the point that the public has lost faith in government (Gore, 1993, p. 1). Borrowing from reform efforts in New Zealand, Australia, and the United Kingdom, new public management adherents endorse the following improvements to government services:

1. A shift in focus from conforming to procedures to achieving results;

2. An effort to utilize market-like competition in the provision of goods and services (for example, through contracting out government services to private firms, by reorganizing government agencies to more closely resemble private corporations who perform similar functions, and by fostering competition between different government agencies and between government agencies and nongovernmental organizations);

3. An effort to create valued services for the general public (such as satellite offices in shopping malls for license renewals, mobile services, "one stop shopping" for social services, faster response to telephone inquiries, and shifts in case management to reduce the number of government employees a member of the general public has to contact to obtain services) and to view the general public as customers or clients of agencies, to whom the government should be responsive;

4. A shift towards the ideal that government should "steer, not row" (Osborne and Gaebler), in other words, embracing the fact that government can appropriately rely on third-parties such as not-for-profit organizations, private corporations, and nongovernmental organizations to deliver services and implement government policies;

5. An effort to deregulate "traditionalist" public administration's preference for centralized control of agency functions in order to be a more results-oriented government driven by customers, competition, and accountability;

6. A desire to empower government employees to be creative in serving customers and clients, especially through teamwork and the use of technology; and

7. A shift away from a rule-bound or process-oriented agency culture to a culture dominated by flexibility, innovation, problem solving and entrepreneurship. (Rosenbloom, 2005, pp. 20-21)

Vice President Al Gore (1993) adopted the New Public Management approach in his National Performance Review (NPR), calling it "a new customer service contract with the American people, a new guarantee of effective, efficient and responsive government" (p. i).

One of the most prominent differences between the traditional managerial perspective and the new public management perspective is the way in which the two approaches view the individual. The "traditionalist" perspective, with its preference for a bureaucratic structure, embraces an impersonal view of the individual.[40] New public management, on the other hand, views individuals as customers. The NPR describes how government should treat individuals as follows:

> Effective, entrepreneurial governments insist on customer satisfaction. They listen carefully to their customers – using surveys, focus groups, and the like. They restructure their basic operations to meet customers' needs. And they use market dynamics such as competition and customer choice to create incentives that drive their employees to put customers first …
>
> In a democracy, citizens and customers both matter. But when they vote, citizens seldom have much chance to influence the behavior of public institutions that directly affect their lives: schools, hospitals, farm service agencies, social security offices. (Gore, 1993, p. 6).

To be sure, the new public management "reformers" do not completely abandon the "traditionalist" approach to public administration. Embracing the politics-

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[40] Rosenbloom uses Ralph Hummel's description of bureaucracy as an example of the impersonal view of the individual prevalent in the "traditionalist" perspective of public administration:

> Bureaucracy is an efficient means for handling large numbers of people. "Efficient" in its own terms. It would be impossible to handle large numbers of people in their full depth and complexity. Bureaucracy is a tool for ferreting out what is "relevant" to the task for which bureaucracy was established. As a result, only those facts in the complex lives of individuals that are relevant to that task need to be communicated between the individual and the bureaucracy.
> To achieve this simplification, the modern bureaucrat has invented the "case." At the intake level of the bureaucracy, individual personalities are converted into cases. Only if a person can qualify as a case, is he or she allowed treatment by the bureaucracy. More accurately, a bureaucracy is never set up to treat or deal with persons: it "processes" only "cases. (Sayre as cited in Rosenbloom, 2005, p. 26)

administration dichotomy, Gore, himself, tells us that "[t]his performance review is not about politics …. We want to make improving the way government does business a permanent part of how government works regardless of which party is in power" (Gore, 1993 p. iv). Moreover, new public management embraces science-based research tools, such as observation, measurement, and quantitative indicators of performance, to gauge public administration's performance and effectiveness (Rosenbloom, 2005, p. 25). The new public management movement, thus, embraces the "traditionalists'" call to reform government while seeking to fix the "broken" (Gore, 1993, p. 1) aspects of the traditional approach to public administration.

Rosenbloom's Political Approach

Rosenbloom (2005) uses the following quote from Wallace Sayre to "forcefully and succinctly" define the political approach to public administration:

> Public administration is ultimately a problem in political theory: the fundamental problem in a democracy is responsibility to popular control; the responsibility and responsiveness of the administrative agencies and the bureaucracies to the elected officials (the chief executives, the legislators) is of central importance in a government based increasingly on the exercise of discretionary power by the agencies of administration. (Sayre as cited in Rosenbloom, 2005, p. 26)

This approach, which developed out of scholarly attention to the New Deal and World War II by Paul Appleby (1949) and others, assumes that public administration is a political process and that public administrators are direct participants in public policymaking (Lowi, 1969). Rosenbloom's (1983) political approach to public administration, in other words, stresses a preference for representation, responsiveness,

transparency and accountability of public administration through elected officials over the values of the managerial approach.

Rosenbloom (2005) uses examples such as the Federal Civil Service Reform Act of 1978, which seeks to ensure a diverse federal workforce, and the Federal Advisory Committee Act of 1972, which attempts to make committees advising administrative agencies on rule making matters more representative, to demonstrate how the values of the political approach are reflected in legislation. A well-known example of transparent government is the Freedom of Information Act (FOIA), which allows the general public to scrutinize government operations by allowing access to many types of government documents. Another example of transparency are so-called "sunshine laws," such as Utah's Open Meetings Act, which require that certain types of meetings and hearings within agencies be open to the public and the press. Rosenbloom takes the term "sunshine" from Supreme Court Justice Brandeis's statement that "sunlight is said to be the best of disinfectants; electric light the most efficient policeman" (Brandeis, 1914, p. 92).

Accountability involves the extent to which an individual or institution must answer to the authority of a higher power or institution. Accountability is a central theme of Rosenbloom's (2005) political approach to public administration because, although public administrators are guardians of the public trust, even the "guardians need guarding" (pp. 556-587). Concerns over corruption, subversion, and misconception of the public interest within bureaucracy help explain public administration's interest in accountability.

Most discussions of accountability in public administration literature relate back to debates between Friedrich (1940) and Finer (1941) about whether accountability is best preserved through internal means or external means. According to Friedrich, internal controls are the most appropriate means for ensuring accountability. For example, in Friedrich's view, the fact that accountants working for the Internal Revenue Service are subject to standards of accountancy imposed by their profession is sufficient to ensure their good behavior. Finer, on the other hand, advocated legislative and popular controls in addition to internal controls to ensure accountability. The Ethics in Government Act (1978), which imposes postemployment restrictions on federal employees in an effort to cut down on conflicts of interest, is an example of an external control designed to ensure bureaucratic accountability.

According to Rosenbloom (2005), the difficulties in establishing administrative accountability are both numerous and difficult to resolve. One explanation for a lack of bureaucratic accountability relates to public employees. Public administrators often become experts at what they do. This expertise makes it difficult for outsiders to evaluate or "second-guess" administrative decisions. Generally speaking, public administrators enjoy a significant degree of job security and legal protections. Some view the process of disciplining and dismissing public employees as overly cumbersome and problematic to accomplish.

Another explanation for the difficulty of ensuring accountability involves time and resource constraints on the part of those seeking to hold public administration accountable. Presidents and members of Congress have other things to do besides

looking over the shoulder of public administration (Rosenbloom, 2005). While they both employ staff to engage in oversight activity, the size and scope of bureaucracy prohibit full and complete investigation of all bureaucratic activities. Similarly, members of the public concerned with accountability must juggle their own employment, family, and other interests with their pursuit to hold the bureaucracy accountable (Rosenbloom, 2005).

Finally, the fragmented structure and functions of agencies hinder administrative accountability (Rosenbloom, 2005). In addition to the fact that many agencies have overlapping missions and realms of influence, an increasing number of "third-parties," such as nonprofit organizations, are providing public services. This fragmentation can lead to confusion on the part of those seeking to identify specific actors involved in misconduct.

The values of Rosenbloom's (1983) political approach are often in tension with those of the managerial approach. Political ideals such as responsiveness and accountability to individuals, for example, have little to do with the results-oriented approach of New Public Management and can frustrate agency efforts to serve the general public in the most cost effective manner (Rosenbloom, 2005). Efforts to make government more transparent through "sunshine" laws and regulations, moreover, can hinder agencies' efforts to be more efficient because public scrutiny can "dissuade public administrators from taking some courses of action even though they may be the most efficient" (Rosenbloom, 2005, p. 29).

Interestingly, Rosenbloom uses two examples from the United States Supreme Court, an entity that many observers may more commonly associate with Rosenbloom's legal approach to public administration, to demonstrate the tension between the managerial and political approaches. In *Immigration and Naturalization Service v. Chadha* (1983), Rosenbloom quotes the majority opinion wherein Chief Justice Warren Burger writes: "[i]t is crystal clear from the records of the [Constitutional] Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency …" Burger's majority opinion continues as follows:

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, and even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President … With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution (p. 959).

The second example Rosenbloom employs is from the Brandeis dissent in the *Myers v. United States* (1926) decision. In his dissent, Brandeis notes:

> The doctrine of the separation of powers was adopted by the [Constitutional] Convention in 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among these three departments, to save the people from autocracy (p. 84).

These examples, for Rosenbloom emphasize the importance of the separation of powers, a political rather than a managerial doctrine, in public administration.

Unlike Rosenbloom's managerial approach to public administration, with its preference for a traditional- bureaucratic organizational structure, or, in the case of NPM, a competitive or firm-like structure, the political approach embraces political pluralism within public administration. According to Harold Seidman (1970), "[e]xecutive branch structure is in fact a microcosm of our society. Inevitably it reflects the values, conflicts, and competing forces to be found in a pluralistic society. The ideal of a neatly symmetrical, frictionless organization structure is a dangerous illusion" (p. 13). Public Administration, in other words, should be representative of the country as a whole (Rosenbloom, 2005).

Finally, the political approach to public administration differs from the managerial approach to public administration in that it views the individual as part of an aggregate group, as opposed to the managerial approach's impersonal view of the individual. For Rosenbloom, this means that the political approach "does not depersonalize the individual by turning him or her into a 'case,' as does the managerial approach, but rather identifies the individual's interests as being similar or identical to those of others considered to be within the same group or category" (Rosenbloom, 1983, p. 222). This is not to say that personality does not exist within the political approach to public administration, rather, it is simply conceptualized in the aggregate. This idea is consistent with a central tenet of American political philosophy that "organized interests are homogenous and easy to define, sometimes monolithic. Any 'duly elected' spokesman for any interest is taken as speaking in close approximation for each and every member" (Lowi, 1969, p. 71).

Rosenbloom's Legal Approach

Rosenbloom's (1983) third approach, the legal approach to public administration, is characterized by three central values. The first value, procedural due process, stands for fundamental fairness and protects individuals from arbitrary or capricious government action. The second value, the substantive constitutional rights of individuals, is embodied in the Bill of Rights and the Fourteenth Amendment's due process provisions. Although some government actions necessarily infringe upon an individual's substantive constitutional rights, judicial doctrines arising out of the Bill of Rights and the Fourteenth Amendment generally place a heavy burden on government activities that abridge these rights. The third value, equity, stands for "fairness in the result of conflicts between private parties and the government" (p. 223). For Rosenbloom, equity encompasses the constitutional requirement of equal protection, and enables courts to grant relief to those whose constitutional rights have been violated by the government.

Like the political approach, the central focus of the legal approach to public administration is not cost-effectiveness or efficiency, but rather protecting the individual. According to one federal court, "[i]nadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights" (*Hamilton v. Love*, 1971, p. 1194). Rosenbloom points out, however, that the judiciary acknowledges the fact that its decisions sometimes impose added costs on government, but that judges' "central focus tends to be on the nature of the individual's right, rather than on the costs to society of securing those rights" (Rosenbloom, 1983, p. 223).

Rosenbloom derives the legal approach from three interrelated sources: (1) administrative law; (2) the "judicialization" of public administration; and (3) constitutional law. Administrative law refers to the statutes, executive orders, regulations, and court decisions which define and control the manner in which administrative agencies exercise their legal authority. Marshall Dimock (1980) writes that administrative law tells public administration what the legislature expects of them, sets limits to public administration's authority, and establishes the procedural and substantive rights of individuals and groups in contact with public administration (p. 31). The Administrative Procedures Act of 1946, which established the parameters of the legal (rulemaking) and judicial (adjudication) functions of federal agencies, is an example of administrative law.

In contrast with administrative law, which for Rosenbloom (1983) relates more to the procedures which bind agency action, the "judicialization" of public administration refers to the fact that agencies have begun to function more like courts in terms of their decision making, and thus legal values now play a greater role in agency activities. "Hearing examiners" and "administrative law judges" are both examples of the "judicialization" of public administration. Agencies began using "hearing officers" to assist in long and technical railroad-related hearings arising from the Interstate Commerce Commission (Dimock, 1980). The U.S. Civil Service Commission, in fact, began recruiting "hearing officers" and assigning them to the different federal agencies (Dimock, 1980). Administrative law judges, sometimes called Article I judges because they serve within the executive branch of government and are different from the life-

tenured judges of the judiciary, preside over administrative-trial hearings designed to resolve disputes between federal agencies and individuals affected by an agency's actions. These hearings, in effect, resemble a bench trial before an Article III judge (or federal district court judge) because administrative law judges can administer oaths, take testimony from witnesses, issue rulings on evidentiary issues, and make determinations of fact and law based on evidence presented to them. The "judicialization" of public administration, in other words, brings not just legal requirements, but also legal procedures to bear on administrative decisionmaking (Rosenbloom, 1983).

Constitutional law, the third source of Rosenbloom's legal approach to public administration, refers to the expansion of individual constitutional rights by the federal judiciary. Beginning in the 1950s, federal courts have issued a number of decisions which require public administrators to afford constitutional procedural due process to private individuals with whom they come into contact. For example, decisions during this time period made the Eighth Amendment's prohibition of cruel and unusual punishment more stringent, created new rights to treatment and habilitation for individuals confined in government-administered public health facilities, and strengthened the right to equal protection in administrative matters ranging from public personnel merit examinations to the operation of public schools and prisons (Rosenbloom, 1983).

Federal courts enforce their expansion of individual constitutional rights in two ways. First, courts have reduced many public administrators' absolute immunity from civil suits to qualified immunity in an effort to deter unconstitutional administrative

actions. Public administrators, thus, are now liable (with some exceptions) for damages if they "knew or reasonably should have known" that their actions infringed an individual's constitutional rights.[41] Consequently, public administrators not only need to be familiar with their administrative polices, but must also have a reasonable knowledge of constitutional law (Rosenbloom, 1983). Second, federal courts have regularly required institutional reforms as part of their opinions in cases where litigants challenge the constitutionality of actions taken by government agencies, such as schools, prisons, and mental health facilities. These reform requirements place judges in the role of "partners" and even "supervisors" of public administration (Bazelon, 1976; Rosenbloom, 1983; 2005).

To reinforce the importance of the Constitution in the daily duties of public administrators, Rosenbloom includes in his textbook a discussion of four reasons why public administrators must know and understand the Constitution. First, Rosenbloom asserts that all public administrators should be working towards the goal of a government based on "principles which have a democratic policy very much at heart" (Wilson as cited by Rosenbloom, 2005 p. 504). For Rosenbloom, this involves developing a government that is a combination of the managerial and political approaches but also is fully compatible with constitutional principles and values (Rosenbloom 2005). The second reason public administrators should know and understand the Constitution is that

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[41] The type of liability discussed here is generally actionable as a constitutional tort under §1983 of the United States Code and not the FTCA. For a discussion of how §1983 liability differs from tort liability, the primary subject of this dissertation, see Chapter 2: History of the FTCA and DFE.

many of them take an oath to support the Constitution when they begin their employment, a gesture which reminds government employees of the fact that their office is one of public trust, and an allusion to "the overarching importance of upholding the nation's fundamental rule of law even in the face of seemingly legitimate pressures to circumvent or violate constitutional requirements" (Rosenbloom, 2005, p. 479). Third, as discussed in the preceding paragraph, Rosenbloom (2005) reminds public administrators that they can be held personally liable in a civil lawsuit for violating the constitutional rights of an individual or a group of individuals. Finally, Rosenbloom notes the growing preference for "constitutional literacy" within public service (Rosenbloom, 2005, 481). Rosenbloom uses the words of Constance Horner (1988), a former director of Office of Personnel Management to explain:

> We may often disagree about what our shared commitment to constitutional values requires – what liberty or equality or justice demands in any given instance. But discourse about those principles should be the unique, common language of the Federal executive. Literacy in these concepts and ideas – constitutional literacy – can help unify and vivify the Federal executive corps. From many professions, it can make one vocation. (p. 14)

In short, because the federal judiciary plays an active role in defining of individual rights, public administrators need to know and understand the Constitution so that they act in a manner consistent with federal judicial interpretations.

According to Rosenbloom, the preferred organizational structure of the legal approach to public administration is adversarial in nature, such as a judicial trial by jury or a bench trial. With its preference for procedural fairness, the legal approach to public

administration also places a premium on the objectivity or independence of the decisionmaker. Addressing this, Marshall Dimock (1980) wrote:

> The hearing officers and administrative judges are on a different payroll. Moreover, unlike other officials in his department or agency, the executive is expressly forbidden to fire, discipline, or even communicate with the administrative judge except under very special circumstances, which usually means when the judge submits his proposed order. Under the new system, the judge is isolated in the same manner as a judicial judge, for fear that improper influence will be brought to bear upon him. (p. 114)

Finally, Rosenbloom's (1983) legal approach to public administration views the individual as a unique person in a unique set of circumstances (p. 224). The adversarial structure of the legal approach to public administration, in other words, should be constructed in a manner which allows individuals to "explain his or her unique and particular circumstances, thinking, motivations, and so forth to the governmental decisionmaker" (Rosenbloom, 1983, p. 224). This notion, that everyone is entitled to their "day in court," is personified by United States Supreme Court opinions in cases such as *Cleveland Board of Education v. LaFleur* (1974), where the Court declared that a pregnant public school teacher was entitled to an individualized medical determination of her fitness to work before a mandatory paternity leave could only be imposed on her by the school district (414 U.S.C. 632).

Just as with the political approach, Rosenbloom's (1983; 2005) legal approach to public administration contrasts with the managerial approach. Historically, for example, most public administration textbooks did not include a discussion of the Constitution and its connection to public administration. Ignoring "democratic constitutionalism," according to Rosenbloom amounts to an implicit endorsement of Woodrow Wilson's

managerial-centered observation that public administration should be concerned with running the Constitution, as opposed to amending or framing the Constitution (Rosenbloom, 2005, p. 479). The legal approach to public administration, in effect, takes the opposite view: that public administrators need to know and understand the Constitution in order to fulfill their role as public servants. Constitutional knowledge, in short, is as important today as it was in the 18th century, as contemporary public administrators seek to bring Constitutional principles into their daily decisionmaking.

Implications of Rosenbloom's Three-part Theory

One of the implications of the Rosenbloom's approach to public administration is that bureaucracy, in effect, serves three masters: the President, Congress, and the courts. Sometimes the values and perspectives of different approaches conflict with one another. For instance, the managerial approach's preference for efficiency and cost-effectiveness operates contrary to preferences for representation on behalf of the political approach, or due process as favored by the legal approach. While the approaches may at times conflict with one another, they are not mutually exclusive. Public administration, thus, is sometimes left with the task of performing its duties and carrying out its functions in an environment of tension between these three approaches.

In part because of the Progressive Era effort to separate or buffer public administration from politics, many today think of public administration as a function most closely associated with presidents, governors and other executive branch officials. For Rosenbloom (and others), Congress possesses as much (if not more) constitutional

authority to direct and oversee public administration as the executive branch. These congressional powers include the ability to pass legislation affecting agencies and public employees, the power to allocate public money to agency functions, and the power to subpoena public administrators and take testimony about government activities.

The FTCA is an important statute for the study of public administration, given Rosenbloom's aforementioned general theory of public administration (discussed in subsections A, B, and C). Specifically, Congress delegated its authority, via the FTCA, to compensate victims of government's torts to the federal district courts for two primary reasons: (1) because it became overburdened by the number of filings under the private bill system; and (2) out of concerns for fair and equal treatment for those harmed by government action. Interestingly, these two congressional concerns with the private bill system, efficiency and fairness, involve values not espoused by the political approach to public administration, but rather values embraced by the managerial and legal approaches to public administration.

Given the procedural and substantive protections available for claimants in the courts, it is clear why Congress wanted the judiciary, rather than an administrative agency, involved in decisions made about government liability. From the FTCA/DFE legislative history, however, it is interesting to note that, despite the judiciary's preference for due process and fairness, Congress still referenced arguments for efficiency and economy when describing their decision to delegate their authority for adjudicating tort claims to the judiciary (See Chapter 2: History of the FTCA and DFE).

This point will be discussed at length in Chapter 6: Theoretical Implications and Conclusions.

This subsection has discussed Rosenbloom's general theory of public administration as developed in his 1983 article and in his textbook. Neither of these works, however, mentions the FTCA. The connections between the FTCA and Rosenbloom's general theory of public administration are explored in his book, Building a Legislative-Centered Public Administration (2000).

The FTCA and Rosenbloom's "Legislative-Centered Public Administration"

In *Building a Legislative-Centered Public Administration* Rosenbloom (2000), argues that Congress, utilizing its power to legislate, took several affirmative legislative steps in 1946 to redefine the relationship between itself and public administration. First, Congress passed the Administrative Procedures Act (APA), which imposes legislative functions and requirements on agency action. For example, the APA requires agencies to follow a period of notice and comment before promulgating final versions of rules. Similar to the legislative process of Congress, this "notice and comment period" allows interested parties an opportunity to provide suggestions or other input as a part of the rulemaking process. Second, Congress passed the Legislative Reorganization Act (LRA) which modernized the congressional committee system and professionalized and expanded the full-time staff of Congress, thus allowing individual members to more closely investigate bureaucratic activities, and to exert individual influence with agencies

on behalf of their constituents. Third, Congress passed the Employment Act, shifting to Congress the responsibility for prioritizing and funding public works projects (and thereby promoting employment). Finally, Congress passed the FTCA, the subject of this dissertation.

For Rosenbloom, a significant factor contributing to this redefined the relationship between Congress and administrative agencies, was the unique political climate during which these acts were passed. Specifically, in the time period leading up to 1946, Congress had "lost its institutional role" vis-à-vis the federal bureaucracy because of Congress's rapidly expanding function in the economy and society in the post-New Deal and World War II era, exponential growth in the size of federal administration during this time period, and years of budget deficits which left the country with massive federal debt (Rosenbloom, 2001, p. 773). One Congressman at the time, as noted by Rosenbloom, asked "[i]s Congress necessary?," and claimed that some other members thought "Congress might not survive the next 20 years" (Kefauver & Levin as cited in Rosenbloom, 2001, p. 773). Congress, in short, had delegated its legislative authority to such an unprecedented degree that it was no longer exercising meaningful oversight over public administration, and "effectively lost control of the power of the purse" (Rosenbloom, 2001, p. 773).

From these four 1946 acts, Rosenbloom (2000) crafts a theoretical construct he calls "legislative-centered public administration." Rosenbloom views this construct as a role that Congress "consciously developed for itself" (p. 776). This construct includes the following seven tenets:

1. Administration is not solely an executive endeavor, as it includes legislative functions;

2. When agencies engage in legislative functions they serve as extensions of Congress;

3. There can be no strict dichotomy between politics and administration. Therefore, American public administration should be informed by the democratic-constitutional values that apply to the exercise of political authority (i.e., representation, participation, transparency, fairness, and avoidance of intrusions on personal privacy and autonomy);

4. Congress has broad supervisory responsibility for federal administration;

5. Intercession on behalf of constituency and district interests is a legitimate representational function;

6. The role of the president and political executives in federal administration is to implement legislative mandates, coordinate actions government-wide, manage agencies on a day-to-day basis, and exercise discretion in pursuing the public interest when Congress has not provided specific direction;

7. The primary role of the federal courts with regard to federal administration is to provide judicial review of agency actions under the terms and conditions established by Congress through administrative law. (Rosenbloom, 2001, p. 776)

Rosenbloom's "legislative-centered administration," with its preference for democratic-constitutional values over "results-oriented" values such as efficiency and economy, thus, stands in stark contrast to both the traditional-managerial and New Public Management approaches to public administration.

In Building a Legislative-Centered Public Administration, Rosenbloom (2000) specifically regards the FTCA as an example of Congressional loadshedding, or the shifting of duties previously performed by Congress to another branch of government (p.

110). The prevailing attitude of many in Congress in 1946 was that too much of members' time was spent on nonlegislative functions. Describing this problem, Representative A.S. Mike Monroney (D-OK) explained:

> Congress is badly jammed up with an extraneous work load that cuts the time for legislative action down to about 20 per cent of the work day. Most members who testified before our hearings [on the LRA] estimated that fully 80 per cent of their time was consumed with purely nonlegislative activities. District problems, complaints, letters from constituents, visits, and conferences with groups from the home state or groups interested in legislation – all cut down on the time that members ought to devote to the study and understanding of legislation. (Monroney as cited in Rosenbloom, 2000, p. 104-105)

Both the LRA and the FTCA facilitated congressional loadshedding. The LRA increased the number of professional and paid staff, individuals who can perform casework functions, assigned to individual members Congress. The FTCA, thus, allowed Congress to rid itself of the time-consuming process of considering private bills.

Interestingly, when speaking about the FTCA and loadshedding, Rosenbloom emphasizes the load shed by Congress to the agencies – while he mentions the FTCA's waiver of sovereign immunity, Rosenbloom does not provide any detail of how the FTCA impacts the Judiciary (Rosenbloom, 2000). Specifically, Rosenbloom cites the FTCA's provisions which allow agencies to settle small tort claims without Congressional approval (Rosenbloom 2000). Of this change in agency function, Rosenbloom writes: "[T]hey might be called executive agencies, but their functions were neither exclusively executive nor solely within the domain of presidential authority" (Rosenbloom, 2001, p. 774). In other words, the FTCA (in addition to the APA and

LRA) not only shifted the load from an overburdened Congress to the administrative agencies, it also made the agencies the extensions or adjuncts of Congress.

Gaps in the Literature

Given the scant attention paid to the FTCA and DFE in all fields of study, it is clear that significant gaps exist in the DFE literature. First, although public law scholars have taken more opportunities to discuss the DFE than scholars in political science and public administration, the public law literature does not provide us with much useful information about how the DFE actually operates in federal district courts. Rather than actually gauge or measure the extent to which citizen litigants are harmed by the United States Supreme Court's evolving interpretation of the DFE, public law literature prefers to simply criticize the DFE based upon the language in the Supreme Court's rulings, and speculate about decreased success for those seeking redress against their government. Kratzke (1993), who believes that citizen success rates in the district courts will not be significantly affected by the change in precedent, is the exception to this case. However, like those in the first group, Kratzke does not defend his assertion with empirical data.

Second, while Weaver and Longoria look beyond the language of the United States Supreme Court and make an effort to observe the way the DFE is utilized in federal circuit courts of appeal, we know almost nothing about the DFE in federal district courts. The government's use of the DFE in district courts is important to study for three reasons. First, relatively few cases of any kind are ever appealed to appellate courts. Therefore, studies conducted at the appellate court level exclude from analysis all of the

district court cases which are never appealed. Second, appellate courts are limited to appellate jurisdiction in the issues they decide, in other words, they do not find facts or receive evidence, they only review whether district courts followed proper legal protocol when making legal decisions. Third, when an appeal is made, most decisions by district court judges are upheld by appellate judges. Data collected from district courts, thus, should be of great interest to those wanting to know how the DFE actually operates in the federal courtrooms which are most accessible to the average citizen litigant.

Finally, while Rosenbloom helps us to understand that Congress utilized the FTCA as a tool to make public administration more "legislatively-centered," we do not know whether outcomes from the federal district courts support a similar conclusion. In other words, outcomes from the federal district courts could, alternatively, reflect a "managerially-centered" perspective of the FTCA as a tool to allow government to function more efficiently and economically. Further, if there is a discernable and observable "perspective" of the FTCA evidenced by outcomes at the federal district court level, it is not clear whether that position has evolved or changed over time. Each of these gaps make this topic an interesting and valuable area of study.

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CHAPTER 4

METHODS

Introduction

This dissertation is a descriptive, quantitative study of the Discretionary Function Exception (DFE) of the Federal Tort Claims Act (FTCA) in federal district courts. Its purpose is to provide both pragmatic and theoretical insight about the historical development of the DFE in the federal district courts. This dissertation utilizes Rosenbloom's (1983; 2005) three-part theoretical construct, based upon the three branches of government outlined in the United States Constitution, as a framework for understanding the DFE data collected for this dissertation. This chapter describes the methods and research design for this dissertation.

Research Questions

1. How often are government's motions to dismiss FTCA cases pursuant to the DFE granted by district court judges?
2. Has the government's rate of success in their motions to dismiss FTCA cases pursuant to the DFE changed over time?

3. Whether the motion is granted or denied, how often do federal district court judges include dicta[42] in their written opinions issued on government motions to dismiss FTCA cases pursuant to the DFE; and
4. How does Rosenbloom's (1983; 2005) three-part theoretical framework[43] help us understand these cases?
5. How do these data advance our understanding of Rosenbloom's (1983; 2005) three-part theoretical framework and contribute to our understanding of other theoretical contributions to public administration scholarship?

Research Design

This dissertation adopts a quantitative research design. Quantitative research is grounded in the positivist approach to the social sciences, applies "reconstructed logic,"[44]

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[42] The legal community uses the terms "dicta" or "dictum" as an abbreviated form of *obiter dictum* (*Six Companies of California v. Joint Highway Dist. No. 13 of State of California*, 1940). This type of "remark by the way" is an observation made by a judge in an opinion "upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination." In other words, dicta are "[e]xpressions in court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases" ("Dicta," 1991, p. 313).

[43] Rosenbloom's (1983; 2005) three-part theoretical framework is discussed in detail in Chapter 3: Literature Review.

[44] Neuman (2006) defines "reconstructed logic" as "[a] logic of research based on reorganizing, standardizing, and codifying research knowledge and practices into explicit

and follows linear research paths using numbers and statistics (Neuman 2006). Quantitative research is commonly employed in public administration, political science, and other fields of social science as a method for empirically testing hypotheses about how the social world operates (Meier & Brudney, 2002). The use of quantitative methods in the field of public law, although relatively rare,[45] has increased in the past 2 decades (Ellickson, 2000).[46]

The research design for this dissertation is descriptive. Descriptive research is defined as "… the accumulation of a data base that is solely descriptive – it does not necessarily seek or explain relationships, test hypotheses, [or] make predictions" (Isaac & Michael, 1997, p. 50). The purpose of descriptive research is to "describe systematically the facts and characteristics of a given population or area of interest, factually and accurately" (p. 50). Descriptive statistics are used by researchers to organize and summarize data so that they are easier to understand (King & Minium, 2003).

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rules, formal procedures, and techniques; it is characteristic of quantitative research" (p. 151).

[45] Although Oliver Wendell Holmes (1897) long ago predicted the future influence of "the man of statistics" on the study of law, most legal scholarship today uses the "case method model" popularized by professors at Harvard Law School around the turn of the twentieth century (Heise, 2002). Most articles appearing in American law reviews, in other words, contain critical or interpretive evaluations of case law and do not ask research questions or utilize any sort of quantitative methods. (Epstein & King, 2002; McAdams & Ulen, 2002). For a complete discussion of public law's approach to quantitative scholarship, see Shlagel (1995).

[46] The study empirical legal studies within American law schools is a growing movement. In fact, the Cornell University Law School has published a law review journal devoted to studying empirical methods in public law, the *Journal of Empirical Legal Studies*, since 2004.

Descriptive statistics are considered a common first step in learning about underresearched areas such as the subject matter of this dissertation (Hardy & Bryman, 2004). Descriptive data, in other words, help "bring order out of chaos" (Welkowitz, Cohen & Ewen, 2006, p. 24). A descriptive research design is appropriate for this study because, as noted above, so little is known about the Federal Tort Claims Act and the Discretionary Function Exception. In short, the research presented in this dissertation is an exploratory or fact-finding effort to learn more about the DFE as it is applied in the federal district courts.

Data Selection

The FTCA is a "cause of action," or legal vehicle, that enables a private litigant to bring suit against the federal government in federal court. The first stop for an FTCA case is the federal district courts, or trial courts of the federal judiciary. Decisions from judges of the district courts can be appealed to the Federal Circuit Courts of Appeal and the United States Supreme Court.

The data for this dissertation come from decisions issued by judges of the federal district courts. Many refer to the district courts as the "workhorses" of the federal judiciary because they hear significantly more cases than the federal appellate courts (Carp & Stidham, 1998; Johnson & Songer, 2002). The primary reason the district courts were chosen as the data source for this dissertation is the abundance of DFE cases at the district court level compared to other federal appellate courts (because so few cases are ever appealed to the federal circuit courts of appeal and the Supreme Court). The federal

district courts, in other words, are where the vast majority of DFE litigation begins and ends. This study may also be of interest to American government scholars because the district courts are a particularly under researched area of the federal judiciary. Most public law studies, especially involving the FTCA, are limited to the United States Supreme Court or the circuit courts of appeal (for a more detailed description of these studies, see Chapter 3: Literature Review). Noting this deficiency, Thurman W. Arnold (1931) explains as follows:

> Law in books has been studied and analyzed; law in action has been left to guesses and personal experience. The result has been a very one-sided view of our legal institutions in which appellate courts, though actually handling a very small percentage of litigation, have so obscured our understanding of trial courts that they have almost been ignored. (p. 799)

Both scholars and practitioners (including plaintiffs' attorneys and attorneys defending the federal government), thus, should be keenly interested in how DFE litigation has evolved at the district court level.

When an FTCA complaint is filed in federal district court, there are at least three different ways it can be resolved, each of which represents a possible source of data for a researcher interested in the FTCA. First, the private litigant and the government can negotiate a settlement, usually involving some sort of financial consideration for injuries incurred by the litigant in exchange for a waiver of the government's liability. A settlement can occur at any stage in FTCA litigation. While federal judges are sometimes asked to approve such a settlement, the terms of a settlement are typically identified and agreed upon by the parties themselves.

The vast majority of settlements include agreements by both parties to keep terms of the settlement confidential. Therefore, FTCA settlements are not a part of the data set for this dissertation. One reason these agreements are negotiated by defendants is to keep future litigants from knowing their agency's exact financial threshold in settlement discussions. Accurate information about settlements, for these reasons, is very difficult to obtain. If information about settlements in DFE cases were readily available to researchers, it would be nice to include them in this study to help better explain how the DFE operates at the district court level. However, since this information is not available, this study focuses on data from final judicial decisions in these cases.

The second possible type of disposition in an FTCA case is a bench trial. A bench trial is a trial heard by a judge rather than a jury. The FTCA itself requires all FTCA trials to be bench trials.[47] Trials in any type of legal case, whether civil or criminal, are extremely rare, and tort cases are no exception (Burbank, 2004a). According to the United States Department of Justice (1995), only four percent of federal tort cases result in a verdict from a judge or jury. Professor Marc Galanter (2004) explains this observation by noting that many tort cases are filed as a class action, and therefore likely to be resolved as part of a mass settlement between plaintiffs and defendant instead of on a case-by-case basis. Although bench trials (unlike cases involving settlements) undoubtedly involve final orders issued by judges, data relating to

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[47] Unlike criminal cases, there is no right to a jury trial in civil litigation. A statutory cause of action, thus, can legally require bench trials rather than jury trials. The FTCA contains such a requirement (28 U.S.C. § 2671).

bench trials are not included in this dissertation because they occur so infrequently in FTCA cases.

Because FTCA bench trials are so rare, the data for this dissertation were selected from a more common aspect of DFE litigation: government's pretrial motions to dismiss a private litigant's DFE case. These motions are typically labeled and referred to as either a "motion for summary judgment" or a "motion to dismiss for lack of subject matter jurisdiction," and require a federal district judge to dismiss a private litigant's DFE case if the judge is convinced that relief cannot be legally granted for that case under the DFE.[48] Researchers, in fact, often attribute the declining number of trials held in civil cases to increased use of summary judgment motions by litigants (Burbank, 2004b; Shadur, 2003). [49]

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[48] While a "motion to dismiss for lack of subject matter jurisdiction" and a "motion for summary judgment" are technically different, federal courts are required to treat a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) as a motion for summary judgment under Fed. R. Civ. P. 56 when resolution of the jurisdictional question is intertwined with the merits of the case *Troubaugh v. United States* (2002). For purposes of this dissertation, therefore, these two motions are the same.

[49] I consulted Professor Paul G. Cassell of the University of Utah's S.J. Quinney College of Law on the frequency of summary judgment motions in FTCA cases. Professor Cassell, a former federal district court judge for the District of Utah, confirmed that the government will frequently file summary judgment motions in FTCA cases, assuming that a legitimate factual and legal basis exists to support the motion. Professor Cassell also noted that, while the incentive to file summary judgment motions is high, these motions require a fair amount of effort and energy on behalf of the attorneys for the moving party; Cassell estimated that the typical summary judgment motion would require at least 1 week of work time for an attorney to prepare (personal communication, March 12, 2009).

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure (FRCP), which were adopted in 1938.[50] The purpose of summary judgment is to act as a filtering system for cases filed in federal courts. Summary judgment, in other words, eliminates the need for some trials which may have been unavoidable prior to the enactment of the FRCP. Summary judgment, therefore, allows the judiciary to operate more efficiently. Very little is known about summary judgment practice in state or federal courts because only a limited number of prior studies exist which utilize summary judgment data (Gordillo, 1994; Guiher, 1962; Issacharoff & Lowenstein, 1990; McGinley, 1993; Mollica, 1997, 2000). Moreover, there are no reliable data at either the federal or the state level documenting the total number of summary judgment motions filed on a year to year basis and it is not clear how many total summary judgment motions are granted or denied once filed by litigants, because these data are not publically recorded (Burbank, 2004b).[51]

The fact that this study involves summary judgment data is not the only methodologically interesting aspect of this dissertation. The data for this dissertation are also noteworthy because the DFE has generated substantial controversy in both the academic and professional communities. The DFE, as one commentator notes, "has

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[50] Because the FRCP was adopted before the FTCA became law, this dissertation will not describe the pre-1938 history of the FRCP. For an excellent description of this history, see Millar (1952).

[51] Because they are confined to summary judgment motions, these data, in effect, show the upper limit of plaintiff success and minimum of government success because, presumably, some plaintiffs who prevail against a government's motion for summary judgment eventually lose at a bench trial.

given rise to more confusion than any other aspect of the [FTCA], and its meaning continues to divide scholars and jurists" (Cole, 1990, n.p.). Furthermore, the Tenth Circuit Court of Appeals has said that the DFE (and the United States Supreme Court cases interpreting the DFE) has led to a "quagmire" of litigation (*Baird v. United States*, 1981). In short, the data set constructed for this dissertation is unique because it combines two little understood concepts: summary judgment and the DFE.

Population

The term population refers to all of the observations in which a researcher is interested. Researchers should "describe the population [of a study] in sufficient detail so that interested individuals can determine the applicability of the findings to their own situations" (Fraenkel & Wallen, 2003, p. 97). The population for this dissertation is all reported FTCA cases from federal district courts between 1946 (the year the FTCA became law) and 2007 in which the federal government filed a motion for summary judgment (or motion to dismiss) pursuant to the DFE.

The difference between "reported" cases and "published" cases is important when describing the population for this dissertation. West Publishing publishes the federal supplement series which includes only cases decided by the federal district courts (United States Supreme Court cases and cases from the federal circuit courts of appeal are published in a different series). The federal supplement series, however, does not publish every case decided by the federal district courts. Some cases are designated as "un published" or "not for official publication" by either the deciding judge or by West

Publishing. While these "unpublished" cases are not printed in the hardbound volumes of the federal supplement series, they are still accessible online through legal search engines such as LexisNexis and Westlaw. This dissertation uses the term "reported" to describe any case, whether "published" or "unpublished," that is available to a researcher through LexisNexis.

Though unpublished opinions are generally considered by courts to have more persuasive, rather than precedential, value, this sentiment may be changing. A recent amendment to The Federal Rules of Appellate Procedure,[52] for example, allows litigants to cite unpublished federal decisions issued on or after January 1, 2007, assuming the decision is either publicly available, or a copy of the decision is made available by the litigant to the adverse party and the court. The United States Supreme Court has long recognized that regardless of their precedential value, unpublished opinions are centrally important to the parties involved. Specifically, the Court has noted that "[t]he fact that [an] opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion … surely is as important to the parties concerned as is a published opinion" (*Smith v. United States*, 1991, p. 1017).

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[52] Rule 32.1 of The Federal Rules of Appellate Procedure reads:

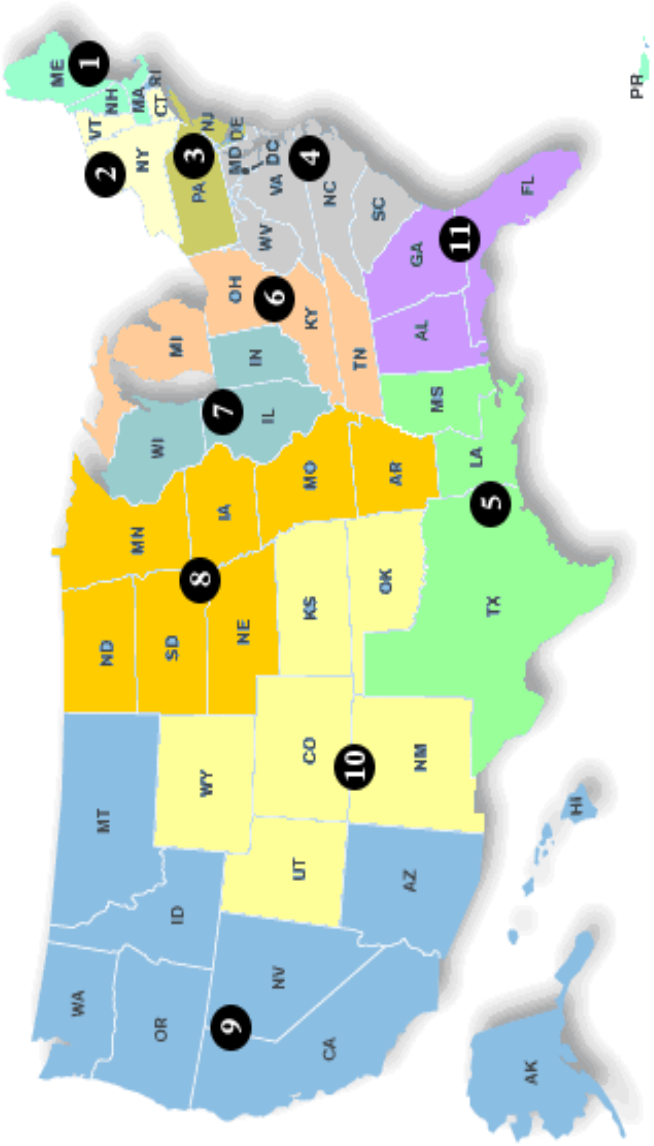
> A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as unpublished, not for publication, nonprecedential, not precedent, or the like; and (ii) issued on or after January 1, 2007. (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

It is also important to describe the federal district courts. The federal district courts are the trial courts of the United States Judiciary and have jurisdiction to hear almost any type of case whether civil or criminal. There are 94 total federal districts, including at least one for every state and the District of Columbia, and one each for Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands. Some states, such as California and Texas, have multiple districts, while some states, such as Idaho and Utah, have only one district.

Litigants can appeal a decision of the federal district courts to one of 12 circuits of the United States Court of Appeals. The circuit court which hears the appeal is the one in which a district court is located. Each appellate circuit contains the district courts of multiple states, and no individual state is divided into more than one appellate circuit. The following map, accessed from the Administrative Office of the United States Courts, shows the location of the different federal district courts and their corresponding appellate jurisdiction (See Figure 4.1).

Data Collection and Coding

This dissertation involves collecting data from formal decisions by judges of the federal district courts. These decisions, which appear in volumes of the Federal Supplement, published by West Publishing, are final orders issued by federal district court judges, and thus can be considered official documents. Specifically, when judges are presented with a legal issue by a party in an actively litigated case, they consider the



(U.S. Courts, 2006).

Figure 4.1: Map of the Geographic Boundaries of the United States Federal Court System

issue or issues before them (and are often provided with both oral and written, or "briefed," arguments by the parties), and issue written rulings which are later "reported" in the Federal Supplement series. The cases collected for this dissertation involve motions to dismiss for lack of subject matter jurisdiction (or motions to dismiss for failure to state a claim upon which relief may be granted, which federal district court judges treat as motions for summary judgment in DFE cases) filed by the United States government.

The data collected for this dissertation come from public records and are primary data in that they have not been collected or used for any prior research purpose (Fielding & Gilbert, 2000). Public records research, or archival research, is a type of nonreactive research, or unobtrusive method designed to study social behavior without the knowledge of the actors being studied (Neuman, 2006). This type of research is especially well-suited for topics which involve information collected over significant time periods by large bureaucratic organizations that gather their information as a public service (Neuman, 2006).

The data were collected through LexisNexis, an on-line legal research search engine available through the Marriott Library at the University of Utah. With LexisNexis, one can search for cases (using Boolean search terms) in a database containing only reported federal district court cases. This database, in other words, allows one to focus on district court cases by excluding opinions from the United States Supreme Court and the federal circuit courts of appeal.

The following combination of search terms was entered in this database to collect the data for this dissertation: (FTCA or "Federal Tort Claims Act" w/p "discretionary function exception" and motion w/s dismiss or "subject matter jurisdiction"). This combination of search terms captured the largest number of applicable cases while still excluding a large number of inapplicable cases (such as cases involving the Federal Suits in Admiralty Act, which commonly include citations to the FTCA). Other combinations of search terms were found either to exclude too many cases which were appropriate for this study, or capture too many cases which were inappropriate for this study.[53] The search terms used, which are identified above, captured 985 cases reported between 1946 and 2007.

Once collected, the cases were examined and coded. Coding involves the systematic processing of raw data into a format that a computer can easily analyze. (Neuman, 2006). For coding to be systematic and reliable, it is helpful for researchers to create a "coding procedure" or a set of rules by which a quantitative researcher can consistently assign a number or symbol to observed phenomena (Neuman, 2006). I organized and categorized the coded data, using a Microsoft Excel spreadsheet, during this process.

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[53] Examples of other combinations of search terms attempted during this process are: (1) FTCA or "Federal Tort Claims Act" w/p discretion! And dismiss and "subject matter jurisdiction" – which captured 732 cases between 1946 and 2006; (2) "discretionary function" and motion w/s dismiss w/p FTCA or "Federal Tort Claims Act" captured 630 cases between 1946 and 2006; (3) "discretionary function" and dismiss and "subject matter" w/p FTCA or "Federal Tort Claims Act" captured 533 cases between 1946 and 2006; and (4) FTCA or "Federal Tort Claims Act" w/p "discretionary function" and motion w/s dismiss captured 903 cases between 1946 and 2006.

The first step in this process involved reading the case. Some cases are between one and two pages in length and required less than 3 minutes to read. Other cases were not nearly as easy to code. One opinion, *Allen v. United States* (1984), is 489 pages long and took much longer to read than the average case. After reading each case, I recorded the case citation, the year the case was decided, the jurisdiction of the case, and the outcome of the case (whether the motion for summary judgment was granted or denied by the district court judge) in the Microsoft Excel spreadsheet.

Additionally, while reading the cases, I identified and noted whether the deciding judge included dicta in the reported decision. In cases including dicta, regardless of whether the motion was granted or denied, I reviewed the dicta and determined whether it was reflective of Rosenbloom's (1983; 2005) three-part theory of public administration. This portion of the data collection was the most difficult and time consuming. Figure 4.2 outlines the steps in this process. As previously noted, I used a Microsoft Excel spreadsheet to facilitate the coding process delineated in the flowchart, and categorized and organized the data. An example of this procedure is outlined in Table 4.1.

Procedures for Data Analysis

Once the data were collected and recorded in the Excel spreadsheet they were analyzed according to the following process. Based upon the information collected during the coding process (i.e., whether the motion was granted or not, whether dicta were included in the opinion, and what type of dicta was included in the opinion), each case was assigned one of six outcomes. The six potential outcomes are as follows:

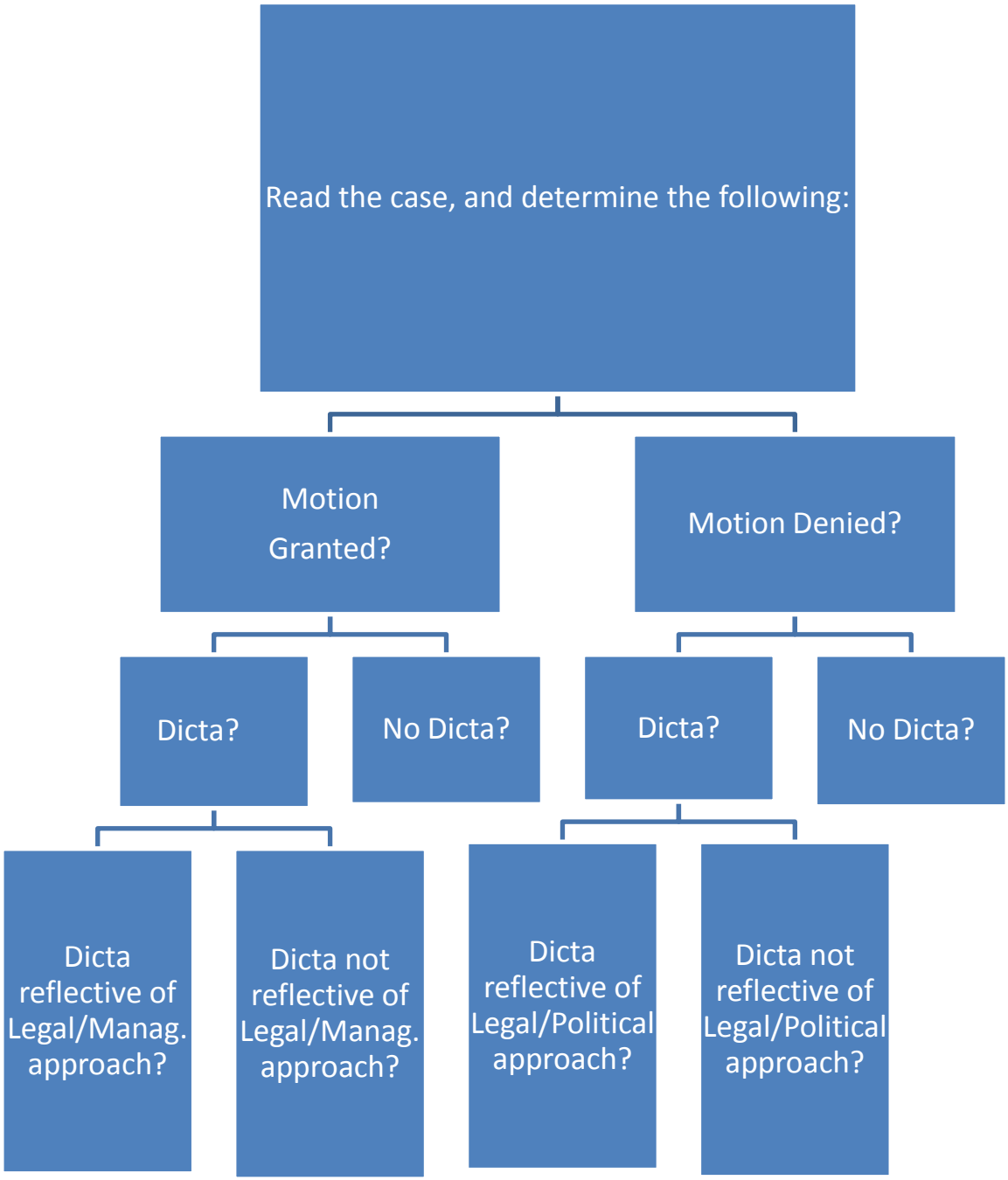

Figure 4.2: Data Collection Process

Table 4.1: Example of Coding Process

A	B	C	D	E	F	G
Citation	Year	Motion: Granted(1) or Denied(0)	If C=1, dicta(1) or no dicta(0)	If C=0, dicta(1) or no dicta(0)	If C=1 & D=1, what kind of dicta?: Jud/Exec(1) or other(0)	If C=0 & E=1, what kind of dicta?: Jud/Leg(1) or other(0)
120 F.Supp. 493	1954	0		1		1
138 F.Supp. 792	1954	1	1		0	

1. **Outcome A:** The court grants the government's motion to dismiss without including dicta in the decision (in spreadsheet, C=1, D=0);
2. **Outcome B:** The court denies the government's motion to dismiss without including dicta in the decision (in spreadsheet, C=0, E=0);
3. **Outcome C:** The court grants the government's motion to dismiss with a written opinion that includes dicta indicating that, although the DFE applies and the petitioner's claim is statutorily precluded from progressing further through the judicial system, this particular case – from a fairness or equity standpoint – is deserving of financial redress (in spreadsheet, C=1, D=1 and F=1);
4. **Outcome D:** This outcome is included when the court grants the government's motion to dismiss with a written opinion that includes dicta

indicating something other than the type of dicta identified in Outcome C (in spreadsheet, C=1, D=1 and F=0);

5. **Outcome E:** The court denies the government's motion to dismiss with a written opinion that includes dicta indicating the judge hearing the case personally believes that the government is using the DFE in this case to avoid accountability or transparency (in spreadsheet, C=0, E=1 and G=1);
6. **Outcome F:** This outcome is included when the court denies the government's motion to dismiss with a written opinion that includes dicta indicating something other than thy type of dicta identified in Outcome E (in spreadsheet, C=0, E=1 and G=0).

As part of the analysis of these data, each of the aforementioned possible outcomes will be related to Rosenbloom's three-part theoretical framework. The following subsections describe the relationship between the data and Rosenbloom's theoretical framework. For a detailed description of Rosenbloom's (1983; 2005) theory, see Chapter 3: Literature Review.

Outcome A or "Managerial Only"

Outcome A is reflective only of Rosenbloom's managerial perspective which values economy and efficiency. When a court grants a government's motion to dismiss an FTCA claim for lack of jurisdiction, the court allows government to operate more economically by saving the government the time and expense of defending itself further against the plaintiff's lawsuit. Furthermore, the court's ruling eliminates the possible

financial burden of an adverse verdict at trial. Outcome A cases allow government to operate more efficiently by allowing the government to direct its resources away from litigation expenses and towards some other government operation.

Outcome B or "Political Only"

Outcome B is reflective only of Rosenbloom's (1983; 2005) political approach which values accountability and transparency. When a court denies a motion to dismiss an FTCA claim for lack of jurisdiction, the court's ruling allows the case to proceed to the trial stage. While a trial may or may not eventually occur, denying the government's motion eliminates a procedural step the government can use to avoid the financial risk of going to trial and the possibility of accountability in the form of an adverse judgment. Furthermore, as the case proceeds to the trial stage, plaintiffs enjoy a continued right to discovery[54] from the government. Because some of the information revealed in discovery may not have been made available to a plaintiff but for the FTCA lawsuit, Outcome B cases foster transparency in government activities.

Outcome C or "Legal/Managerial"

Outcome C is reflective of both Rosenbloom's (1983; 2005) legal and managerial approaches. Rosenbloom's legal approach embodies values such as fairness and equity.

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[54] Discovery refers to the pretrial process of exchange facts and information between parties ("discovery," 1991). For a more complete discussion of the relationship between the discovery process and Rosenbloom's (1983; 2005) political approach, see Chapter 3: Literature Review.

This outcome applies to cases where a court grants a government's motion to dismiss, but includes dicta in the opinion indicating that although the lawsuit is legally barred by the DFE, the plaintiff's injuries are significant and deserving of restitution or compensation. Although Outcome C cases allow government to continue operating efficiently and economically in the short run, the dicta in these opinions could embolden a petitioner to seek some alternative source of relief – for instance, through an appeal to a higher court or through a private bill (like the petitioners in the *Allen v. United States*, 1984).

Outcome D – None

Outcome D is not reflective of Rosenbloom's theoretical framework. This outcome is included for cases where a motion to dismiss is granted but includes dicta which cannot be categorized under Outcome C.

Outcome E or "Legal/Political"

Outcome E is reflective of both Rosenbloom's legal and political approaches. As noted in Subsection C, Rosenbloom's (1983; 2005) legal approach includes the values of fairness and equity. This outcome applies to cases where a judge denies a government motion to dismiss an FTCA case under the DFE, allowing the case to proceed to the trial stage, and includes dicta indicating that the government's use of the DFE in a particular case appears to be an effort to avoid accountability or transparency. These cases are important because, in addition to encouraging the plaintiff in the case to continue their efforts to hold the government accountable for its conduct, an Outcome E case could

motivate the government to extend a more favorable settlement offer to resolve the case prior to a bench trial.

Outcome F – None

Outcome F is not reflective of Rosenbloom's theoretical framework. This outcome is included for cases where a motion to dismiss is denied but includes dicta which cannot be categorized under Outcome E.[55]

Limitations

Connection Between Nonreactive Data and Theory

It is important to note that a researcher's ability to make theoretical inferences based on nonreactive data is limited. It is difficult for researchers to use unobtrusive measures to eliminate alternative explanations when identifying data's connection to theory because subjects in these types of studies are not directly questioned about theory. (Neuman, 2006). For example, none of the judicial opinions collected and analyzed in this dissertation make any mention of Rosenbloom or his three-part theoretical framework (1983; 2005).

However, given the unique institutional nature of the federal district courts, this type of analysis is likely the best way for us to view district court outcomes through the lens of Rosenbloom's theory (1983; 2005). Specifically, in addition to the fact that

[55] Given all of the negative commentary on the DFE, as reflected in Chapter 3: Literature Review, it is not likely that many observations will be coded as Outcome F.

judges rarely speak on work-related issues in a public (or unofficial) setting, the institutional rules of the judiciary dictate that judges may only hear cases brought to their courtrooms by actual litigants. This requirement, found in Article III of the United States Constitution,[56] is referred to in the public law community as "standing" and prohibits judges from issuing advisory opinions or hearing cases that don't involve an actual case or controversy, such as controversies which are moot or unripe.[57] In other words, judges cannot speak in an official capacity to an issue unless it has been brought to their courtrooms by either citizen or government litigants. Judges, thus, are in a very different situation than members of the executive or legislative branch who enjoy much broader authority and opportunity to speak publicly (or officially) about public issues.

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[56] Article III, section II, clause I reads, in full, as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects (U.S. Constitution).

[57] *Muskrat v. United States* (1911), one of the more famous cases establishing the parameters of the case and controversy requirement, involved a statute passed by Congress authorizing challenges in federal court to the allocation of tribal lands provided that both counsel (plaintiff and defendant) were paid by the United States Treasury. Because the United States was both a defendant and a party paying for the plaintiff's litigation, the Court held there was no real controversy between the parties, but rather an effort to obtain an advisory opinion from the Court.

Reported Decisions v. Unreported Decisions

The data for this dissertation only come from decisions reported by LexisNexis. Once litigation is commenced through a civil complaint or a criminal information (or indictment), courts generate an assortment of official work product (i.e, orders, memorandum, judgment, opinions). Only a portion of the work product generated by judges is reported by LexisNexis or Westlaw (Reynolds & Richman, 1981) and most public law research is confined to reported opinions (Heise, 2002). The number of unreported DFE cases involving summary judgment motions at the district court level is unknown. However, at least one researcher notes that unreported summary judgment decisions have contributed to confusion on the part of those studying the circuit courts of appeal (Burbank, 2004b).[58]

Reported cases are popular with public law researchers because of their accessibility through legal search engines such as LexisNexis and Westlaw. Unreported judicial work product, on the other hand, cannot be remotely accessed. Some public law scholars discount studies involving only reported decisions as distorted and unreliable (Burbank, 1989, 2004b; Burbank & Plager, 1993; Eisenberg & Schwab, 1989). Because of the inaccessibility of the data (the only way to systematically collect unreported

[58] In support of this observation, Burbank cites an opinion of the Second Circuit Court of Appeals: "The widespread misperception regarding the disposition of appeals of summary judgment may be due to the fact that reversals are much more likely to be reported in published opinions than affirmances, which frequently are disposed of by unpublished orders" (*Knight v. U.S. Fire Ins. Co.* 1986, p.12).

decisions would be to obtain the orders directly from a judge's files), studies using unreported decisions on a multiregional or national level are a practical impossibility.

Despite criticism from some scholars, studies involving only reported decisions are valuable to both the academic and professional communities. First, because practitioners are limited by what they can access through LexisNexis or Westlaw, reported decisions shape future litigants' expectations and predictions about what might happen to their case once they file it in court. Furthermore, reviewing reported decisions can influence a litigant's decision whether or not to initiate a potential legal claim (Heise, 2002). Litigants, however, are not the only individuals who make decisions based on information from reported decisions. Judges also utilize reported decisions (typically obtained from LexisNexis or Westlaw) when they consider the merit of cases brought to their courts and cite to reported decisions in their written orders. Lawyers and judges, in other words, are like public law scholars: Whatever the subject, they all utilize the most accessible information. In sum, while the number of reported decisions may not represent with one hundred percent accuracy the number of total decisions (both reported and unreported) on a particular type of case, studying reported decisions is still a valuable exercise because of the influence they exert on the legal, judicial, and academic communities.

Measurement Error and the Reporting Practices of LexisNexis

Measurement error, sometimes called observational error, is the difference between observed values of a variable and that variable's true value (Everitt, 1998). This

type of inaccuracy can be caused by defects in a measuring instrument itself or by mistakes made by those using the measuring instrument (Vogt, 2005). For example, if a team of researchers were studying how far an athlete can run without stopping for water, and the treadmills used in the experiment were not accurately recording the mileage of the experiment participants (or if the researchers were inaccurately recording the mileage calculated by the treadmills), measurement error would occur. Measurement error is inevitable in every experiment because absolute precision is impossible for a researcher to achieve (Vogt, 2005).

Manheim and Rich (1986) use the example of a mirror to explain how the concept of measurement error affects research specifically in the social sciences. Viewing a reflection of an object in a mirror is different than viewing an object with an unaided eye because mirrors can mask differences we would perceive with the naked eye and can create an impression of differences we would not otherwise see. Manheim and Rich (1986) explain that "[i]n the social sciences, we can rarely see our key concepts directly and must rely on measurement procedures analogous to the mirror to reflect these concepts in any given case. Consequently, the accuracy of our impressions of the world depends on the precision with which our measures reflect reality" (p. 55).

Using LexisNexis as a "mirror" for viewing federal district court cases raises an interesting issue of measurement error for this dissertation. Specifically, the accuracy of the data collected for this dissertation depends on the internal reporting practices of LexisNexis. This question is especially important because the judicial decisions collected

for this dissertation were issued over a 50-year time period, a large portion of which occurred prior to the incorporation of LexisNexis (in 1973).

Unfortunately, very little is known about LexisNexis' reporting practices over time. There is no academic literature detailing the reporting practices of LexisNexis, and Suzane Darais, Head of Information Technology at the University of Utah's Quinney Law Library, has never seen any information, from either academia or the private sector, about why LexisNexis reports the cases it does (personal communication, May 27, 2008). In an email message, Kenneth Hoover, Sr. Director of Citators and Official Reports with LexisNexis, told me that although LexisNexis was not incorporated until 1973, LexisNexis has every federal district court opinion available online that has ever been published in print. He also indicated that while LexisNexis does not have every opinion ever issued, they have a "significantly larger collection of federal district court opinions" than Westlaw (personal communication, May 28, 2008, n.p.). When asked about whether reporting practices at LexisNexis had changed over time, another LexisNexis employee, Michael Morton, indicated that any change in the number of reported cases can be attributed directly to changes in the number of decisions arising from the district courts themselves, and not because of any internal shift in reporting practices by LexisNexis (personal communication, May 28, 2008).

Given this limited information, it is clear that LexisNexis is not an absolutely precise measuring instrument. At the very least, however, LexisNexis is likely the most accurate of the imprecise instruments available to measure federal district court cases (LexisNexis, Westlaw, Findlaw, etc.). Moreover, as noted in the previous subsection,

despite the limitations of LexisNexis, its use as a measurement tool is still a valuable exercise given its widespread acceptance in the legal, judicial, and academic communities.

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CHAPTER 5

DATA

Introduction

The following chapter presents and discusses the data collected for this dissertation. Before addressing the research questions individually, however, this chapter provides the reader with an overview of the data set. Subsequent sections of this chapter are divided based on the research questions described in the previous chapter. This chapter concludes with a detailed discussion of findings and conclusions drawn from these data.

Overview of the Data

Collecting and Coding

As described in Chapter 4, the data for this dissertation were collected from the federal district court database of the online legal search engine LexisNexis. Using this database, 985 reported cases decided by federal district court judges between 1946 and 2007 were initially identified as meeting the criteria for this dissertation. Once these cases were identified, they were analyzed and it was determined (1) whether the case was filed under the FTCA and involved the application of the DFE to the facts of the case; and (2) whether the case involved a government's motion to dismiss the plaintiff's claim

for lack of subject matter jurisdiction pursuant to the DFE. When a case met these two criteria, it was coded according to the research design outlined in Chapter 4. For convenience, these cases will be referred to in this chapter by the acronym "RDCDFEMSJ" Cases (reported federal district court DFE cases where a motion for summary judgment is decided). Cases which did not meet these two criteria were not coded and are not included in the data presented in this chapter.

Separating Applicable Cases from Nonapplicable Cases

Once reviewed and analyzed, approximately 77% of the 985 cases initially identified through LexisNexus were identified as RDCDFEMSJ Cases (see Table 5.1). Most of the non-RDCDFEMSJ Cases were cases involving a statutory cause of action other than the FTCA which were captured by LexisNexus because the opinion referenced the DFE, but did not directly involve the DFE. For example, many cases filed by plaintiffs under the Suits in Admiralty Act (SIAA) included citations to the DFE in the written opinion. Another example of non-FDCDFEMSJ Case was a case which did directly involve the DFE, but did not involve a motion for summary judgment but rather some other aspect of civil litigation. For example, at least one of these cases was a lawsuit that had proceeded past the summary judgment stage, and involved some sort of a dispute about the discovery process. This case, and others like it, was excluded from the final analysis for this study so as to avoid multiple counting (it was assumed that the case had already been captured for the study during the summary judgment phase of the litigation).

Table 5.1: Number of RDCDFEMSJ Cases as a Percentage of Total Cases (1946 - 2007)

Type of Case	Number	Percentage of Total
RDCDFEMSJ Cases	760	77.2%
non-RDCDFEMSJ Cases	225	22.8%
Total	**985**	**100%**

Geographical Breakdown of the Applicable Cases

Of the 760 RDCDFEMSJ Cases identified through the data collection process of this dissertation, over 200 were decided by federal district courts located within the Second and Ninth Circuit Courts of Appeal. Both of these jurisdictions contain major population centers. New York State is located within the Second Circuit Court of Appeals, and California is located within the Ninth Circuit Court of Appeals (See Figure 4.1). The smallest number of RDCDFEMSJ Cases comes from the Seventh Circuit Court of Appeals, which includes Indiana, Illinois and Wisconsin. Only 38 RDCDFEMSJ Cases were decided by the federal district courts of the Seventh Circuit between 1946 and 2007 (See Figure 5.1).

Distribution of Applicable Cases Over Time

Although Congress passed the FTCA in 1946, the first RDCDFEMSJ was not decided until 1949.[59] Very few RDCDFEMSJ Cases were decided in the decades

[59] In this case, decided by Judge Switzer of the Southern District of Iowa (located in the Eighth Circuit Court of Appeals) the plaintiff argued that the federal government's possession of a privately owned coal mine caused irreparable financial damage to the mine owner. Judge Switzer granted the government's motion to dismiss the plaintiff's claim without including dicta in the decision (*Old King Coal Co. v. United States*, 1949).

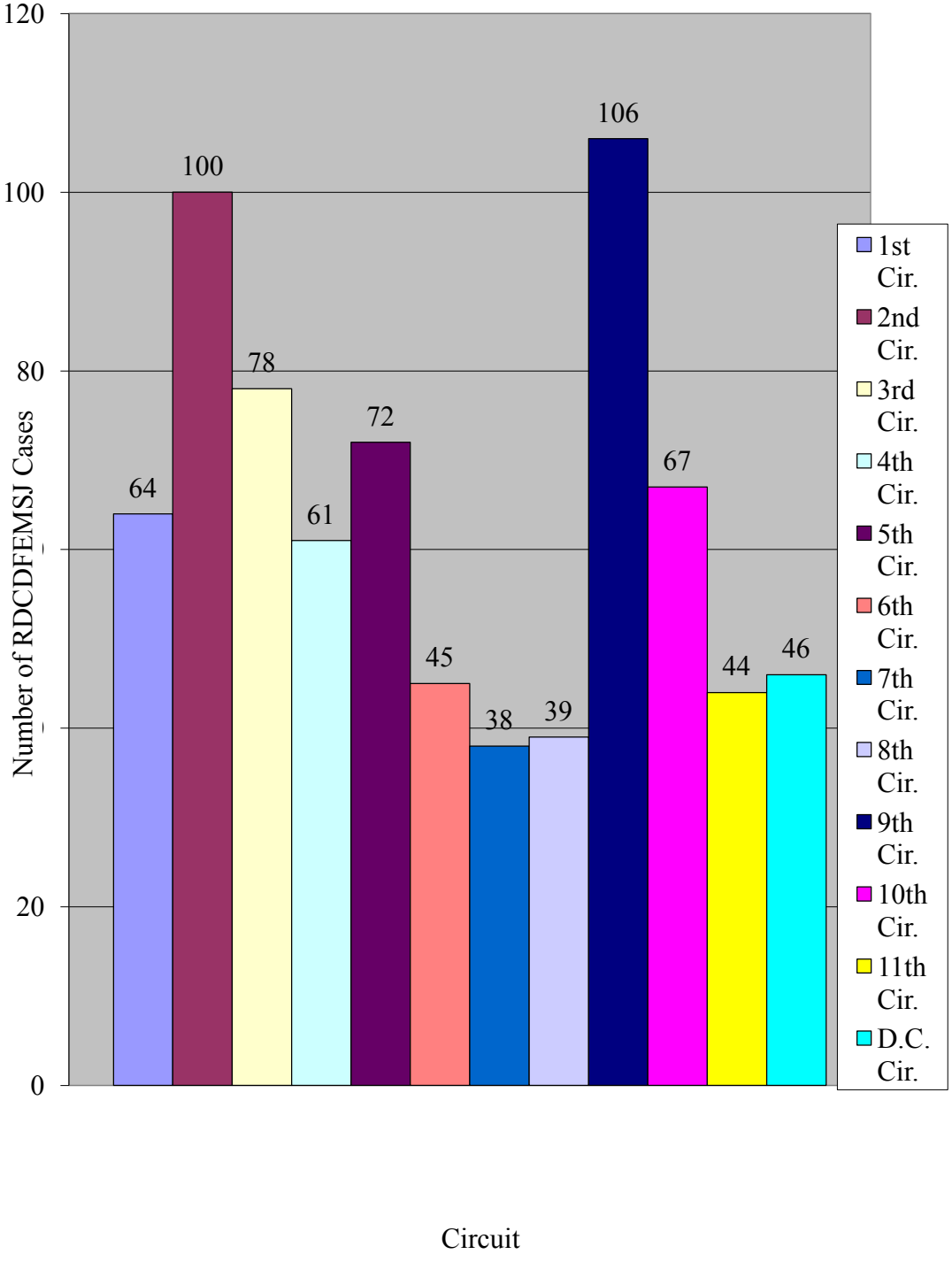

Figure 5.1: Number of RDCDFEMSJ Cases per Circuit (1946-2007)

following this initial case. For example, 1978 was the first year since the FTCA was passed in which at least 10 RDCDFEMSJ Cases were decided in a single year (see Figure 5.2). Beginning in 1983, the number of RDCDFEMSJ Cases decided per year began to steadily increase. Fifty-four RDCDFEMSJ Cases were decided in 2006, the highest number of RDCDFEMSJ Cases decided within a single year (see Figure 5.2).[60]

Applicable Cases by Circuit Over Time

Very few RDCDFEMSJ Cases per year were decided within any circuit between 1946 and 1978. During this time period, the maximum number of cases decided per year in district courts within the First, Fifth, Eighth, and Eleventh Circuits was one (See Figures 5.3, 5.4, 5.5, and 5.6). Within the Second, Third, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits, the maximum number of cases decided per year was two (See Figures 5.7, 5.8, 5.9, 5.10, 5.11, 5.12 and 5.13).

Like the total number of RDCDFEMSJ Cases decided per year across all circuits, the total number of RDCDFEMSJ Cases decided within each individual circuit between 1946 and 1978 is very small, but varies from circuit to circuit. For example, district courts within the Fifth, Seventh, and Eleventh Circuits decided only one RDCDFEMSJ Case (See Figures 5.4, 5.6 and 5.10). However, district courts within the Second, Sixth, Ninth, and Tenth Circuits decided between three and ten cases (See Figures 5.7, 5.9, 5.11, and 5.12). Four cases were decided within the Fourth Circuit (See Figure 5.14).

[60] The number of tort cases generally (not just FTCA cases) increased substantially in 2006. In 2006, 68,804 tort cases were filed in federal district courts, a 24% increase from 2005 (United States Courts, 2006).

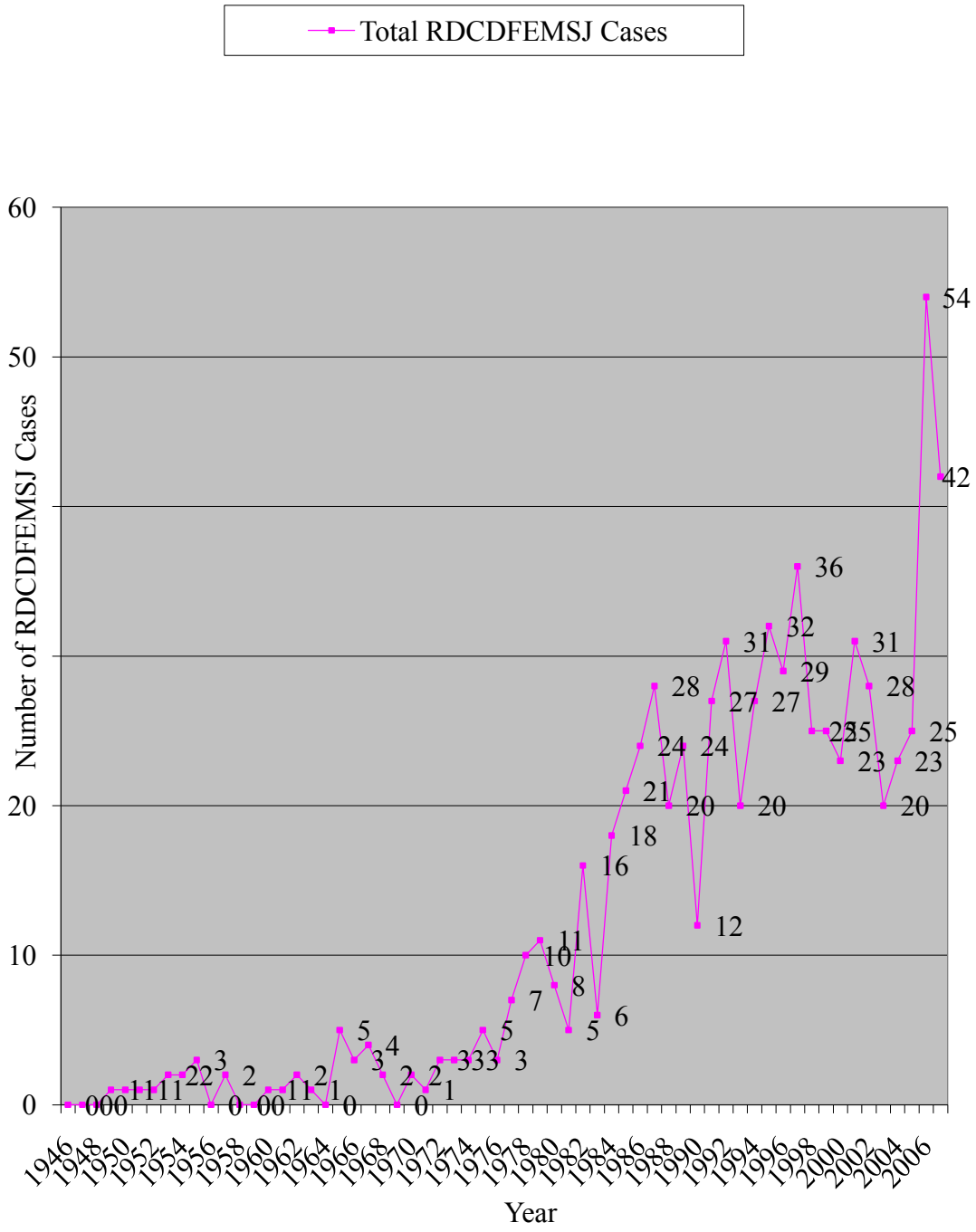

Figure 5.2: Total RDCDFEMSJ Cases per Year (1946-2007)

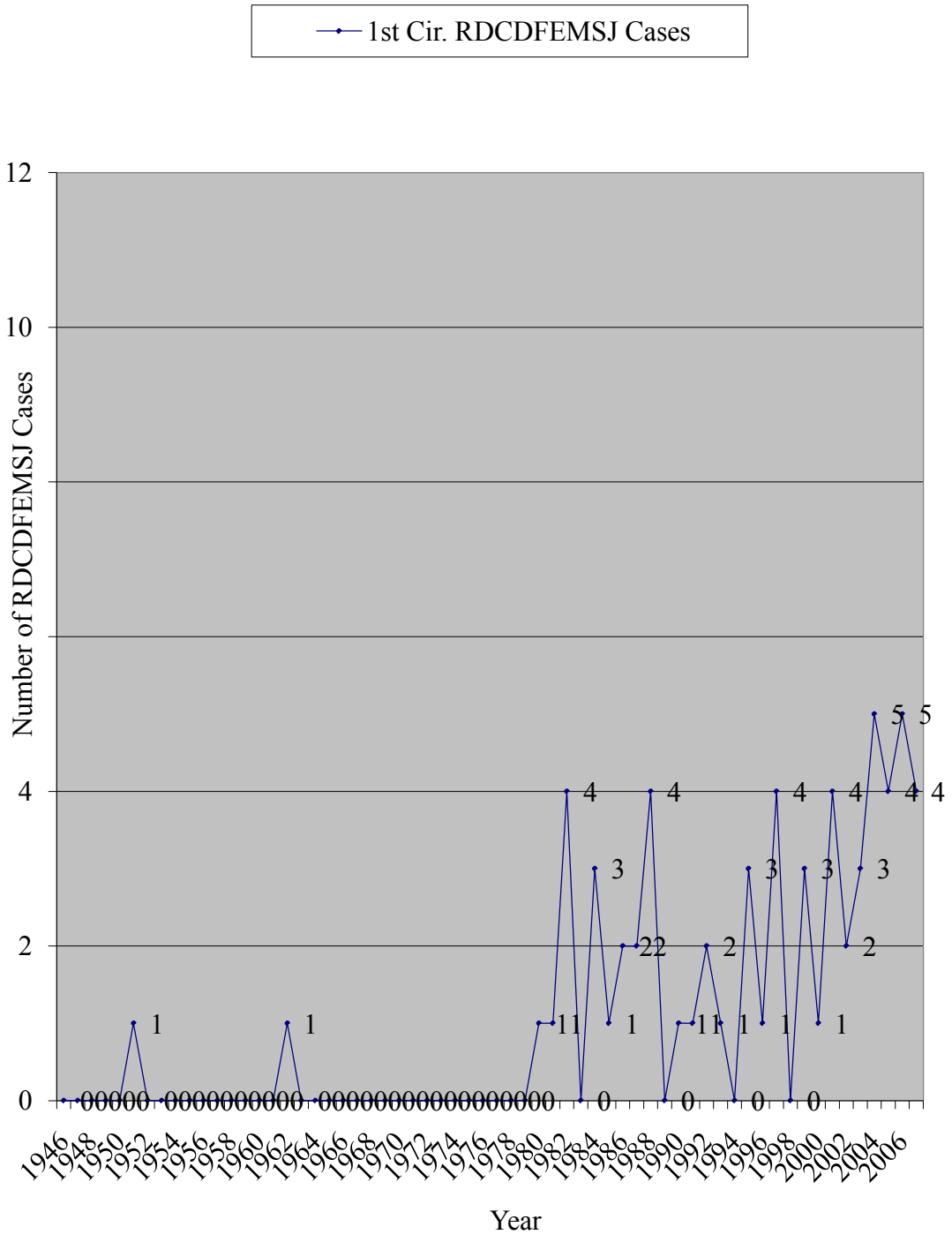

Figure 5.3: 1st Cir. RDCDFEMSJ Cases per Year (1946-2007)

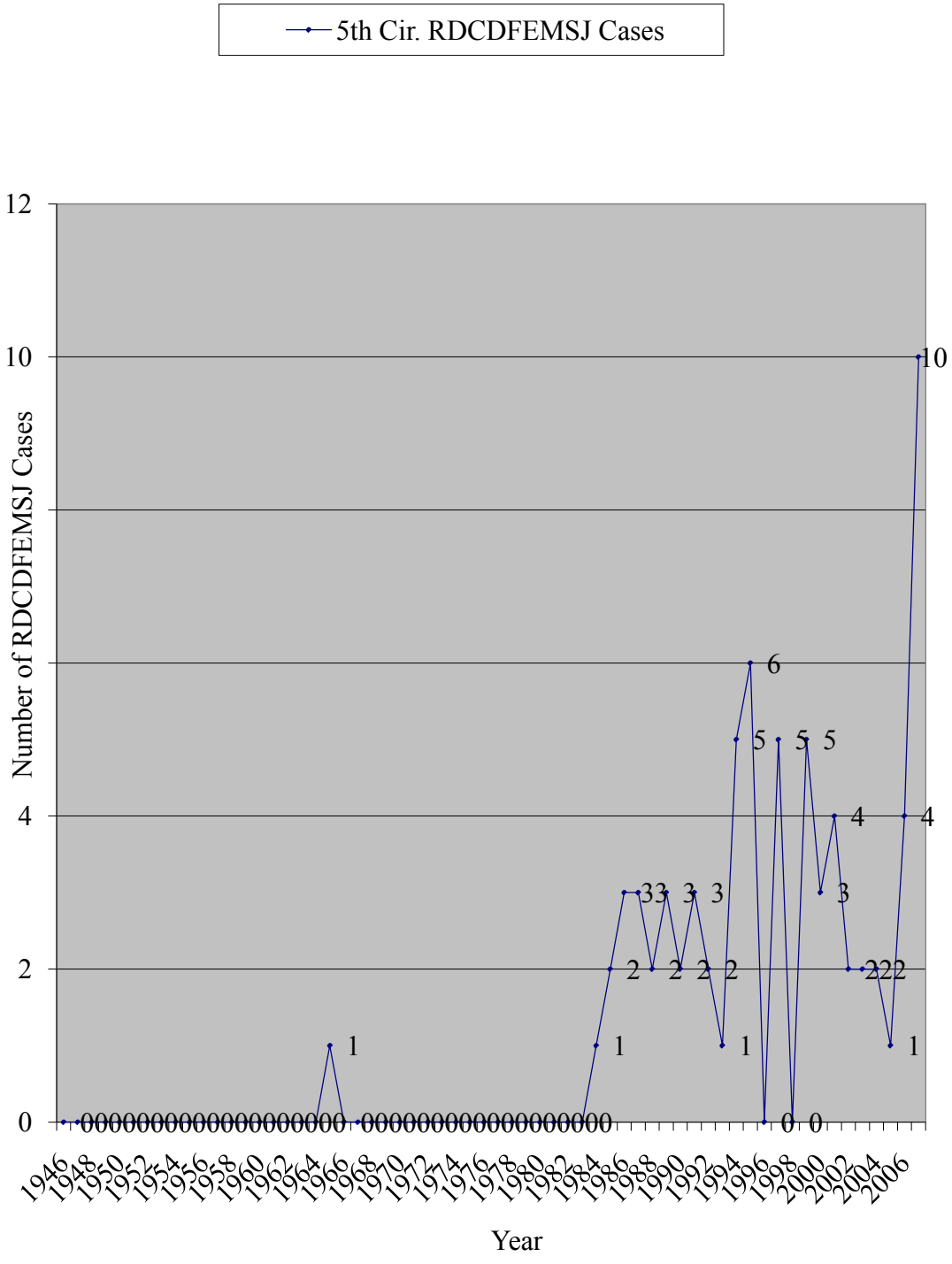

Figure 5.4: 5th Cir. RDCDFEMSJ Cases per Year (1946-2007)

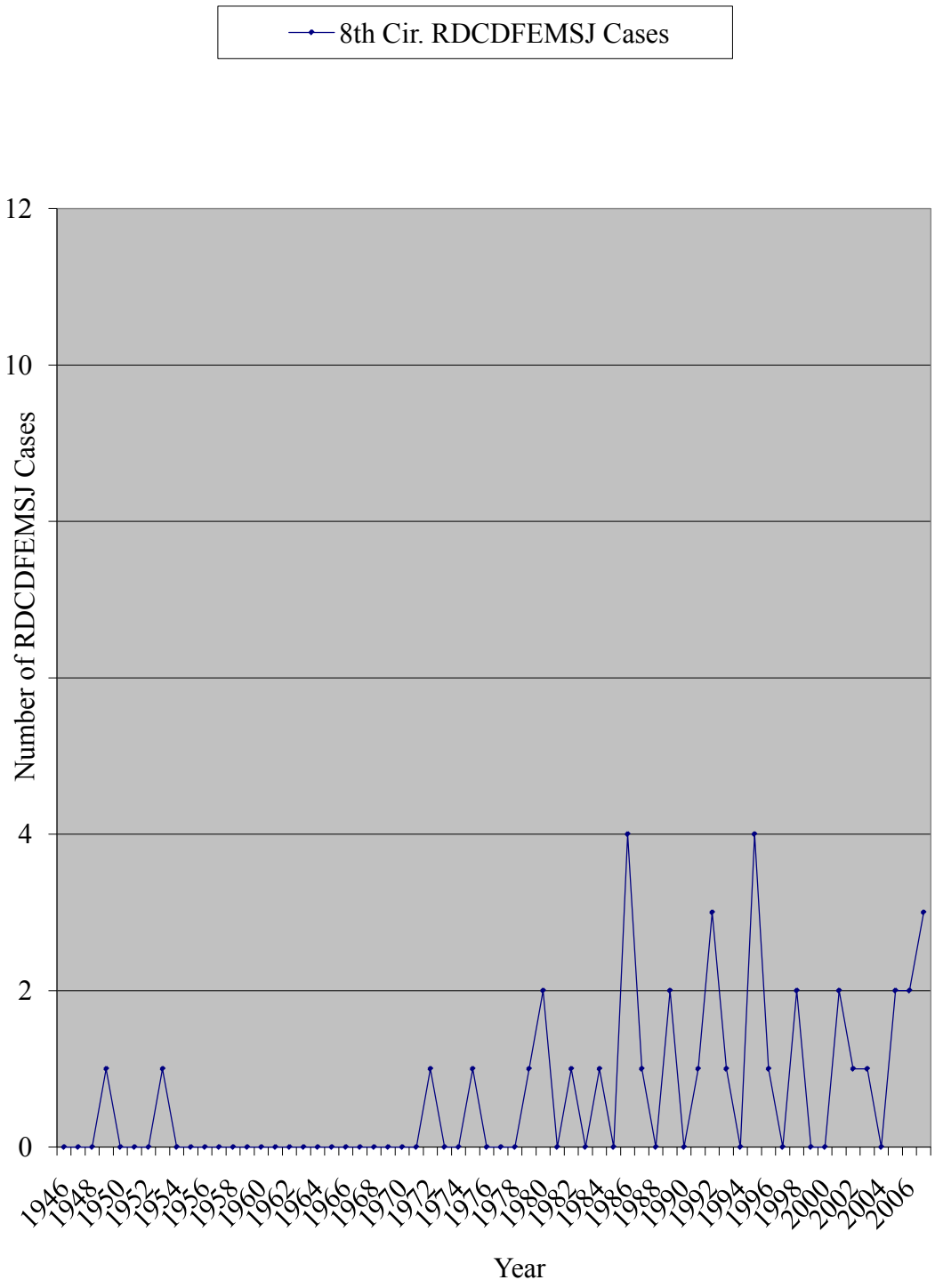

Figure 5.5: 8th Cir. RDCDFEMSJ Cases per Year (1946-2007)

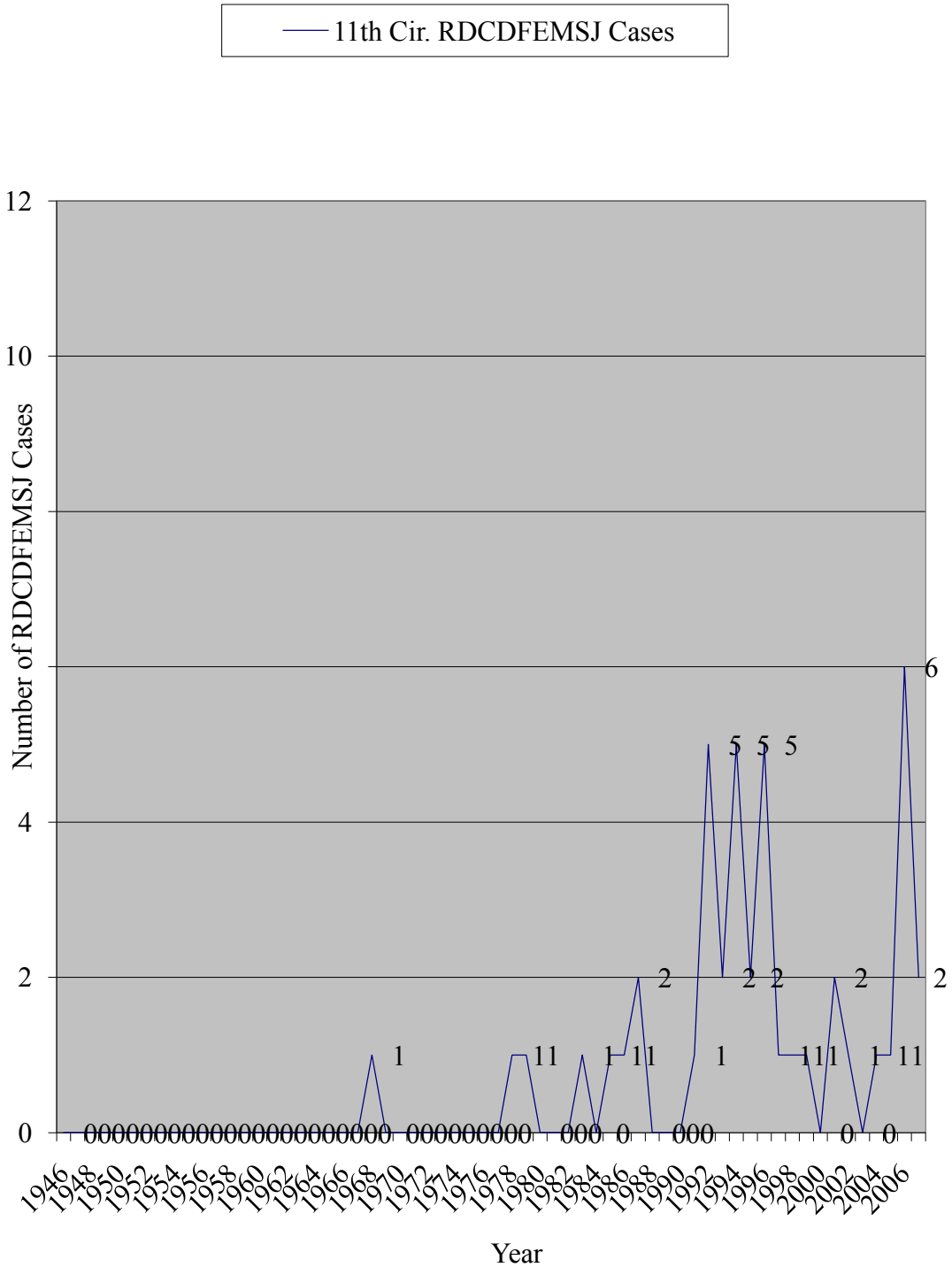

Figure 5.6: 11th. Cir. RDCDFEMSJ Cases per Year (1946-2007)

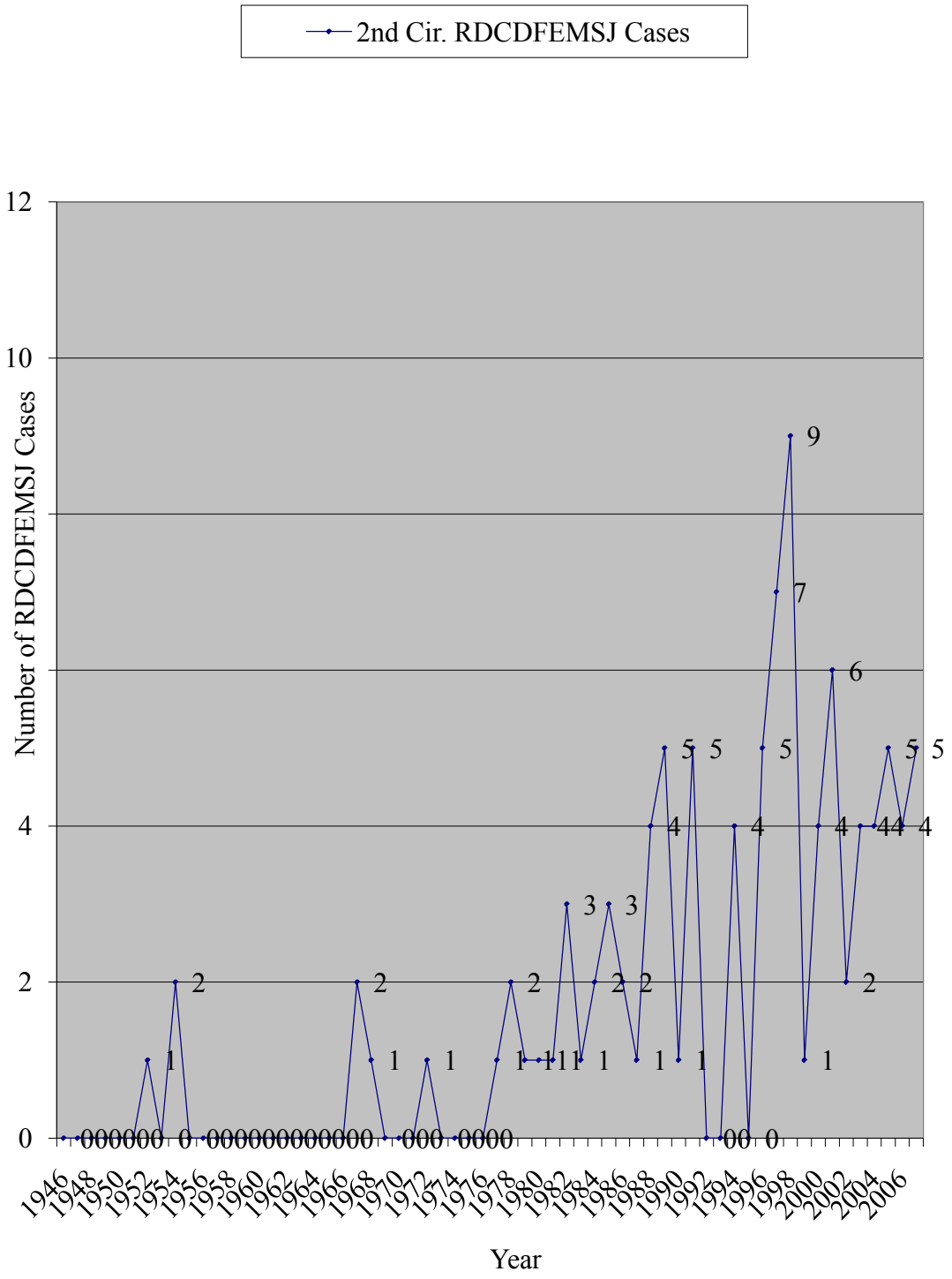

Figure 5.7: 2nd Cir. RDCDFEMSJ Cases per Year (1946-2007)

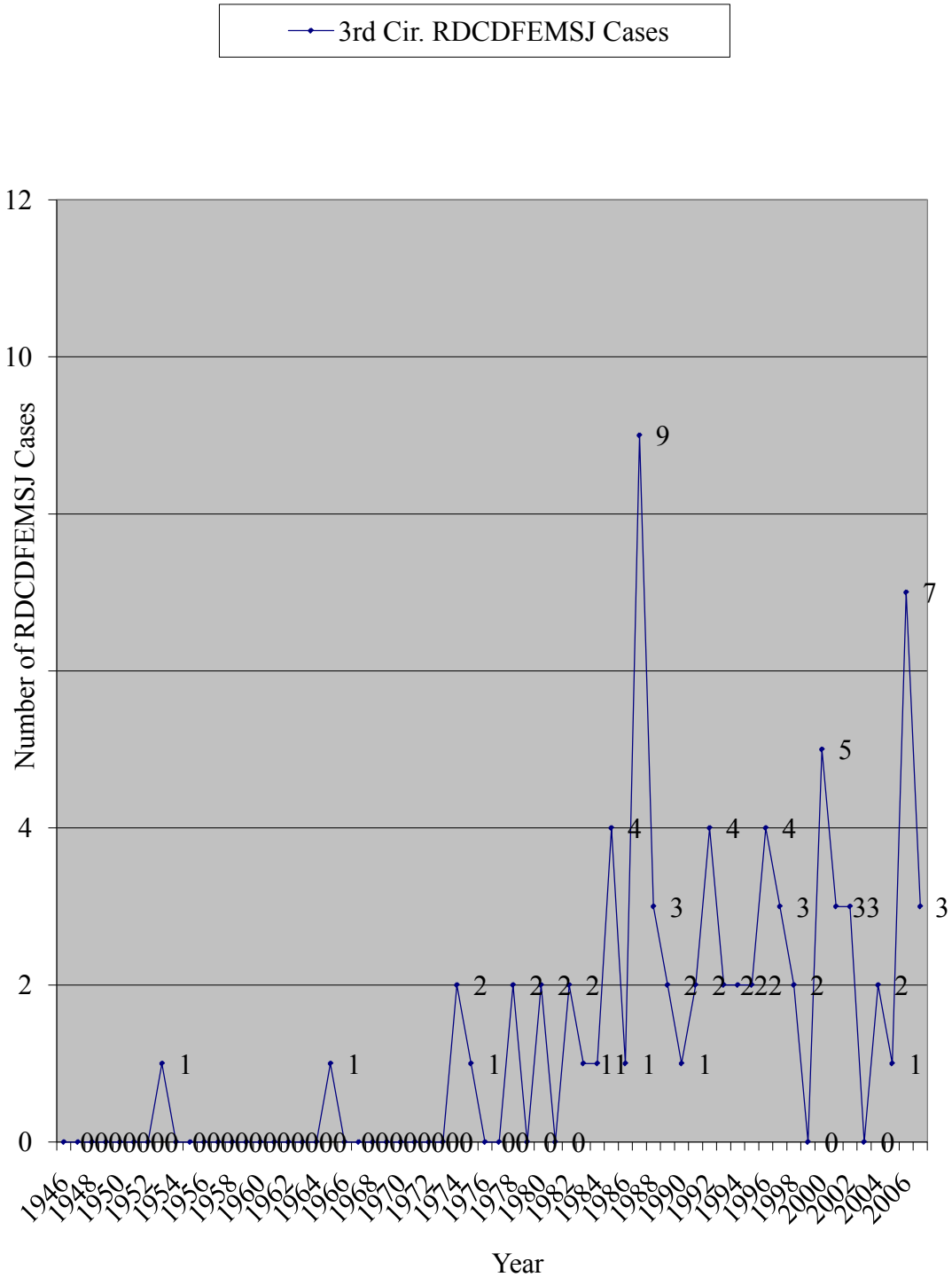

Figure 5.8: 3rd Cir. RDCDFEMSJ Cases per Year (1946-2007)

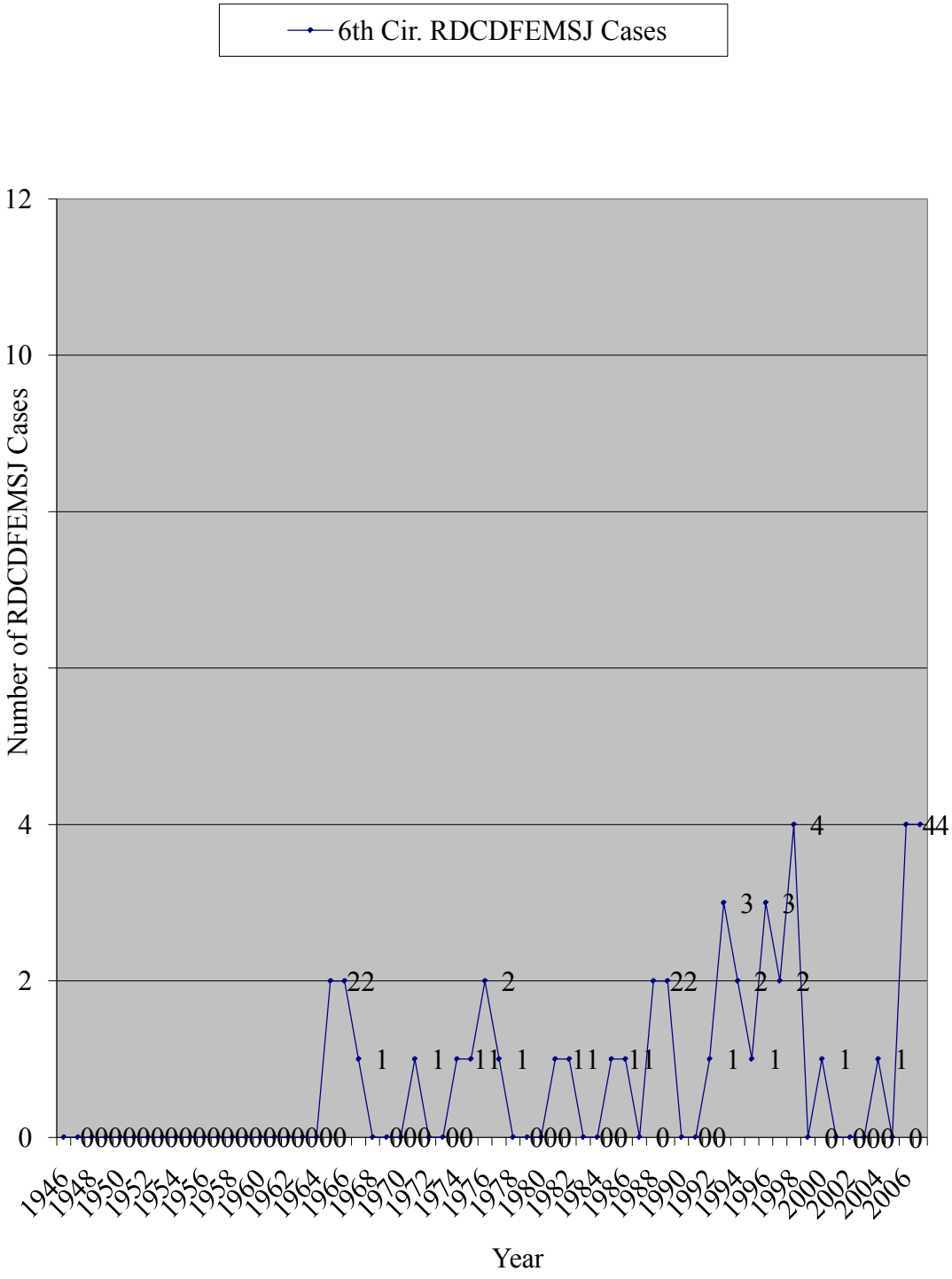

Figure 5.9: 6th Cir. RDCDFEMSJ Cases per Year (1946-2007)

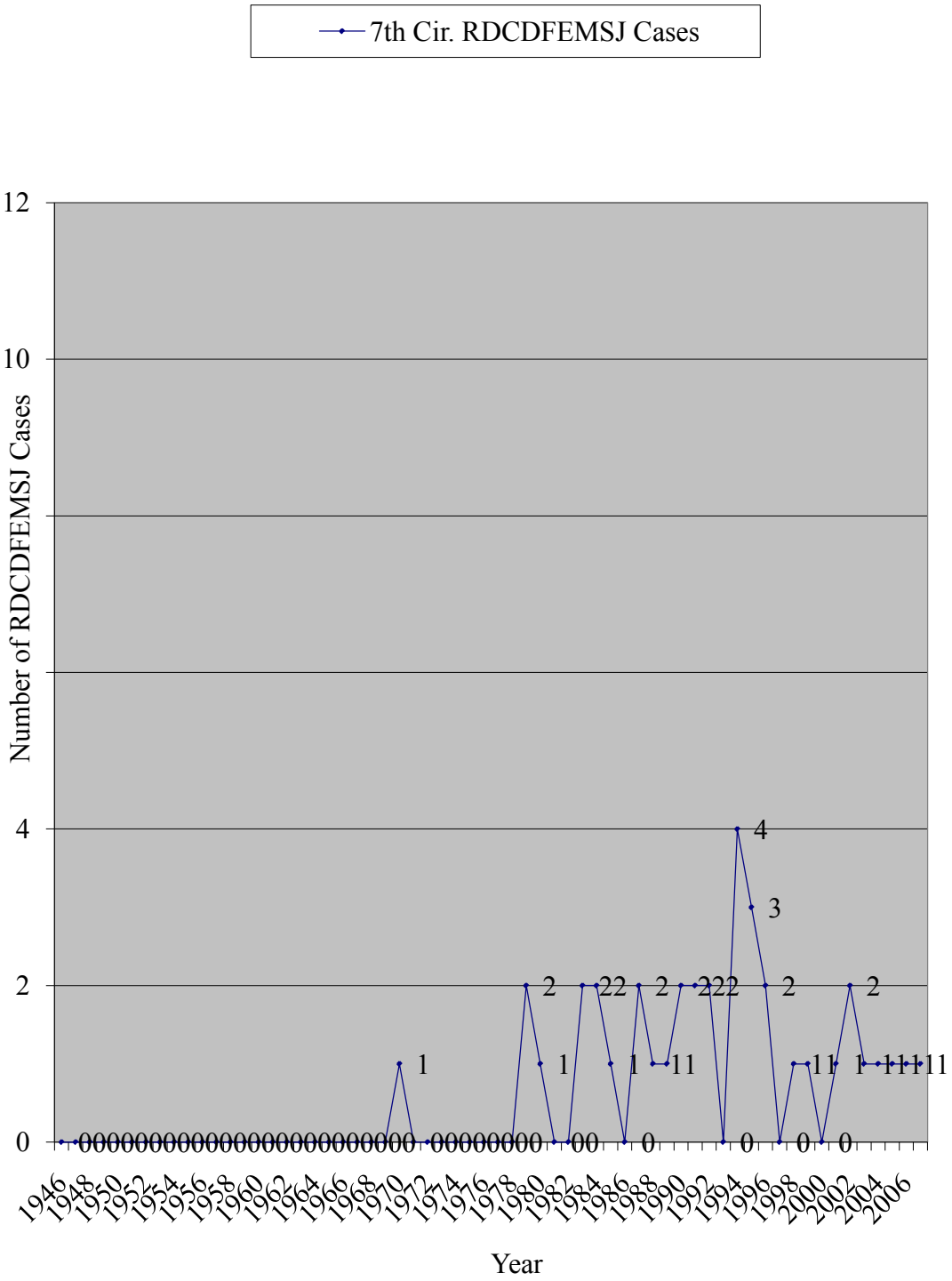

Figure 5.10: 7th Cir. RDCDFEMSJ Cases per Year (1946-2007)

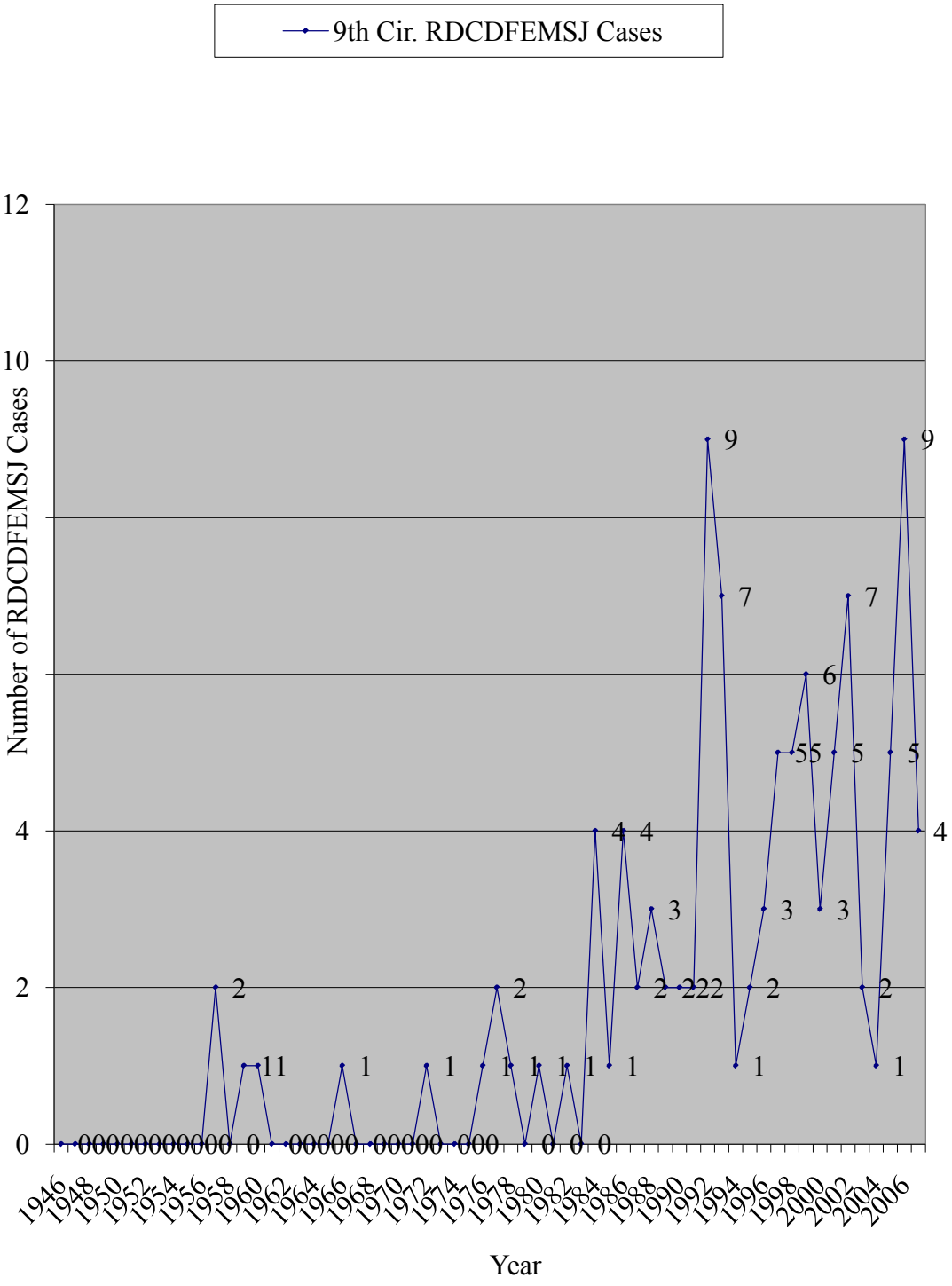

Figure 5.11: 9th Cir. RDCDFEMSJ Cases per Year (1946-2007)

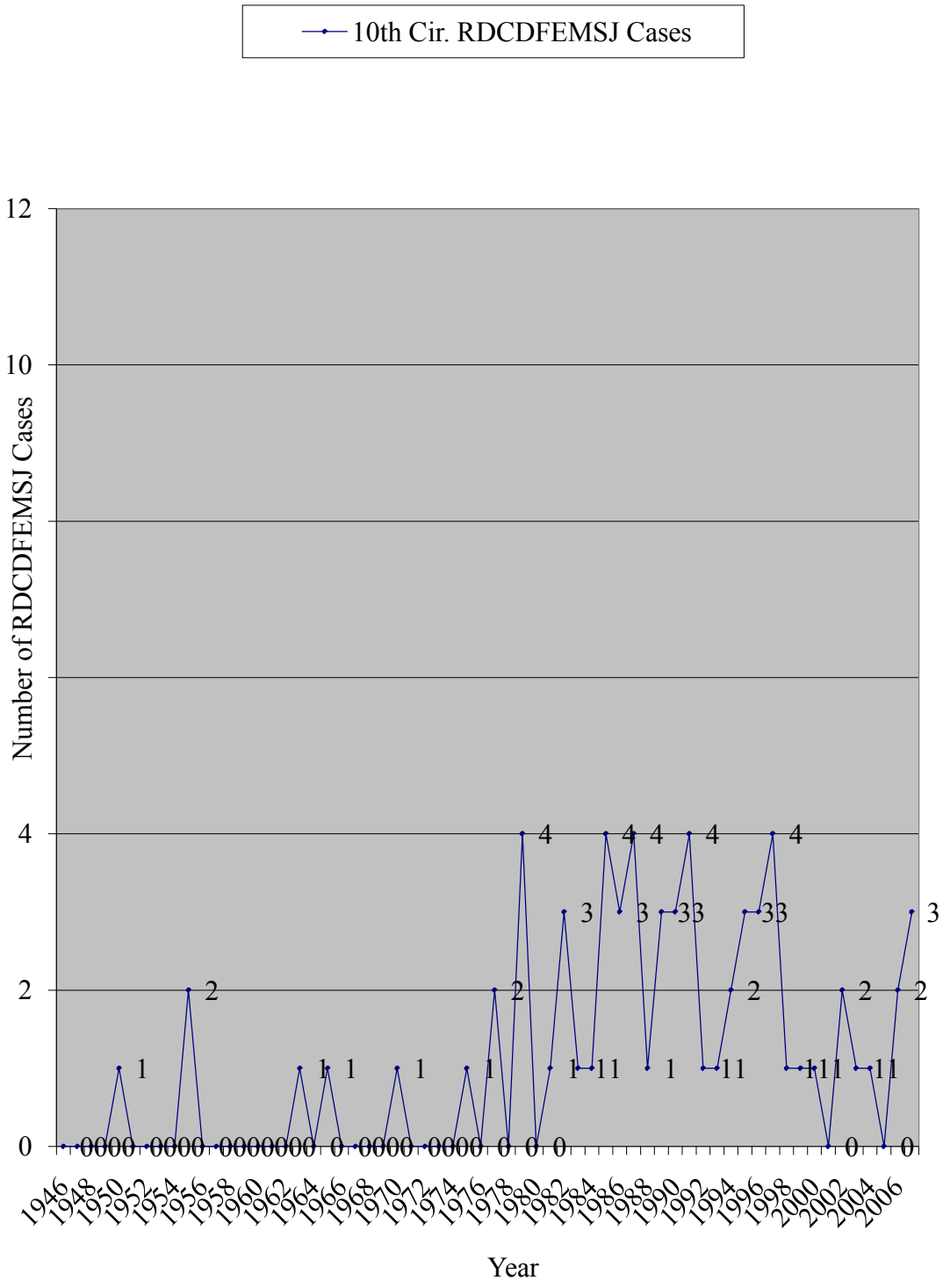

Figure 5.12: 10th Cir. RDCDFEMSJ Cases per Year (1946-2007)

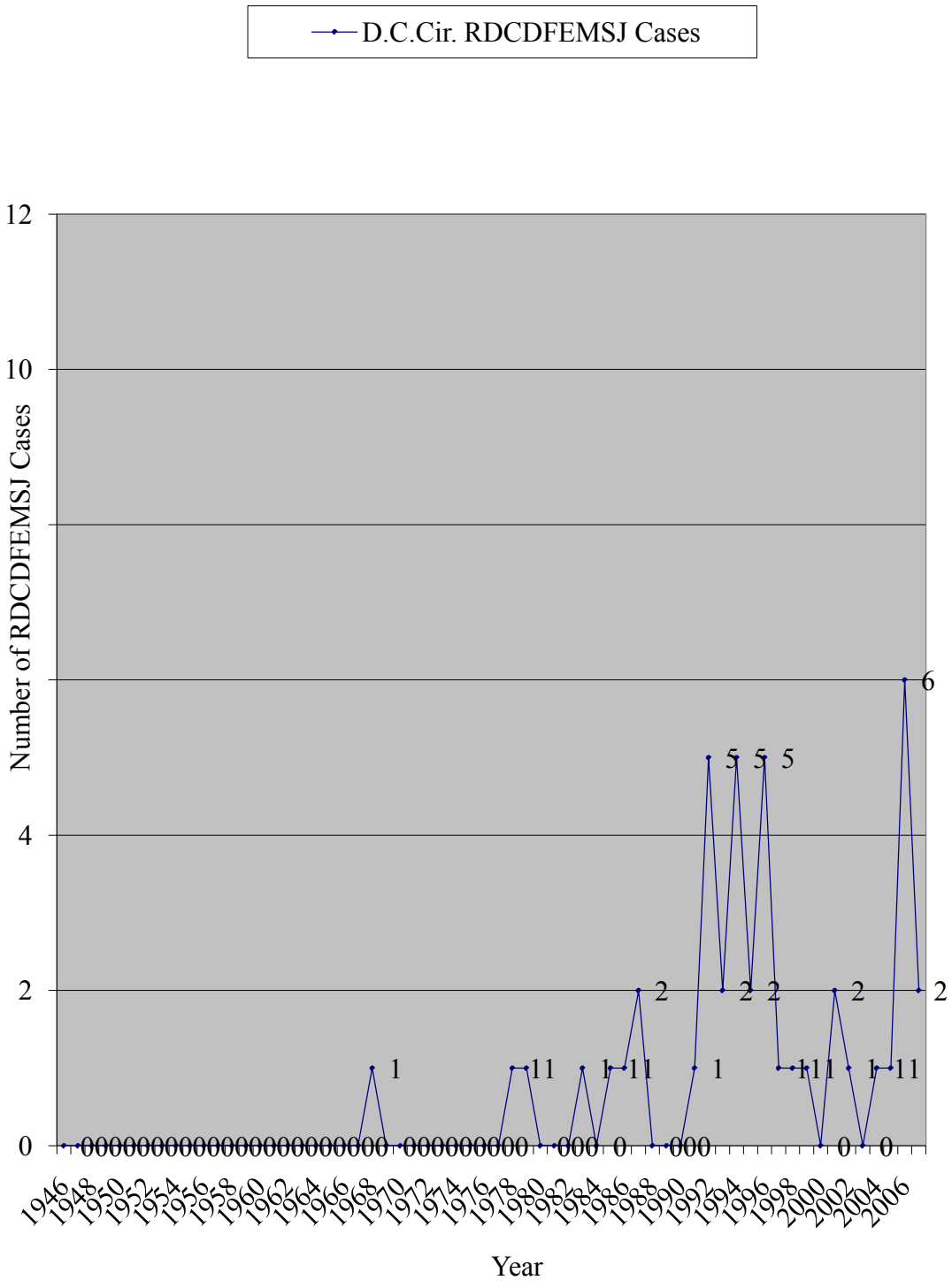

Figure 5.13: D.C. Cir. RDCDFEMSJ Cases per Year (1946-2007)

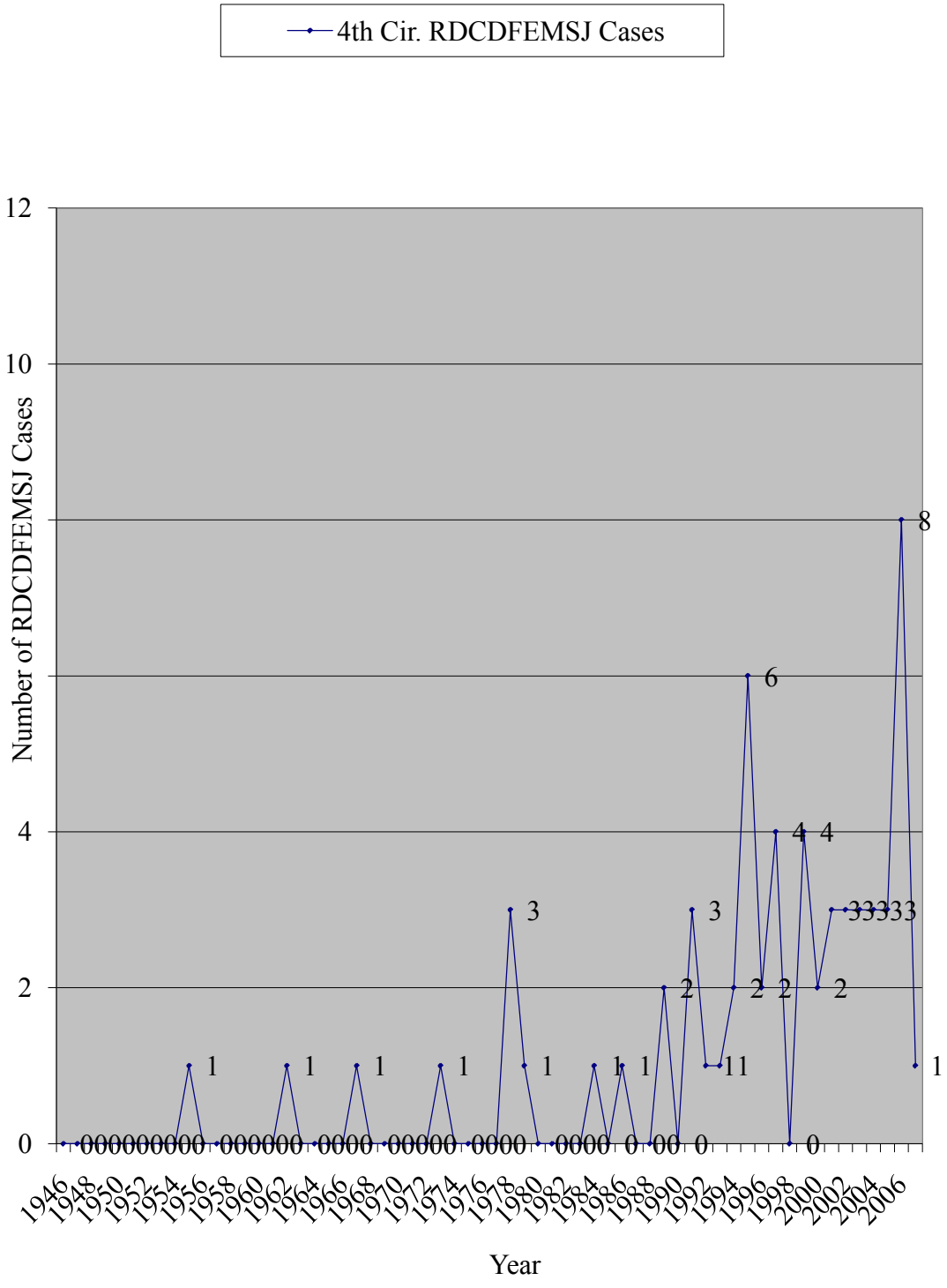

Figure 5.14: 4th Cir. RDCDFEMSJ Cases per Year (1946-2007)

Beginning in 1979, and continuing through 2007, the frequency of RDCDFEMSJ Cases increased within each of the 12 circuits. The number of RDCDFEMSJ Cases decided per year, however, varied among the circuits. In some circuits, this increase was relatively gradual, without any significant spike in the number of decisions from year to year. For example, the number of RDCDFEMSJ Cases decided within the First Circuit Court of Appeals varied between zero and five from 1979 to 2007 (See Figure 5.3). District courts within the Sixth Circuit decided as many as four cases in three different years during this time period, 1998, 2006, and 2007, but also decided one or zero cases in several years during this time period (See Figure 5.9). With the exception of 1994 and 1995, no more than two cases were decided per year within the Seventh Circuit (See Figure 5.10). The number of RDCDFEMSJ Cases decided during this time period varied between zero and four within the Eighth and Tenth Circuits (See Figures 5.5 and 5.12). The greatest number of RDCDFEMSJ Cases decided within the D.C. Circuit during this time period was three (See Figure 5.13).

Within other circuits, differences in the number of RDCDFEMSJ Cases decided per year was considerably more pronounced between 1978 and 2007. For example, in 1998, nine RDCDFEMSJ Cases were decided within the Second Circuit, but only one RDCDFEMSJ Case the following year (See Figure 5.7). The data from the Third Circuit show two great spikes in the number of RDCDFEMSJ Case decisions. Nine cases were decided within the Third Circuit in 1987 and seven cases were decided in 2006. Between 1987 and 2006, the highest number of cases decided per year was five, but district courts

within the Third Circuit did not decide any cases in 2 years during this time period (See Figure 5.8).

The number of RDCDFEMSJ Cases decided within the Fourth Circuit surged to six in 1995 and again to eight in 2006. Before and after these years, however, the number of cases within the Fourth Circuit was significantly lower (See Figure 5.14). The number of RDCDFEMSJ Cases decided within the Fifth Circuit between 1978 and 2004 fluctuated between zero and six. That number increased sharply from one to 10, however, between 2005 and 2007 (See Figure 5.4). As many as nine RDCDFEMSJ Cases were decided within the Ninth Circuit in both 1992 and 2006 (See Figure 5.11), but the number of cases decided within this circuit dropped sharply in subsequent years. District courts within the Eleventh Circuit decided five RDCDFEMSJ Cases in 1992, 1994, and 1996, and decided six cases in 2006, but decided only one or two (or zero) cases in all other years between 1978 and 2007 (See Figure 5.6). These figures show the number of RDCDFEMSJ Cases decided on a year-to-year basis (between 1946 and 2007) in district courts located within all 12 appellate circuits.

Government Success Rate in RDCDFEMSJ Cases

Overall Government Success Rate

The government is successful in a RDCDFEMSJ Case when a federal district court judge grants a motion to dismiss for lack of subject matter jurisdiction. When this happens, the plaintiff's case is dismissed from the court's docket, and the plaintiff must seek some other avenue of relief against the government, such as through a private bill or

an appeal to a higher court (See Chapter 2: History of the FTCA and DFE). Federal district court judges granted government motions to dismiss in 563 of the 760 RDCDFEMSJ Cases identified through LexisNexis between 1946 and 2007. The federal government's success rate during this time period, in other words, was 74.08% (the number of successful cases divided by the total number of cases decided). Conversely, federal district court judges denied government motions to dismiss in 197 of the 760 cases decided between 1946 and 2007. Private litigants, therefore, were successful in opposing these motions in 25.92% of the total number of cases decided during this time period (See Table 5.2).

Government Success Rate Within Each Circuit

The government's success rate in moving to dismiss RDCDFEMSJ Cases varies by jurisdiction. For example, the government's success rate is above 82% when a RDCDFEMSJ Case is decided by a district court within the Fourth, Sixth, Eighth, Tenth, or Eleventh Circuit Court of Appeals. However, the government's success rate is below 71% if a RDCDFEMSJ Case is decided by a district court within the First, Second, Third,

Table 5.2: Government Success Rate in RDCDFEMSJ Cases (1946-2007)

	Number of Cases	**Percentage of Total**
Government's Motion for Summary Judgment Granted	563	74.08%
Government's Motion for Summary Judgment Denied	197	25.92%
Total Cases	760	100.00%

Seventh, or Ninth Circuits. The circuit within which the government is most likely to be successful in moving to dismiss a RDCDFEMSJ Case is the Fourth Circuit, where the government succeeded in 91.8% of cases during the time period the data for this dissertation were collected. The circuit within which the government is least likely to succeed is the First Circuit, where the government was successful in moving to dismiss only 57.8% of cases during the time period the data for this dissertation were collected (See Figure 5.15).

Government Success Rate Over Time

Overall Success Rate Over Time

The government's success rate in moving to dismiss RDCDFEMSJ Cases from 1946 to 1992 is extremely erratic. In several years during this time period (1949, 1950, 1952, 1961, 1963, 1966, 1967, 1970, 1971, 1972, and 1985), the government successfully moved to dismiss all or nearly all of the RDCDFEMSJ Cases decided. However, in other years during this same time period (1953, 1954, 1960, 1962, 1968, 1984, and 1990), the government's success rate was at or below 50% (See Figure 5.16). Beginning in 1992, the government's success rate became much more consistent. From 1992 to 2001, the government's success rate was between 81% and 72%. In 2002, the government's success rate dropped to 68% and dropped again to 65% in 2003. Since 2002, the government's success rate increased every year until 2007, the final year of data collected for this dissertation (See Figure 5.16).

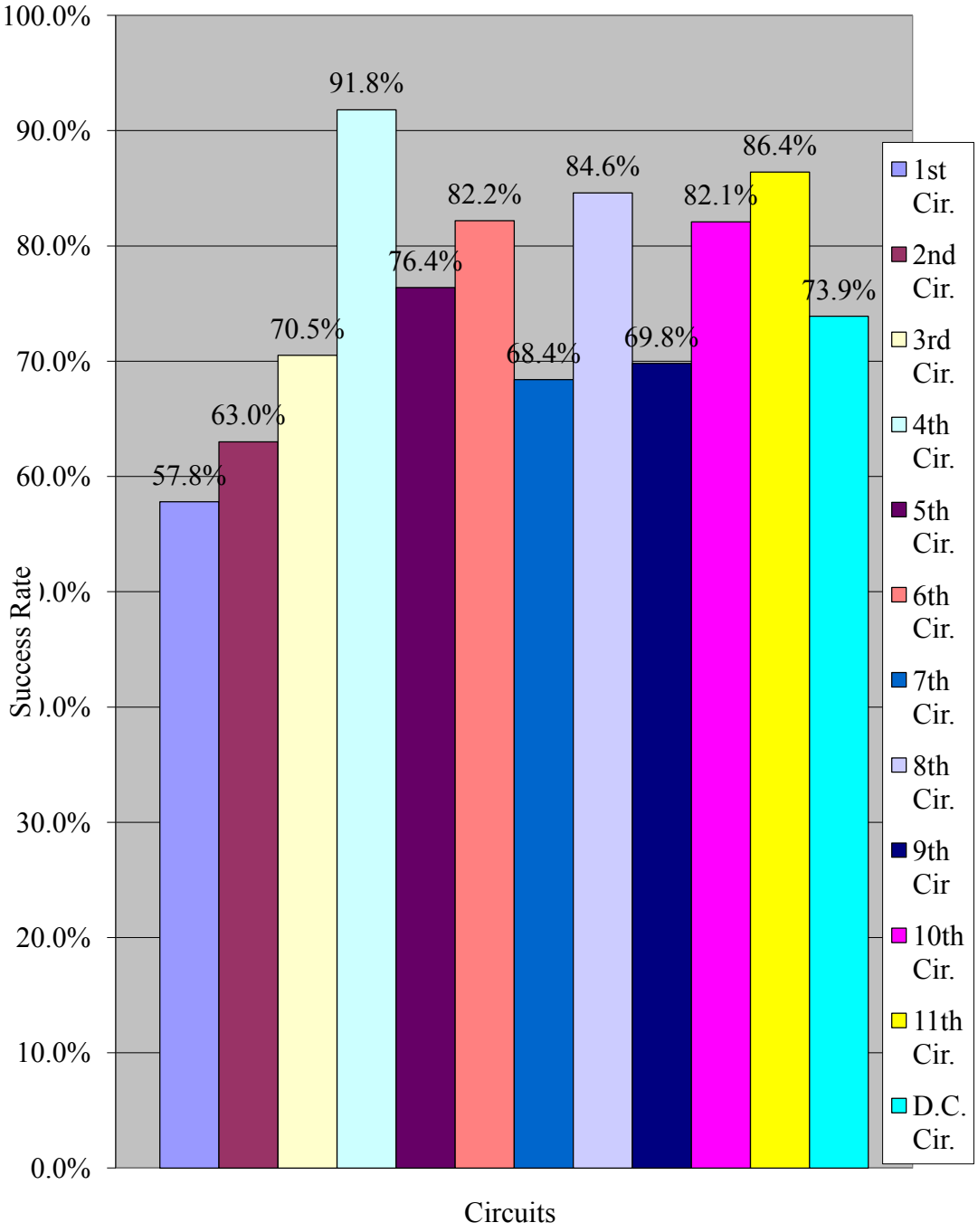

Figure 5.15: Government Success Rate in RDCDFEMSJ

Cases per Year (1946-2007) by Circuit

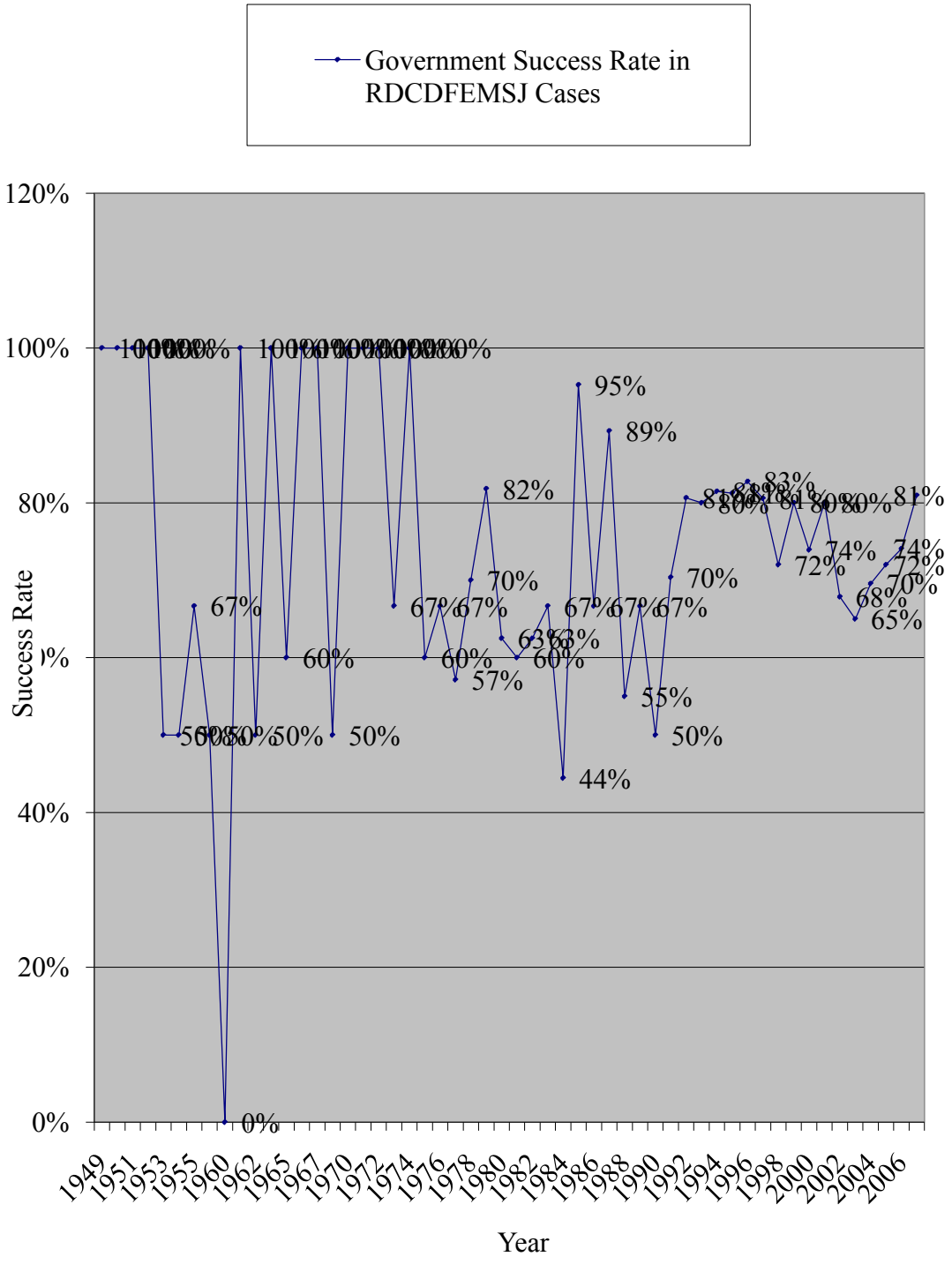

Figure 5.16: Overall Government Success Rate in RDCDFEMSJ Cases (1946-2007)

Government Success Rate by Circuit Over Time

Within some circuits, the government's success rate in RDCDFEMSJ Cases over time varies to a great extent between 1946 and 2007. For example, within the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits, the government's success rate in RDCDFEMSJ Cases varied between 0% and 100% between 1946 and 2005 (See Figures 5.17, 5.18, 2.19, 5.20, 5.21, 5.22, 5.23, and 5.24). Moreover, after 2005, the government's success rate in RDCDFEMSJ Cases within each of these circuits was at least 50%.

In the final year of the data collected for this dissertation all but one of the eight circuits discussed above experienced an increase in the government's success rate in RDCDFEMSJ Cases. After dropping from a 75% success rate in 2001 to a 40% success rate in 2006, the government's success rate within the First Circuit was 50% in 2007 (See Figure 5.17). The success rate within the Second Circuit in 2007 was 80%, a 30% increase over the prior three years (See Figure 5.18). The most substantial increase in the final 3 years of these data occurred within the Third Circuit and the Seventh Circuit, where the government's success rate increased from 0% in 2005 to 100% in 2007 (See Figure 5.19 and 5.21). The government success rate within the Fifth Circuit was as low as 50% three times after 2002, but increased to 80% in 2007 (See Figure 5.20). Within both the Ninth and the Tenth Circuits, the government success rate increased by almost 50% from 2006 to 2007 (See Figures 5.22 and 5.23).

Within other circuits, the government success rate in RDCDFEMSJ Cases was more consistent between 1946 and 2007. For example, the success rate within the Fourth

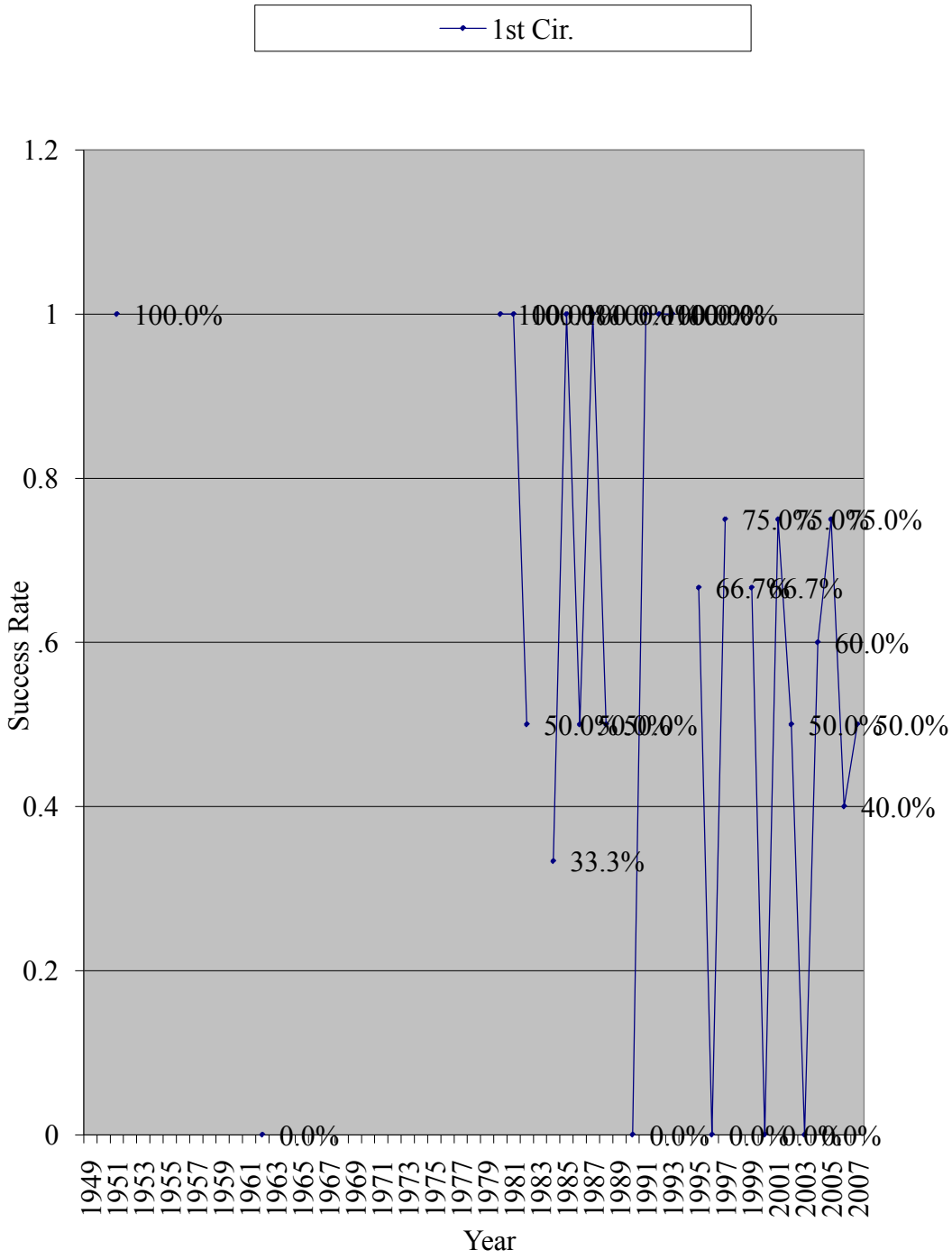

Figure 5.17: Government Success Rate in RDCDFEMSJ Cases per Year within the First Circuit (1946-2007)

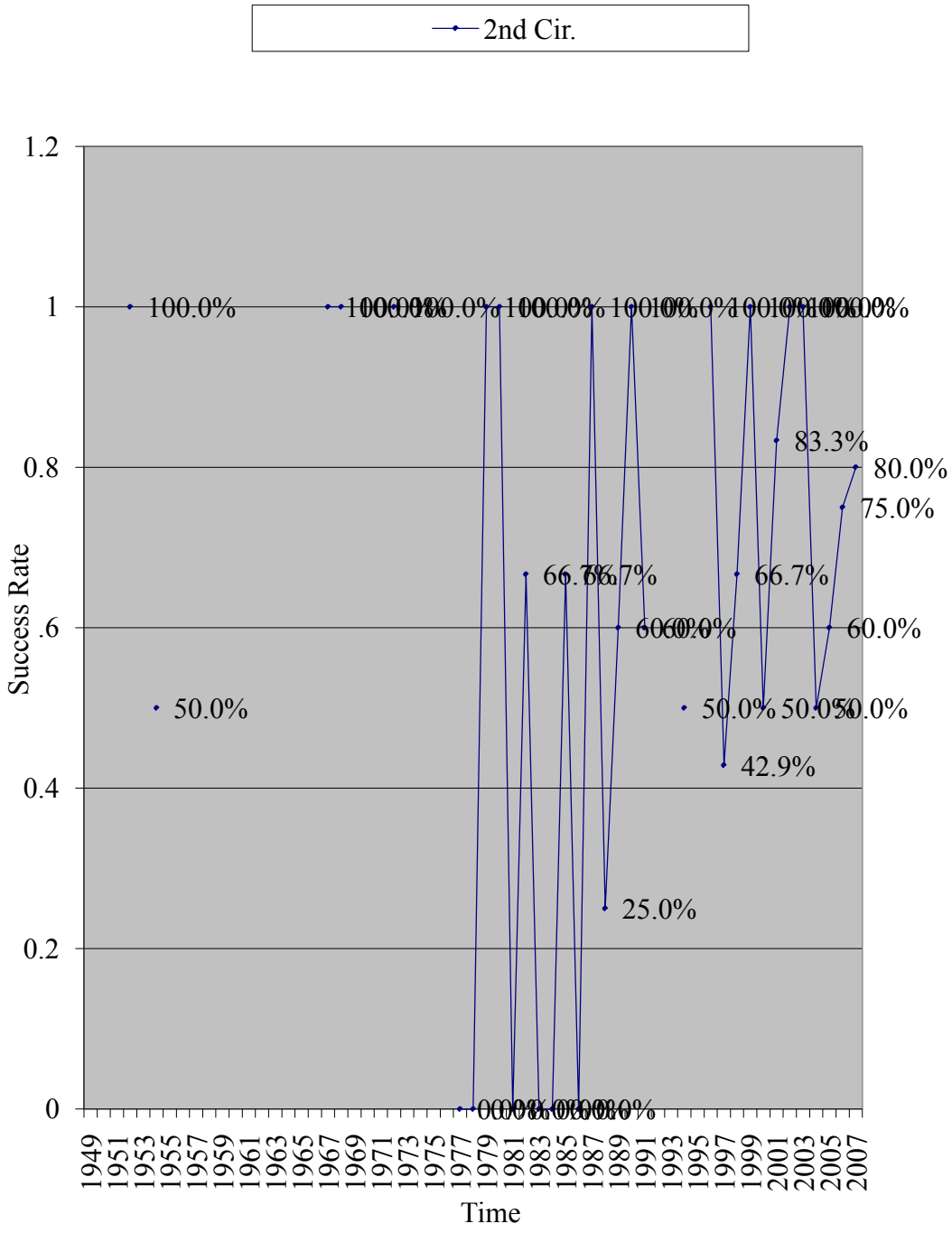

Figure 5.18: Government Success Rate in RDCDFEMSJ Cases per Year within the Second Circuit (1946-2007)

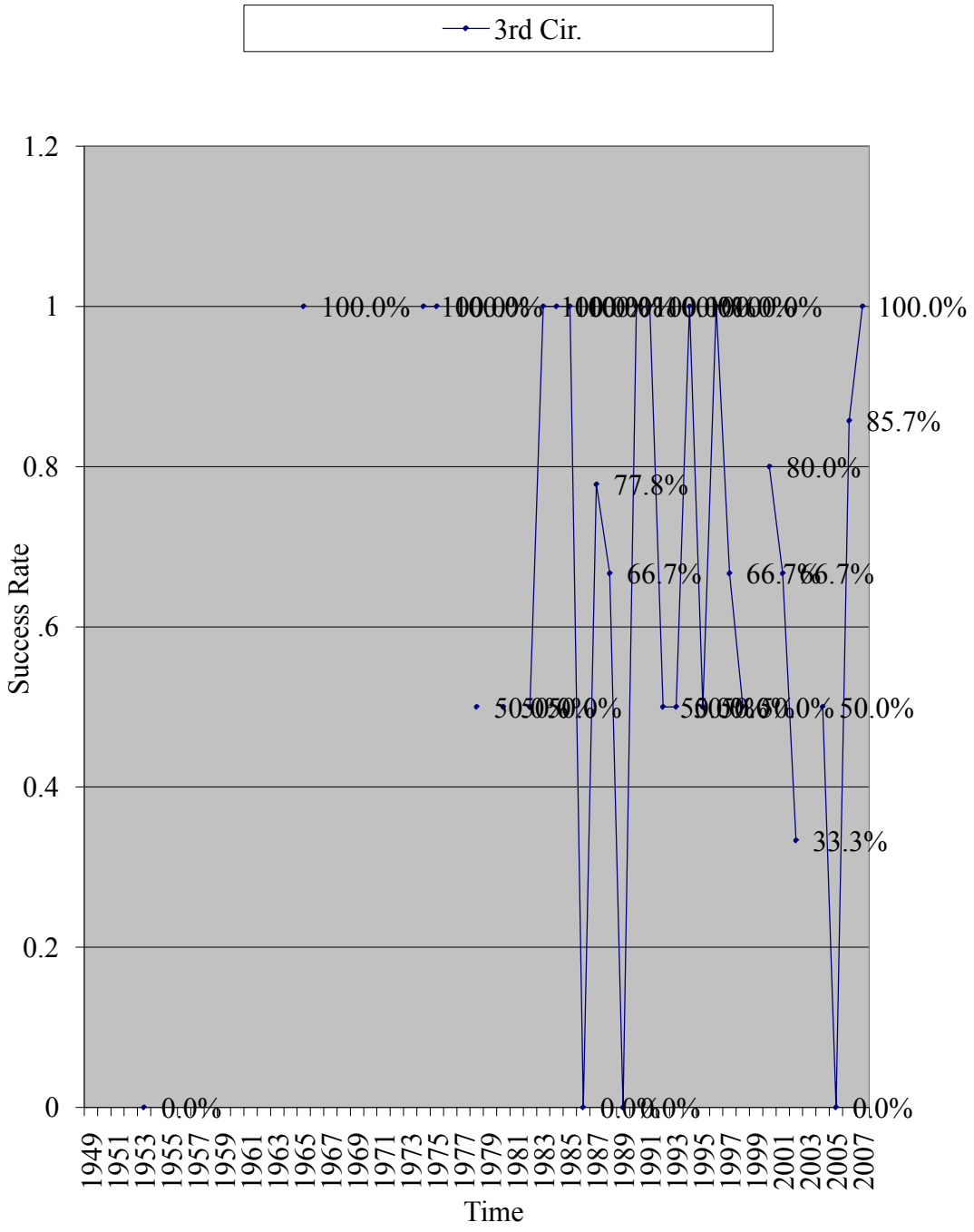

Figure 5.19: Government Success Rate in RDCDFEMSJ Cases per Year within the Third Circuit (1946-2007)

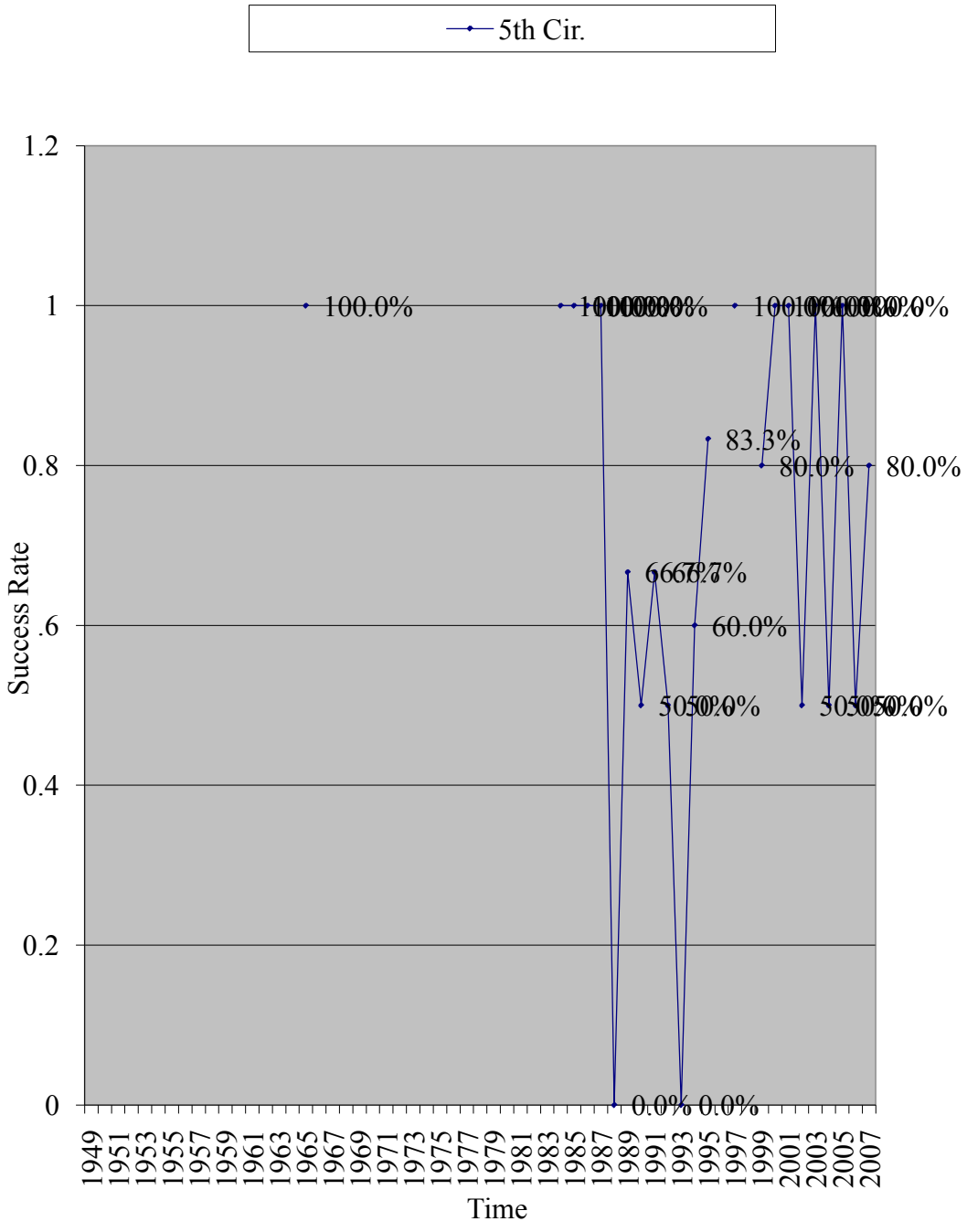

Figure 5.20: Government Success Rate in RDCDFEMSJ Cases per Year within the Fifth Circuit (1946-2007)

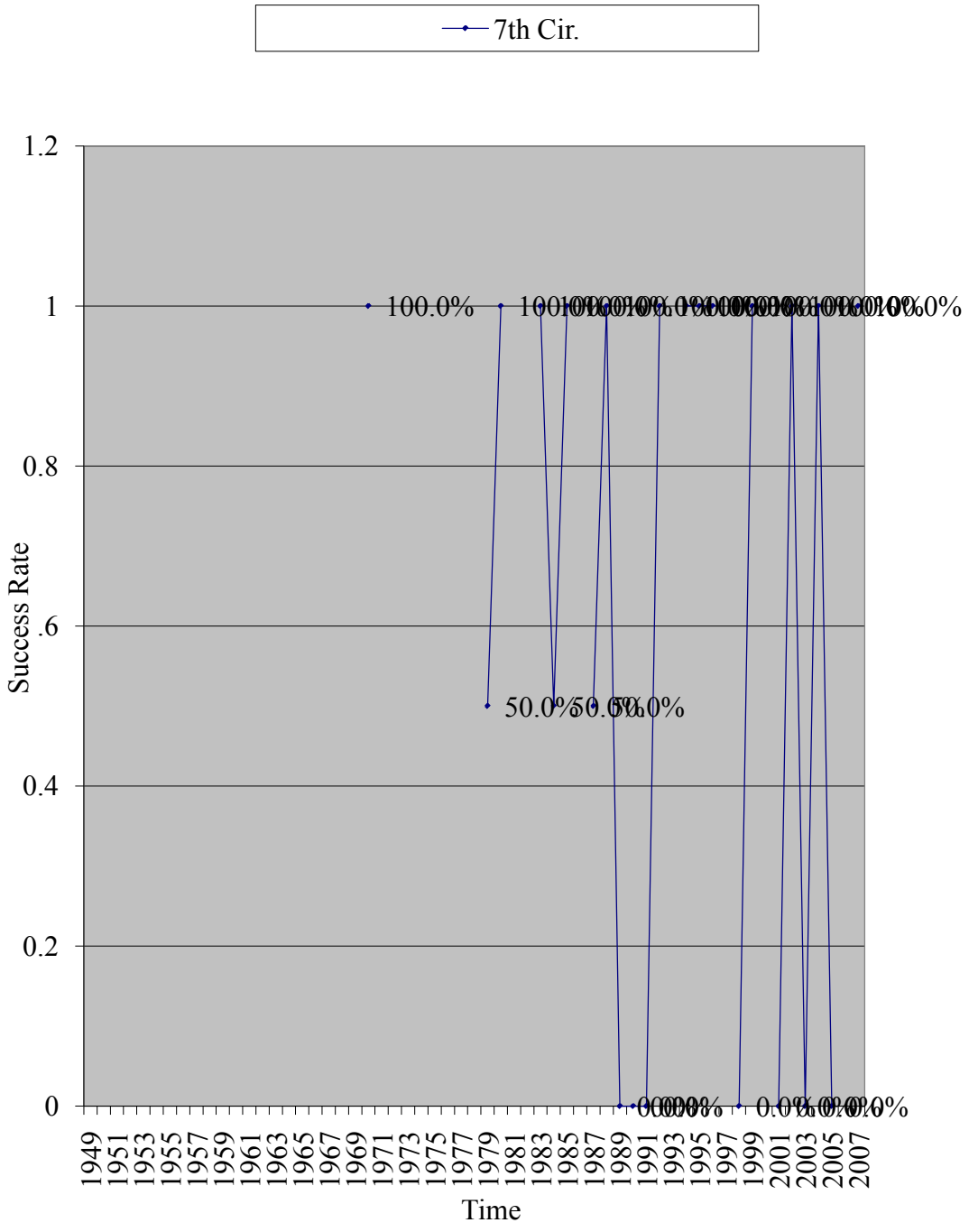

Figure 5.21: Government Success Rate in RDCDFEMSJ Cases per Year within the Seventh Circuit (1946-2007)

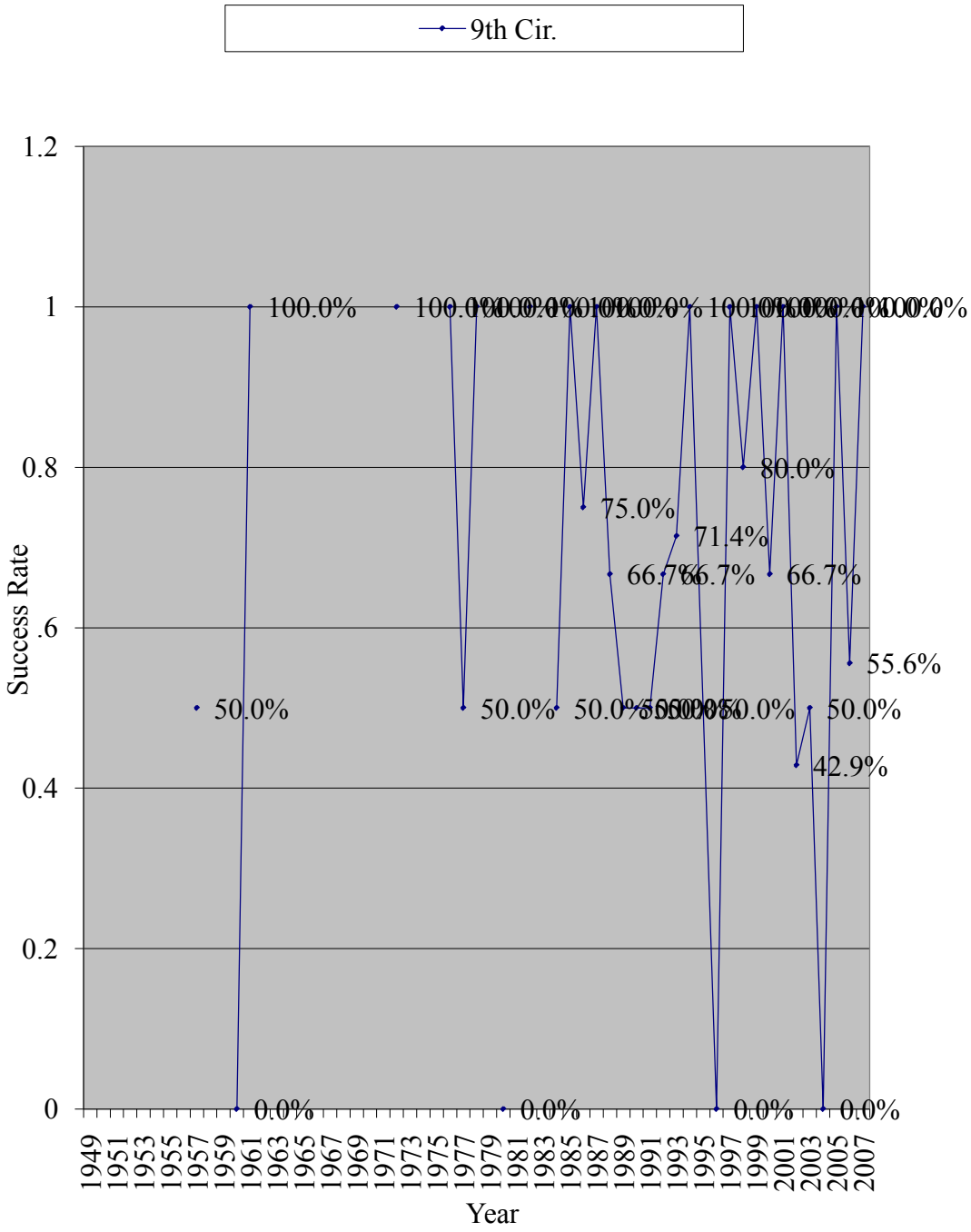

Figure 5.22: Government Success Rate in RDCDFEMSJ Cases per Year within the Ninth Circuit (1946-2007)

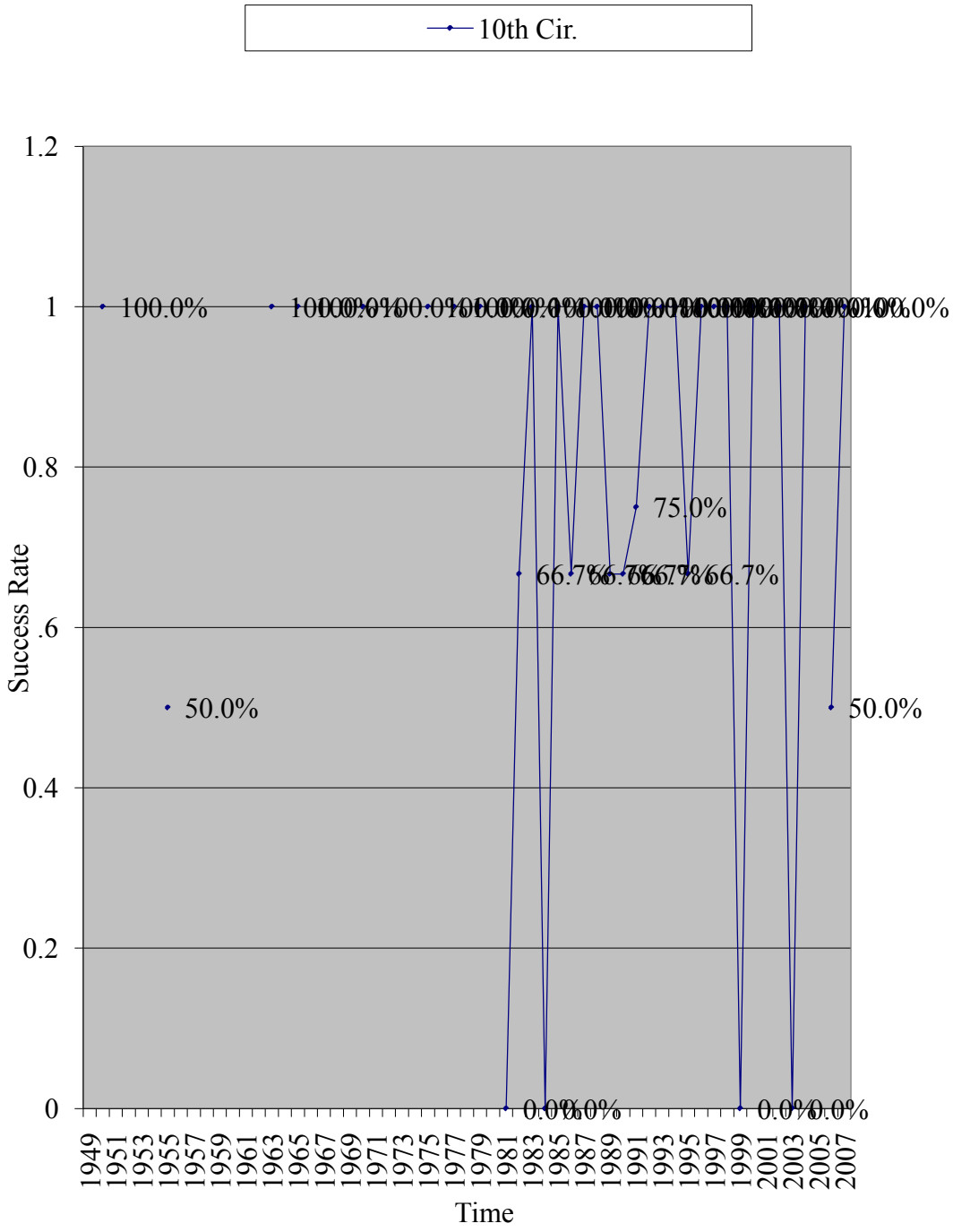

Figure 5.23: Government Success Rate in RDCDFEMSJ Cases per Year within the Tenth Circuit (1946-2007)

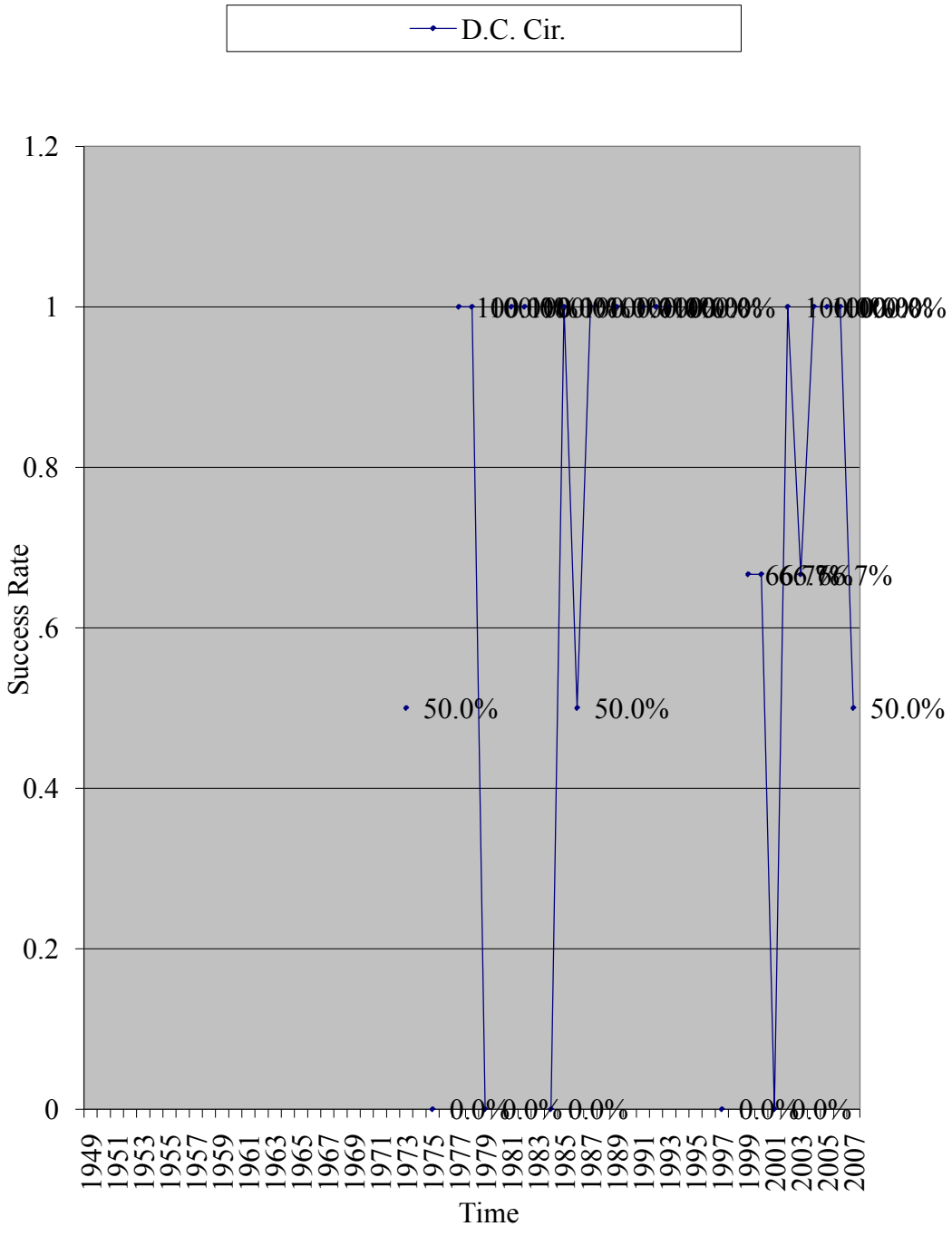

Figure 5.24: Government Success Rate in RDCDFEMSJ Cases per Year within the D.C. Circuit (1946-2007)

Circuit was 100% in all but four years: (See Figure 5.25). Moreover, although it dropped to 75% in 2006 and 2007, the government success rate within the Sixth Circuit was 100% in every year but one between 1981 and 2005 (See Figure 5.26). In the final ten years of data collected within the Eighth Circuit, the government success rate dropped below 100% only twice: 2001 and 2005 (See Figure 5.27). Finally, the government success rate within the Eleventh Circuit was 100% between 1946 and 2007 in all but four years (See Figure 5.28).

Overall Government Success Rate in RDCDFEMSJ Cases in the Pre- and Post-*Varig Airlines* Eras

United States v. Varig Airlines (1984) was issued by the United States Supreme Court on June 19, 1984. *Varig Arilines* overruled *Dalehite v. United States* (1953), and changed the way federal district courts evaluated RDCDFEMSJ Cases (See Chapter 2: History of the FTCA and DFE). After it was issued, many in the public law community predicted that the *Varig Airlines* decision would make it more difficult for plaintiffs to prevail in FTCA cases against the government (See Chapter 3: Literature Review). The data in this dissertation demonstrate that the government's success rate in RDCDFEMSJ Cases increased after *Varig Airlines*, but that increase was rather slight. Prior to *Varig Airlines*, from 1946 to June 18, 1984, the overall government success rate in RDCDFEMSJ Cases was 66.9%. After *Varig Airlines*, from June 19, 1984, to December 31, 2007, the overall government success rate in RDCDFEMSJ Cases increased to 72.1% (See Table 5.3).

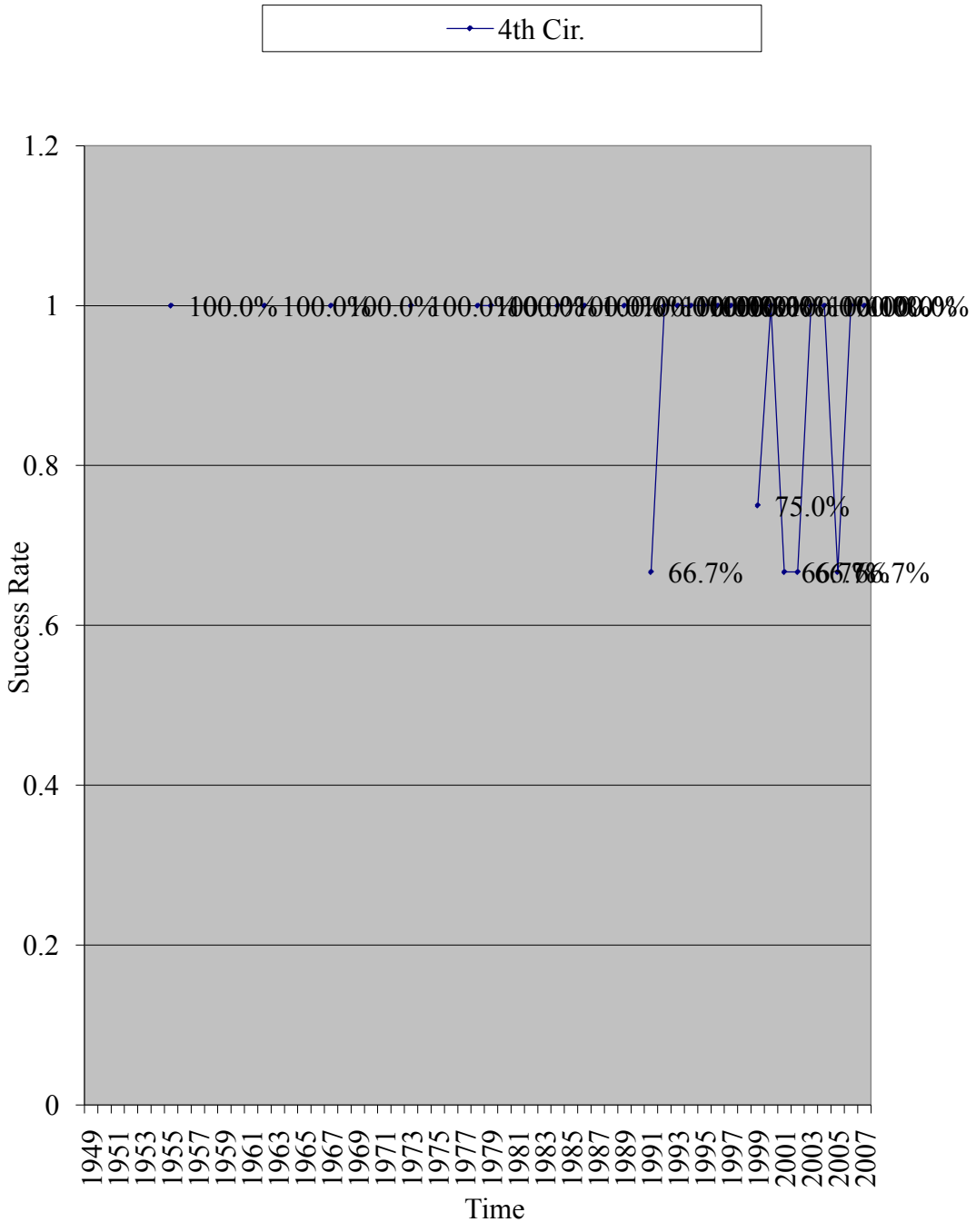

Figure 5.25: Government Success Rate in RDCDFEMSJ Cases per Year within the Fourth Circuit (1946-2007)

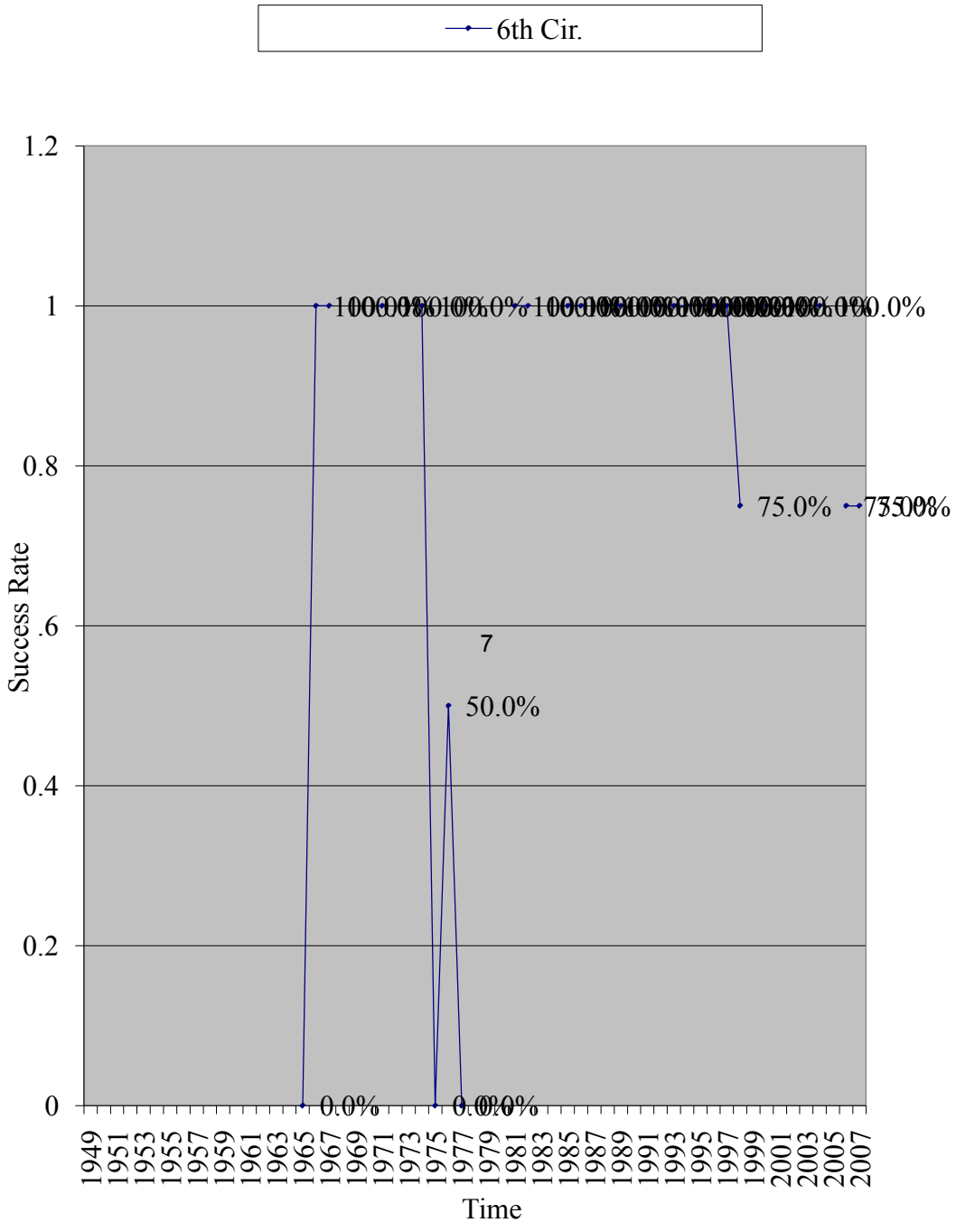

Figure 5.26: Government Success Rate in RDCDFEMSJ Cases per Year within the Sixth Circuit (1946-2007)

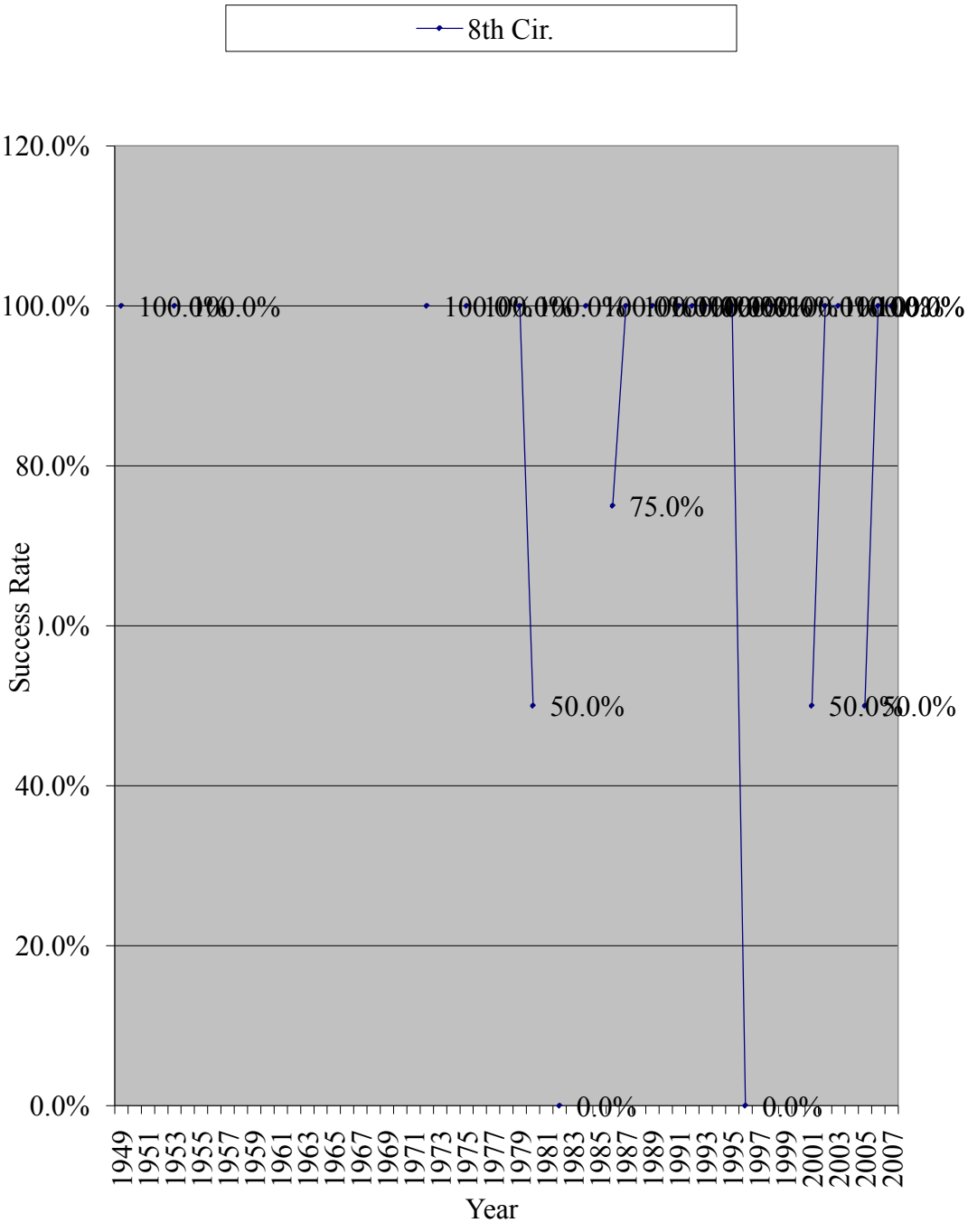

Figure 5.27: Government Success Rate in RDCDFEMSJ Cases per Year within the Eighth Circuit (1946-2007)

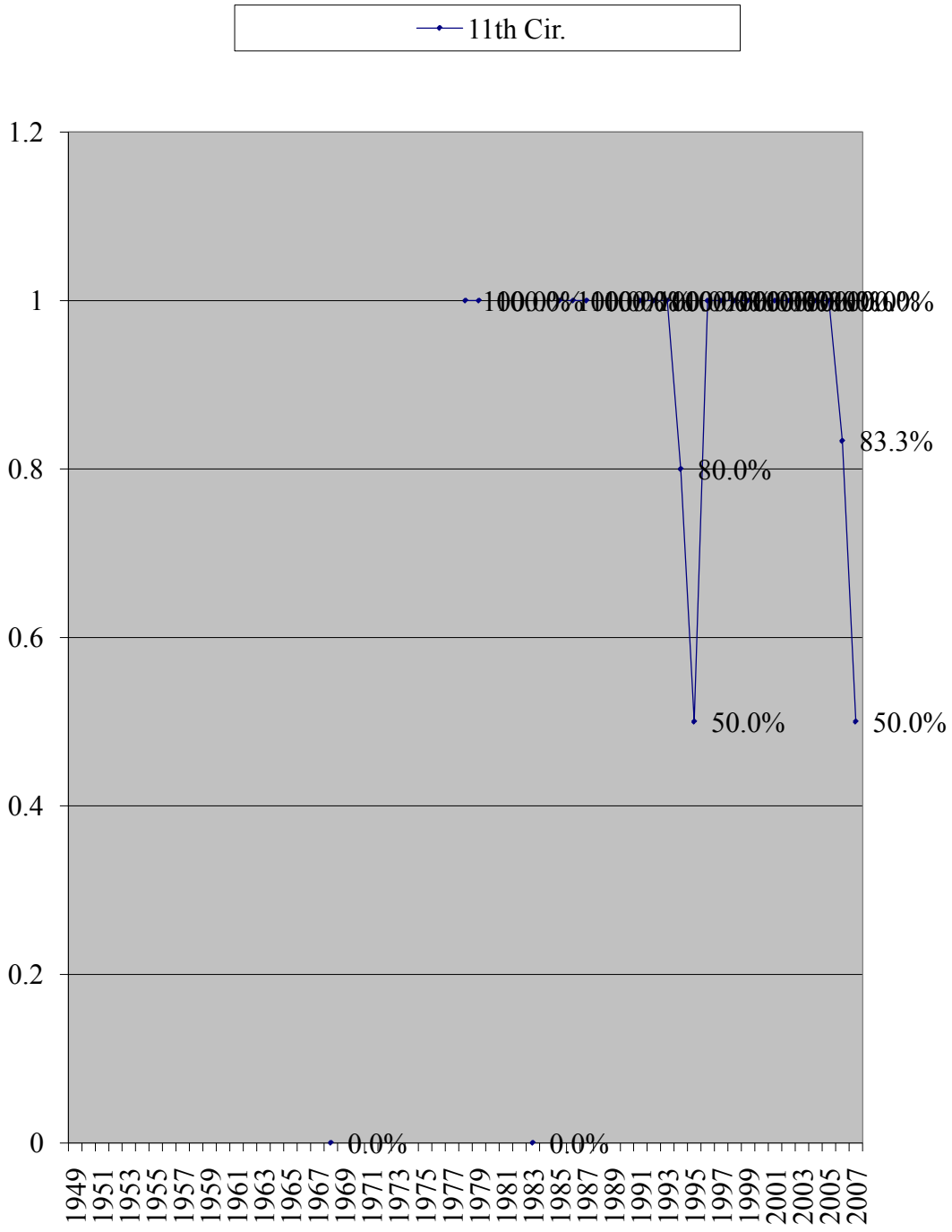

Figure 5.28: Government Success Rate in RDCDFEMSJ Cases per Year within the Eleventh Circuit (1946-2007)

Table 5.3: Overall Difference in Government Success Rate in RDCDFEMSJ Cases Between Pre- and Post-*Varig Airlines*

		Pre-*Varig Airlines*		**Post-*Varig Airlines***		
		Success Rate	**Number of Cases**	**Success Rate**	**Number of Cases**	
		66.9%	121	72.1%	639	

Government Success Rate in the Pre- and Post-*Varig Airlines* Eras by Circuit

The government success rate after *Varig Airlines*, however, did not increase within every circuit. Plaintiffs, in fact, were more successful in RDCDFEMSJ Cases after *Varig Airlines* within the First, Fourth, Fifth, and Seventh Circuits. While the government success rate increased within the Second, Third, Sixth, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits after *Varig Airlines*, many of these increases were fairly small. For example, the difference after *Varig Airlines* within two of these circuits, the Third and Tenth Circuits, was less than 5%, and the difference between three of these circuits, the Second, Eighth and Ninth Circuits, was between 9.1% and 13%. Within the remaining circuits, however, the government's success rate increased significantly after *Varig Airlines*. Important to note, however, is the fact that substantially fewer cases were decided during the Pre-*Varig Airlines* Era. District Courts within the Fifth Circuit, for example, only decided one RDCDFEMSJ Case in the Pre-*Varig Airlines* Era. (See Table 5.4).

Table 5.4: Difference in Government Success Rate by Circuit in RDCDFEMSJ Cases Between Pre- and Post-*Varig Airlines*

		Pre-*Varig Airlines*		Post-*Varig Airlines*	
	Circuit	**Success Rate**	**Number of Cases**	**Success Rate**	**Number of Cases**
	1st	60.0%	10	57.4%	54
	2nd	55.5%	18	64.6%	82
	3rd	66.7%	12	71.2%	66
	4th	100.0%	8	90.6%	53
	5th	100.0%	1	76.1%	71
	6th	61.5%	13	90.6%	32
	7th	71.4%	7	66.7%	31
	8th	75.0%	8	87.1%	31
	9th	58.3%	12	71.3%	94
	10th	79.0%	19	83.3%	48
	11th	50.0%	4	90.0%	40
	D.C.	55.6%	9	78.4%	37
	Total		121		639

Overall Government Success Rate in the Pre- and Post-*Gaubert* Eras

United States v. Gaubert, decided March 26, 1991, approximately 7 years after *Varig Airlines*, is the most recent case from the United States Supreme Court interpreting the DFE. Many commentators within the field of public law view *Gaubert* as further limiting (above and beyond the restrictions of *Varig Airlines*) plaintiffs' ability to prevail against the government in FTCA cases (See Chapter 3: Literature Review). Before *Gaubert*, from 1946 to March 25, 1991 (the "Pre-*Gaubert* Era"), the government's success rate in RDCDFEMSJ Cases was 69.9%. After *Gaubert*, from March 26, 1991, to December 31, 2007 (the "Post-*Gaubert* Era"), the government's success rate in RDCDFEMSJ Cases is 76.3% (See Table 5.5).

Table 5.5: Difference in Government Success Rate in RDCDFEMSJ Cases Between Pre- and Post-*Gaubert*

		Pre-*Gaubert*		Post-*Gaubert*	
	Circuit	**Success Rate**	**Number of Cases**	**Success Rate**	**Number of Cases**
	Overall	69.9%	266	76.3%	494

Government Success Rate in the Pre- and Post-*Gaubert* Eras by Circuit

The government's success rate in RDCDFEMSJ Cases dropped in district courts within only three circuits in the post *Gaubert* era (after March 25, 1991): within the First Circuit from 59.1% to 57.1%, within the Fourth Circuit from 100.0% to 89.8%, and within the Seventh Circuit from 60.0% to 52.5%. In all other circuits, the government success rate increased after *Gaubert*. The greatest increase in government success rate after *Gaubert* was 14.8% within the Sixth Circuit (See Table 5.6).

Comparing Government Success Rate in the Pre- *Varig Airlines* and Post-*Gaubert* Eras Overall and by Circuit

The impact of the *Varig/Berkovitz/Gaubert* trio of opinions is also observed when comparing cases in the pre-*Varig* era (before June 19, 1984) to cases in the post-*Gaubert* era (after March 25, 1991). As seen in Table 5.7, which excludes cases decided between *Varig* and *Gaubert* to demonstrate the maximum effect of the change in success rate over time (by highlighting cases decided before *Varig* but after *Gaubert*), the overall change in success rates among all circuits was 9.4%. The Second, Third, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits all experienced increases in government success rate

Table 5.6: Difference in Government Success Rate by Circuit

in RDCDFEMSJ Cases Between Pre- and Post-*Gaubert*

		Pre-*Gaubert*		Post-*Gaubert*	
	Circuit	**Success Rate**	**Number of Cases**	**Success Rate**	**Number of Cases**
	1st	59.1%	22	57.1%	42
	2nd	54.1%	37	68.3%	63
	3rd	69.7%	33	71.2%	45
	4th	100.0%	12	89.8%	49
	5th	72.2%	18	77.8%	54
	6th	73.7%	19	88.5%	26
	7th	60.0%	15	52.5%	23
	8th	81.3%	16	87.0%	23
	9th	65.5%	29	71.4%	77
	10th	81.1%	37	83.3%	30
	11th	75.0%	8	88.9%	36
	D.C.	70.0%	20	76.9%	26
	Total		266		494

between these two time periods. The First, Fourth, Fifth, all Seventh Circuits all experienced decreases in government success rate between these two time periods. Conclusions from these data, however, should be made with caution as the number of cases in the pre-*Varig* era is very small within some circuits, especially the Fifth Circuit.

Dicta in RDCDFEMSJ Opinions and Rosenbloom's Theoretical Framework

Overall Distribution of Outcomes

Part of the collection and analysis procedures for this dissertation involved assigning each RDCDFEMSJ Case one of six outcomes depending on whether the government's motion to dismiss was granted or not, whether dicta was included by the

Table 5.7: Difference in Government Success Rate in RDCDFEMSJ Cases Between Pre-*Varig Airlines* and Post-*Gaubert* (Overall and by Circuit)

		Pre-*Varig Airlines*		**Post-*Gaubert***		
	Circuit	**Success Rate**	**Number of Cases**	**Success Rate**	**Number of Cases**	
	1st	60.00%	10	57.10%	42	
	2nd	55.50%	18	68.30%	63	
	3rd	66.70%	12	71.20%	45	
	4th	100.00%	8	89.80%	49	
	5th	100.00%	1	77.80%	54	
	6th	61.50%	13	88.50%	26	
	7th	71.40%	7	52.50%	23	
	8th	75.00%	8	87.00%	23	
	9th	58.30%	12	71.40%	77	
	10th	79.00%	19	83.30%	30	
	11th	50.00%	4	88.90%	36	
	D.C.	55.60%	9	76.90%	26	
	Overall	66.90%	121	76.30%	494	

judge in the issued opinion, and whether the dicta in the opinion related to Rosenbloom's three-part theoretical framework (See Chapter 4: Methods). Outcome A, with 62.4% of the total number of cases, was the most common outcome for RDCDFEMSJ Cases collected between 1946 and 2007. Outcome B cases were less common than Outcome A, but at 22.8% were still a sizeable portion of the total number of cases. Very few RDCDFEMSJ Cases collected for this dissertation could be categorized as Outcome C, D, E, or F (See Table 5.8).

Table 5.8: Overall Distribution of Outcomes for RDCDFEMSJ Cases (1946-2007)

		Number of Cases	Percent of Total	
	Outcome A	474	62.4%	
	Motion to Dismiss Granted without Dicta			
	Reflective of Rosenbloom's Managerial Perspective			
	Outcome B	173	22.8%	
	Motion to Dismiss Denied without Dicta			
	Reflective of Rosenbloom's Political Perspective			
	Outcome C	27	3.6%	
	Motion Granted with Legal/Managerial Dicta			
	Reflective of Rosenbloom's Legal and Managerial Perspectives			
	Outcome D	62	8.2%	
	Motion Granted with non-Legal/Managerial Dicta			
	Not Reflective of any of Rosenbloom's Perspectives			
	Outcome E	10	1.3%	
	Motion Denied with Legal/Political Dicta			
	Reflective of Rosenbloom's Legal and Political perspectives			
	Outcome F	14	1.8%	
	Motion Denied and non Legal/Political Dicta			
	Not Reflective of any of Rosenbloom's Perspectives			
	Total	760	100.0%	

Example of Outcome C

The purpose of this subsection is to describe in detail an example of the dicta included in one of the 27 Outcome C cases collected for this dissertation. On February 3, 1991, Nevada Highway Patrol Trooper Kenneth Gager stopped Robert Collins for a traffic violation. The resulting traffic stop later resulted in Collins' conviction for several charges unrelated to the traffic stop. On September 8, 1993, 4 days before Gager's 42nd birthday, Collins sent a package bomb to Gager's home address through the United States Postal Service (USPS). Gager opened the package, thinking it was a birthday present. The resulting explosion took Gager's left hand and left eye, and left Gager suffering from several other injuries. Gager's wife was also injured by the bomb, which was made up of three sticks of dynamite, staples, and other shrapnel (Geer, 1997).

On August 29, 1996, Gager filed suit against the United States under the FTCA, alleging negligence on behalf of the USPS. Specifically, Gager claimed that the USPS failed to properly train employees to spot dangerous packages. The Assistant United States Attorneys defending the government filed a motion to dismiss Gager's claim pursuant to the DFE that was granted by Judge Philip M. Pro of the United States District Court for the District of Nevada on March 27, 1997 (*Gager v. United States*, 1997).

The final paragraph written by Judge Pro is an excellent example of Outcome C dicta. Speaking at times directly to the Gagers, Judge Pro, stated:

> The Court is aware of the seriousness of the Gager's injuries and the grave safety concerns surrounding dangerous packages transported through the United States Postal Service. The Gagers, just as anyone else whose claims are barred by the discretionary function exception, will be understandably dissatisfied and frustrated with the result. Furthermore, the Gagers may find little solace, and

> even less compensation, for their pain and injuries by the fact that the individuals responsible for the heinous mail bomb attack on them have been sentenced to prison and may be subject to personal liability to the Gagers as a result of their conduct. However, as a Court of limited jurisdiction, this Court is bound by the narrow areas in which the United States has consented to waive sovereign immunity. (*Gager v. United States*, 1997)

While nothing in the preceding paragraph directly affected the outcome of the Court's ruling, and was entirely unnecessary to include in the published order, Judge Pro's expression of sympathy for the Gagers may have inspired the Gagers to pursue another avenue of recovery against the government (or against the attacker himself, in a civil lawsuit for damages). Unfortunately for the Gagers, however, the Ninth Circuit Court of Appeals upheld Judge Pro's ruling on February 12, 1998. The United States Supreme Court denied the Gagers' petition for certiorari on November 2, 1998.

Example of Outcome E[61]

On May 27, 1975, James A. Stephens dove into Lake Shelbyville from a cove located within Eagle Creek State Park, 4 miles southeast of Findlay, Illinois. During the dive, Stephens hit his head on a submerged tree stump, resulting in the permanent paralysis of his legs and hands. Because Stephens was injured in an area owned and maintained (in part)[62] by the United States, but leased to the State of Illinois, Stephens

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[61] The purpose of this subsection is to describe in detail an example of the dicta included in one of the 10 Outcome E cases collected for this dissertation.

[62] The Army Corps of Engineers, in fact, employed park rangers in the area who were responsible for "assisting the using public, patrolling all project recreation areas, and inspecting all Government lands" (*Stephens v. United States*, 1979).

filed suit against the United States for negligently maintaining its property under the FTCA (*Stephens v. United States*, 1979).

The government answered Stephens' claim by moving for summary judgment pursuant to the DFE, claiming that the decision whether to remove stumps from Lake Shelbyville was a discretionary function. Judge J. Waldo Ackerman of the United States District Court for the Central District Court of Illinois disagreed with the government, denied the government's motion, and ordered Stephen's claim proceed to a bench trial. In his opinion, Judge Ackerman criticized the government's argument, noting: "[t]he Government cannot avoid its duty to warn by assimilating the decision whether or how to warn into another decision protected by the discretionary function exception" (*Stephens v. United States*, 1979). It is not clear what became of Stephens' claim against the government. There is no subsequent appellate history for *Stephens v. United States*, and there is no public information about a settlement between Stephens and the government.

Outcomes Over Time

While the total number of Outcome A cases began to increase in 1977, the number of Outcome A cases reported on a yearly basis fluctuated greatly over time between 1977 and 2007. For example, significant increases in Outcome A Cases in 1987, 1992, 1997, and 2006, were followed by sharp decreases in subsequent years. While the number of Outcome B cases dropped from nine in 1984 to zero in 1985, the number of Outcome B cases between 1986 and 2007 was much more constant than Outcome A cases during the same time period. Very few outcome C, D, E, or F cases were decided

during any single year. The highest number of Outcome C cases decided in a single year was five in 2007. The highest number of Outcome D cases decided in a single year was six in 1985. The highest number of Outcome E cases decided in a single year was two in 1992. The highest number of Outcome F cases decided in a single year was two in 1977, 1986, and 1991 (See Figure 5.29).

Outcomes by Circuit

District courts within the Ninth Circuit decided 66 Outcome A cases between the years 1946 and 2007, the highest total recorded within any of the 12 federal circuits during this time period. The second highest number of Outcome A cases decided was 58 within the Second Circuit. Several circuits decided between 28 and 48 Outcome A cases. The lowest number of Outcome A cases decided during this time period was within the Seventh and Eighth Circuits, which decided 22 and 26 cases, respectively (See Figure 5.30).

The highest number of Outcome B cases was decided within the Second Circuit, which decided 33 cases between 1946 and 2007. The second highest total of Outcome B cases per circuit was 26, within both the First and Ninth Circuits. The lowest number of Outcome B cases decided between 1946 and 2007 was five, within both the Fourth and Eleventh Circuits (See Figure 5.31).

The highest number of Outcome C cases decided within any of the 12 federal circuits was five, within the Fifth Circuit. The second highest total during this time period was four, within the D.C. Circuit. Both the Third Circuit and Eleventh Circuit

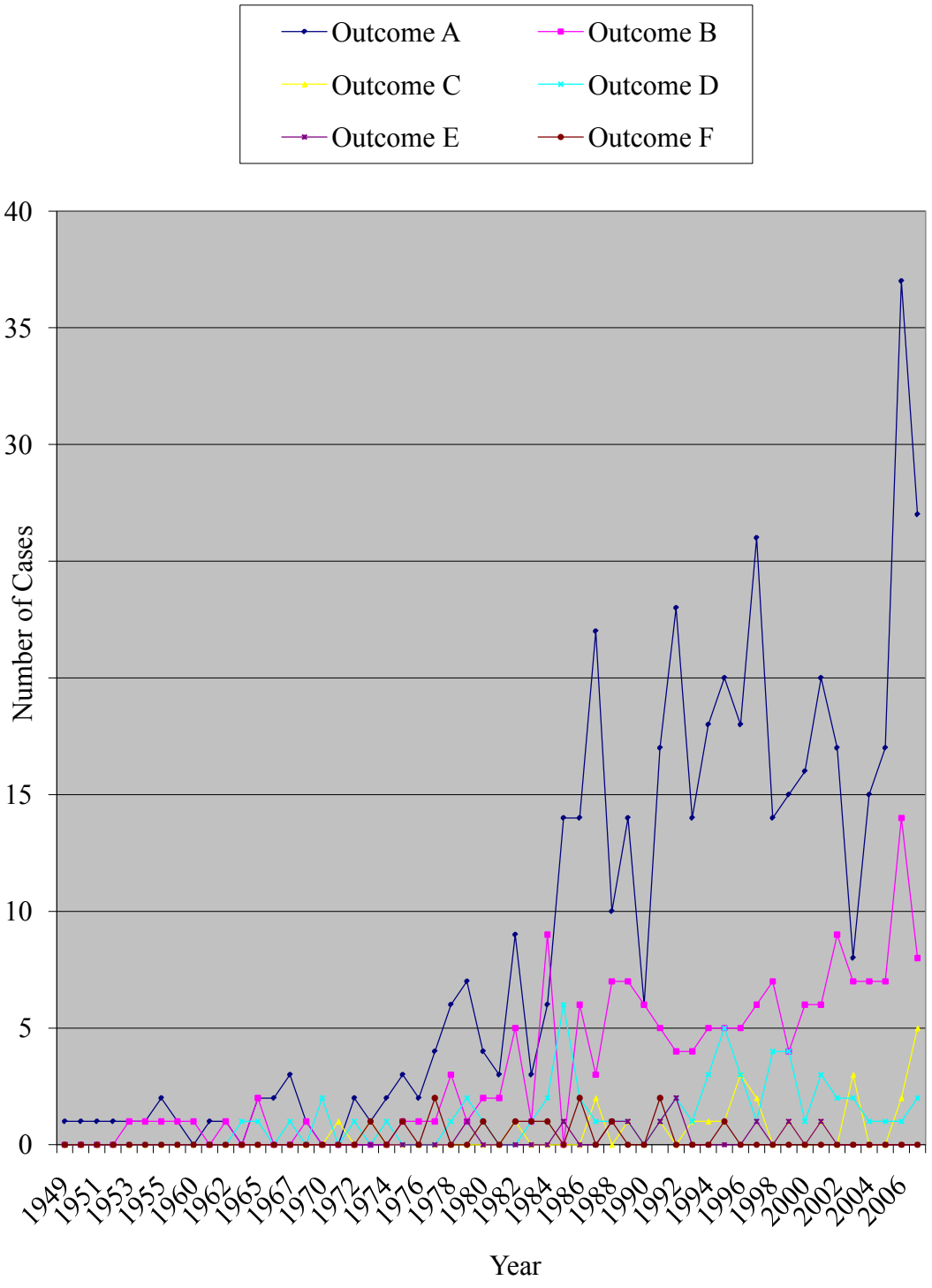

Figure 5.29: Number of Outcomes A, B, C, D, E, and F Per Year (1946-2007)

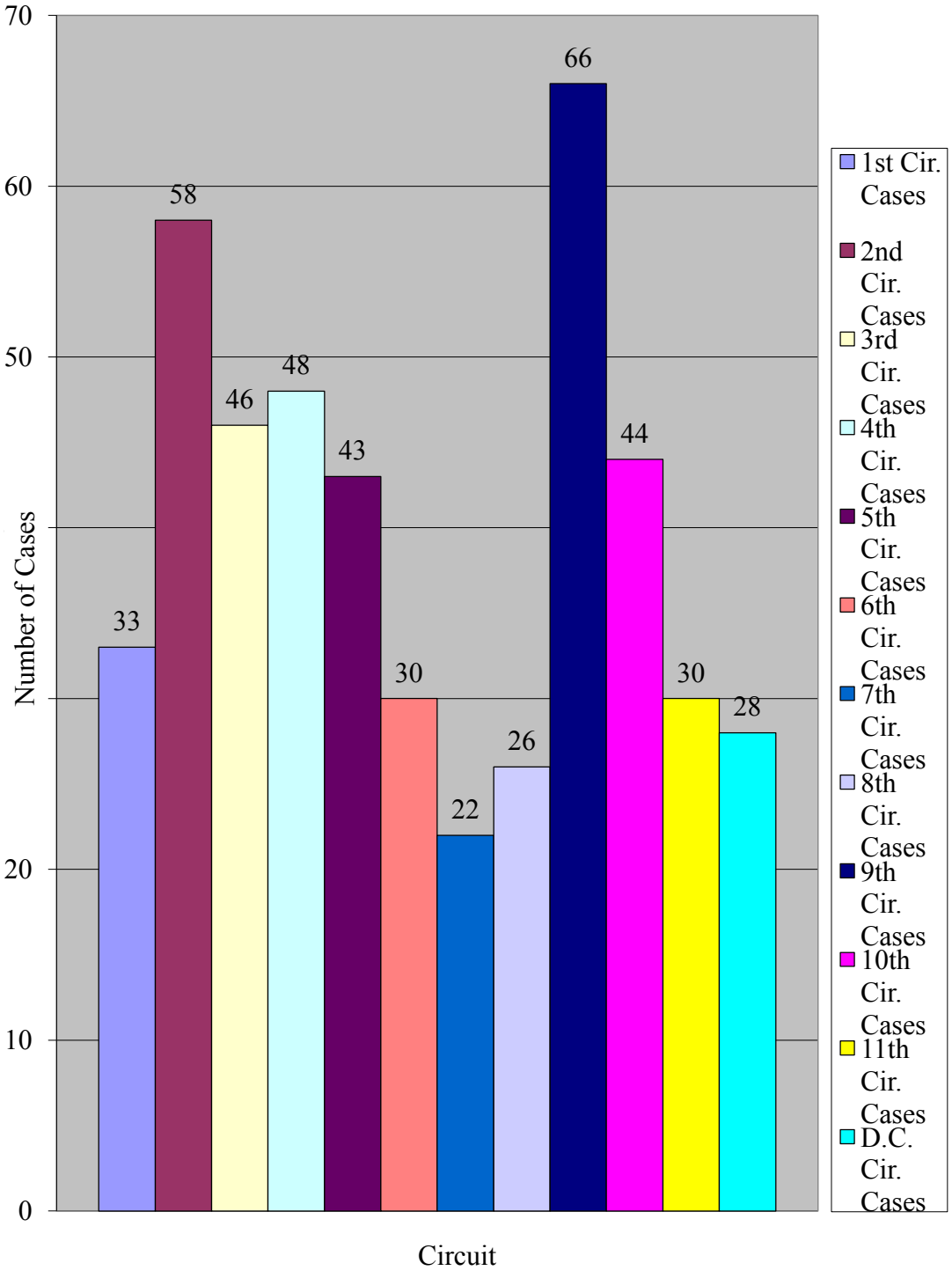

Figure 5.30: Number of Outcome A Cases per Circuit (1946-2007)

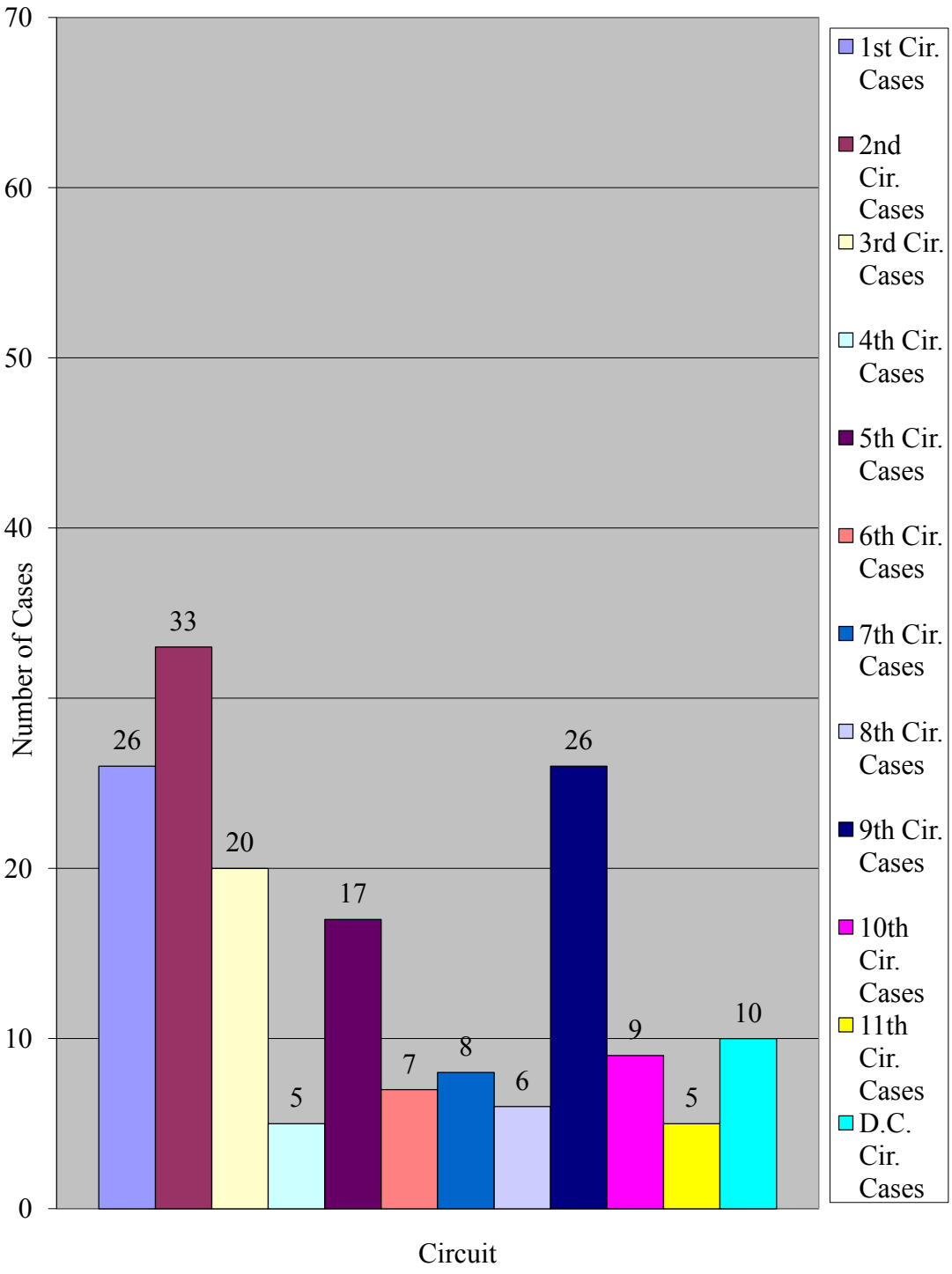

Figure 5.31: Number of Outcome B Cases per Circuit (1946-2007)

decided 3 Outcome C cases. The Fourth and Tenth Circuits decided two Outcome C cases, and the Sixth and Seventh Circuits decided one Outcome C case each. Neither the First Circuit nor the Second Circuit decided an Outcome C case between 1946 and 2007 (See Figure 5.32).

Nine Outcome D cases were decided within the Tenth Circuit, the highest total between 1946 and 2007. The second highest total of Outcome D cases decided during this time period was within the Fifth Circuit, which decided seven Outcome D Cases. The lowest total of Outcome D cases decided between 1946 and 2007 was two, within the D.C. Circuit (See Figure 5.33).

Outcome E cases were uncommon within each of the 12 circuits between 1946 and 2007. The highest number of Outcome E decided during this time period was three, within the Third Circuit. Two Outcome E cases were decided by both the Seventh and Ninth Circuits. Six circuits, the First, Fourth, Fifth, Sixth, Eighth and Eleventh did not decide an Outcome E case between 1946 and 2007 (See Figure 5.34).

Like Outcome E cases, Outcome F cases were very uncommon within any of the 12 federal circuits. The Ninth Circuit decided four cases, the highest number of Outcome F cases decided during this time period. The next highest total was two cases, decided within both the Seventh and Tenth Circuits. Three circuits, the Fourth, Fifth, and Eighth Circuits, did not decide any Outcome F cases between 1946 and 2007 (See Figure 5.35).

Outcome A cases make up 78.69% of the total number of cases decided by district courts within the Fourth Circuit between 1946 and 2007, the highest percentage of

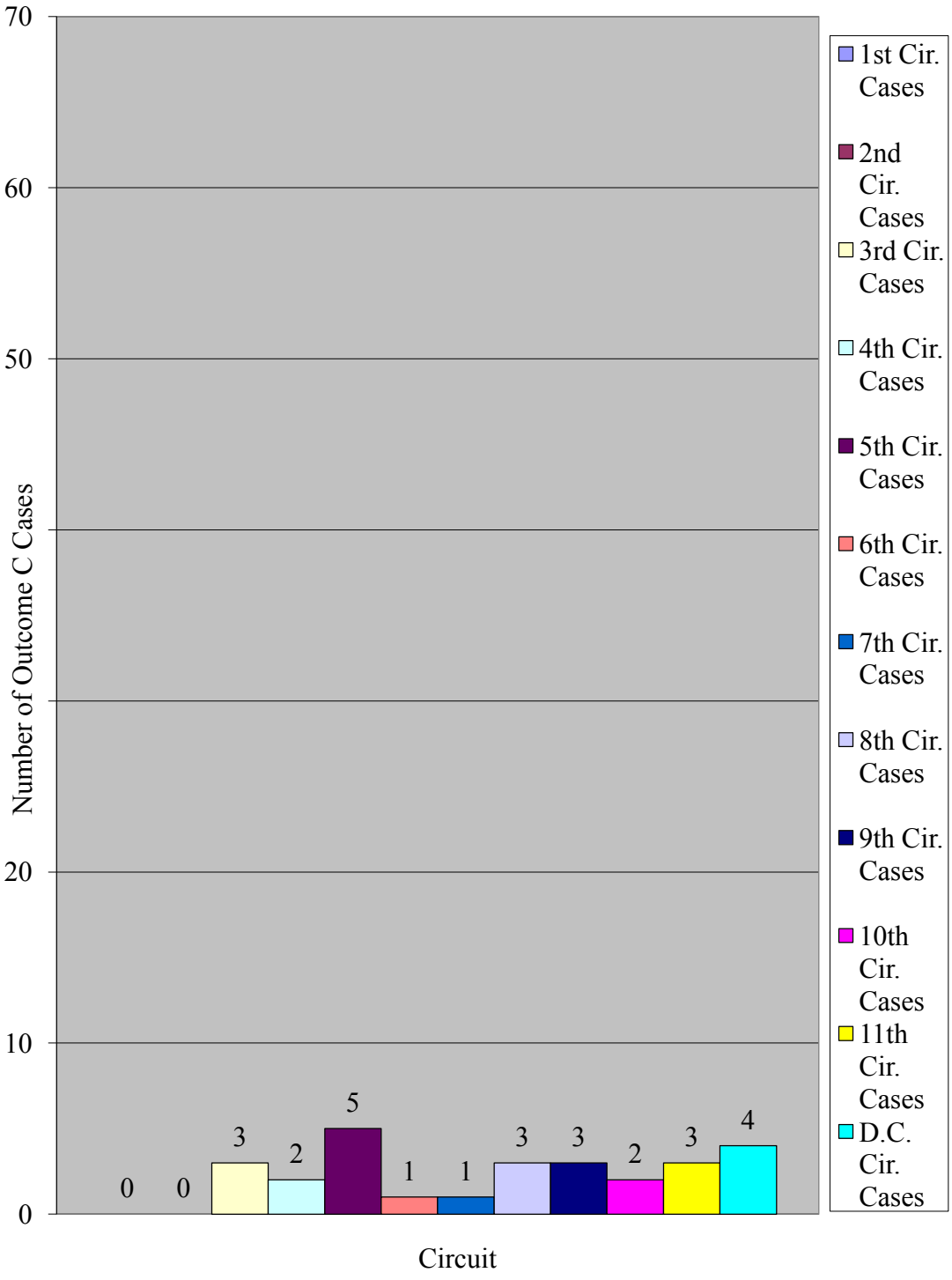

Figure 5.32: Number of Outcome C Cases per Circuit (1946-2007)

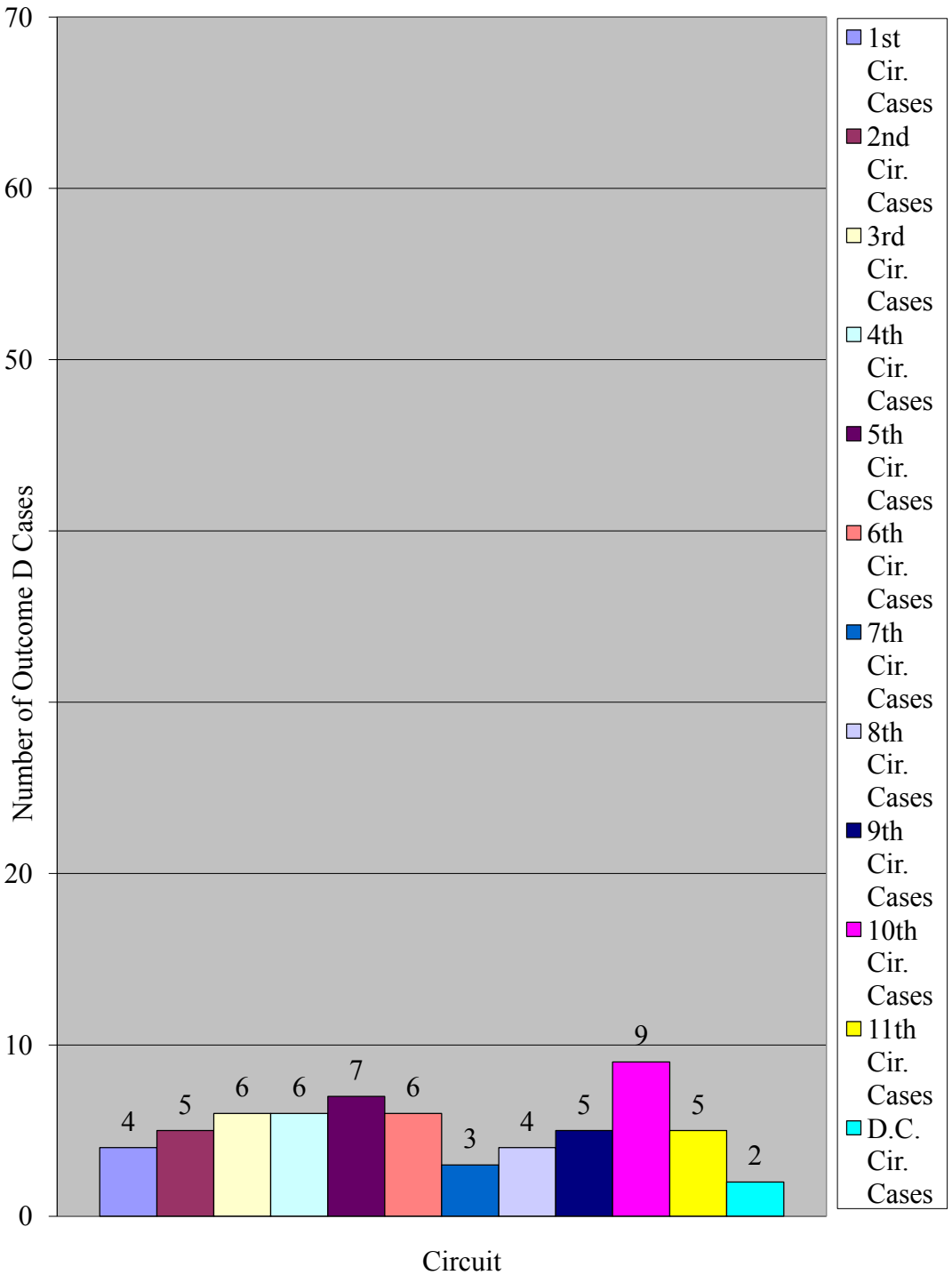

Figure 5.33: Number of Outcome D Cases per Circuit (1946-2007)

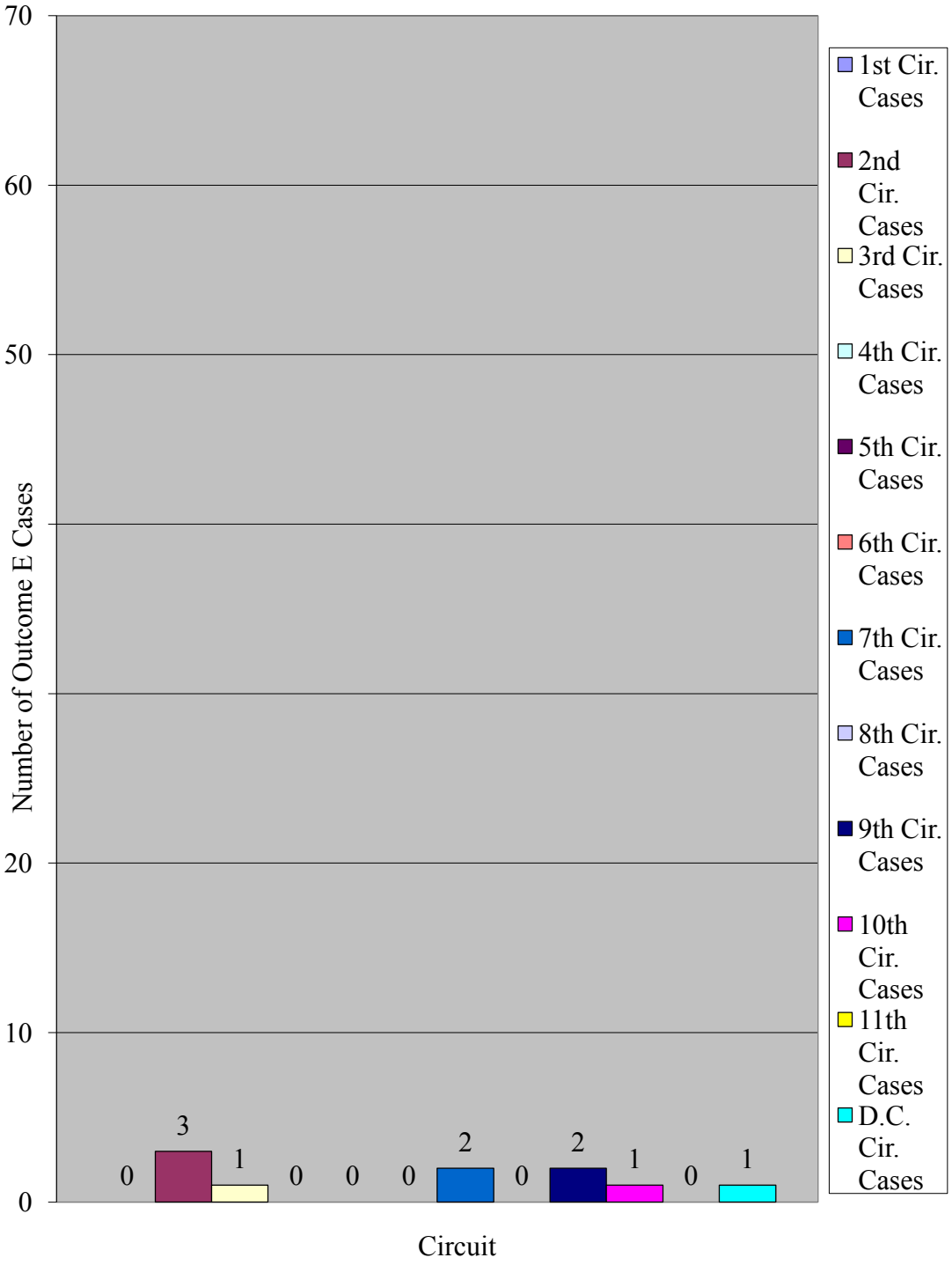

Figure 5.34: Number of Outcome E Cases per Circuit (1946-2007)

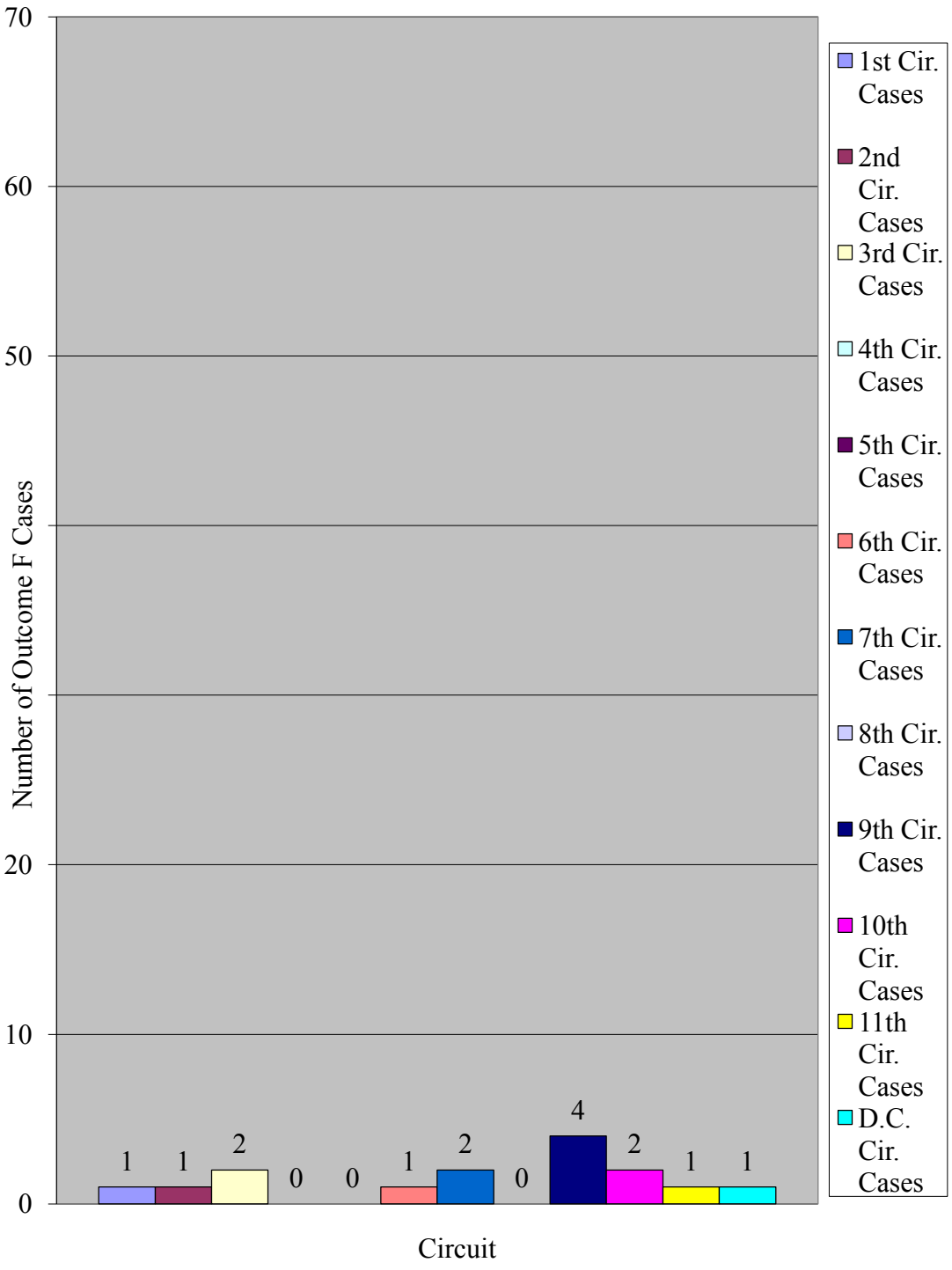

Figure 5.35: Number of Outcome F Cases per Circuit (1946-2007)

Table 5.9: Outcome A Cases as a Percentage of Total Cases by Circuit (1946-2007)

	Circuit	Number of Outcome A Cases	Total Number of Cases	Outcome A Cases as % of Total Cases	
	1st	33	64	51.56%	
	2nd	58	100	58.00%	
	3rd	46	78	58.97%	
	4th	48	61	78.69%	
	5th	43	72	59.72%	
	6th	30	45	66.67%	
	7th	22	38	57.89%	
	8th	26	39	66.67%	
	9th	66	106	62.26%	
	10th	44	67	65.67%	
	11th	30	44	68.18%	
	D.C.	28	46	60.87%	
	Totals	**474**	**760**		

Outcome A cases within any of the 12 circuits. The circuit with the next highest percentage of Outcome A cases, the Eleventh Circuit with 68.18%, is over 10% below the Fourth Circuit. District courts within the First Circuit have the lowest percentage of Outcome A cases during this time period, at 51.56% of the total number of cases (See Table 5.9).

Over 40% of cases decided within the First Circuit were Outcome B cases, the highest percentage of Outcome B cases within any of the 12 circuits between 1946 and 2007. The only other circuit above 30% was the Second Circuit, within which Outcome B cases comprised 33% of the total number of cases. The circuit with the lowest percentage of Outcome B cases was the Fourth Circuit, with 8.20%. Four other circuits, the Sixth, Eighth, Tenth, and Eleventh Circuits had percentages under 16% during this time period (See Table 5.10).

Table 5.10: Outcome B Cases as a Percentage of Total Cases by Circuit (1946-2007)

	Circuit	Number of Outcome B Cases	Total Number of Cases	Outcome B Cases as % of Total Cases	
	1st	26	64	40.63%	
	2nd	33	100	33.00%	
	3rd	20	78	25.64%	
	4th	5	61	8.20%	
	5th	17	72	23.61%	
	6th	7	45	15.56%	
	7th	8	38	21.05%	
	8th	6	39	15.38%	
	9th	26	106	24.53%	
	10th	9	67	13.43%	
	11th	5	44	11.36%	
	D.C.	10	46	21.74%	
	Totals	**172**	**760**		

The circuit with the highest percentage of Outcome C cases as a percentage of its total cases between 1946 and 2007 was the D.C. Circuit. Outcome C cases constituted fewer than five percent of cases in all but four circuits, the Fifth, Eighth, Eleventh, and D.C. Circuits. Neither the First nor the Second Circuit decided any Outcome C cases during this time period (See Table 5.11).

Over 13% of cases decided between 1946 and 2007 within the Sixth and Tenth Circuits were Outcome D cases. Outcome D cases encompassed between 7 and 12% of the total number of cases within seven different circuits during this time period). The lowest percentage of Outcome D cases during this time period was within the D.C. Circuit, where Outcome D cases made up just 4.35% of the total number of cases (See Table 5.12).

Table 5.11: Outcome C Cases as a Percentage of Total Cases by Circuit (1946-2007)

	Circuit	Number of Outcome C Cases	Total Number of Cases	Outcome C Cases as % of Total Cases	
	1st	0	64	0.00%	
	2nd	0	100	0.00%	
	3rd	3	78	3.85%	
	4th	2	61	3.28%	
	5th	5	72	6.94%	
	6th	1	45	2.22%	
	7th	1	38	2.63%	
	8th	3	39	7.69%	
	9th	3	106	2.83%	
	10th	2	67	2.99%	
	11th	3	44	6.82%	
	D.C.	4	46	8.70%	
	Totals	**27**	**760**		

Table 5.12: Outcome D Cases as a Percentage of Total Cases by Circuit (1946-2007)

	Circuit	Number of Outcome D Cases	Total Number of Cases	Outcome D Cases as % of Total Cases	
	1st	4	64	6.25%	
	2nd	5	100	5.00%	
	3rd	6	78	7.69%	
	4th	6	61	9.84%	
	5th	7	72	9.72%	
	6th	6	45	13.33%	
	7th	3	38	7.89%	
	8th	4	39	10.26%	
	9th	5	106	4.72%	
	10th	9	67	13.43%	
	11th	5	44	11.36%	
	D.C.	2	46	4.35%	
	Totals	62	760		

Table 5.13: Outcome E Cases as a Percentage of Total Cases by Circuit (1946-2007)

	Circuit	Number of Outcome E Cases	Total Number of Cases	Outcome E Cases as % of Total Cases	
	1st	0	64	0.00%	
	2nd	3	100	3.00%	
	3rd	1	78	1.28%	
	4th	0	61	0.00%	
	5th	0	72	0.00%	
	6th	0	45	0.00%	
	7th	2	38	5.26%	
	8th	0	39	0.00%	
	9th	2	106	1.89%	
	10th	1	67	1.49%	
	11th	0	44	0.00%	
	D.C.	1	46	2.17%	
	Totals	**10**	**760**		

Three Outcome E cases were decided within the Second Circuit, comprising 3.00% of the total number of cases within the Second Circuit between 1946 and 2007. While only two Outcome E cases were decided during this time period within the Seventh Circuit, the Seventh Circuit had the highest percentage of Outcome E cases as a percentage of total cases. Five circuits did not decide an Outcome E case during this time period (See Table 5.13).

Outcome F cases were not a large percentage of cases within any of the 12 circuits between 1946 and 2007. The highest percentage of Outcome F cases was within the Seventh Circuit, where 5.26% of the total number of cases decided were Outcome F cases. The total percentage of Outcome F cases did not exceed 4.00% in any of the other eleven circuits. There were no Outcome F cases within either the Fourth, Fifth, or Eighth Circuits during this time period (See Table 5.14).

Table 5.14: Outcome F Cases as a Percentage of Total Cases by Circuit (1946-2007)

	Circuit	Number of Outcome F Cases	Total Number of Cases	Outcome F Cases as % of Total Cases	
	1st	1	64	1.56%	
	2nd	1	100	1.00%	
	3rd	2	78	2.56%	
	4th	0	61	0.00%	
	5th	0	72	0.00%	
	6th	1	45	2.22%	
	7th	2	38	5.26%	
	8th	0	39	0.00%	
	9th	4	106	3.77%	
	10th	2	67	2.99%	
	11th	1	44	2.27%	
	D.C.	1	46	2.17%	
	Totals	15	760		

Findings and Conclusions

The DFE and the American "Litigation Explosion"

For years, the public law community has noted that American society has become more litigious over time. At least one researcher refers to this phenomenon as a "litigation explosion" (Galanter, 1988, p. 18). This "explosion," or sharp increase in number of cases filed, has contributed to a perceived need for tort reform at both the federal and state levels (Kelner, 2006). For example, in 2006, the House of Representatives passed a bill which would have imposed a $250,000 limit on nonpecuniary damages in tort cases involving medical malpractice. Speaking in support of the legislation, President Bush declared: "We have a problem in America. There are too many frivolous lawsuits against good doctors, and the patients are paying the price." (Bush, 2003, n.p.). While these studies commonly discuss increases in tort litigation,

they do not distinguish between FTCA cases and cases between private litigants (National Center for State Courts, 1986).

The data for this dissertation, which are specific to the FTCA, are consistent with these other studies. While a total of 760 RDCDFEMSJ Cases were decided between 1946 and 2007 (see Figure 5.1), the number of RDCDFEMSJ Cases decided after 1980 is significantly higher than the number of cases decided before 1980 (See Figure 5.2). The data within all 12 of the federal appellate circuits show similar increases after 1980 (See Figures 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13 and 5.14).

Despite a general increase in case decisions after 1980, the number of RDCDFEMSJ Cases decided per year after 1980 has fluctuated over time (see Figure 5.2). Fluctuations were also recorded within every circuit (See Figures 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13). The number of cases decided within each circuit, however, does not fluctuate simultaneously across all circuits. The data themselves, of course, do not explain the differences across the circuits – that question is an issue for future research. However, the fact that these data show unexplained differences across the circuits underscores the importance of studying courts-related data at the circuit level (and not just an overall basis).

Government Success Rate in RDCDFEMSJ Cases

(Overall and Over Time)

Of the 760 RDCDFEMSJ Cases decided in the United States between 1946 and 2007, the government succeeded 74.08% of the time (See Table 5.2). The government's

success rate during this time period, however, varied from circuit to circuit. The government's success rate is highest within the Fourth Circuit and lowest within the First Circuit (See Figure 5.15).

Within the first 42 years of the FTCA, from 1946-1991, the government's success rate was notably inconsistent, fluctuating between 100% and 0%. Between 1992 and 2007, however, the government's success rate was much more consistent, ranging between 65% and 83% (See Figure 5.16). One possible explanation for this change may be the judiciary's increased experience with the FTCA in the second time period. In other words, as judges became more familiar with the statute (and with the types of facts involved in these cases) they may have developed stronger and more-informed opinions as to which cases are deserving of redress under the statute and which are not. Another possible explanation for this change may be the experience level of the litigants involved in these cases. Just like the judges described above, as plaintiff's attorneys and Assistant United States Attorneys became more familiar with the DFE they may have come to more ardent conclusions as to which DFE cases should be filed and which should not, which DFE cases should be quickly settled and which should not, and which DFE cases should be litigated and which should not. Of course, the data themselves cannot tell us precisely why the government's success rate has become more consistent. Answering this question is an issue for future research.

Both the *Varig Airlines* and *Gaubert* opinions generated a considerable amount of public law literature in the years following their publication. Most of these articles are critical of *Varig Airlines* and *Gaubert*, and predict that these opinions will substantially

impact a private litigant's ability to succeed against the government in an FTCA case (See Chapter 3: Literature Review). Kratzke (1993) is the lone public law scholar who predicts little change in government success in DFE cases over time (See Chapter 3: Literature Review). None of these articles, however, includes any empirical data to support these positions.

The data for this dissertation show that while the overall government success rate in RDCDFEMSJ Cases increased after both *Varig Airlines* and *Gaubert*, these increases were relatively small. After *Varig Airlines*, the government's success rate increased by 5.2%, from 66.9% to 72.1%. (See Table 5.3). After *Gaubert*, the government's success rate increased by 6.4%, from 69.9% to 76.3% (See Table 5.5). While these data confirm the suspicions within the public law community that FTCA litigation would become more difficult for plaintiffs after *Varig Airlines* and *Gaubert*, the data show that the difference in government success before and after these cases is very small. Moreover, these data show that plaintiffs were very unlikely to succeed against the government before *Varig Airlines* and *Gaubert* were decided. The United States Supreme Court, therefore, is only slightly to blame for plaintiffs' difficulties in FTCA cases.

Speculations about the effect of *Varig Airlines* from prior public law research are further called into question when these data are viewed at the circuit level. Specifically, the government's success rate actually declined within the First, Fourth, Fifth, and Seventh Circuits (See Table 5.4) after *Varig Airlines*. Unfortunately, the only other empirical study on the DFE within the circuit courts of appeal, *Weaver and Longoria* (2002), does not disaggregate its data by circuit, so there are no comparable data from the

federal circuit courts of appeal with which to examine this study. The reason for the differences between circuits identified by this dissertation, thus, is another topic for future research.

The Ninth Circuit Court of Appeals as a Moderate Court

Many politicians perceive the Ninth Circuit Court of Appeals as a "bastion of liberalism run amok" (Wermiel, 2006, p. 355). For example, when the Ninth Circuit issued a ruling striking down the Pledge of Allegiance in 2002,[63] Senator Kit Bond (R-MO) called the decision "… the worst kind of political correctness…" (Egelko, 2002, n.p.; *Newdow v. U.S. Congress*, 2002, p. 597). Speaker of the U.S. House of Representatives Dennis Hastert (R-IL.), remarked, "[o]bviously, the liberal Court in San Francisco has gotten this one wrong" (Snow, 2002). Senator Charles Grassley (R-IA), who called the decision "crazy" and "outrageous," noted further that:

> [t]his decision is so much out of the mainstream of thinking of Americans and the culture and values that we hold in America, that any Congressman that voted to take it out would be putting his tenure in Congress in jeopardy at the next election. (Egelko, 2002, n.p.)

Even Democrats used this decision as an opportunity to condemn the Ninth Circuit. According to Senate Majority Leader Tom Daschle (D-S.D.), "[t]his decision is just nuts" (Knowlton, 2002). Senator Joseph Lieberman (D-CN) went as far to say:

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[63] The Ninth Circuit later revised its opinion so that it did not invalidate the federal statute that created the Pledge, but only school-mandated recitations of the Pledge led by teachers under policies of California school districts (*Newdow v. U.S. Cong.*, 2003).

"[t]here may have been a more senseless, ridiculous decision issued by a court at some time, but I don't remember it" (Egelko, 2002, n.p.).

Criticism of the Ninth Circuit is also common within the academic community. Although charting the exact age of the Ninth Circuit's reputation for liberalism is difficult, many in the public law community perceive a deep ideological divide between the Ninth Circuit and the United States Supreme Court because the Ninth Circuit, over the past 30 years, has a disproportionately high reversal rate at the Supreme Court when compared to other circuits (Wermiel, 2006,). The Ninth Circuit, according to some, is so out of control that the Supreme Court must devote "considerable time and energy to reining in the judges and correcting their decisions" (Wermiel, 2002, p. 355). For example, in the October Term of 1996, the Ninth Circuit was upheld once and reversed twenty-seven times by the Supreme Court (Farris, 1997; Herald, 1998).[64]

The data for this dissertation do not describe the Ninth Circuit as a "bastion of liberalism run amok."[65] Rather, when it comes to RDCDFEMSJ dispositions, the district

[64] While some attribute problems between the Ninth Circuit and the United States Supreme Court to political and ideological differences, others point to the Ninth Circuit's size as a source of problems for the circuit. The Ninth Circuit Court of Appeals is the largest circuit court in the United States: it covers nine states, two territories, and has had as many as 28 active judges and authorization for 23 senior judges. Senators Orrin Hatch (R-UT) and Frank Murkowski (R-AK) introduced legislation in 2000 to split the Ninth Circuit into two separate entities (S. 2184, 106th Cong. (2000); see also 146 Cong. Rec. S1233 (daily ed. Mar. 7, 2000)). Since then, there have been several other legislative and administrative proposals to split the Ninth Circuit, but none of these has been adopted as of yet.

[65] For purposes of this section, it is assumed that a "liberal" outcome in a RDCDFEMSJ case is a decision by a district court judge denying the government's motion for summary judgment and allowing a plaintiff's tort claim to proceed to trial.

courts within the Ninth Circuit are relatively moderate when compared with those of other circuits.[66] While district courts within Ninth Circuit between 1946 and 2007 decided more RDCDFEMSJ Cases than any other circuit (See Figure 5.1), the government's success rate within the Ninth Circuit during this time period was 69.8%, placing the Ninth Circuit near the middle of the 12 circuits in this statistic (See Figure 5.15). Moreover, unlike the First, Fourth, Fifth, and Seventh Circuits, the government's success rate within the Ninth Circuit increased in both the Post-*Varig Airlines* and Post-*Gaubert* Eras, which public law commentators predicted would happen across all circuits (see Chapter 3: Literature Review). Nothing about the data from this dissertation, in other words, contributes to widely-held perceptions about the Ninth Circuit.

Rosenbloom's Three-Part Theoretical Framework

Rosenbloom's three-part theoretical framework helps us understand the development of the DFE in federal district courts over time. Overall, 62.4% of RDCDFEMSJ Cases are reflective of Rosenbloom's managerial perspective. Considerably fewer RDCDFEMSJ Cases, only 22.8%, are reflective of Rosenbloom's political perspective. Very few cases are reflective of either the "legal/managerial" or "legal/political" perspectives (See Table 5.8). The DFE (as applied by district courts),

[66] While this dissertation does not address the Ninth Circuit itself, and only directly relates to the district courts within the Ninth Circuit, these findings are interesting because district court decisions are so frequently affirmed by appellate courts. The reputation of the Ninth Circuit Court of Appeals, in other words, applies (at least to some degree) to district courts within the Ninth Circuit.

thus, can appropriately be described as facilitating the efficient and economical operation of government.

The number of Outcome C ("legal/managerial") and Outcome E ("legal/political") cases is a very small portion of the total number of cases collected for this dissertation. However, the vast majority of these cases were decided after *Varig Airlines*. Another future research project will be to explore why these two outcomes have become more common in the post-*Varig Airlines* Era. Chapter 6: Theoretical Implications and Conclusions, describes in detail how these data contribute to our understanding of Rosenbloom's three-part framework (Rosenbloom, 1983; 2005).

Normative Implications for Congress and the Judiciary

The data for this dissertation have important normative implications for Congress and the Judiciary. By passing the DFE with such vague language, by declining to include specific statements of Congressional intent within the DFE, and by choosing not to revisit the DFE in the 61 years after its passage, Congress implicitly allowed the Judiciary to establish the parameters of the DFE for both plaintiffs and the government involved FTCA litigation. The judiciary, in short, is largely responsible for the government's 74.1% success rate in RDCDFEMSJ Cases. Now that this success rate is known, Congress and the Judiciary must decide whether the federal district courts have correctly, in their minds, applied the DFE over time. Specifically, Congress could amend the DFE to make it more difficult (or easier) for the government to succeed in DFE cases. Like

Congress, the Judiciary could change the way it evaluates DFE cases, and allow more FTCA cases to proceed to the trial stage.

From the data presented in this chapter, we now know how DFE jurisprudence has developed at the federal district court level over time. Chapter 6: Theoretical Implications and Conclusions, discusses in detail how theory can help us understand and contextualize this jurisprudence. Chapter 6: Theoretical Implications and Conclusions also describes how these data indicate a "partnership" between pubic administration and the judiciary.

Implications for Plaintiffs

Knowing the government success rate, both overall and within individual circuits, is also important for plaintiffs (and their attorneys). According to these data, FTCA cases filed within the First and Second Circuit Courts of Appeal are most likely to survive a government's motion to dismiss and proceed to trial. Cases filed within the Fourth Circuit, on the other hand, are most likely to be dismissed under the DFE. These data, in other words, demonstrate that venue is an important aspect of FTCA litigation for both parties. While litigants (and their attorneys) have no control over where a tort is committed, there are some instances in which a litigant can convince a court to shift venue (See Chapter 2: History of the FTCA and DFE for a detailed discussion of federal jurisdiction in FTCA cases). To maximize their likelihood of obtaining financial redress (whether through a settlement or through a favorable trial verdict); thus, plaintiffs will

want to pursue FTCA cases within circuits with high percentages of Outcome B cases, such as the First and Second Circuits.

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CHAPTER 6

THEORETICAL IMPLICATIONS AND CONCLUSIONS

Introduction

This chapter discusses the theoretical implications and conclusions of this dissertation. An extended discussion of how this dissertation implicates public administration theory is appropriate because research on doctoral dissertations within the field of public administration has shown that "the majority of the dissertations studied lacked a theoretical framework … and tended to address questions of moderate to low interest in the field" (White, Adams, & Forrester, 1996, p. 442; see also McCurdy & Cleary, 1984; White, 1986). In addition to the implications for Rosenbloom's three-part theoretical framework, this chapter discusses how this dissertation contributes to our understanding of DFE jurisprudence and the partnership between public administration and the Judiciary (Rosenbloom, 1983; 2005).

Implications for Rosenbloom's Theory

The DFE and the "Judicialization" of Public Administration

Rosenbloom derives his "legal approach" to public administration from three sources: (1) administrative law (the statutes, executive orders, and court decisions which define and control agencies' legal authority); (2) constitutional law (the court decisions which protect individual constitutional rights); and (3) the "judicialization" of public

administration (Rosenbloom, 1983). The "judicialization" of public administration, for Rosenbloom, means that as agencies have begun to act more like courts, legal values now play a greater role in their decisionmaking. The use of "hearing officers" and administrative law judges, who preside over trial-like administrative hearings, are examples of the "judicialization" of public administration. For Rosenbloom, the "judicialization" of public administration "brings not only law but legal procedure as well to bear upon administrative decision making … and consequently legal values come to play a greater role in their activities" (Rosenbloom, 1983, p. 223).

This dissertation suggests that Rosenbloom's discussion of the "judicialization" of public administration should be expanded to include the FTCA. Specifically, although the FTCA did not create internal agency actors (such as "hearing examiners" or administrative law judges) to hear tort complaints against agencies, the FTCA's delegation of authority to hear tort cases to an external agency actor within the judicial branch of government (the federal district courts) brings legal processes and procedures to bear on administrative decisionmaking. For example, with the advent of FTCA litigation, federal managers concerned about automobile safety need to do more than just require their employees who utilize government motor pool vehicles to watch a training video on defensive driving – they need to ensure their employees complete paperwork (drafted by attorneys) documenting their attendance at these meetings in case that employee is involved in an automobile accident that forms the basis for an FTCA law suit.

One consequence of the argument that the FTCA has "judicialized" public administration is that Rosenbloom's directive that public administrators know and

understand the Constitution should be extended to include knowledge about tort liability (Rosenbloom, 2005, pp. 479-481). That administrators should know and understand the constitutional rights of individuals they come into contact with during their jobs is an easy argument to make given that § 1983 makes administrators personally liable for violating individual constitutional rights. Phillip Cooper (1985), as discussed in detail below, refers to the ability of a public administrator to use knowledge of the legal system to avoid liability judgments as a "defensive matter" that in turn reinforces agency discretion and acts as an enabling force by encouraging public administrators to be more familiar with the legal boundaries of their authority (p. 650). Even though Rosenbloom and Cooper are speaking specifically of a public administrator's personal liability under § 1983, as compared with the FTCA, which only imposes agency liability, conscientious public administrators (and their managers) should still want to avoid the millions of dollars in liability that successfully litigated tort claims might cost their employers.

The DFE and Rosenbloom's "Legislative-Centered" Public Administration

In Building a Legislative-Centered Public Administration, discussed in detail in Chapter 3: Literature Review, Rosenbloom (2000) describes how Congress redefined the relationship between itself and public administration in 1946 by passing the Administrative Procedures Act, the Legislative Reorganization Act, the Employment Act, and the FTCA. Among other things, these acts assign legislative functions to agencies, making them extensions of Congress (Rosenbloom, 2000, p. 776). Rosenbloom regards the FTCA as an example of Congressional "loadshedding," or the shifting of duties

previously performed by Congress to another branch of government, thereby allowing Congress to devote more time and attention to other tasks (See Rosenbloom, 2000; see also Chapter 3: Literature Review). Given the preceding discussion about the FTCA and the "judicialization" of public administration, the following question becomes relevant: is the FTCA still "legislative-centered" as Rosenbloom suggests?

In addition to arguments that the FTCA "judicializes" public administration, this dissertation suggests that, over their 60-year history in the federal courts, the FTCA and DFE have stifled values lauded by Rosenbloom's political approach to public administration (Rosenbloom 1983; 2005). For example, a common criticism of the DFE is that it allows government to avoid financial accountability in the form of adverse monetary judgments by limiting the number of FTCA suits allowed to proceed to the trial stage. While no empirical data exist documenting the exact impact of FTCA litigation on federal budgets, Professor Harold Krent (1991) estimates that the DFE saves government "perhaps billions of dollars a year" (p. 871). The United States Supreme Court's ruling in *United States v. Gaubert* (1991) alone quashed a $100 million dollar claim by plaintiffs. Whether the exact dollar amount is in the hundreds of thousands, millions, or hundreds of millions, the DFE allows the government to avoid spending a substantial amount of money every year on tort judgments.

Another criticism apparent from this dissertation is that the DFE stifles transparent government. Transparency in government means that government operations and inner-workings are open to public view and scrutiny. This public scrutiny, in turn, helps ensure the proper conduct of public officials. Rosenbloom (2002) uses the term "sunshine" to describe the value of open government (p. 579). He takes this term from

Supreme Court Justice Brandeis's statement that "sunlight is said to be the best of disinfectants; electric light the most efficient policeman" (Brandeis, 1914, p. 92). A well-known example of transparent government is the Freedom of Information Act of 1966 (FOIA), which allows the general public access to many types of administrative documents. So-called "sunshine laws," such as the Government in the Sunshine Act of 1976, which require that certain types of meetings and hearings within agencies be open to the public and the press, exemplify transparency philosophy in government.

The discovery process of federal district court litigation is another example of open government. Discovery, governed by the Federal Rules of Civil Procedure for civil actions in federal court such as FTCA litigation, is the process through which opposing parties in litigation obtain litigation-relevant information from each other. The purpose of discovery is to:

> … enable one who is asserting a right or claim to determine the exact nature of such right or claim and the extent thereof. Its objectives are to enhance the truth-seeking process, to enable the attorneys [responsible for the case] to better prepare for trial, to eliminate surprise, and to promote an expeditious and final determination of controversies in accordance with the substantive rights of the parties. The goal of discovery is to permit a litigant to obtain whatever information he may need to prepare adequately for the issues that may develop without imposing an onerous burden on his adversary. Its legitimate function is to furnish evidence, and the ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial. (Corpus Juris Secundum, 1999, 10)

The rules of discovery do not distinguish between private litigants and the United States government. Thus, both parties are equally obligated under court rules to disclose all relevant information to the adverse party. Discovery is obtained in a number of ways, including depositions, interrogatories, and the exchange of written documents. When litigation ends, so do the discovery rights of the parties involved. For example, when a

DFE case is dismissed for lack of subject matter jurisdiction (or if the plaintiff settles with the government), a private litigant no longer has a right to receive information from the government about its actions which led to the injury involved in the case.[67]

This dissertation explores the concept of open government because plaintiffs in FTCA litigation are entitled to a considerable amount of information through the discovery process of federal district court litigation. Because it involves allegations of negligent conduct on behalf of federal employees and agencies, discovery in FTCA litigation potentially involves the disclosure of embarrassing information to scrutiny from the outside world. In other words, once an FTCA case progresses to the discovery phase of the litigation process, agencies will have a more difficult time limiting the dissemination of documentation confirming the misconduct of their agency or its employees. When the DFE applies, however, a plaintiff's case in district court is dismissed, and the plaintiff's right to discovery ends. The incentive to use the DFE, therefore, is incredibly high for an agency attempting to avoid disclosing documentation and testimony and revealing information about its employees' negligent actions to public scrutiny.

Arguments that the DFE decreases administrative accountability and hinders transparent government suggest that the FTCA does not contribute to a legislative-centered public administration, but rather that the DFE "managerializes" public administration by allowing agencies to operate more economically and efficiently without

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[67] It is not known whether plaintiffs will have always received "full" (or complete) discovery before a motion for summary judgment is argued. Discovery is often viewed as a "continuing obligation." Parties, therefore, are obligated to produce relevant documents and information even after initial discovery is complete.

the financial costs and scrutiny that a successful DFE law suit would impose. However, it is important to remember that although the FTCA allows Congress to shift the load of the "private bill" system to the judiciary, which is Rosenbloom's (2000) central argument about why the FTCA is legislative-centered, the FTCA still only provides a partial waiver of sovereign immunity. In other words, for those plaintiffs whose FTCA case is dismissed as a result of a government's discretionary function exception motion, the only way to collect monetary damages is by petitioning Congress directly through a "private bill." Rosenbloom's contention that the FTCA is legislative-centered, therefore, must emphasize (in addition to loadshedding) that by only partially waiving its sovereign immunity through the FTCA, Congress retained a significant degree of authority over whether, and to what degree, victims are compensated for government's tortious conduct.

Understanding DFE Jurisprudence

As described in previous chapters of this dissertation, public law scholarship is generally critical of the DFE and the United States Supreme Court opinions which interpret it. One common theme of this literature is that the DFE provides too much protection for the government against private tort suits (Hyer, 2007; Krent, 1991; Levine, 2000; Peterson & Van Der Weide, 1997; Zillman, 1995). Another criticism levied against the DFE is that its vague language is confusing. For example, scholars have called for Congressional clarification of the DFE (Cass, 1987; Matthews, 1957), and complain that the Supreme Court has done little to help both federal circuit and district courts and litigants understand the scope of the DFE (Bagby & Gittings, 1992; Peck, 1956).

Each of these studies comes from American law review journals and uses traditional public law theory and doctrines to understand the DFE. Public law scholarship focuses on individual rights and interests (such as those of a specific plaintiff or defendant) and view the law as recognizing "higher values than speed and efficiency" (*Stanley v. Illinois*, 1972). Public law theory and doctrines are encompassed, in large part, in Rosenbloom's legal approach to public administration, which was discussed in Chapter 3: Literature Review.

Although the values of public law scholarship conflict with those of "traditionalist" public administration, Carl Stover (1995) demonstrates the utility of using administrative theory to understand judicial action. Stover's article is a response to public law scholarship that is critical of the Burger and Rehnquist Courts. Public law scholars, as noted by Stover, describe the jurisprudence of the Burger and Rehnquist Courts as inconsistent, rootless, and hostile to individual rights (Blasi, 1983; Calabresi, 1991; Chayes, 1982; Chemerinski, 1989; Mezey 1989; Nichol, 1984; Schmidt, 1984; Tribe, 1985). Stover (1995), on the other hand, sees this jurisprudence as coherent and "principled" when viewed in light of public administration theory (p. 82). Stover argues that, although Supreme Court justices may not know "traditionalist" public administration scholars, like Luther Gulick (1937) and Leonard White (1926) by name, the justices adopt the principles of "the old public administration" in their written opinions. "Traditionalist" public administration theory, in other words, resolves many of the confusing paradoxes identified by public law scholars from the jurisprudence of the Burger and Rehnquist Courts.

After describing "traditionalist" public administration theory in detail, including its preference for a separation of politics from administration, Stover (1995) identifies two aspects of traditional managerial thought which differ radically from public law theory. First, "traditionalist" public administration is oriented to the collectivity, and not to the individual (p. 85). These scholars, in other words, are primarily concerned with making organizations work and they assume that when organizations are functioning well, the interests of individual clients are also well-served. Stover also points out that this particular perspective is a collective one. In other words, while most customers generally receive good products from the private businesses they frequent, once in a while, isolated individuals may "get a lemon" from time to time (pp. 85-86). Similarly, in the public sector, while most citizens generally receive good police protection, it is entirely possible that a police officer will not be immediately available when one individual citizen is accosted by one individual mugger.

Second, Stover identifies the concept of reasonable discretion as a fundamental difference between public law theory and "traditionalist" public administration. For the public law community, discretion is a regrettable necessity (Davis, 1969). In other words, some decisions have to be left to discretion because it is "humanly impossible to prescribe everything in advance by law" (Stover, 1995, p. 86). Stover uses the following quote from Woodrow Wilson (though he alters slightly the original order of Wilson's sentences) to emphasize the importance of discretion in public administration:

> The broad plans of governmental action are not administrative [they are political]; the detailed execution of such plans is administrative …. This is not quite the distinction between Will and answering Deed, because the administrator should and does have a will of his own in the choice of means for accomplishing his work. He is not and ought not to be a mere passive instrument …. Large powers

> and unhampered discretion [are] indispensable …. Trust is strength in all relations of life …. There is no danger in power, if only it be not irresponsible …. it is the office of the administrative organizer to fit administration with conditions of clearcut responsibility which shall insure trustworthiness … if to keep his office a man must achieve open and honest success, and if at the same time he feels himself intrusted with large freedom of discretion, the greater his power, the less likely is he to abuse it, the more he is nerved and sobered and elevated by it. (Wilson as cited in Stover, 1995)

For "traditionalist" public administration scholars, then, discretion is the center of good governance, and should be fostered and developed within public organizations.

Too support his argument, Stover (1995) offers multiple examples from the Burger and Rehnquist Courts. First, Stover declares that the "clearest demonstration" of the Court's acceptance of "traditionalist" public administration theory is *Rutan v. Republican Party of Illinois* (1990). In *Rutan*, the Court prohibited the hiring, firing, or transfer of most public employees for reasons relating to political affiliation or political service. For Stover (1995), the requirements of *Rutan* did more than protect the individual appellant who brought the case to federal court, they "mandate[d] … the apolitical and professional civil service the [Progressive] reformers longed for" (p. 88).

Second, Stover (1995) identifies *Matthews v. Eldridge* (1976), an opinion relating to whether a recipient of government benefits was entitled to a hearing before or only after termination of their benefits, as the most important due process case for his paradigm. The *Matthews* opinion is so important to Stover because it was issued on the heels of *Goldberg v. Kelly* (1970), a case which also involved the right to a pretermination hearing for a benefits recipient, but was significantly more individual-oriented than *Matthews*. The *Goldberg* Court held that the determination as to when a full hearing must be given to a benefits recipient "… is influenced by the extent to which

[the recipient is] 'condemned to suffer grievous loss' and … depends upon whether the recipient's interest in avoiding that loss outweighs the government's interest in summary adjudication" (*Goldberg v. Kelly*, 1970, p. 263). The *Goldberg* Court noted that because eligible benefits recipients have no other income or assets, "termination of aid pending resolution of a controversy may deprive an eligible recipient of the very means to live while he waits" (*Goldberg v. Kelly*, 1970, p. 264). The benefits recipient's interest, for the *Goldberg* Court, "clearly outweighs the State's competing concern to prevent an increase in its fiscal and administrative burdens" (*Goldberg v. Kelly*, 1970, p. 263). The Court's opinion in *Goldberg* not only granted the appellant a hearing on the termination of his benefits, it also required all 50 states to adopt procedures to ensure that hearings were granted to all benefits recipients who requested them.

In contrast to the individual-oriented focus of *Goldberg*, the *Matthews* Court held that the question of imposing additional procedures on bureaucracy

> … requires the analysis of the governmental and private interests that are affected … [this] requires consideration of three distinct factors: [the private interest;] the risk of [error] and the probable value, if any, of additional process[; and] the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. (*Matthews v. Eldridge*, 1976, p. 336)

The *Matthews* Court was careful to point out that the burdens it can impose are substantial, and that the balance between the rights of the individual and the interests of the State are "shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions" (*Matthews v. Eldridge*, 1976, p. 345). The Court further declared that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social

welfare programs that the procedures they have provided assure fair consideration" (*Matthews v. Eldridge*, 1976, p. 349).

Unlike the appellant in *Goldberg*, the Court denied Mr. Eldridge's request for a hearing. He lost despite the fact that in his poor health he had been driven into destitution, losing his house, his car, his furniture, and even his bed (Stover, 1995, p. 90). Eldridge had filed his suit against the government after a prior 11-month suspension of his benefits fearing he would not live through another suspension (Cooper, 1988). Stover notes that, in its decision, the *Matthews* Court deviates not just from prior liberal-activist courts, but also from traditional understanding of the function of a court (Stover, 1995, p. 90). Specifically, by ignoring Eldridge (whose case it was supposed to be deciding) and deciding the case based upon "the generality of cases," the *Matthews* Court engaged in managerial reasoning as opposed to judicial reasoning (Stover, 1995, p. 90). The concern for the *Matthews* Court, then, is not how to save Eldridge from starving, but how to make the Social Security Administration more efficient (Stover, 1995).

Stover (1995) also investigates several search and seizure cases issued by the Burger and Rehnquist Courts identified by public law scholars as "particularly puzzling" (p. 94). Decisions during this time period allow law enforcement officials to stop all oncoming traffic without any specific legal cause but refused to allow stops of individual motorists or pedestrians unless officers could satisfy either a probable cause standard to arrest the individual or a reasonable articulable suspicion standard to detain the individual in order to conduct further investigation into criminal activity. Some public law scholars see these decisions as inherently contradictory, because "after all, is a crowd but an

aggregation of individuals? So how can the crowd have rights different from those of the individuals in it?" (Stover, 1995, p. 94).

Stover uses the concept of administrative discretion to explain the apparent contradiction created by the Burger-Rehnquist Court. For Stover, roadblocks or "administrative checkpoints" are constitutional because decisions about when to utilize them are presumably made by highly visible and politically accountable officials rather than line-level patrol officers, and the roadblocks themselves are both visible to the public and indiscriminate. The burdens of these roadblocks, in other words, are felt by the public as a whole, and not just by individuals (Stover, 1995, p. 94).

> [We must not] transfer from politically accountable officials to the courts the decision as to which among several reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree [but] the choice … remains with the government officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers. (*Michigan Dept. of State Police v. Sitz*, 1990, pp. 453-454)

Because administrative checkpoints "minimize the discretion of the officers on the scene" and vest the decision about when and where to employ them in the hands of politically accountable officials, Stover presumes that these checkpoints will be used "to the extent, and only to the extent, that the majority of the public perceives them as just and necessary, and the specific procedures and manners used in carrying them out as professional and decent" (*Michigan Dept. of State Police v. Sitz*, 1990; Stover, 1995, p. 94).

It is important to note that Stover's article does not present any fundamental disagreements with public law scholarship on the issue of the importance of individual rights. For example, Stover does not applaud or otherwise endorse the *Matthews* decision

(or any other decisions he uses as examples in his article), which is roundly criticized within both the public law and political science communities. Rather, Stover's purpose is to employ managerialist theory to help us understand these jurisprudential developments.

Stover's findings are interesting for the fields of public law, political science and public administration because they challenge established conceptions of judicial functions. One of the traditional roles of the judiciary is to remind managers that the Constitution is "designed to protect the fragile values of a vulnerable citizenry from an overbearing concern with efficiency and efficacy" (*Stanley v. Illinois*, 1972, pp. 645-646; see also *Ex Parte Milligan*, 1866; *Fuentes v. Shevin*, 1972; *Joint Anti-Fascist Refugee Committee v. McGrath*, 1951; *Olmstead v. United States*, 1928 [dissent]). According to Stover (1995), "that [traditionalist public administration] principles, long accepted (even if not always followed) by the executive and legislative branches as the right way to organize government operations, should now be accepted by the judicial branch is a major watershed in constitutional development" (p. 85). Specifically, the principles of "traditionalist" public administration theory, which have been "discredited" within public administration scholarship, "have found a new home in jurisprudence" (Stover, 1995, p. 102).

Stover's observations, although specific to decisions in the areas of due process, institutional reform suits, searches and seizures, and official liability suits, help explain the public law community's difficulty understanding the development of the DFE in the United States Supreme Court. When viewed though the eyes of public law and its preference for individual rights over values such as efficiency and economy, the transition to *Varig/Berkovitz/Gaubert* may appear to be a confusing shift, if not a

fundamental departure, from the *Dalehite/Indian Towing* standard (especially given the fact that the public law community does not collect empirical data to confirm their suspicions) (*Dalehite v. United States*, 1953; *Indian Towing Co., Inc. v. United States*, 1955). The transition from *Dalehite/Indian Towing* to *Varig/Berkovitz/Gaubert* is significantly clearer when viewed through the lens of "traditionalist" public administration theory which, unlike the public law perspective, tells us that these two eras share a fundamental theoretical similarity. The planning versus operational test of *Dalehite* and *Indian Towing*, for example, reflects Wilson's call for a politics-administration dichotomy. Moreover, *Varig*'s call (echoed in *Berkovitz* and *Gaubert*) to "prevent judicial 'second guessing'" of agency action endorses the responsible exercise of administrative discretion. Rather than confusing or in need of clarification, the DFE's development within the Supreme Court is understandable because it follows a common theoretical premise: "traditionalist" public administration theory (Bagby & Gittings, 1992; Cass, 1987; Matthews, 1957; Peck, 1956).

Given the public law community's difficulty in understanding the transition from *Dalehite/Indian Towing* to *Varig/Berkovitz/Gaubert*, it makes sense that the public law community would incorrectly anticipate that plaintiffs would be less likely to successfully litigate a DFE case against the government in the *Varig/Berkovitz/Gaubert* era. Unlike the public law community, the federal district courts do not appear to be confused by *Varig/Berkovitz/Gaubert*, but rather see these opinions as an extension of the *Dalehite/Indian Towing* era. Specifically, as described in Chapter 5 of this dissertation, the change in government's success rate at the federal district court level changed only slightly in the post-*Varig* era (See Tables 5.3, 5.4. 5.5, 5.6. and 5.7; see also Figure 5.15

and 5.16). After *Varig Airlines*, the government's success rate increased by just 5.2%, from 66.9% to 72.1% (See Table 5.3). After *Gaubert*, the government's success rate increased by just 6.4%, from 69.9% to 76.3% (See Table 5.5). Even when viewed before and after the *Varig/Berkovitz/Gaubert* trio of cases, we see that the government's success rate rose just 9.4% during this time period (See Table 5.7). Plaintiffs, therefore, were very unlikely to succeed before *Varig Airlines* and *Gaubert* were decided, and the federal government, on the other hand, has consistently (from 1946 through 2007) been able to avoid FTCA litigation (and continue operating efficiently and economically) using the DFE in federal district courts. These data, in short, confirm the development of a "traditionalist" public administration jurisprudence at both the United States Supreme Court level, as identified previously by Stover (1995), and within the federal district courts.

The DFE and the "Partnership" Between Public Administration and the Judiciary

The core of Stover's argument, that the relationship between public administration and the judiciary is often misunderstood, is not necessarily new to the study of public administration (Stover, 1995). However, instead of focusing on the public law community's understanding of United States Supreme Court jurisprudence, Melnick (1985) and Cooper (1985) focus on public administrators' perception of the administrative law opinions that affect them. Melnick and Cooper, as described below, see a "partnership" between federal courts and public administration developing in administrative law decisions.

As early as 1971, Chief Judge David Bazelon of the Federal Circuit Court of Appeals for the District of Columbia Circuit, the federal appellate court which hears the vast majority of appeals of agency actions, declared the arrival of "… a new era in the long and fruitful collaboration of administrative agencies and reviewing courts" while issuing an order requiring Department of Agriculture administrators to initiate proceedings to ban the pesticide DDT (*Environmental Defense Fund v. Ruckleshaus*, 1971, p. 597). Public administrators (whether in the early 1970s or today), having watched the D.C. Circuit and other federal courts overrule federal agency decisions at an accelerating rate, criticizing administrators for arbitrary or sloppy behavior, and requiring compliance with new rulemaking procedures, may be more likely to side with the dissenting judge in the *Ruckleshaus* opinion, who complained that the Court was "undertaking to manage the Department of Agriculture" through its opinion (*Environmental Defense Fund v. Ruckleshaus*, 1971, p. 598). Noting this disconnect between judges and administrators within the public administration community, Melnick facetiously asks: "[w]ith partners like this, who needs enemies?" (Melnick, 1985, p. 653).

Melnick (1985) and Cooper (1985) view Bazelon's declaration as more than just court-sponsored rhetoric intended "as a clever disguise for judicial usurpation of administrative authority" (Melnick, 1985, p. 653). Rather, Melnick and Cooper view the relationship between public administration and the federal courts as a "complex, low visibility … coalition" (Melnick, 1985, p. 658). Both Melnick and Cooper describe how judicial objectives, such as open, fair, and rational decision making, do not hinder agency discretion or efforts to carry out policy, but rather help agencies deliver services to the public.

Melnick (1985) bases his argument, in part, on federal court decisions interpreting the Administrative Procedures Act. Opinions such as *Kennecott Copper Corp. v. EPA* (1972), *Portland Cement Assoc. v. Ruckelshaus* (1973), and *South Terminal Corp. v. EPA* (1974) changed the relatively lenient "arbitrary and capricious" analysis to a more demanding standard of judicial review on the "notice and comment" rulemaking procedures outlined in Section 553 of the APA. This new standard requires agencies to make their data, methodology, and arguments upon which they rely to propose new regulations available to the public. Agencies must also invite comment on this information, respond to all "significant" criticism of their proposals, and explain in detail the manner in which they arrive at their final rule. This court-required process generates a "record" which appellate courts can access when reviewing agency decisionmaking. With the help of this "record," courts require agencies to "articulate with reasonable clarity its reason for decision and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination" (*Greater Boston Television Corp. v. FCC*, 1970, p. 851).

The more active role played by courts in agency decision making serves multiple purposes. First, by allowing everyone an opportunity to speak and be heard during the decision-making process, agencies have more information and alternatives available for their consideration. Moreover, by encouraging participation from entities such as civil rights organizations, consumer protection groups, and environmentalists, courts help break down "iron triangles" and keep agencies focused on the public interest (Melnick, 1985, p. 653). Melnick lauds this development, noting:

> Who would object to this? Certainly not the agencies, which would hardly claim the right to be irrational or unfair. Certainly not Congress, which constantly criticizes bureaucratic myopia. Before long, Congress had written these judicially created procedures into many regulatory statutes. Certainly not the press, for which openness is next to godliness. And certainly not legal scholars, who want nothing more than for government to be as fair and reasonable as the most distinguished members of their profession. To be sure, a few judges complained of the enormous burden this put on the courts; but this was a cross most judges would gladly bear. (Melnick, 1985, p. 654)

Even lawyers representing agencies eventually endorsed the increased scrutiny courts placed on their employers. "The effect of such detailed factual review by the courts on the portion of the agency subject to it is entirely beneficial" declared one Environmental Protection Agency attorney, a sentiment echoed by other agency lawyers (Pederson, 1975, pp. 59-60).

Phillip Cooper (1985) echoes Melnick's discussion of a "partnership" between public administration and the courts urging public administrators to reassess their relationship with the judiciary. Cooper argues that, despite a reputation within the public administration community for constraining agency flexibility and interfering with internal agency functions through their rulings, the federal judiciary has, in fact, changed the law governing administrative agencies in ways that are "charitable" to administrators (p. 643). Cooper gives six examples of public administration's misperceptions about the judiciary to demonstrate his point.

First, Cooper addresses the complaint that courts do not care about agency costs. Cooper identifies the *Matthews v. Eldridge* (1976) opinion, described above in the subsection discussing Carl Stover's work on jurisprudential developments in administrative law, as evidence of the Supreme Court's concern for agency costs. For Cooper, the significance of *Matthews* is that it allows for administrative flexibility in

determining what process is due to individuals. The *Matthews* Court guides agencies in this process by requiring they consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitutes procedural requirements would entail. (*Matthews v. Eldridge*, 1976, p. 335)

As Cooper points out, the *Matthews* balancing test has been the controlling standard for federal courts since 1976, and the Supreme Court has rejected calls for expanded administrative due process since that time (see *Bishop v. Wood*, 1976; *Board of Curators v. Horowitz*, 1978; *Ingraham v. Wright*, 1977; *Parham v. J.R.*, 1979; *Paul v. Davis*, 1976). Lower courts are also aware of the way their decisions implicate agency budgets. According to one federal district court, in a decision about whether confining inmates in overcrowded, dirty, smelly, and unsanitary isolation cells violated the Eighth Amendment prohibition of cruel and unusual punishment:

> [t]his Court has no intention of entering a decree herein what will disrupt the [Arkansas State] Penitentiary or leave [the Arkansas director of corrections] and his subordinates helpless to deal with dangerous and unruly convicts… The Court has recognized heretofore the financial handicaps under which the Penitentiary system is laboring, and the Court knows that [Respondent] cannot make bricks without straw. (*Holt v. Sarver*, 1969, p. 833)

Just because courts are aware of the fiscal impact of their decisions, of course, does not mean they will routinely excuse the violation of constitutional rights in the name of budget savings. However, as noted by Cooper (1985), the public administration community "can improve their relationship with judges in such cases by making careful decisions about when to fight and when to negotiate," and when they find themselves in

court as a result of their actions, administrators "can present detailed and understandable explanations of their concerns about financial and administrative flexibility" (p. 645).

Next, Cooper (1985) addresses the perception that courts are increasingly unwilling to defer to administrative expertise. Cooper responds to this concern by first citing to the leading ruling on judicial review of agency rulemaking, *Vermont Yankee Nuclear Power Corp. v. United States Nuclear Regulatory Commission* (1978), wherein the United States Supreme Court warned lower courts against imposing procedural requirements beyond those contains in the statutes administered by the agency affected by the affected agency. For Cooper, *Vermont Yankee* demonstrates that the central focus of expanded rulemaking requirements should be legislation and executive orders, as opposed to judicially-imposed mandates (p. 646).

Another example of judicial deference to agency expertise employed by Cooper is *Youngberg v. Romeo* (1982), a lawsuit for damages against a state-run hospital and state officials for lack of treatment. Although it required agencies to provide some mental health care for institutionalized retarded persons (and also recognized a constitutional claim for protection against abuse), the *Youngberg* Court warned against judicial second-guessing of decisions based on administrative expertise:

> By so limiting judicial review of challenges to conditions in state institutions, interferences by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions [about the kind of care and treatment needed by a patient]. (*Youngberg v. Romeo*, 1982, pp. 322-323)

At least in the area of mental health treatment, thus, the United States Supreme Court is explicit in its pronouncement that courts "must show deference to the judgment exercised by a qualified professional" (*Youngberg v. Romeo*, 1982, p. 322).[68]

Next, Cooper addresses the concern that the Supreme Court is continually expanding the ability of federal district courts to issue remedial orders which obstruct agencies' ability to operate. Cooper first reminds us that public administrators often encourage such suits in order to pressure legislators for increased funding (Stickney, 1974; Wasby, 1981). Furthermore, Cooper notes that the Supreme Court has acted to make it more difficult for trial judges to issue remedial orders (*Personnel Administrator v. Feeny*, 1979; & *Rizzo v. Goode*, 1976; *San Antonio Independent School District v. Rodriguez*, 1973; *Washington v. Davis*, 1976) has narrowed the scope of remedial orders (*Columbus Bd. Of Ed. v. Penick*, 1979; *Dayton Bd. Of Ed. v. Brinkman*, 1977; *Firefighters Local Union No. 1784 v. Stotts*, 1984; *Milliken v. Bradley*, 1974), and has limited the duration of supervisory jurisdiction a district court may exercise over an administrative institution. For Cooper (1985), these decisions demonstrate to the public

[68] Around the time of the publication of Cooper's article, the United States Supreme Court issued its opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc* (1984). *Chevron* directs lower courts to apply a two-step test when reviewing an agency's interpretation of a statute which gives it authority to act in a given situation. The two-step test involves determining: (1) whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress;" and (2) "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" (*Chevron*, 1984). Although issued in 1984, *Chevron* retains its influence in administrative law and "… has become foundational, even a quasi-constitutional text – the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies" (Sunstein, 2006, p. 188).

administration community that "it is not always clear that the relationship of court to agency … is primarily adversarial" (p. 647).

The next concern Cooper addresses is that the Supreme Court is expanding legal protections for public employees at the expense of managers' discretion. After acknowledging that the Supreme Court did expand employee rights, particularly in the area of First Amendment free speech and freedom of association, in the late 1960s and early 1970s, Cooper (1985) reminds the public administration community that many other employee rights have been created by statute (such as the Civil Service Reform act of 1978, the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, and the Fair Labor Standards Act of 1938) or executive order, and have nothing to do with shifts in federal jurisprudence (p. 647).

Moreover, for its part, the Supreme Court has issued decisions in the area of employee speech which reinforce the importance of agency discretion. In *Myers v. Connick* (1983), Justice White (an apologist for managerial values) insisted that:

> … where a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior ….
>
> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to employers' judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. (*Myers v. Connick*, 1983, pp. 719-720)

For Cooper (1985), the clear language in *Connick* represents a shift toward the Court's deference to administrative interests, signifying the Court's intention to "leav[e] managers free of unnecessary judicial involvement in personnel decisions (p. 647).

Cooper (1985) next addresses the concern that the Supreme Court has consistently issued rulings that make it easier to bring suit in federal court. In Cooper's opinion, the Warren Court's trend of relaxing the rules governing law suits in the federal courts during the late 1960s and early 1970s ended with the Burger Court. In addition to a number of decisions limiting standing within the federal courts (*Allen v. Wright*, 1984; *Duke Power Co. v. Carolina Environmental Study Group*, 1978; *Simon v. Eastern Kentucky Welfare Rights Organization*, 1976; *Valley Forge Christian College v. Americans United for Separation of Church and State*, 1982; *Warth v. Seldin*, 1975), the Burger Court also rejected the claim that public interest groups acting as private attorneys general could collect attorneys' fees after a successful lawsuit (*Alyeska Pipeline v. Wilderness Society*, 1975), and also rejected an implied right of action, or the ability of a private group to claim a right to sue under a statute that does not expressly authorize private litigation (*California v. Sierra Club*, 1981; *Cannon v. University of Chicago*, 1979; *Middlesex County Sewerage Authority v. National Sea Clammers Assn*, 1981; *Touche Ross & Co v. Redington*, 1979).

Finally, Cooper (1985) addresses the concern that the federal courts are expanding the threat to administrators in the form of tort liability judgments. Cooper is talking about constitutional torts in this section (see discussion of § 1983 litigation in Chapter 2: History of the FTCA and DFE), and notes that while the Supreme Court allows for a wider range of damage suits, it has also limited remedial orders that interfere with ongoing administrative activities. The Supreme Court's message to the lower federal courts, thus, is "to limit interference with current administrative operations, but to let

claimants come into court after the fact and collect damages if they can make their case" (p. 648).

Although Cooper's (1985) examples have become somewhat dated, they are still relevant to this dissertation as a demonstration of the fact that the federal courts "are not part of a continuing judicial assault on public administration" (p. 648), but are in fact sensitive to issues and problems public administrators face on a daily basis. For Cooper, this means that while there are natural tensions between public administration and the judiciary, there are also positive aspects to this relationship for administrators each of which reinforces agency discretion. First a knowledge of the legal elements of public administration (including not just statutes and executive orders, but also judicial decisions interpreting these legal authorities), can be an enabling force for public administrators, because care in exercising such formal authority supports and contributes to effective administration. This knowledge, in other words, supports public administrators' claim for legitimacy within government. Second, an understanding of the legal aspects of public administration can serve as a defense mechanism for administrators seeking to avoid adverse legal judgments, whether for themselves (under § 1983, for example) or their agencies (under the FTCA, for example). Finally, an understanding of judicial trends in areas of law impacting public administration can provide managers with increased ability to predict how courts will treat their agency, allowing administrators to better manage their agency. For Coooper (1985), in short, "[a]dministration without attention to law would not mean more efficiency, it would mean chaos" (p. 650).

The data for this dissertation suggest an additional partnership between courts and the judiciary not previously identified by Melnick and Cooper. By delegating the

authority to hear FTCA cases to the federal district courts, and by allowing the scope of the DFE to develop within the federal courts over time, Congress saved federal agencies a substantial amount of time and money. Professor Harold Krent (1991) estimates that the DFE saves government "perhaps billions of dollars a year" (p. 871). The *Gaubert* ruling alone quashed a $100 million dollar claim by plaintiffs. (pp. 319-320). The federal district courts, in a sense, serve a risk management function for agencies. By dismissing over 74% of tort claims against the government (under the DFE) since 1946, the federal district courts have allowed the government to spend its money in areas other than judgments to plaintiffs, and have allowed agencies to focus their time and personnel efforts on activities other than tort litigation.

Conclusion

This dissertation demonstrates that the FTCA and DFE implicate public administration theory in at least three meaningful ways. First, although the FTCA "judicialized" public administration, and while FTCA litigation in the federal district courts has not led to increased accountability and transparency for agencies, the FTCA remains a "legislative-centered" statute because it is only a partial waiver of sovereign immunity and leaves to Congress the ultimate authority to compensate victims of government's torts. Second, an examination of DFE jurisprudence reveals a preference of both the United States Supreme Court and federal district courts for "traditionalist" public administration values, something which previously had only been observed at the Supreme Court level. And, third, the DFE's history in the federal district courts reveals a previously unidentified partnership between the public administration and the judiciary:

the federal district courts as agencies' risk managers. It is interesting to note, then, the FTCA is a "legislative-centered" statute that has been interpreted and applied by the judiciary using "traditionalist" managerial values.

By leaving the DFE unchanged for the last 62 years, Congress has implicitly endorsed the manner in which the scope of the DFE has developed at the United States Supreme Court and within the federal district courts. With this dissertation, Congress is now on notice of the success rate for DFE motions within the federal district courts. Having this knowledge, Congress can either choose to remain silent on the issue, or, if unsatisfied with the DFE's development at the federal district court level, amend the statute in attempt to bring DFE outcomes more in line with their intent.

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