

The Government Gorilla

Why Does Government Come Out Ahead in Appellate Courts?

Introduction

One strand of research inspired by Marc Galanter's "Why the 'Haves' Come Out Ahead" has involved statistical analyses of winners and losers in appellate court cases. Going under the rubric of "party capability theory," these studies have examined outcomes in a variety of courts:

- The U.S. Courts of Appeals (Songer and Sheehan 1992; Songer et al. 1999, reprinted in this volume)
- The U.S. Supreme Court (Sheehan et al. 1992)
- State supreme courts in the United States (Farole 1999; Wheeler et al. 1987)
- The Supreme Court of Canada (Haynie et al. 2001; McCormick 1993)
- The Philippine Supreme Court (Haynie 1994; see also Haynie 1995; Haynie et al. 2001)
- The High Court of Australia (Smyth 2000; Willis and Sheehan 1999; Haynie et al. 2001)
- The Court of Appeal of England and Wales (Atkins 1991)
- The House of Lords (Great Britain) (Haynie et al. 2001)
- The Indian Supreme Court (Haynie et al. 2001)¹
- The South African Supreme Court (Haynie et al. 2001)
- The Tanzanian Court of Appeal (Haynie et al. 2001)

With some exceptions, these studies have reported support for the proposition that, in the context of appellate litigation, parties likely to have more resources and experience have an advantage over opponents with less in the

way of resources and experience. The general interpretation of these findings is to provide broad, but not universal, support for the argument that the “haves” come out ahead because they have tangible and intangible resources that advantage them against weaker parties.

In this chapter, I revisit the analyses testing party capability theory in the appellate court context and suggest that the dominant pattern is not advantageous to “haves” but advantageous to government. While there may be evidence that parties with more resources have an advantage, I will argue that the big advantage comes to government parties rather than to business parties. Moreover, this advantage is not simply one of greater resources. Government is different, and these differences, rather than simple party capability, account for government’s advantage.

I posit that there are two key components to government’s advantage that go beyond the usual resource and experience associated with repeat players. First, the government makes the rules, which the courts in turn enforce. In some ways, this is almost so obvious that it gets overlooked. I will lay out a variety of ways in which government “stacks the deck” to its advantage. Second, despite norms of judicial independence, courts and judges are not independent of government; they are part of government. Courts are agencies of the state (Shapiro 1964, 1968). One possible impact of this is that judges feel some loyalty toward the government or regime of which they are a part (see Derthick 2002, 83, 218). This does not mean that judges blindly back the actions of the other branches but rather that there may be a tendency in relatively close cases to give the edge to a governmental party or to give the government a more sympathetic hearing (Rosenberg 1991, 14–15).

I conclude with a discussion of what my analysis of this body of research focused on the appellate courts may mean for litigation in first instance or trial courts. This is an important question because the cases that get to the appeals level are a highly selective subset of an already selected subset of an already selected subset. That is, using the pyramid metaphor that has been applied to understanding the dispute resolution and litigation hierarchy (see in particular Miller and Sarat 1980–81), appellate litigation cannot be deemed to be typical of disputes that arise, that lead to demands for redress, or that become formal court actions. However, despite the atypicality of appellate cases, understanding the sources of advantage in those cases has implications for cases throughout the dispute pyramid.

The Evidence Concerning Government’s Appellate Advantage

Table 11.1 brings together summary information from eleven different studies that considered sets of cases in appellate courts involving government

TABLE II.1

Net Advantage for Different Types of Parties

	Source	Federal or National Government	State and City/Local Government	State Government	Local Government	Government	"Big Business"	Business or Corporations or "Other Business"	Other Groups or "Other"	Individuals
<i>United States</i>										
	(1)		+11.8		-1.6 ^d		+6.4	+3.1		-1.5
State Supreme Courts	(2)			+32.3	+11.0		+11.1 ^b	-2.4	-6.7	-12.5
State Supreme Courts	(3)	+45.1	+29.9				+5.9	+1.6		-18.2
Federal Courts of Appeals	(4)	+25.6	+15.6					-2.8		-12.6
Federal Courts of Appeals	(5)	+35.9		+11.2	-6.3		-19.3	-11.9		-17.4
U.S. Supreme Court	(6)	+20.4		+3.7 ^c	-2.5	+28.7	+15.0	-5.9		-9.6
Supreme Court	(10)							-27.8		-16.2
Supreme Court										
<i>England and Wales / Great Britain</i>										
Court of Appeal ^d	(7)	+27.0						+6.0		-14.0
House of Lords	(10)					+34.1		-8.4		-26.3
<i>Australia</i>										
High Court	(8)	-0.1	-3.6					+1.2		-1.0
High Court	(10)							+10.7		+4.8
High Court	(11)	11.8 ^c		-2.5	-16.5		+1.3	-3.5	+7.6	+0.5
<i>Philippines</i>										
Supreme Court	(9)	-10.8 ^f						-9.1		+13.7
Supreme Court	(10)					+16.7		-10.5		-7.5
<i>India</i>										
Supreme Court	(10)					+1.0		-6.4		-2.7
<i>South Africa</i>										
Supreme Court	(10)					+2.0		-4.9		+2.7
<i>Tanzania</i>										
Court of Appeal	(10)					+25.0		+14.3		-18.7

SOURCES

- (1) Wheeler et al. 1987 (analysis of samples of cases from sixteen state supreme courts, 1870–1970)
- (2) Farole 1999 (analysis of sample of 1975, 1980, 1985, and 1990 cases from six state supreme courts)
- (3) Songer and Sheehan 1992 (analysis of 1986 decisions of three circuits)
- (4) Songer et al. 1999 (reprinted in this volume) (1925–1988)
- (5) Sheehan et al. 1992 (analysis of U.S. Supreme Court decisions, 1953–1988)
- (6) McCormick 1993 (1949–1992 decisions of the Supreme Court of Canada)
- (7) Atkins 1991 (analysis of Court of Appeal cases, 1983–1985)
- (8) Willis and Sheehan 1999 (High Court decisions, 1988–1998)
- (9) Haynie 1994 (analysis of decisions of the Philippine Supreme Court, 1961–1986)
- (10) Computed from table 2 in Haynie et al. 2001 (data from the Comparative Judicial Database Project; varying number of recent years for each court)
- (11) Smyth 2000 (High Court appellate decisions, 1948–August 1999)

^a “Small” local governments.

^b Almost all cases against individuals or small businesses.

^c Provincial government net advantage.

^d Net advantage scores are author’s estimates based upon tabular data in original article.

^e “Crown” has a net advantage of -2.0 .

^f Includes all levels of government.

while examining whether the “haves” come out ahead. These studies involve eleven different courts in eight different countries, with five of the courts considered in two different studies. Ten of the eleven studies reported the relative advantage of various types of parties using a measure commonly referred to as “net advantage.” For the remaining study, that of the English Court of Appeal, I derived estimates of net advantage from the original author’s tables.

The net advantage measure was introduced by Wheeler et al. (1987, 418) in the first of the studies in this series. Net advantage is computed as follows:

$$\text{Net Advantage} = \text{Success Rate as Appellant} - (1 - \text{Success Rate as Respondent})$$

The latter element of this formula can alternately be read as the success rate of the opponent when the opponent is the appellant. This formula takes into account a common pattern that a given court’s decisions may tend to advantage one side or the other and that some types of parties are more likely to appear as appellants while others are more likely to appear as respondents. In most appellate courts, the U.S. Courts of Appeals (see Howard 1981), for example, the respondent tends to prevail. An exception to this is the U.S. Supreme Court, which has a well-recognized tendency to reverse lower courts (Sheehan et al. 1992, 467), in part reflecting the discretionary nature of its docket whereby the justices can pick and choose which cases to hear (Brenner and Krol 1989; Perry 1991). Appellate courts that have mandatory dockets (that is, where the court is required to decide appeals brought to it) are more likely to uphold the lower court’s decision. For example, in one of the studies of the U.S. Courts of Appeals (Songer et al. 1999, 819), the authors determined that the federal government prevailed in 51.3 percent of appeals when it was the appellant; when the federal government was the respondent, it prevailed in 74.3 percent of appeals (that is, the appellant prevailed in 25.7 percent of appeals); the federal government’s net advantage was then computed as $51.3 - (1 - 74.3) = +25.6$. In contrast, individuals as appellants prevailed in 26.1 percent of appeals and in 61.3 percent of appeals as respondents (that is, the appellant prevailed in 38.7 percent of appeals); thus, the net advantage of individuals is $26.1 - (1 - 61.3) = -12.6$.

My interest is not in the general question of how parties do relative to their resources but in the relative success specifically of governmental parties. For some of the studies, there are two levels of governmental parties involved; when those two parties are pitted against one another, the case will normally be dealt with in the courts of the higher entity and will be decided according to the law and procedure of the higher entity (that is, cases involving a state and the federal government in the United States are handled

in federal court using federal procedural rules and are decided according to federal law).

Table 11.1 shows a very clear pattern for governmental parties to have an advantage.² When there are two levels of government, the higher level has an advantage over the lower level. The average net advantage to governments shown in Table 11.1 is 11.08, while the average net advantage to business is -1.42 and to individuals is -8.03. With the exception of Australia and the Philippines (for the earlier of two periods only), the only negative net advantages for government were for local government; probably a significant proportion of cases involving such litigants were with higher units of government, so it is not necessarily surprising that they would have a low net advantage. The two settings showing a net disadvantage for government merit some additional discussion.

The studies of the Australian High Court report both overall net advantage patterns and patterns for specific pairings of parties. Table 11.2 shows specific pairings. For my purposes, the key anomaly here is the net advantage of individuals in cases with the federal government of Australia. This appears to reflect one peculiarity of High Court cases: a large proportion of cases pitting an individual against the federal government are criminal cases, and the High Court has taken on a role as a watchdog vis-à-vis the protection of defendants' rights. Smyth (2000) categorized these as "Crown" cases, and hence these are separated out in his study. Specifically, most cases involving government are categorized as criminal or public law cases. According to one study (Haynie et al. 2001, table 4), the government has a net advantage of -43 in criminal cases, virtually all of which involve individuals. In public law cases, the government's net advantage is +19. Interestingly, Smyth's study shows a similar advantage in "federal government" (presumably, mostly public law) cases but a much smaller gap in "Crown" (presumably, criminal law) cases involving individuals; this may reflect the time period covered by the studies, with Smyth's going back much farther (1948) than do the other studies. (See Table 11.2.)

The pattern for the Philippines differs radically depending on the period examined. In her analysis of the earlier period, Haynie concluded that the absence of apparent party capability effects might reflect that country's status as part of the Third World and a concern for legitimacy and stability among developing countries. In such countries, she argued, it may be that the courts recognize their unique status within the society, and in order to maintain the court's integrity and legitimacy, the judges take care to not allow the "haves" to take advantage of their resources and capabilities in cases before the court (Haynie 1994, 769; see also Tate and Haynie 1994). While this may be the case, a careful examination of the patterns in the Philippines

TABLE 11.2

Party Pairings for Australia

	Willis and Sheehan 1999	Haynie et al. 2001	Smyth 2000
<i>Crown</i>			
vs. "other" business			-42.1
vs. individuals			+5.4
<i>Federal government</i>			
vs. state and local	+41.7		
vs. business	+14.2		
vs. big business			+20.3
vs. "other" business			+15.5
vs. individual	-8.7		+3.2
<i>State and local government</i>			
vs. business	-8.0		
vs. individuals	+16.7		
<i>State government</i>			
vs. big business			-7.0
vs. "other" business			-9.8
vs. individuals			+2.9
<i>Local government</i>			
vs. "other" business			-14.5
vs. individuals			-8.4
<i>Government</i>			
vs. business		-4	
vs. individuals		-17	
<i>Business</i>			
vs. individuals	22	+17	
<i>Big business</i>			
vs. "other" business			+24.7
vs. individuals			-7.4
<i>Other business</i>			
vs. individuals			-0.5

suggests that the government as litigant may in fact have greater success than the simple results indicate. Breaking down the results by specific party configurations shows the following (Haynie 1994, 764):

Government	
vs. business	+32.57
vs. individuals	-19.36
Business	
vs. individuals	-20.26

These results are in a sense quite consistent with Haynie's argument: it appears that the court is looking out for the interests of individuals. However, Haynie shows some additional results that serve to qualify this conclusion. She provides breakdowns by type of party for six different categories of cases (torts, creditor/debtor, landlord/tenant, labor/management, workers' compensation, and contempt). The net advantage of individuals is strongest in workers' compensation cases, +57.94, and these constitute a very significant proportion of cases, particularly those between individuals and government (in fact, 43 percent of all cases involving government are workers' compensation cases). I suspect that if one were to eliminate workers' compensation cases, government would show a clear net advantage vis-à-vis individuals. This would leave the question of why the Philippine Supreme Court was particularly pro-individual in workers' compensation cases, but one could imagine an explanation that turned on such cases serving a calming effect on a potentially restive population. In thinking about this issue, one also needs to keep in mind that the Philippine Supreme Court's docket differs from that of the other appellate courts shown in Table 11.1; specifically, it "contains many routine decisions generally associated with the lower courts, such as landlord-tenant disputes, property ownership disputes, and debtor/creditor disputes" (Haynie 1994, 756). Thus, there may be differences in the relative success of differing types of parties depending on the level of the court and the general approaches to litigation by various types of parties; for example, if Government A has a policy of stonewalling at the trial level, it may be that government loses a large proportion of cases compared to Government B, which tries to resolve cases before they get into litigation if there is a basis for the opposing party's claim.

The more recent data from the Philippines does not show individuals having any advantage. Part of the reason for this may be a shift in the docket of the Philippine Supreme Court. While in the early period a large proportion of the cases involving individuals were workers' compensation matters in which the Court seemed to favor individuals, by the later period the bulk of cases involving individuals were criminal cases in which the Court fa-

vored government (Haynie et al. 2001, table 4). Moreover, while into the mid to late 1980s, the Philippine Supreme Court was held in relatively high esteem, by the 1990s the Court had slid from favor due to a series of corruption scandals (see Coronel 1997, 2000, 196–231) and the politicization of the court (Haynie 1998).

There is one final issue that I need to consider before turning to possible explanations of government's relative success: the authors of the study of the U.S. Supreme Court conducted a series of multivariate analyses that led them to the conclusion that party resources are relatively unimportant despite the net advantages they reported for different types of litigants. However, the authors make the following crucial observation (Sheehan et al. 1992, 467):

Further weakening the resource argument is the evidence that the effects of resources in the business and state and local model stem almost entirely from the tendency of these parties to lose consistently to the federal government. In analyses in which cases involving the federal government are removed, resources cease to be statistically significant in the business model and are reduced to borderline significance in the state and local government model.

In other words, in U.S. Supreme Court cases that involve the federal government, the federal government has a strong advantage, and the degree of advantage is not linked to the presumed resources of the opposing party. In cases involving state and local governments, there is a small but discernible linkage, which would indicate that state and local governments maintain at least some advantage over nongovernmental parties. Thus, even though the authors conclude that party capability theory, as they have operationalized it, does not account for the relative success of different types of parties before the U.S. Supreme Court, their analysis is consistent with a conclusion that government, particularly the federal government, is advantaged in this forum.

Some authors who focus specifically on the federal government's success do attribute that success to repeat player/party capability factors (McGuire 1998; Salokar 1995, 66–67), while others attribute it, at least in part, to factors such as “special relationships” and the like (Cohen and Spitzer 2000, 405–406; Puro 1981, 221).³ The most persuasive of these analyses is that of McGuire (1998), which predicts the likelihood of winning before the Supreme Court as a function of party status (appellant or respondent) and the relative litigation experience of the advocates before the Court for the two sides. He finds that the Solicitor General gains no advantage over the opposing side beyond that of being the more experienced advocate.⁴

Explaining Government's Advantage

Looking across the range of studies considering party capability theory in the appellate court context, the strongest pattern is the advantage that accrues to government litigants. While there are some specific types of exceptions, the advantage to government greatly exceeds that of the other set of "haves," business or corporations. Moreover, in cases pitting one level of government against another level of government, the higher level of government, in whose courts the case is typically decided, has an advantage.

The standard explanation for the success of government is that it is a have with more resources than virtually any possible opponent. At one level, this is undoubtedly true: a government litigant has a potential resource base (that is, taxes) that is not subject to the limits of the marketplace. However, in the context of democratic systems, the ability to draw on this resource base is highly constrained by political forces. Government legal offices routinely deal with resource constraints that would be unlikely to concern a large corporation. While in principle government legal offices have extensive experience, many or most government legal offices experience high turnover and often have relatively inexperienced staffs of attorneys who receive little in the way of training and mentoring. Of course, there are exceptions to this: some specific government legal offices, such as the office of the Solicitor General of the United States (see Salokar 1992), have exceptionally competent staffs; as discussed above, McGuire (1998) argues that the federal government's advantage before the Supreme Court can be fully explained by the experience of the advocates from the Solicitor General's office.

Still, it seems too facile to accept the simple assertion that government comes out ahead because the government has greater economic and experiential resources. Undoubtedly, resources have something to do with government success in litigation, but government has other advantages as well:

- Government makes the rules by which litigation is conducted.
- Government often has extensive structures for filtering out cases where its position is weak.
- Government litigates in its own courts before judges that are part of the larger governmental regime.

Let me examine each of these sources of advantage in turn.

MAKING THE RULES TO SECURE ADVANTAGE

Immunity

It some ways, it seems almost too obvious to say that government makes rules for its own advantage, but it is probably a central aspect of govern-

ment's advantage. Under the concept of sovereignty, government itself decides whether it can be taken to court (Fox 1997, 423–24). Many contemporary governments may choose to allow suits to be brought against them, but this need not be the case and sometimes is not the case. In the United States, most states have invoked sovereign immunity to limit or eliminate liability for common torts arising from actions of the states, their subunits, and employees of states and subunits (see Eaton and Talarico 1993; Gellis 1990; Shepard's Editorial Staff 1992).

In the United States, the Eleventh Amendment has recently become the subject of significant litigation. Under this amendment as interpreted by the U.S. Supreme Court, states may not be sued without their consent by individuals and corporations except where the issue affords strong protections under the Fourteenth Amendment (or earlier amendments within the Bill of Rights that have been deemed incorporated by the Fourteenth Amendment). In recent decisions, the U.S. Supreme Court has disallowed federal suits brought against states by individuals on the grounds of age discrimination (*Kimel v. Florida Board of Regents*, 528 U.S. 62 [2000]) and disability (e.g., *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 148 L.Ed.2d 866 [2001]), and on other grounds as well (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 [1996]; *College Savings Bank v. Florida Prepaid*, 627 U.S. 666 [1999]). In 2002, the Court extended state immunity to cases before federal agencies (*Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 [2002]). Cases can still be brought by the federal government against state or local governments on behalf of individuals; that is, the *federal* Supreme Court did not limit the *federal* government's power to use the *federal* courts against lower levels of government.

Federal Tort Claims Act

While restrictions on the right to bring government to court constitute the most extreme form of stacking the deck, one can find many other examples of government creating rules that work to its benefit even when it does allow itself to be sued. In the United States, claims concerning some torts caused by federal employees can be brought against the federal government under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (see Fox 1997, 429–33; Weaver and Longoria 2002). This law specifically abrogates the federal government's immunity from suit for injuries caused by the government or government personnel in certain situations (that is, the employee must have acted within the scope of his or her duties). This act limits the government's liability to compensatory damages only (that is, no punitive damages are available) and requires that cases be decided by judges rather than by juries (all cases must of course be handled in the federal courts).⁵ It also re-

quires that claimants must first try to reach a settlement with the agency before filing suit.⁶

Federal Employees Compensation Act

Another example of government control of the rules is the Federal Employees Compensation Act (5 U.S.C. §§ 8101–8193), which governs workers' compensation cases for federal employees injured in the course of their employment. This statute is administered by the Office of Workers' Compensation Programs (OWCP), which in turn has established a set of administrative regulations.⁷ A number of years ago, I spent a month observing a lawyer who handles contingency fee cases, a significant proportion of which are workers' compensation cases. He will not touch federal workers' compensation cases. Sometime later, I contacted him to ask him for specifics as to why he did not take federal workers' compensation cases; he said they were just a quagmire and gave me the names of several other lawyers who might handle them. The second lawyer also said she didn't handle such cases because they were so difficult, and she gave me the name of another lawyer my first contact gave me. That lawyer said he tried handling such cases at one time (about ten years earlier) but found he could not do so in a way that was financially viable. He attributed the problems to two factors.

First, under federal workers' compensation, there is no procedure to "protect" the attorney's fee. The attorney has to collect the fee directly from the client rather than there being some provision such as having the workers' compensation insurer send separate checks to the lawyer and to the claimant or having the insurer pay the settlement or award jointly to the lawyer and client so that the lawyer could deduct the fee due before forwarding the balance to the client (the latter is the common practice in most other types of contingency fee cases). Furthermore, all fees must be approved by the OWCP before the lawyer can collect any fee from the client, and there is no simple formula, such as a standard percentage of any disputed compensation (in Wisconsin, the standard fee for nonfederal workers' compensation cases is 20 percent of disputed compensation other than medical expenses). While in some, perhaps many or all, states there is a requirement of administrative approval of attorneys' fees in workers' compensation cases, these approvals typically turn only on the question of whether there was any genuine dispute that required attorney assistance; the result is that the fee approval process is generally pro forma. Finally, by the time OWCP approves the fee, the client has long since received any lump sum payment that was due, and collecting from the client is very difficult because clients tend to be in fairly dire straits and may have spent any money they received.

Second, the bureaucratic structure of OWCP forces the lawyer to spend

unproductive time. The lawyer I spoke with reported that he or his paralegal often was put on hold for extended periods of time. (I suspect that simply asking to be called back was not a viable option.) There is no mechanism to force OWCP to be more responsive. In contrast, in a private workers' compensation case, the state hearing officer has some power to force the workers' compensation insurer to deal with contested claims in a reasonably timely and responsive manner.⁸

Limitations on Attorney Fees

One way in which government creates advantages for itself is by imposing special limits on attorney fees applicable in proceedings against government. One of the most notorious examples of this was a statutory limit of \$10 on any legal fees that existed for many years in cases brought to secure benefits for veterans. The impact of this limitation was to make it extremely difficult for veterans who believed that they had incorrectly been denied government benefits to obtain recourse through the courts (Kochman 1979). In Social Security cases, attorneys typically charge on a no win, no pay basis, collecting 25 percent of back due benefits as a fee if the appeal is successful, a system that was challenged unsuccessfully in a case decided by the Supreme Court in 2002 (*Gisbrecht v. Barnhart*, 535 U.S. 789). If the challenge had been successful, attorney fees would have been limited to a maximum of \$125 per hour. In defending the current system attorneys asserted that the proposed limits would have discouraged attorneys from taking many Social Security cases (see Coyle 2001). Finally, in those situations where the government makes provisions whereby it will compensate counsel who bring successful cases against it, the government may turn around and impose limits on those fees, which effectively discourages attorneys from bringing the cases.

Notice Requirements and Reduced Statutes of Limitation Periods

Because governments make the rules by which claims can be brought against them, they can impose requirements that do not apply to other types of defendants or respondents (see Eaton and Talarico 1993; Shepard's Editorial Staff 1992). For example, as with the Federal Tort Claims Act, there may be a requirement that the potential claimant notify (and negotiate with) the potential defendant before initiating any formal court action. There may also be a relatively short time period within which a claim or court case can be filed; that is, where for ordinary defendants the statute of limitations might be three years, all claims against a governmental unit might have to be filed within twelve months of the injury. Moreover, rules related to statutes of limitations, such as their not starting to run for minors until the minor reaches age eighteen, do not necessarily apply to the statutory filing period

for claims against a governmental entity. It might also be the case in some situations that rules requiring notice interact with shortened time horizons in a way that serves to bar a suit. For example, there might be a twelve-month time horizon, and a government might have three months to respond to a claim before any suit can be filed; if notice is not given until after nine months have elapsed, the governmental unit can effectively time-bar the claim by simply not responding to the notice until after the twelve-month period has elapsed.

Wisconsin is an example of a governmental entity that applies special notice and time limit rules to claims against it and its subunits. Before filing suit in a Wisconsin state court against the state, a local government, or a governmental officer, the claimant must give notice of the alleged injury within 120 days of the injury's occurrence (180 days for injuries due to medical malpractice). The defendant then has 120 days to grant or disallow the relief that the claimant requests. If the defendant disallows the relief, the claimant must file suit within six months of receiving notice of the disallowance.⁹

Damage Limitations

Another way that government sets rules for its own benefit is by imposing limitations on the damages that can be collected (see Eaton and Talarico 1993; Shepard's Editorial Staff 1992). While tort reform proponents in the United States have for some years advocated caps on damages, particularly caps on noneconomic and punitive damages, such caps are fairly common in cases against state and local governments in the United States. A number of states specifically preclude any punitive damages being awarded against them.¹⁰ Many states place limits on all categories of damages, including economic (medical expenses, property loss, and lost income) and noneconomic damages (pain and suffering, loss of consortium, and so forth). For some types of cases, such as medical malpractice cases against governmental health care facilities, the limits are sufficiently low that bringing cases can be too costly to merit the potential attorney's fee that might be earned on a percentage basis. Even if the limit does not absolutely deter bringing a case, it may limit the investment that a percentage-fee lawyer can afford to make in the case and hence advantage the governmental defendant in any settlement negotiations.

SECURITY FOR COSTS

One final rules advantage that governments may have can arise in legal systems employing a "loser pays" rule. Under such systems, in use in some form in most countries of the world other than the United States, the loser in a court case is obligated to pay some or all of the winner's legal fees. One feature that is sometimes associated with a loser-pays rule is a provision al-

lowing a defendant to request that the plaintiff be ordered to give “security for costs,” whereby the plaintiff must provide some type of guarantee that it will pay the defendant’s costs if the requesting party wins the case. In Ontario, for example, security for costs is allowed when (Ontario Rules of Civil Procedure, Rule 56.01 [1]):

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
- (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
- (f) a statute entitles the defendant or respondent to security for costs.

These rules apply to all cases, but in cases where the Crown (that is, the government) is the defendant, the Public Authorities Protection Act (1980) allows government to apply for security for costs if the “plaintiff is not possessed of *property sufficient* to answer the costs of the action in case a judgment is given in favour of the defendant, and the defendant has a good defence upon the merits, or that the grounds of action are trivial or frivolous” (Watson et al. 1991, 442; emphasis added).

CREATING STRUCTURES TO AVOID TAKING LOSING CASES TO COURT

Governments have extensive control over how disputes in which they are involved are processed. They can create fairly elaborate structures to deal with routine errors in administration whereby the cases that ultimately make it to court have gone through very extensive screening. At the very top of the U.S. federal hierarchy of legal representation sits the office of the Solicitor General (see Salokar 1992). This office oversees most of the federal government’s appellate litigation and all of the litigation before the U.S. Supreme Court. The office has a well-deserved reputation for rigorous screening of cases that federal agencies bring to it for appeal. Of course, this does not necessarily help when the government is appealed against, unless the office takes a position that the lower court’s decision was incorrect, which does happen on occasion (see Salokar 1995, 69–70); in the latter case,

the Solicitor General's office may let the agency defend the appeal, or it could conceivably insist that the agency settle or drop the case to the appellant's benefit.

At the other end of the governmental case review process one finds administrative tribunals that rigorously review the initial decisions of agencies. A good example of this is found within the Social Security Administration (SSA). While the SSA is best known for the Old Age and Survivors Program, it also administers several disability-related programs that involve a high degree of discretionary determination of whether a claimant meets the legal definition of disability. In two of the programs, Disability Insurance (DI) and Supplemental Security Income (SSI), the majority of applicants are initially denied (60 percent for DI and 76 percent for SSI for claims filed in 1996, the most recent year for which I could find complete data). Of those appealed for reconsideration (62 percent of the initial DI denials and 43 percent of the initial SSI denials), 15 percent (DI) and 12 percent (SSI) are allowed. Of those denied at reconsideration, 81 percent of DI and 68 percent of SSI denials are appealed to the Office of Hearings and Appeals; 80 percent of DI and 56 percent of SSI denials are allowed by the administrative law judges.¹¹ If the decision of the administrative law judge is to deny the claim, that decision is then appealed to the Appeals Council, and only after the Appeals Council denies the claim can a claimant initiate a suit in federal district court. In one sense, this many-layered process might serve to discourage claimants who did not achieve a quick positive response. Generally, however, the rate by which unsuccessful claimants move on is quite high, particularly those who are unsuccessful at the first reconsideration. More important for my argument is that the multi-layered review process at the agency level means that a number of people have examined the case before it gets to court, and it is likely that a large proportion of the incorrect denials have been filtered out. By the time the case gets to court, the judge has good reason to presume that there is a strong basis to the denial. Thus, except in unusual situations, the cases that make it to court are likely to be those where the agency has a strong basis for its decision. Situations can arise where the courts and the agency come into conflict if the agency adopts a stance that the courts find inconsistent with the governing statute; this happened in the early 1980s when the Reagan administration sought to discontinue disability payments to large numbers of recipients.

REGIME LOYALTY

Close to forty years ago Martin Shapiro advanced the construct of political jurisprudence. His argument was that we had to understand courts by combining ideas of law and ideas of politics. As applied to the Supreme Court, Shapiro saw political jurisprudence as "an attempt to treat the Su-

preme Court as one government agency among many—as part of the American political process, rather than as a unique body of impervious legal technicians above and beyond the political struggle” (1964, 15). While today this may seem almost trite, one aspect of his argument has been largely lost: courts are part of the larger government and function within the context of that government.

But what exactly does this mean? In his own work, Shapiro approached the Supreme Court and courts more generally as agencies of government. As an institutionalist, he was concerned with the politics of institutions and institutional relationships. In carrying out their primary function, deciding disputed cases, courts determine their roles vis-à-vis the other institutions of government, and this is particularly true when one of the parties to the case being decided is an agency of government. Contingent on the nature of an issue, courts may take a primary or subordinate role in establishing policy. This may depend upon either the nature of the substantive issues being decided or the history and role of the agency involved, and courts may be more or less successful in their interventions into the policy process (see particularly Shapiro 1968).

Norms of Deference

While the courts compete with other government agencies in the process of creating and administering policy, judges must engage in this competition in a way that is sensitive to the ongoing nature of the relationship the courts have with other agencies. In most countries, courts are highly, if not entirely, dependent on those other agencies to enforce the decisions the courts hand down. As a result, one might expect judges to be hesitant about “slapping down” agencies in the other branches upon which the courts depend. It is important here to distinguish between administrative tribunals, specialist administrative courts, and specialist constitutional tribunals, which exist solely to review the administrative decisions of government bureaucracies or the constitutionality of legislative enactments. Specialized tribunals such as these have less dependence on governmental agencies because the range of cases they are dealing with is limited. My argument is that the generalist courts are particularly dependent on other parts of government and have to be wary of being perceived as being overly inclined to put roadblocks in the paths those other parts of government are seeking to travel.

One good example of a tendency for deference can be found in the practice of judicial review in England. In the English setting, “judicial review” refers not to “constitutional review” as the term is customarily used in the United States but to the judicial review of administrative decision-making. The practice of such review, which is handled by a part of the High Court known as the Divisional Court, has become much more common in the last

several decades; in 1962 there were only 190 cases, but by 1993 the caseload had grown to 3,636 (Jacob et al. 1996, 157), and in 2000 the number of applications for judicial review was 4,247, actually down slightly from a peak of 4,539 in 1998 (Sunkin 2001, table 1).¹² Parties seeking to challenge the actions of administrators must first obtain leave to apply for judicial review, and only then will the Divisional Court consider the merits of the case. As of the mid-1990s, the Divisional Court granted only about half of the applications for leave, and then found for the applicant on the merits in only about half of the cases where leave was granted (ibid.); thus, the government prevailed in about three-quarters of the cases where judicial review was sought. In 1999, the Court granted a smaller proportion of applications for permission (28 percent), but the proportion of those granted that were “allowed” by the Court remained about the same, at 47 percent (Lord Chancellor’s Department 2000, 17).

A second example can be found in American administrative law. One of the leading Supreme Court cases in this area is *Chevron v. National Resources Defense Council* (467 U.S. 837 [1984]), which enunciated a principle of judicial deference to agency expertise in the absence of explicit standards established by the authorizing legislation. Specifically, if Congress has not spoken “to the precise question at issue”—that is, if Congress is either silent or ambiguous—courts are to defer to the agency’s position if that position is a “reasonable” interpretation of the statute. While there can be much debate over the question of when Congress has spoken, the decisions of both federal appellate courts (Schuck and Elliott 1990) and the U.S. Supreme Court since *Chevron* (Canon and Giles 1972; Chae 2000; Crowley 1987; Handberg 1979; Kilwein and Brisbin 1996; Sheehan 1990, 1992) have shown evidence of this deference, and at least in the case of appellate courts, deference appears to have increased in the wake of *Chevron*.¹³

More broadly, there is evidence that the Supreme Court is more deferential to acts of the federal government than to those of lower levels of the states. Even while arguing that justices’ decisions are dominated by their attitudes, Segal and Spaeth (1993, 305–13) provide evidence that justices more likely tend to uphold acts and actions of the federal government and its agencies than acts and actions of state governments. Marshall (1988, 302) shows that justices were more likely to defer to the federal government than to state governments after controlling for whether the policy or statute being challenged was consistent with nationwide opinion. Research has repeatedly shown that even in cases not involving the federal government as a direct party, having the support of the Solicitor General (as an amicus) increases a party’s likelihood of success (George and Epstein 1992, 329–33; Puro 1981; Scigliano 1971, 179; Segal 1988; Segal and Reedy 1988).

Another example of deference in the U.S. context directly involves chal-

lenges to the President before the courts. A recent study examined challenges of presidential executive orders (Howell 2003, 136–74). Such orders can reflect either authority delegated to the President by statute or inherent authority under the Constitution itself. Since the 1940s, there have been thousands of executive orders (see Mayer 1999), but only forty-four have actually been challenged in the courts; these challenges have involved eighty-two separate cases (because some orders have been challenged multiple times). The challenges were successful in only fourteen (17 percent) of the cases (Howell 2003, 154–55). Equally interesting as the high level of deference by courts to the President when an executive order is challenged are the factors that predict deference. First, courts are more likely to uphold executive orders when the President is in a situation of political strength (that is, no divided government, high public approval, and lack of interest group opposition to the President in court). Second, and even more interesting, variations among individual judges link clearly to loyalty to the person who appointed the judge. Specifically, judges appointed by the President who is defending the executive order are more likely to vote to uphold the President than are judges appointed by a different President of the same party as the defending President or by a President of the other party. This is clearly a regime loyalty effect rather than a simple effect of ideology because if it were the latter, one might expect that those appointed by the President would be most supportive, but one would also expect that judges appointed by a different President of the same party would be more supportive than would judges appointed by an opposing-party President; in fact, there is no difference in support between these latter two groups (Howell 2003, 163–68).

One final indicator of regime loyalty comes from a study that predates Galanter's seminal article. In 1967, Kenneth Dolbeare published a study entitled *Trial Courts in Urban Politics*. Part of his analysis examined 388 cases reported in *New York Miscellaneous Reports* involving decisions by state trial courts in one urban county (population about 1,000,000) in New York during a sixteen-year period (Dolbeare 1967, x). Dolbeare divided the cases into those involving a zoning issue and those involving other types of issues. He found that government won 51 percent of the former and 67 percent of the latter cases; when he split the cases into a finer set of categories, government won 60 percent or more in eight of thirteen categories and lost a majority of cases in only three categories (*ibid.*, 72). Furthermore, Dolbeare observes:

Some subject areas are seen to be largely controlled by State statutes and hence to have more precedents applicable to them, whereas other areas depend upon local ordinances or the fairness of a local procedure. In the former areas, judicial support for government is decidedly high, whereas in the latter it is distinctly low; in other words, when the judges are presented with cases hinging upon locally created law or

action, having fewer controlling precedents, they are much more likely to act in behalf of the private claim and against governments (*ibid.*, 70).

Another way of interpreting this pattern is that state court judges give greater deference to the primary regime that their court is a part of, which in this case is the state rather than the local government.

Verdicts For and Against the Government

Another way we can examine government success in court is to look at cases that involve a trial. A study of civil verdicts in state courts located in forty-five large counties (selected to represent the seventy-five largest counties in the United States) in 1996 (DeFrances and Litras 1999) includes 1,223 cases involving government either as plaintiff or as defendant;¹⁵ for 1,214 of these cases, there is usable information on outcome.¹⁶ Government is strikingly unsuccessful in cases that come to trial: as plaintiffs, they win 23 percent of their cases, while losing 43 percent as defendants, for a net advantage of -20. Government has a negative net advantage even if one controls for whether the case is tried to judge or jury; however, government does less poorly before a judge (net advantage -12) than before a jury (net advantage -19).¹⁷

If one controls for type of opponent, individual or business, government has a negative net advantage in every comparison. Ignoring type of decision-maker, the net advantage is -14 against individuals and -21 against business. However, against both business and individuals, the government's disadvantage is less when a judge is making the decision: -4 versus -15 against individuals and -36 versus -15 against business.

While it is possible that some of the difference before juries and judges reflects case differences, the alternate explanation is that judges are more inclined to give governmental parties a bit of an edge in a close case. Certainly this pattern does not support the proposition that government is the more powerful party, otherwise one would ask why government has such a consistent net disadvantage.

Conclusion

In this chapter, I have argued that "party capability theory" is not adequate to explain the strong pattern of government success in appellate litigation around the world. Government is not just "more capable" in terms of resources and experience, but it has a fundamental advantage that flows from the fact that it sets the rules by which cases are brought and decisions are made, and it is government officials, judges, who make the decisions. While norms of judicial independence are supposed to insulate judges from other

parts of government, this separation only goes so far. Ultimately, judges are part of the regime, and when the regime comes under challenge, the government will tend to receive any breaks or benefits at the margin that might accrue.

In the beginning of this chapter, I suggested that I was not necessarily calling into question the broad thrust of party capability theory, only asking whether it can fully account for the advantage possessed by government. Let me now briefly consider the larger question: how much does party capability really matter in appellate courts, at least in terms of what decisions those courts make on the merits of cases? I returned to the same studies cited at the beginning of this essay and compiled the specific net advantage scores for all comparisons of individuals versus business (or, in one case, unions). I found a total of twenty-four such comparisons in the various studies. While in sixteen of the twenty-four comparisons business had a net advantage over individuals, the average net advantage to business was only 0.98. If I make the obviously incorrect assumption that I have a random sample of measures of business advantage and test the statistical hypothesis that business has an advantage (that is, the average net advantage is nonzero and in business's favor), I obtain a t-test value of 0.34, which does not support in any way a hypothesis of advantage.¹⁸

One problem with this analysis, and any analysis of cases decided by courts, is that of selection bias. Actually, this problem extends to well before the filing of court cases because, as suggested by the dispute pyramid metaphor (Miller and Sarat 1980–81), cases get selected out continuously along the litigation process. Parties may decide not to bring a case because of the perceived resource advantage of an opponent, or a well-resourced defendant may decide immediately to settle a claim to avoid creating a precedent or letting it be known that there is some larger problem. If one limits the question to the advantage of parties *given the entrance of a case into a particular stage of the litigation process*, then the analysis here is quite revealing because of the absence of any statistically discernible advantage to business. If one accepts the argument that one advantage that a repeat player has is the ability and resources to “play for rules,” one would expect that would enhance the advantage of non-governmental “haves” because such litigants would be more selective in proceeding with appeals, trying to settle weaker cases to avoid any court decision, and if that is unsuccessful and they lose at trial, not appealing to avoid establishing a citable precedent.

While my focus has been on appellate litigation, the evidence I present raises some intriguing questions about government advantage, or lack of advantage, at the trial level. One striking pattern from the study of verdicts in forty-five large counties around the United States (DeFrances and Litras

1999) was the overall low win rate for government parties: government won only 23 percent of verdicts as plaintiffs and only 43 percent as defendants. Why is government so unsuccessful at trial? I do not have a good answer to that question.

One possible explanation is that government “loses” a large proportion of cases because it is less willing to settle cases that a nongovernmental party would settle when the dispute is largely over the amount of damages. This might explain government’s low success rate as a defendant, but it does not explain the low success rate as a plaintiff. That is, in plaintiff verdict cases, it is hard to know who actually benefited from the trial, and hence who *really* won, without knowing what the pretrial settlement offers looked like (Kritzer 1990, 146–49). Thus, when the government lost as a defendant, it may have actually “won” if the award was substantially below what it would have had to be paid to settle a case.

Perhaps the apparent weakness of government in the forty-five-county study reflects that most government cases may involve a local government litigating in a state court of general jurisdiction. Local government has little control over the rules of the game (these are set at the state level), and it may well be that local government is actually relatively resource poor. If this is the case, one would expect government to bring relatively few cases as a plaintiff; in fact, in only 19 percent of the cases involving government did the government appear as the plaintiff, and in 65 percent of these cases, government had brought suit against a business rather than an individual. This pattern would be consistent with the argument that some governmental litigants are more advantaged than others.

The argument that government is less willing to settle cases than other litigants would be consistent with an analysis of tort cases terminated in 1980–81 in three federal districts (Schwab and Eisenberg 1988, 775–76). The authors of this study found that the U.S. government as a defendant was more likely to win than were other types of defendants. Looking at all cases, including those where it was not possible to determine which side won, they found plaintiffs’ verdicts in 8.1 percent and defendants’ verdicts in 14.9 percent of cases when the U.S. government was the defendant compared to 7.1 percent and 9.1 percent for plaintiffs’ and defendants’ verdicts, respectively, when some other type of party was defending the case. Thus, the odds of a defendant’s verdict was 1.84 for the U.S. government as defendant compared to 1.28 for other types of defendants (that is, almost 50 percent higher). Moreover, when the U.S. government was defending a case, a settlement appeared to be less likely. Some of the advantage of the U.S. government might reflect that tort cases involving the U.S. government must be brought under the Federal Tort Claims Act, which mandates a bench trial,

while other types of torts are covered by the Seventh Amendment's guarantee of a right to a jury trial.¹⁹ There is no easy way to determine whether the government's advantage in these cases reflects what might be labeled "regime effects" (that is, the case is decided by a judge who is him or herself part of the regime) or resource/experience effects. However, if one assumes that the other defendants in these cases were largely insurance companies, then one might presume that they bring to the cases expertise equal to that of the federal government (perhaps greater, given that the lawyers representing the insurance companies are likely to have greater expertise in tort cases than the typical Assistant U.S. Attorney who would try a Federal Tort Claims Act case).²⁰

Finally, what does my analysis say about the broad issue of whether the "haves" come out ahead at the trial level of litigation? The key question suggested by my discussion is the crucial importance of considering, at the trial level, settlements as well as verdicts. In a recent review of what we know about contract cases, Galanter (2001, 599–604) surveyed studies of outcomes in contract cases and found that "haves" did seem to come out ahead, even taking into account settlements. In contrast, in my study of "ordinary litigation," which in that study was predominantly tort litigation, I found evidence that both plaintiffs (typically "have nots") and defendants (typically "haves") can be seen as coming out ahead, but this presumes very different baselines for the two sides (Kritzer 1990, 143–55).²¹ In his study in this volume of cases brought to the Israeli High Court, Dotan concludes that "have nots" do quite well once settlement is considered. In contrast, Albiston, also in this volume, argues that in the new area of litigation created by the Family Medical Leave Act, the "haves" were able to "play for rules" by settling weak cases or cases that might lead to bad precedents and litigating cases that looked to produce long-term favorable results. The conclusion to be drawn from this is that it is too simple to just assert that the "'haves' come out ahead"; the "haves" can come out ahead in some, and perhaps a majority, of contexts, but this depends on complex factors and how one defines coming out ahead.

Notes

The author would like to thank Charles Epp, Marc Galanter, and Susan Silbey for helpful suggestions on an earlier draft of this chapter. Stacia Haynie kindly replied to a number of inquiries about her work, as did Kevin McGuire.

1. According to the senior author of this study, 10 percent or less of the cases included are on the Indian Supreme Court's original jurisdiction docket (Stacia Haynie, personal communication, November 26, 2001).

2. One simple speculation might be that government's advantage at the appellate

level comes largely through criminal cases. However, the studies that have controlled for type of case show that the advantage is by no means limited to criminal cases or is even at its maximum in such cases (Farole 1999, 1049; Haynie et al. 2001, table 4; Wheeler et al. 1987, 426).

3. Given the discretionary nature of the Supreme Court's docket and the ability of the Solicitor General's office to select with care the cases it brings to the Court, some of the federal government's advantage may reflect this selectivity (see Cohen and Spitzer 2000, 408–9) and hence the government's ability to “play for rules.” The federal government may be particularly selective given the practice of “administrative nonacquiescence,” whereby the decisions of lower courts in administrative law matters do not bind administrative action in other cases, a practice upheld by the Supreme Court (see *United States v. Mendoza*, 464 U.S. 154 [1984]). There is at least one analysis of cases that applies a selection model to consider both the certiorari stage and the merits stage, and it finds that the federal government's advantage at the merits stage disappears after taking into account the selection stage (Schmeling 2000); later, more refined analyses by this author suggest that there may be some advantage at the merits stage for cases in which the federal government is a respondent but not in cases in which the government is a petitioner (Thomas Schmeling, personal communication, June 16, 2002).

4. In personal correspondence, Kevin McGuire provided me with additional results from his data set that enhance his argument that the Solicitor General's advantage can be explained in terms of experience. First, in the 321 cases in which the Solicitor General's office appeared, the advocate from that office was less experienced in only 5 cases and was equally experienced by McGuire's measure in only 7. Second, at my request, McGuire ran a logistic regression eliminating all cases in which the experience of the advocate from the Solicitor General's office had equal or less experience than the other side and all cases not involving the Solicitor General's office where the experience of the two advocates was equal (leaving 645 observations); the model included two parameters: for cases with the Solicitor General appearing, which side the Solicitor General represented (1 petitioner, -1 respondent, 0 not appearing); for cases without the Solicitor General, which side had more experience (1 petitioner, 0 neither, -1 respondent). The values of the estimates of the two parameters were virtually identical, indicating that the Solicitor General has no greater advantage than that of a side with a more experienced advocate.

5. While it is a common assumption that judges are less plaintiff-oriented than are juries, recent statistical evidence raises some doubts about that (see Clermont and Eisenberg 1992; DeFrances and Litras 1999; Eisenberg et al. 2002).

6. The Tucker Act (28 U.S.C §1481) provides for contract-related claims against the federal government; those claims must be brought in a special court, the U.S. Claims Court (see Fox 1997, 433–34).

7. CFR Parts 10 and 25 (<http://www.federalaw.com/20CFR10-25.htm>).

8. Interestingly, while one might expect federal employee unions to support improvements in the system, that does not seem to be the case. Most workers' compensation cases involve claims that lawyers would not handle (because nothing is in dispute). Unions provide a benefit to their members in assisting the members in

dealing with workers' compensation claims, a benefit that can be a strong incentive to pay union dues. From the union's perspective, there is more to be gained from the incentives provided by union assistance with workers' compensation than by making a system simpler in a way that makes it viable for a lawyer to handle the kinds of disputed and difficult cases that may be problematic for the union representatives. Thus, the unions' interest in creating incentives to join works in concert with the government's interest of minimizing complex, high-value claims of the type lawyers would want to handle.

9. Wis. Stat. Chapter 893.80

10. Ariz. Stat. § 12-820.04 (no punitive damages against public entity or employee); Fl. Stat. Ann. § 768.28(5) (government immune from punitive damages); Hi. Rev. St. § 622-2 (no punitive damages against government); Ind. Code Ann. § 34-4-16.5-4 (no punitive damages against government entity); Minn. Stat Ann. §§ 3.736 (state will not pay punitive damages), 466.04(b) (no punitive damages against municipalities); Vernon's Ann. Mo. Stat. § 537.610(3) (no punitive damages against governments); Wis. Stat. § 893.80(3) (no punitive damages against governments).

11. The statistics are from reports found at the Social Security website (visited October 29, 2001):

http://www.ssa.gov/OACT/NOTES/AS114/as114Tbl_2.html

<http://www.ssa.gov/OACT/SSIR/SS101/AllowanceData.html>

12. The Lord Chancellor's Department's *Judicial Statistics Annual Report 1999* actually shows a total of 4,959 applications for permission to apply for judicial review being received in 1999 (Lord Chancellor's Department 2000, 17).

13. In a 2001 case, *United States v. Mead*, 533 U.S. 218 (2001), the justices appear to have pulled back somewhat from *Chevron*. However, while this may affect the level of deference courts show to administrative decision-makers, it does not mean that deference will disappear.

14. This is not simply a matter of lack of statistical significance. In a logistic regression analysis including a number of control variables, judicial partisanship was included as a pair of dummy variables: appointed by defending President and appointed by a different President of the same party; appointed by a President of the opposing party is the omitted category. The regression coefficient for appointed by the defending President was .922, while the coefficient for appointed by a different President of the same party was .094, which is essentially zero.

15. I obtained the data for reanalysis from the website of the Interuniversity Consortium for Political and Social Research (<http://www.icpsr.umich.edu/>), ICPSR Study No. 2883, "Civil Justice Survey of State Courts, 1996."

16. This is the number of cases included in my analysis. The original coding of the party type variable separated out "hospital" as a different category; because I did not know whether the hospital was government owned or private, I threw out cases involving a hospital. This actually involved deleting only three cases.

17. One obvious question here is why is government so unsuccessful at the trial stage. I discuss that question in the conclusion.

18. The test is a one-tailed, single-sample t-test against a null hypothesis of a mean advantage of 0; the standard error of the mean is 2.93.

19. Lest the reader jump to the conclusion that bench trials are more favorable to

defendants than are jury trials, at least two different studies, one of federal cases (Clermont and Eisenberg 1992) and one of state cases (DeFrances and Litras 1999), do not show this to be the case

20. The only other type of likely defendant is a large corporation with the resources to mount a substantial defense; individuals are not going to be sued in tort cases if they are uninsured, and state and local governments cannot typically be sued in federal court for tort cases other than certain types of constitutional torts that are excluded from Schwab and Eisenberg's computations.

21. A study of jury verdicts in Cook County from 1959 to 1979 found that in tort cases where the plaintiff had suffered serious injuries, juries awarded higher damages depending on the defendant; for one comparison, the median award in 1979 dollars against corporate defendants was \$161,000, \$98,000 against governmental defendants, and \$37,000 against individual defendants (Chin and Peterson 1985, 43). This certainly does not suggest an advantage to "haves."

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